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ARTICLES

LET THE JURY DECIDE: THE GAP BETWEEN WHAT JUDGES AND REASONABLE PEOPLE BELIEVE IS SEXUALLY HARASSING

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I. INTRODUCTION

What the public perceives as sexual harassment at work, according to legal and journalistic pundits, is anything but clear.¹ This confusion is

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1. See, e.g., Kingsley R. Browne, *An Evolutionary Perspective on Sexual Harassment: Seeking Roots in Biology Rather than Ideology*, 8 J. CONTEMP. LEGAL ISSUES 5, 6 (1997) ("One of the reasons for this disparity of views is that sexual harassment is not a unitary phenomenon; in fact, one might say that it consists of so many different phenomena that the label itself has lost any meaning."); Pamela L. Hemminger, *Sexual Harassment and the Reasonable Woman Standard*, 20 PEPP. L. REV. 1148, 1151 (1993); Kathryn Martell & George Sullivan, *Sexual Harassment: The Continuing Workplace Crisis*, 45 LAB. L.J. 195, 195 (1994) (stating, "employers continue to be exposed to uncertainty and liability due to an exceedingly vague standard by which future allegations of environmental sexual harassment will be judged"); Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, DISSENT, Winter 1995, at 48 (discussing how the reasonable woman standard debate has not given "sufficient guidance for the judgment of actual cases"); *Anti-expressionism*, NEW REPUBLIC, July 20 & 27, 1998, at 7, 8 (noting that the Court has failed to clarify harassment law); John Cloud, *Sexual Harassment: He Can't, She Can't*, TIME, Mar. 23, 1998, at 48, 49 ("The legal principle of harassment hinges on impossibly squishy terms like 'unwelcome' and 'pervasive,' words that a thousand lawyers can define in a thousand ways."); Anne Fisher, *After All This Time, Why Don't People Know What*

supported by human resources professionals, who say that the biggest problem they have with sexual harassment is that employees do not know what behaviors constitute sexual harassment.² However, is the conduct that constitutes sexual harassment really so unclear? Are people really at such a loss, at such a lack of understanding, about what is appropriate and inappropriate interpersonal workplace behavior? Or, is this simply a myth—a type of legal urban legend—that has very little basis in fact?³ Most importantly, if indeed it is a myth, is it one that the judiciary has bought into or been complicit in creating by rejecting plaintiffs' cases where reasonable people believe there is sexually harassing conduct?

Part of the ambiguity in this area may well stem from the nature of the legal standards developed by the courts.⁴ From its inception, sexual harassment law has been difficult to place among the other theories of employment discrimination already developed by the courts.⁵ Terms such

Sexual Harassment Means?, FORTUNE, Jan. 12, 1998, at 156, 156; Ellen Goodman, *Confusion Reigns on What's Sexual Harassment*, FLA. TODAY, Feb. 25, 1997, at 7A; John Leo, *Are You Feeling Harassed?*, U.S. NEWS & WORLD REP. Apr. 13, 1998, at 18, 18 ("Sexual harassment law continues to be a mess and a national embarrassment—the strange offspring of radical feminist lawyers and guilty, well-meaning male jurists."); Alan Rolnick, *Sex, Lies and Employment: What Can We Learn from the Paula Jones Case?*, BOBBIN, Aug. 1998, at 172, 176 (noting that in the wake of *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998), "confusion surrounding hostile working environment sexual harassment claims is not likely to dissipate any time soon"); Andrew Stephen, *Fondle a Woman; Pay \$250,000*, NEW STATESMAN, June 14, 1999, at 20, 20 ("What gives companies and their lawyers the heebie-jeebies is that sexual harassment laws are such a mishmash of legislation that few know where they stand."). *But see* DEP'T OF DEF., 1995 SEXUAL HARASSMENT SURVEY 28–29 & fig.28 (1996) (showing that 84% of military personnel surveyed were confident to a large extent that they knew what constituted sexual harassment).

2. Jennifer J. Laabs, *HR Puts Its Sexual Harassment Questions on the Line*, PERSONNEL J., Feb. 1995, at 36, 38.

3. There are a variety of myths surrounding sexual harassment law. A myth that is related to the thesis of this paper is that "men just don't get it" or "women see it, men don't." John B. Pryor & Eros R. DeSouza, *Gender Differences in the Interpretation of Social-Sexual Behavior: A Cross-Cultural Perspective on Sexual Harassment*, 28 J. CROSS-CULTURAL PSYCHOL. 509, 510 (1997). One common perception that has been exposed as "myth" is that it is easy to win a sexual harassment suit. MIA L. CAHILL, *THE SOCIAL CONSTRUCTION OF SEXUAL HARASSMENT LAW* 30–31 (2001). The reality is that studies of plaintiff success rates in federal courts show between one-third and slightly over one-half of plaintiffs in these cases are successful. *See id.* at 31 (citing studies that reached these results).

4. *See Nichols v. Frank*, 42 F.3d 503, 510 (9th Cir. 1994) (stating, "there is no uniform attitude towards the role of sex nor any agreement on what is appropriate for inclusion in a code governing sexual conduct"); Gerald L. Blakely, Eleanor H. Blakely & Robert H. Moorman, *The Effects of Training on Perceptions of Sexual Harassment Allegations*, 28 J. OF APP. SOCIAL PSYCHOL. 71, 72 (1998) (stating that "what is problematic about this definition of sexual harassment is that it is vague enough to allow for different people to hold different perceptions of what sexual harassment is for them personally").

5. Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se As a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 361 (1980) (noting that "it is difficult to fit sexual

as “severe or pervasive” and “alter the conditions of employment” are necessarily vague.⁶ This has left the courts to develop, on a case by case basis, the law based on the particular facts involved. Indeed, the Supreme Court essentially has told them to do just that.⁷ Far from being inappropriate in this setting, it seems to make sense for harassment to be judged on a case-specific basis, considering the entire context in which the harassment occurs.⁸ This, however, does not seem to give workers and the courts much guidance.

Given the case by case analysis supported by Supreme Court precedent, it would seem that by now—the Supreme Court recognized the cause of action sixteen years ago⁹—there would be some consensus from the lower courts about what behaviors constitute sexual harassment so that employers and workers would know what is appropriate in the workplace. Other problems have made a lower court consensus difficult to reach. Very few sexual harassment cases are actually litigated to a final jury verdict.¹⁰ Thus, workers and employers have not had much guidance on what “reasonable people” (jurors) believe is harassing. This might leave a false sense that there is no evidence about what reasonable people deem harassing.

In spite of the prevalence of sexual harassment in the American workplace in its various manifestations and degrees of severity,¹¹ there is,

harassment into traditional concepts of discrimination, requiring either a showing of hostile motive, differential treatment, or disparate impact”).

6. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67–69 (1986). For more on the legal standards for sexual harassment, see *infra* notes 19–69 and accompanying text.

7. In *Harris v. Forklift Sys., Inc.*, the Court stated that the totality of the circumstances must be considered in assessing whether the particular environment is sufficiently severe or pervasive to constitute harassment. 510 U.S. 17, 23 (1993). This necessarily requires a very context-specific analysis that likely will not be generalizable to a vast array of cases. See also *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998) (emphasizing context in making sexual harassment determinations).

8. See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 97–98 (1999) (arguing that the lower courts are ignoring the Supreme Court’s directive to consider the totality of circumstances at the expense of Title VII plaintiffs).

9. *Meritor Sav. Bank, FSB*, 477 U.S. at 73 (first Supreme Court case recognizing the cause of action under Title VII).

10. See Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, J. SOC. ISSUES, Spring 1995, at 117, 121 (noting that one of the least common responses to harassment is court action).

11. While studies attempting to quantify the percentage of women sexually harassed on the job have varied from 40% to 80%, it is clear that a sizable number of women believe they have experienced sexual harassment on the job. Richard D. Arvey & Marcie A. Cavanaugh, *Using Surveys to Assess the Prevalence of Sexual Harassment: Some Methodological Problems*, J. SOC. ISSUES, Spring 1995, at 39, 40. A survey conducted by the United States Merit Systems Protection Board of over 8,000 federal

in actuality, considerable evidence that people do have a perception of what constitutes sexual harassment in the workplace and that, with respect to a wide range of behaviors, there is some agreement among workers about what they find harassing. This evidence comes from social scientists, who over the last twenty years have been studying what types of behaviors people find harassing and what factors influence those perceptions.¹² Thus, social science informs us about behaviors that men and women might perceive as harassing. While these studies reveal some areas of ambiguity and confusion, they also show a surprising amount of consensus—and consensus about behaviors that some courts have rejected as being nonactionable.¹³ The preliminary findings from these data suggest that the

employees in 1994 found that more than 37% of women and 14% of men working for the U.S. government experienced sexual harassment. OFFICE OF POL'Y & EVALUATION, U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE* viii (1995) (hereinafter "USMSPB"). While this Article focuses on sexual harassment of women by men, it is in no way suggesting that men are not likewise harassed. Studies indicate, however, that men are harassed far less frequently than women. See Virgil L. Sheets & Sanford L. Braver, *Organizational Status and Perceived Sexual Harassment: Detecting the Mediators of a Null Effect*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1159, 1160 (1999) (citing studies); John B. Pryor, Janet L. Giedd & Karen B. Williams, *A Social Psychological Model for Predicting Sexual Harassment*, J. SOC. ISSUES, Spring 1995, at 69, 70 (citing studies that reflect this). See also Elissa L. Perry, James M. Schmidtke & Carol T. Kulik, *Propensity to Sexually Harass: An Exploration of Gender Differences*, 38 SEX ROLES 443, 454 (1998) (study showing that male subjects had a significantly higher propensity to harass than female subjects). Given this, it is not surprising that most social scientists have focused their study on sexual harassment of women by men. See generally Cathy L. Z. DuBois, Deborah E. Knapp, Robert H. Faley & Gary A. Kustis, *An Empirical Examination of Same- and Other-Gender Sexual Harassment in the Workplace*, 39 SEX ROLES 731, 732 (1998) (noting that the stereotypical view is that workplace sexual harassment takes place between males and females, with the perpetrator as a male and the target as a female). One recent study has indicated that male on male sexual harassment may be as prevalent as male on female sexual harassment. See Craig R. Waldo, Jennif L. Berdahl & Louise F. Fitzgerald, *Are Men Sexually Harassed? If So, By Whom?*, 22 LAW & HUMAN BEHAV. 59, 61–62 (1998). Male on male harassment in the workplace, however, may operate differently (and, perhaps, have less impact), than male on female harassment. *Id.* at 60. In the area of same-gender harassment, more harassment occurs among males than females. See DuBois et al., *supra*; Waldo et al., *supra*, at 62 (citing studies).

12. See Richard L. Wiener & Barbara A. Gutek, *Advances in Sexual Harassment Research, Theory, and Policy*, 5 PSYCHOL., PUB. POL'Y & L. 507, 508 (1999) (finding that in computer search of PsycInfo database, using the key word "sexual harassment" pulled up 273 journal articles related to the topic for the years 1978 through 1997).

13. Another potential cause of the confusion might well be that sexual harassment, as a legal theory, developed before social scientists had the opportunity to study and analyze it carefully. While some preliminary work had been done by social scientists, see Pryor et al., *supra* note 11, at 69 (noting that social science study of sexual harassment is still in "its infancy"), it wasn't until the publication in the late 1970s of two books, LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* (1978), CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979), and the promulgation of the Equal Employment Opportunity Commission's Guidelines on Sexual Harassment, see Elaine Lunsford Weeks, Jacqueline M. Boles, Albino P. Garbin & John Blount, *The Transformation of Sexual Harassment from Private Trouble into a Public Issues*, 56 SOC. INQUIRY 436, 444 (1986), that both social scientists and legal scholars focused on sexual harassment in the workplace and what constitutes possible actionable conduct. See CAHILL, *supra* note 3, at 10–11

courts have not evaluated sexual harassment cases in a manner consistent with what many reasonable people believe is harassing.

In this Article, I will review the work of social scientists regarding perceptions of what constitutes sexual harassment and discuss the implications of that research on the manner in which courts should assess whether harassment reaches the "severe or pervasive" level set by the Supreme Court.¹⁴ Of course, sexual harassment jurisprudence does not exist in a vacuum. Already a great deal of law exists on the subject. Therefore, I also will consider current sexual harassment law and suggest reforms in a manner that is sensible for court use. Unfortunately, the findings of social scientists are not necessarily adaptable wholesale into the legal standard. I will consider the limitations on the use of social science in the courts in general as well as in the particular context of sexual harassment. After considering these limitations, I will show that social science provides a great deal of information about what people perceive as harassing. Indeed, my thesis is that judges often get assessments of harassment wrong. The average worker's beliefs encompass more behaviors than the courts currently recognize. Thus, while reasonable people believe that conduct is sexually harassing, the courts often underestimate the effects of such behaviors and instead summarily dispose of cases by summary judgment or judgment as a matter of law. Thus, the

(describing these books as having added "legitimacy and publicity" to the issue of sexual harassment); Jeremy Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUMAN BEHAV. 33, 33-34, 37 (1998) (alluding to a 1982 special issue of the Journal of Social Issues as the starting point of empirical research on sexual harassment); Patti A. Giuffre & Christine L. Williams, *Boundary Lines: Labeling Sexual Harassment in Restaurants*, 8 GENDER & SOC'Y 378, 379 (1994) (noting significance of MacKinnon book); Weeks et al., *supra*, at 439 (noting that MacKinnon first described sexual harassment in her 1979 book); Patricia M. Hanrahan, "How Do I Know If I'm Being Harassed or If this is Part of My Job?" *Nurses and Definitions of Harassment*, 9 NWSA J. 43, 44-45 (1997) (noting that MacKinnon's, along with the subsequent promulgation of EEOC guidelines, spurred research interest in sexual harassment). The courts already had begun to develop harassment law in the context of racial and ethnic harassment. *See, e.g.,* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (harassment of Hispanic employee). As MacKinnon states: "Sometimes, even the law does something for the first time." Louise F. Fitzgerald, Suzanne Swan & Vicki J. Magley, *But Was It Really Sexual Harassment? Legal, Behavioral, and Psychological Definitions of the Workplace Victimization of Women*, in SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 5, 9 (William O'Donohue ed., 1997). Since that time, social scientists have scrambled to study the contours of workplace harassment, including studying, among other things, how frequently harassment occurs, *see* Arvey & Cavanaugh, *supra* note 11, whether male and female perceptions of harassment differ, *see* Patricia A. Frazier, Caroline C. Cochran & Andrea M. Olson, *Social Science Research on Lay Definitions of Sexual Harassment*, J. SOC. ISSUES, Spring 1995, at 21, 29-31 (discussing studies that sought to determine if males and females had differing perceptions of harassment), and how women respond to harassment. *See* Fitzgerald et al., *supra* note 10.

14. *Meritor Sav. Bank, FSB*, 477 U.S. at 67.

perceptions of judges on what constitutes harassment to the reasonable person do not always square with what the reasonable person perceives as harassing.

II. BACKGROUND ON SEXUAL HARASSMENT LAW

How the courts have defined the elements of a sexual harassment claim will have a distinct effect on how such claims are litigated.¹⁵ Traditionally, the courts have set out two categories of sexual harassment claims: quid pro quo and hostile environment.¹⁶ In quid pro quo cases, a supervisor takes a tangible employment action against an employee for not acceding to demands for sexual favors. Anything short of a tangible employment action falls into the hostile environment category.¹⁷ There are six United States Supreme Court cases that address what constitutes sexual harassment in the workplace. A review of these Supreme Court cases is necessary to assess where the law is now so that it can be better formulated to meet the needs of both employers and working Americans. In this section, I will give a brief overview of sexual harassment law as it is currently formulated, with an emphasis on those aspects that are informed by common perceptions of what is harassment.

A fair degree of consensus exists among the courts on the elements of a hostile environment claim. There seem to be four basic elements: (1) an employee was subjected to unwelcome harassment;¹⁸ (2) the harassment was based on his or her gender; (3) the harassment must be "sufficiently severe or pervasive" to alter a term, condition, or privilege of employment;¹⁹ and (4) in the case of a co-worker, the employee must show that the employer knew or should have known of the harassment and failed to take corrective action, but in the case of a supervisor, the employer will

15. See Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 225 (1992).

In evaluating and litigating claims, American lawyers break down general statutory language into specific variables or elements. The choices made in the delineation of the elements of the prima facie case and in the assignment of the burden of proof have a profound impact not only on the nature of a plaintiff's claim but also on the contours of the entire litigation, from the pleadings to discovery, the possibility of Rule 11 sanctions, the outcome and the finality of the decision.

Id.

16. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752-54 (1998).

17. *Id.* at 753-54.

18. *Meritor Sav. Bank, FSB*, 477 U.S. at 68-69.

19. *Id.* at 67.

be strictly liable, subject to the *Faragher/Ellerth* affirmative defense.²⁰ Bearing these elements in mind, specific aspects of the claim that have particular relevance to common opinion of what constitutes sexual harassment are described in more depth below.

A. THE COURT'S VIEW ON WHAT IS "SUFFICIENTLY SEVERE OR PERVASIVE TO ALTER THE CONDITIONS OF EMPLOYMENT"

In its first decision involving a sexual harassment claim, the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*²¹ stated that to be actionable, the behavior or behaviors in question "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"²² Since this case, the lower courts, and, to a certain extent, the Supreme Court itself, have grappled to give meaning to this standard, and have been all over the map in their results.²³ Thus, while some courts have held that a single incident, if sufficiently severe, can give rise to a claim,²⁴ others have examined multiple incidents of behavior, including physical touching, and found it

20. See, e.g., *O'Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001) (stating it as six elements); *Fenton v. HISAN, Inc.*, 174 F.3d 827, 829-30 (6th Cir. 1999) (stating it as five elements); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) (stating it as four elements). Some courts add the element that the victim is a member of a protected class. See, e.g., *Davis v. City of Sioux City*, 115 F.3d 1365, 1368 n.5 (8th Cir. 1997); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 806 (5th Cir. 1996); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 69 F.3d 525, 540 (1st Cir. 1995). This element appears redundant because the plaintiff must prove that the harassment was based on gender and everyone is necessarily a member of one gender group or the other.

21. 477 U.S. 57 (1986).

22. See *Meritor Sav. Bank, FSB*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). The Court relied on several sources for this standard, including the language of Title VII itself. See *id.* Specifically, the Court noted the language of Title VII was not limited to "economic" or "tangible" forms of discrimination. *Id.* It also relied on the EEOC Guidelines on sexual harassment. See *id.* at 65. The EEOC Guidelines at the time were codified at 29 C.F.R. §1604.11(1) (1985). The Guidelines defined "Sexual Harassment" to include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Meritor Sav. Bank, FSB*, 477 U.S. at 65. The Guidelines also did not limit the definition to quid pro quo situations, but extended it to situations in which "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). Finally, two lower court precedents played a major role in establishing the standard. See *Meritor Sav. Bank, FSB*, 477 U.S. at 65-67 (citing *Henson*, 682 F.2d at 904; *Rogers*, 454 F.2d at 238).

23. See *Beiner*, *supra* note 8, at 83-115.

24. See, e.g., *Torres v. Pisano*, 116 F.3d 625, 631 (2d Cir. 1997); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 n.4 (7th Cir. 1991). This can often be difficult to do in practice. See, e.g., *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 170 (10th Cir. 1996) (holding a single incident insufficiently severe to constitute harassment); *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998).

insufficiently severe or pervasive to be actionable.²⁵ For reasons explained below, this is the aspect of the sexual harassment standard that would be most informed by what social scientists have found about perceptions of what is harassment.

Along with setting this standard, the *Meritor* Court held that such claims are not limited to situations in which the plaintiff has faced “tangible, economic barriers.”²⁶ The Supreme Court further clarified the standard in *Harris v. Forklift Systems, Inc.*²⁷ The *Harris* Court was faced with a split in the circuits as to whether the harassment had to seriously affect the psychological well-being of the plaintiff in order to be actionable.²⁸ The Court explained that a Title VII violation occurs “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult . . . that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”²⁹ In reiterating this standard, the Court rejected what it considered the two extreme approaches of making every utterance of an epithet actionable and requiring that the conduct produce “tangible psychological injury.”³⁰ In doing so, the Court adopted both an objective and subjective approach to the determination of what constitutes sufficiently severe or pervasive behavior.

First, the conduct must be severe or pervasive enough to create “an objectively hostile or abusive work environment, an environment that a reasonable person would find hostile or abusive.”³¹ Several courts have reinterpreted this standard in light of the status of the victim of harassment. For example, several lower federal courts have adopted a reasonable woman standard for cases in which the plaintiff is a female.³² Some

25. See Beiner, *supra* note 8, at 83–115 (and cases cited and described therein).

26. See *Meritor Sav. Bank, FSB*, 477 U.S. at 64.

27. 510 U.S. 17, 22 (1993).

28. See *id.* at 20.

29. *Id.* at 21 (quoting *Meritor Sav. Bank, FSB*, at 65, 67).

30. *Id.*

31. *Id.* Professor Anita Bernstein has criticized the use of “reasonableness” in the context of sexual harassment and argued in favor of using a “respectful person standard.” See Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 448–50 (1997).

32. See *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 962 n.3 (8th Cir. 1993); *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990); *Yates v. Avco Corp.* 819 F.2d 630, 637 (6th Cir. 1987); *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1515 (D. Me. 1991). See also Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 219 (1994) (noting that the *Harris* Court’s decision does not preclude such an interpretation). This interpretation is consistent with the

commentators believe that *Harris* implicitly rejected the reasonable woman standard.³³ However, the *Harris* Court did not directly address this issue,³⁴ and therefore it remains open and controversial.³⁵

In addition to the objective standard, the *Harris* Court also held that the victim must “subjectively perceive the environment to be abusive.”³⁶ The Court reasoned that if the victim does not subjectively find the environment abusive, the conduct does not alter the conditions of that person’s employment enough to make it actionable under Title VII.³⁷ The importance of the objective and subjective components of the severity or pervasiveness element has led at least one court to make this a separate element of the claim.³⁸

The Supreme Court did note that it was not creating a “mathematically precise test.”³⁹ Instead, whether behaviors amount to actionable sexual harassment should be viewed from the totality of the circumstances. In this regard, the Court specifically set out several factors for the lower courts to consider, including: “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an

EEOC’s proposed guidelines, which were later withdrawn. See 58 Fed. Reg., 51,266 (1993) (proposed 29 C.F.R. § 1609.1(c)).

33. See, e.g., Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the “Reasonable Person,”* 58 OHIO ST. L.J. 1217, 1258–59 (1997); Martell & Sullivan, *supra* note 1, at 203, 204–05 (arguing that *Harris* rejected the “reasonable woman” standard); George Rutherglen, *Sexual Harassment: Ideology or Law?*, 18 HARV. J.L. & PUB. POL’Y 487, 496 (1995) (noting that “the Supreme Court has resolved the question without directly confronting it” in *Harris*).

34. Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Environment Claims under Title VIII: Who Is the Reasonable Person?*, 38 B.C. L. REV. 861, 873–74 (1997).

35. See *id.* at 875; Liesa L. Bernardin, Note, *Does the Reasonable Woman Exist and Does She Have Any Place in Hostile Environment Sexual Harassment Claims under Title VII After Harris*, 46 FLA. L. REV. 291, 310, 312 (1994) (noting tacit agreement in *Harris* with using victim’s perspective); Sharon J. Bittner, Note, *The Reasonable Woman Standard After Harris v. Forklift Sys., Inc., The Debate Rages On*, 16 WOMEN’S RTS. L. REP. 127, 133–34. Indeed, lower courts have continued to use the reasonable woman standard. See Zalesne, *supra* note 34, at 874–75 nn.80–93 (citing and discussing cases subsequent to *Harris*).

36. *Harris*, 510 U.S. at 21.

37. See *id.* at 21–22. Commentators have likewise criticized this standard as refocusing the claim on the conduct of the plaintiff and marginalizing her testimony as somehow “unreasonable” in contrast to the objectively “reasonable person” standard. See Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed after Harris v. Forklift Systems, Inc.*?, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 402 (1995).

38. *O’Rourke v. City of Providence*, 235 F.2d 713, 728 (1st Cir. 2001) (stating six elements, one of which contains the objective/subjective standard).

39. *Harris*, 510 U.S. at 21–22.

employee's work performance."⁴⁰ While noting that "no single factor is required," the Court did explain that the harassment's effect on the plaintiff's psychological well-being is relevant to whether the plaintiff found the environment abusive; however, harassment need not "seriously affect" the plaintiff's "psychological well-being" to be actionable.⁴¹

One of the Supreme Court's more recent pronouncements on harassment law emphasized the contextual nature of the severe or pervasive determination. In *Oncale v. Sundowner Offshore Services, Inc.*⁴² the Court explained that

[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." . . . In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The 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.⁴³

The context of the alleged harassment, according to the Court, is key to determining whether the incident qualifies as harassment.

The *Oncale* Court also settled two questions that had been lingering in the area of harassment law. One issue—and the primary holding of the case—was whether same-sex sexual harassment is cognizable under Title VII. The Court clearly held that it was.⁴⁴ Second, the Court resolved whether the alleged harassing behavior must be of a "sexual" nature. Many lower courts had held that, in the context of sexual harassment, the harassing behavior need not be of a "sexual nature" to constitute discrimination.⁴⁵ Thus, if a supervisor treated women in a demeaning—but

40. *Id.* at 23.

41. *Id.* at 22.

42. 523 U.S. 75, 75 (1998).

43. *Id.* at 81–82.

44. *See id.* at 79–80.

45. *See, e.g.,* *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 (8th Cir. 1994); *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415

not necessarily sexual—manner and did not treat male subordinates the same way, that could constitute sexual harassment. This, however, was not quite a universal rule.⁴⁶ The Court in *Oncale* explained that this was a correct interpretation:

But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.⁴⁷

Thus, the Court made clear that what some have referred to as “gender” harassment is actionable as well if it is sufficiently severe or pervasive to alter the conditions of employment.

Finally, in a recent per curiam decision, the Court visited the issue of whether a single incident of relatively minor behavior could support the first element of a retaliation claim—in particular, whether the plaintiff could reasonably believe that the employer’s conduct was unlawful.⁴⁸ The case revolved around the following single incident of harassment:

[Plaintiff’s] male supervisor met with respondent and another male employee to review the psychological evaluation reports of four job applicants. The report for one of the applicants disclosed that the applicant had once commented to a co-worker, “I hear making love to you is like making love to the Grand Canyon.” . . . At the meeting [plaintiff’s] supervisor read the comment aloud, looked at [plaintiff] and stated, “ I don’t know what that means.” . . . The other employee then said, “Well, I’ll tell you later,” and both men chuckled. . . . Respondent later complained about the comment.⁴⁹

(10th Cir. 1987). See also Joshua F. Thorpe, *Gender-Based Harassment and the Hostile Environment*, 1990 DUKE L.J. 1361, 1364–65 (1990) (arguing in favor of such a standard).

46. See Thorpe, *supra* note 45, at 1364–65. See generally Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1710–11 (1998) (observing that district court and Sixth Circuit found demeaning treatment did not rise to level of hostile work environment).

47. See *Oncale*, 523 U.S. at 80–81. For more discussion regarding the *Oncale* decision, see Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 693–700 (1998).

48. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269–70 (2001).

49. *Id.* (citations omitted).

Based on this one incident and her complaint about it, the plaintiff alleged that her employer retaliated against her. The Court found her claim meritless, in part, because “no one could reasonably believe that the incident recounted above violated Title VII.”⁵⁰ Thus, the incident detailed above was not sufficiently severe or pervasive to be actionable.

In reaching this conclusion, the Court reiterated its position that “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”⁵¹ The Court appeared swayed, in part, by the routine nature of sexually explicit statements arising in the course of plaintiff’s review of job applications and plaintiff’s position that this did not bother her.⁵² The Court characterized the addition of the exchange between her supervisor and co-worker as “at worst an ‘isolated incident[t]’ that cannot remotely be considered ‘extremely serious,’” which the Court’s language in other cases regarding actionable single incidents requires.⁵³

Given Supreme Court precedent and the nature of the single incident involved here, this result is hardly surprising, although there is irony in this result. The Court has insisted that victims of harassment report harassing behaviors as quickly as possible so that the employer might correct the situation before it reaches the “severe or pervasive” level.⁵⁴ Here, the plaintiff did just that. Since she reported before the harassment reached a severe and pervasive level, however, the Court held her retaliation claim inadequate. The plaintiff was penalized, essentially, for following the Court’s earlier rulings. Also, this decision does not appear to undermine the position of lower courts that a single incident, if sufficiently severe, is enough to give rise to a claim. This incident was simply too minor to even arguably reach that level.

50. *Id.* The court also held that she failed to show that her protected activity was causally connected to the adverse employment action alleged in the case. *Id.* at 1511.

51. *Id.* at 271 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1997)).

52. *See id.*

53. *Id.* (quoting *Faragher*, 524 U.S. at 788).

54. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher*, 524 U.S. at 807–08. *See also* Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK 169, 173 (2001).

B. IMPUTING LIABILITY TO THE EMPLOYER

Since the Court's decision in *Meritor*, the lower courts also have struggled to determine under what circumstances they should impute liability to the employer for supervisors' acts.⁵⁵ Whether the alleged harasser is a co-worker or a supervisor may have an effect on whether people find behaviors to be harassing. Victims or factfinders are more likely to see supervisor behavior as harassing because of the power differential. With increased power and status of supervisors comes, in theory, a perception that their behaviors are more coercive and threatening, resulting in a higher likelihood that people will find their actions harassing. Therefore, social science evidence on perceptions of harassment might likewise inform the standards for imputing liability to employers. In addition, cases involving this issue help define the difference between quid pro quo and hostile environment cases, which also has implications for the severe or pervasive standard.

To begin with, the courts have not been so confused regarding harassment by co-workers. In this context, there is a consensus that if the employer knew or should have known of the harassment and failed to take effective remedial measures, the employer will be liable.⁵⁶ Consensus also exists on quid pro quo cases: When a "tangible employment action is taken" against a complaining employee by a sexually harassing supervisor, the employer is liable.⁵⁷

When it came to supervisors who engage in acts that could constitute a hostile environment, however, the *Meritor* Court found itself caught between the trial court's standard of actual notice and the court of appeals' standard of strict liability. Instead of issuing "a definitive rule,"⁵⁸ the

55. See Theresa M. Beiner, *Do Reindeer Games Count As Terms, Conditions, or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643, 682-85 (1996); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 141-49 (1995); J. Houtt Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 280-86 (1995).

56. *Ellerth*, 524 U.S. at 759; *Faragher*, 524 U.S. at 799. The Court in *Ellerth* suggested that if a co-worker is the harasser and the harassee has a "reasonable" belief that the harasser is actually a supervisor, the employer could be held liable under an "apparent authority" theory. *Ellerth*, 524 U.S. at 759.

57. *Ellerth*, 524 U.S. at 765. The *Ellerth* Court defined "tangible employment action" to include "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. See *Faragher*, 524 U.S. at 808.

58. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). Justice Marshall's concurring opinion, joined by Justices Brennan, Blackmun and Stevens, would have issued a "definitive rule." *Id.*

Supreme Court “agree[d] with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.”⁵⁹ The Court referred to agency law because the language of Title VII defined employer to include an “agent” of the employer.⁶⁰ It also acknowledged that common-law agency principles might not be “transferable in all their particulars to Title VII.”⁶¹ With so vague a standard, it is not surprising that it led to confusion among the lower courts and scholarly debate as to what the standard was for imposing liability on employers for harassment perpetrated by supervisors.⁶²

Since *Meritor*, the Court has clarified this standard in two recent cases—*Faragher v. City of Boca Raton*⁶³ and *Burlington Industries, Inc. v. Ellerth*.⁶⁴ In *Faragher*, the Court addressed under what circumstances an employer may be held liable for the actions of supervisory employees who create a hostile work environment. In doing so, it acknowledged that its “cases have established few definite rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive.”⁶⁵ In order to frame a standard, the Court considered several theories for imputing liability to employers for the actions of their supervisors. The Court took into consideration that supervisors can easily misuse their authority and that the threat of an adverse employment action always exists for an employee who does not act in the manner a supervisor wishes. On the other hand, it acknowledged its statement in *Meritor* that employers would not automatically be liable for the acts of their supervisors.⁶⁶

With this in mind, as well as Title VII’s emphasis on correcting problems before they reach litigation, the Court set this standard:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When

at 74. Believing the question to be properly before the Court, they adopted the EEOC Guideline standards for employer liability, rather than leaving the issue indefinite. *Id.* at 74–75. Specifically, the guidelines would hold an employer strictly liable for the acts of harassment by its agents and supervisory employees, while holding an employer liable for harassment by co-workers only if the employer “knew or should have known” of the alleged harassing behavior. *Id.* at 74.

59. *Id.* at 72.

60. *See id.* (citing 42 U.S.C. § 2000e(b) (1994)).

61. *Id.*

62. *See Faragher*, 524 U.S. at 785 (acknowledging the lower courts’ difficulties). *See also* Oppenheimer, *supra* note 55; Verkerke, *supra* note 55.

63. 524 U.S. at 775.

64. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

65. *Faragher*, 524 U.S. at 788.

66. *Id.* at 804.

no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . 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.⁶⁷

The Court also made clear that this defense does not exist if the supervisor's harassment involves a "tangible employment action" against the harassed employee, such as a demotion, pay cut, etc.⁶⁸ In such cases, the strict liability rule for quid pro quo cases applies.

Given this case law on sexual harassment, the lower courts have endeavored to give meaning to these standards in individual cases. As is explained below, the meaning given these standards often favors the defendant in close cases.

III. PERCEPTIONS OF HARASSMENT IN LOWER COURT DECISIONMAKING

While the Supreme Court has issued several decisions on sexual harassment, this pales in comparison to the escalating number of cases that are coming through the lower federal courts.⁶⁹ Given the rate of certiorari

67. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The *Ellerth* and *Faragher* Court also described what evidence might suffice to prove the affirmative defense:

While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Ellerth, 524 U.S. at 765. Thus, an employer's success in establishing the defense often turns on the nature of its antiharassment policy. See, e.g., *Shaw v. Autozone, Inc.*, 180 F.3d 806, 811 (7th Cir. 1999) (stating that "the existence of an appropriate anti-harassment policy will often satisfy this first prong"); *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (noting that "existence of [an anti-sexual harassment policy] militates strongly in favor of a conclusion that the employer exercised reasonable care to prevent and promptly correct sexual harassment").

68. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

69. The search "HE('sexual harassment') & DA(aft 01/01/2000)" in the federal district courts database on Westlaw for 2000 and 2001 pulled up well over two hundred cases. This search is both underinclusive and overinclusive. Obviously, more cases are actually filed than this. This search only includes the cases that have written decisions that were included in Westlaw's district court database. It does not include those in which no decisions have been made or which Westlaw did not choose to

grants, the lower federal courts are the main decisionmakers in cases of sexual harassment. Therefore, how they perceive sexual harassment and interpret the current Supreme Court standards are of the utmost importance to the efficacy of the law as well as the rights and interests of litigants. So, just what do the lower federal courts perceive as sexual harassment? Some courts appear very sympathetic to sexual harassment claims.⁷⁰ Nonetheless, there appears to be some hostility to these claims in the judiciary,⁷¹ perhaps resulting in summary judgments as well as judgments as a matter of law against plaintiffs in what can be considered questionable cases. In addition, one study showed that in job-related civil rights cases, plaintiffs fare better before juries than judges.⁷²

While it is very difficult to ascertain how pervasive this problem is,⁷³ it does appear that pretrial motion practice in sexual harassment cases is on the rise.⁷⁴ Of these, there have been some very questionable cases decided summarily by courts—via motions to dismiss, summary judgment, and judgment as a matter of law—using the objective standard that “no reasonable person” could find the alleged behavior, even if proven, to be sexual harassment. In addition, plaintiffs do not fare well in the federal appellate courts. A study by Eisenberg and Schwab that relies on official

include. It is also overinclusive for the years in question. It contains cases that were filed before 2000, but had decisions reported during 2000 or 2001. Most cases are terminated in the district courts, with recent statistics showing that anywhere from nineteen to twenty-four percent of nonprisoner civil rights cases are appealed from the district courts. See CAROL KRAFKA, JOE S. CECIL & PATRICIA LOMBARD, FEDERAL JUDICIAL CENTER, STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS 29 (1995).

70. See, e.g., *Fitzgerald v. Henderson*, 251 F.3d 345, 355–56 (2d Cir. 2001) (overturning district court’s granting of defendant’s motion to dismiss); *Howley v. Town of Stratford*, 217 F.3d 141, 145 (2d Cir. 2000) (overturning district court’s granting of summary judgment for defendant employer); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 166–67 (8th Cir. 1997) (overturning district court’s granting of summary judgment for defendant employer).

71. See, e.g., *Beiner*, *supra* note 8, at 126–30 (describing findings of gender bias task forces with respect to judicial impatience directed at employment discrimination cases).

72. Kevin M. Clermont & Theodore Eisenberg, *Trial by Judge or Jury: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1175 (1992) (study of cases between 1979 and 1989 showed plaintiff win rates of 20% in bench trials and 39% in jury trials).

73. See *Beiner*, *supra* note 8, at 98 n.165 (discussing difficulties in quantifying rate of granting summary judgment in hostile work environment cases).

74. In a recent study of cases decided in the ten years following *Meritor* (through 1995), Juliano and Schwab found that in 64.9% of reported district court cases, there were pretrial motions on a substantive claim. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 570 (2001). Of these, plaintiffs won 52.5% of the motions. *Id.* In addition, 3.8% were decided on pretrial motion on procedure or evidence. Of these motions, plaintiffs won 79%. *Id.* Overall, 54.1% of district court cases were decided on pretrial motions without a trial. *Id.* In addition, Juliano and Schwab note that pretrial motion practice in sexual harassment cases is on the rise. *Id.* at 568. During 1986–89, half of the opinions they studied were at the pretrial stage, whereas three-quarters of the decisions studied in the 1990s are at the pretrial stage. *Id.*

government data generated by the Administrative Office of the United States Court found that in all cases decided after trial between 1988 and 1997, “employment discrimination plaintiffs do dramatically worse than defendants on appeal.”⁷⁵ This held true for cases decided on pretrial motions as well.⁷⁶

Part of this trend in the lower courts may be the result of dicta in *Oncale*, *Ellerth* and *Faragher*. Although these three decisions are apparently plaintiff-friendly, dicta within them suggest that the bar for what is actionable harassment might be high. As one commentator pointed out:

The Court [in *Oncale*] declared that Title VII does not prohibit “genuine but innocuous differences in ways men and women routinely interact with members of the same sex and of the opposite sex.” . . . This approach is consistent with earlier rulings intended to protect employers from a barrage of claims by hypersensitive employees and from employees who believe that any workplace triviality that offends someone rises to the level of actionable harassment. “We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory ‘conditions of employment.’”⁷⁷

This is likewise supported by the Court’s latest decision involving—though tangentially—sexual harassment.⁷⁸ As a result of these cases, what are termed “innocuous” incidents of harassment are not actionable. Some lower courts, as described below, have taken these bits of dicta and used them as a basis for summary disposition in some very close cases, which in

75. Theodore Eisenberg & Stewart J. Schwab, *Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeal* at 1, at <http://findjustice.com/mmr/news/eisenber-schwab/schwab-report.htm>. The figures on this point are staggering. When an employment discrimination defendant wins at trial, plaintiffs in only 5.8% of cases on appeal are successful in getting that judgment reversed. *Id.* at 4. On the other hand, when a plaintiff wins at trial, defendants are successful in 43.61% of those cases in having the judgments reversed. *Id.* This reversal rate for defendants is greater than any other category of federal litigation except for “other civil rights cases,” which includes such cases as police brutality and school desegregation cases. *Id.* at 5. In addition, this gap between plaintiff and defendant reversal rates is not simply a problem in one or two circuits, it “occurs in all federal circuits in all regions of the country.” *Id.* at 1, 4–5.

76. *Id.* at 6. Defendants appealing win 44.74% of the time, whereas plaintiffs win 11.03% of the time. *Id.*

77. Jane Goodman-Delahunty, *Pragmatic Support for the Reasonable Victim Standard in Hostile Workplace Sexual Harassment Cases*, 5 PSYCHOL., PUB. POL’Y, & L. 519, 531–32 (quoting *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75, 79–82. (1998)).

78. See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 268–73 (2001). See also *supra* notes 48–53 and accompanying text (discussing case).

some instances obviously, and in others, arguably, involve more than “innocuous” incidents. There is, however, evidence in the case law that judicial hostility to these claims predates these decisions.⁷⁹

In a recent study of all reported sexual harassment decisions in the ten years following the *Meritor* decision (up through 1995), Ann Juliano and Stewart J. Schwab tracked how many courts used or mentioned the reasonableness standard in deciding cases.⁸⁰ They found that in most cases in which the court decided that the harassment did not reach the severe or pervasive level, the courts did not even mention the reasonableness standard.⁸¹ This seems odd given the Supreme Court precedent. This, however, does not mean that the courts did not take it into account, as they should have; it simply means they were not explicit in their opinions about doing so.

Thematically, the lower courts are using several strategies to dispose of sexual harassment cases before and in some cases after they reach the jury. Vicki Schultz has already recounted difficulties in the lower courts for plaintiffs bringing gender harassment cases,⁸² in spite of the Supreme Court’s clear pronouncement in *Oncale* that such behavior is actionable. In addition, courts simply downplay the severity of the conduct in order to conclude that no reasonable person could find it sexually harassing. They also engage in what I call the “divide and conquer” approach, whereby rather than looking at the effects of all incidents as the “totality of the circumstances” standard requires, some courts view the incidents in a piecemeal manner, essentially concluding that each individual instance is insufficient, while failing to consider the cumulative effect of all the incidents. Finally, they rely on faulty precedent. Subsequent courts will use one extremely close case to justify summary disposition in succeeding

79. Indeed, there is language in both *Meritor* and *Harris* that would support a court’s summary disposition of what it thought to be cases of innocuous behavior. See *Meritor Sav. Bank, FSB*, 477 U.S. 57, 67 (1986) (stating that “not all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment within the meaning of Title VII”); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (“mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” would not affect the conditions of employment to a sufficiently significant degree to violate Title VII); *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (quoting same); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (“As we pointed out in *Meritor*, ‘mere utterance of an . . . epithet which engenders offensive feelings in a employee,’ *ibid.* (internal quotation marks omitted) does not sufficiently affect the conditions of employment to implicate Title VII.”). Thus, it should come as no surprise that cases predating *Oncale*, *Ellerth*, and *Faragher* picked up on this theme.

80. See Juliano & Schwab, *supra* note 74, at 584–85.

81. See *id.* at 585.

82. See Schultz, *supra* note 46, at 1720–29.

close cases in the same circuit, without reflecting on whether the initial case was correctly decided.⁸³ Sometimes courts use a combination of these strategies in an effort to dismiss cases. Examination of cases involving summary dismissal reveals how, as a practical matter, some courts use these approaches to resolve sexual harassment cases.

A. UNDERMINING THE SEVERITY OF THE HARASSMENT

One of the most common rhetorical strategies lower courts use to dispose of sexual harassment cases is simply to declare that no reasonable person could find the behavior sufficiently severe or pervasive. Courts do this in two ways. First, courts simply say that this is the case or downplay the severity or frequency of the harassment. Second, they set the bar of what is actionable harassment so high that few claimants could reach it. Perhaps it is easiest to understand this phenomenon by way of example.

In an obvious instance of downplaying the severity of the harassment, the court in *Hosey v. McDonald's Corp.*⁸⁴ granted the employer's motion for summary judgment, stating that "[w]hile [plaintiff] may have thought such conduct improper, Title VII does not prohibit teenagers from asking each other out on dates."⁸⁵ This statement is incredible, given the facts of the case. In *Hosey*, a female supervisor⁸⁶ at a McDonald's restaurant directed unwanted sexual advances toward a male subordinate. Specifically, she asked him out on numerous occasions and made offensive comments to him, including telling him "she would like to know what it felt like to have [him] inside her."⁸⁷ She also touched him offensively on ten occasions⁸⁸ including grabbing his rear end and pinching him. The District Court, with the Fourth Circuit affirming, found these incidents insufficiently severe or pervasive to be actionable. Citing *Saxton v. AT&T Corp.*, the court dismissed the touching incidents as insufficient evidence

83. While this is understandable on the part of district courts, given that they are bound to follow precedent, one would expect the courts of appeal to be more circumspect.

84. No. AW-95-196, 1996 WL 414057, at *1 (D. Md. May 17, 1996), *aff'd*, 113 F.3d 1232 (4th Cir. 1997).

85. *Id.* at *2.

86. Although the alleged harasser was a supervisor, she did not have direct supervisory capacity over the plaintiff. *See id.* at *1.

87. *Id.* at *1.

88. Although plaintiff testified that there were ten such incidents, the court could account for only three or more incidents, given the number of times plaintiff worked with the alleged harasser. *Id.* at *3. The court, however, considered that there might be ten such incidents for purposes of summary judgment, stating that "[a]lthough a fact finder may not believe his allegations of repeated touching, the Court accepts Mr. Hosey's contradictory deposition testimony for this motion." *Id.* at *3 n.2.

of a hostile environment. Considering the number of incidents, this case seems to be about more than teenagers asking each other out on dates. The plaintiff was subjected to repeated acts of a sexual nature, which included offensive touching. By reducing the incidents merely to “teenagers . . . asking each other out on dates,” the court downplayed both the severity (the physical touching) and the pervasiveness (repetitive nature) of the behavior.⁸⁹ This, in part, laid the foundation for summary judgment in this case.

*EEOC v. Champion International Corp.*⁹⁰ is another case in which a court downplayed the severity of the harassment as well as created an extremely high bar of severity. The plaintiff, an African-American woman, confronted a male co-worker who was poking two female co-workers with a stick. When the alleged harasser saw plaintiff observing this behavior, he shouted at her “What the fuck are you looking at!” and allegedly told her he would make her job more difficult. He then shouted at her, “Suck my dick, you black bitch,” while dropping his pants and holding his penis, referred to as the Butram incident.⁹¹ In addition to this incident, another co-worker told plaintiff that he wanted to hang plaintiff in a cornfield and that if she brought any “gang-member” friends to work, he would bury them in a cornfield.⁹² Finally, a fellow African-American employee found a Ku Klux Klan card posted on the inside of a beam at the factory. The card was eventually shown to plaintiff by one of her African-American co-workers.⁹³

While there was some discrepancy about the primary incident of harassment,⁹⁴ the court evaluated plaintiff’s claim based on her account, which is appropriate at the summary judgment stage. Indeed, “[i]n moving for summary judgment, Champion contends that . . . even if the incidents Jackson asserts occurred as she alleged, they do not rise to a sufficient level

89. See also *Peinado v. Norwegian Am. Hops., Inc.*, No. 99 C 3233, 2001 WL 726993, at *8 (N.D. Ill. 2001) (referring to repeated use of profanity, sexually explicit jokes and innuendo around lower-ranking employees as “sophomoric behavior” that did not provide a basis for a sexual harassment claim).

90. No. 93 C 20279, 1995 WL 488333, at *1 (N.D. Ill. Aug. 1, 1995).

91. *Id.* at *2.

92. *Id.* at *3.

93. *Id.* at *4.

94. Two witnesses said they saw a heated argument between plaintiff and the alleged harasser. The two employees who were being prodded with a stick denied that they were being fondled. The alleged harasser did concede that he had an argument with plaintiff, but denied any sexual harassment. *Id.* at *3.

to constitute harassment actionable under Title VII.”⁹⁵ The court explained:

In the present case, the only event or behavior the EEOC can point to as the basis of a sexually hostile work environment with regard to Jackson [plaintiff] is the Butram incident. Taking the evidence in the light most favorable to the EEOC, Butram’s behavior was deplorable and even offensive, humiliating, and threatening to Jackson. It very well could have interfered with her work performance at the time. There is no evidence, however, from which this court can draw a reasonable inference that Butram’s sexual harassment of Jackson was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. This single incident, which was of very limited duration and included nothing but expressive behavior, with no follow-up or repeat, is simply not enough to violate Title VII as sexual harassment.⁹⁶

The court here overlooked that a single incident, if sufficiently severe, can form the basis of a sexual harassment claim.⁹⁷ The court held similarly on the claim of racial harassment, stating that even though the incidents involved (the derogatory statement and Ku Klux Klan incident) were “deplorable and even offensive to” plaintiff, the derogatory statement was a single incident and the Ku Klux Klan card “does not by itself rise to within anywhere near the same level of severity hypothesized in the discrimination claim against Champion.”⁹⁸ Finally, the court did not see the link between the incidents. Being called a “black bitch” is about more than sexual harassment. It has racial harassment implications as well. By ignoring this link, the court separated the incidents, finding that neither constituted actionable harassment. In this case, the severity bar is set so high that it is nearly impossible for plaintiffs in single incident cases to get to the jury.⁹⁹

Another example is provided by the court in *Blankenship v. Parke Care Centers, Inc.*¹⁰⁰ In this case, two hospital employees claimed

95. *Id.* at *6.

96. *Id.* at *8.

97. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (harassment can be either “severe or pervasive”) (emphasis added). *See also* Torres v. Pisano, 116 F.3d 625, 631 (2d Cir. 1997) (single incident can be enough); Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 n.4 (7th Cir. 1991) (same).

98. *Champion*, 1995 WL 488333, at *10.

99. A single incident case that was sufficient involved a plaintiff who was allegedly raped after a business dinner. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1300 (2d Cir. 1995).

100. 913 F. Supp. 1045, 1055 (S.D. Ohio 1995).

harassment by a forty-year-old male co-worker. One of the plaintiffs endured the co-worker's blowing kisses at her, licking his lips and looking at her, and "smil[ing] at her seductively or perversely on several occasions; [making] obscene gestures toward his crotch once; touch[ing] his finger against her chest above her breast on one occasion; and [making] vulgar sexual remarks in her presence about another female co-worker" during a five to six-day period.¹⁰¹ The other plaintiff, a seventeen-year-old high school student who was employed as a dietary aide in a hospital, was harassed by the same co-worker. He told her that "he was falling in love with her." He tickled her on one occasion, hugged her and/or kissed her on the cheek on four occasions. He also approached her from behind and lifted her breasts. He repeatedly asked her out on dates. While the court agreed that the latter plaintiff presented a stronger case,¹⁰² it concluded that "neither Plaintiff's contentions definitively meet the applicable legal standard. Accordingly, the nature of the conduct itself conceivably could provide an alternative basis for granting Defendants' motions."¹⁰³

In other cases, lower courts have dismissed cases of sexual harassment only to have the courts of appeal reverse. Even though these cases ultimately were reversed by the courts of appeal, this avenue is not open to every plaintiff because of the cost and risk involved. These cases provide additional evidence of judicial hostility at the trial court level to these claims. For example, in *Gregory v. Daly*,¹⁰⁴ the Second Circuit reversed the granting of a motion to dismiss by a trial court where it was clear that the plaintiff had alleged sufficient facts under federal notice pleading standards to state a claim for sexual harassment. The Second Circuit described the disturbing allegations in this complaint:

Daly made "demeaning comments about women." Later, Daly made further "demeaning comments of a sexual nature," engaged in "behavioral displays of a sexual nature, and made unwelcome physical contact . . . of a sexual nature" with Gregory [the plaintiff]. In particular, Daly asked Gregory if she knew what a "sexual perpetrator" was, explained "in graphic detail[]" how a rape may occur, and told her "how easy it is to rape a woman," and "described sodomy and anal intercourse

101. *Id.* at 1053.

102. There were alternative grounds for summary judgment in this case. *See id.* at 1054–55.

103. *Id.* at 1055 (emphasis omitted). Summary judgment was ultimately granted in this case because the court decided that the employer had taken appropriate corrective action in response to the plaintiffs' complaints. *Id.* at 1053–55. It is noteworthy that the employer's actions were not successful in stopping the harassment. *See id.* at 1054.

104. 243 F.3d 687, 687 (2d Cir. 2001).

relating to boys in detail.” Gregory further alleges that Daly repeatedly came into her office, closed the door, and stood uncomfortably close to her, despite her requests that he move away.¹⁰⁵

The trial court characterized the complaint as containing nothing more than accusations of “‘demeaning’ comments” that were insufficient to reach the severe or pervasive standard required in sexual harassment cases.¹⁰⁶ Again, the trial court downplayed the severity of the allegations as well as ignored the repeated nature of the incidents. While the Second Circuit reversed this decision, the plaintiff had to wait two years for this result.

Similarly, the Fourth Circuit recently reversed the grant of summary judgment in favor of the employer in another close case. In *EEOC v. R & R Ventures, Inc.*,¹⁰⁷ the court of appeals held that the trial court had erred in deciding that no triable issue of fact existed as to the severity or pervasiveness of the harassment of the plaintiffs. In this case, the manager of a Taco Bell regularly harassed two of his young female employees. This harassment included:

Scott [the first plaintiff] claims that Wheeler [the harasser] made sexual jokes on a daily basis and that he frequently discussed sexual positions and experiences. When Scott bent over, Wheeler told her she was giving him a “cheap thrill.” He commented regularly about the size of her buttocks and breasts. He repeatedly asked Scott if she liked to be spanked. He also frequently said that women were stupid as compared to men. Wheeler made these comments *every time* he worked with Scott, often in front of other employees. . . . Wheeler flirted with Potter [the second plaintiff] and repeatedly made sexual comments in her presence. For example, Wheeler inquired about the size of Potter’s pants and complained to her about how long it had been since he had engaged in sex. Wheeler also belittled Potter in front of others, telling her she was stupid. Wheeler behaved this way *every time* the two worked together.¹⁰⁸

In addition, Scott complained about Wheeler touching her and brushing up against her.¹⁰⁹ Given the pervasiveness of these incidents (plaintiffs experienced these behaviors every time they worked with the harasser), and that this was a supervisor harassing two young women working for him, the Second Circuit concluded that the trial court was

105. *Id.* at 690.

106. *Gregory v. Daly*, 78 F. Supp. 2d 48, 49 (N.D.N.Y. 1999).

107. 244 F.3d 334, 334 (4th Cir. 2001).

108. *Id.* at 337 (emphasis added).

109. *Id.* at 339.

mistaken, stating “[t]his eclipses the threshold of severity required to defeat summary judgment.”¹¹⁰ Once again, the plaintiffs had to wait to have their day in court before a jury due to the misapprehension of a trial judge as to what constitutes actionable harassment. The EEOC filed this action on March 30, 1999.¹¹¹ Almost two years later, this case was still meandering its way through the appellate court system, and these plaintiffs had yet to have their day in court.

In all of these cases, the courts saw factual circumstances that presented close cases and found a way to resolve them before they got to the jury. Although sometimes this strategy was short-lived due to appellate court corrections, in all of them the courts made assumptions about what is or is not sexually harassing and concluded that some disturbing and often repeated behaviors were not.

B. THE DIVIDE AND CONQUER APPROACH

Courts also have looked at individual instances of harassment, concluding they were not sufficiently severe or pervasive, without considering the “totality of the circumstances.” In other words, they failed to consider the cumulative effect of the incidents. While some courts have recognized this as improper given the totality of the circumstances standard,¹¹² this has not stopped many courts from using this strategy.

*Saxton v. AT&T Co.*¹¹³ provides an example of the divide and conquer approach. In this case, the Seventh Circuit held that the plaintiff failed to raise an issue of fact as to whether a reasonable person would find that her supervisor’s conduct created a hostile environment. The facts as described by that court indicate two overt sexually-related acts. First, Saxton’s supervisor requested to meet with her at a club after work to discuss problems with her work performance. He placed his hand on Saxton’s thigh several times and rubbed his hand along her upper thigh. After they left the club, he pulled her into a doorway and kissed her. Plaintiff

110. *Id.* at 340.

111. *Id.* at 338.

112. *Conner v. Schrader-Bridgeport Int’l, Inc.*, 227 F.3d 179, 193–94 (4th Cir. 2000) (noting that the district court had “improperly disaggregat[ed] the incidents from the whole” in granting judgment as a matter of law); *Madison v. IBP, Inc.*, 257 F.3d 780, 793. (8th Cir. 2001) (“[E]vidence of a hostile environment must not be compartmentalized, but must instead be based on the totality of the circumstances of the entire hostile environment.” (quoting *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 355 (8th Cir. 1997))).

113. 10 F.3d 526, 526 (7th Cir. 1993).

objected to these actions. He also put his hand on her leg in the car on the way home. On another occasion, they went to lunch to discuss work. He stopped at an Arboretum to take a walk. He lurched at her from behind some bushes, as if to grab her.¹¹⁴ Once again, plaintiff rebuffed his advance. After these incidents, the supervisor's attitude toward plaintiff changed. "[H]e refused to speak with her, treated her in a condescending manner, and teased her about her romantic interest in a co-worker. In addition, [the alleged harasser] seemed inaccessible and on several occasions canceled meetings that he had scheduled with [plaintiff]."¹¹⁵

The court found that these facts regarding the actions of Saxton's supervisor were not sufficiently severe or pervasive to raise an issue of fact for purposes of summary judgment.¹¹⁶ According to the court, the plaintiff's showing failed on several grounds. First, as to the two incidents of "undoubtedly inappropriate" behavior detailed above, the court held that they "did not rise to the level of pervasive harassment as that term has been defined by this court."¹¹⁷ As to her allegations of getting the "cold shoulder" from her boss, the court opined:

Saxton has offered no evidence that Richardson's conduct was frequent or severe, that it interfered with her work, or that it otherwise created an abusive work environment. Thus, although it might be reasonable for us to assume that Richardson's inaccessibility, condescension, impatience, and teasing made Saxton's life at work subjectively unpleasant, the evidence fails to demonstrate that his behavior was not "merely offensive," . . . but instead was "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment."¹¹⁸

The court further reasoned that even if there were questions of fact whether Saxton's work environment had become difficult, the evidence was

114. *Id.* at 528.

115. *Id.* at 529.

116. *Id.* at 534. The court accepted plaintiff's evidence as true, which is typical for a court considering a summary judgment motion in a hostile environment case in which the defendant is arguing lack of severity or pervasiveness. See *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 773 n.6 (4th Cir. 1997); *Saxton*, 10 F.3d at 529 n.4; *EEOC v. Champion Int'l Corp.*, No. 93 C 20279, 1995 WL 488333, at *7 (N.D. Ill. 1995). This is common because harassment often occurs behind closed doors with no witnesses. Thus, a fact finder often is faced with two very different accounts—that of the harasser and that of the harassed—of the same event. The court considers the plaintiff's account as true because a jury could believe her and disbelieve the harasser.

117. *Saxton*, 10 F.3d at 534.

118. *Id.* at 534–35 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 12, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

insufficient to raise an issue of fact whether a reasonable person would have found the environment hostile.¹¹⁹

The court here disaggregated the two sexually-oriented incidents from the later cold shoulder treatment that the same supervisor directed at her. Yet, these incidents were part of the total harassing environment experienced by the plaintiff. They were also related in time and by perpetrator. The court refuses even to consider that the two forms of harassment—both based on gender—might rise to the severe or pervasive level set by the Supreme Court.

The court in *Peinado v. Norwegian American Hospital, Inc.*,¹²⁰ likewise engaged in blatant disaggregation, considering the behavior of an individual that occurred generally at the workplace that was not directed at the plaintiff as entirely separate from the behavior of that same individual when directed at the plaintiff.¹²¹ The court used a combination of sexual harassment standards to grant summary judgment for the defendant employer. First, it concluded that the nondirected incidents did not rise to the severe or pervasive level.¹²² With a constant stream of behavior out of the way, the court further concluded that the employer made an effective response to the directed incident, which was clearly more severe than the prior incidents.¹²³ Therefore, the employer was not liable. This was a creative way to disaggregate the incidents, which allowed the court to avoid two difficult issues: (1) whether liability could be imputed to the employer for the nondirected incidents; and (2) whether the sum total of all the incidents—the totality—amounted to a hostile environment.

The courts in several of the cases discussed in the prior section likewise engaged in the “divide and conquer” approach to evaluate the incidents of sexual harassment. For example, the court in *Champion*, while acknowledging that even though the incidents involved (the derogatory statement and Ku Klux Klan incident) were “deplorable and even offensive to” plaintiff, concluded that the derogatory statement was a single incident and the Ku Klux Klan card “d[id] not by itself rise to within anywhere near the same level of severity hypothesized” in the discrimination claim against

119. *Id.* at 535. Saxton’s claim also failed on the independent basis that the employer had taken sufficient remedial measures. *Id.*

120. 2001 WL 726993, at *1 (N.D. Ill. 2001).

121. *Id.* at *7, *9.

122. *Id.* at *7-*9.

123. *Id.* at *10. The harasser asked plaintiff to come to his office, where he closed and locked the door, grabbed her and kissed her, while touching her breasts and buttocks. *Id.* at *4.

Champion.¹²⁴ Again, the court refused to look at the two incidents together to determine whether a reasonable person in the plaintiff's position would feel harassed based on race.

Finally, courts have disaggregated types of harassment from each other. For example, if a plaintiff is harassed based on sex (i.e., being female) and based on race (i.e., being Black), the courts have considered these categories separately.¹²⁵ They seem unwilling to acknowledge that harassment can occur based on two protected statuses at once—for example, the sexual harassment of a Black woman. This form of harassment can combine into a joint form of harassment based on a combination of both statuses.¹²⁶ However, the courts have been reluctant to look at the totality of the effect based on all statuses in assessing harassing incidents.

C. BAD PRECEDENT LEADS TO BAD PRECEDENT

In each circuit, it only takes one appellate court granting a motion to dismiss, summary judgment, or judgment as a matter of law in a case that should be decided by the jury to spur the same outcome in succeeding cases of equally questionable outcomes. Some of the cases previously discussed have become such cases.

For example, several district and circuit courts in the Seventh Circuit have relied upon *Saxton v. AT&T Co.* to support summary judgment.¹²⁷

124. *Champion*, 1995 WL 488333, at *10.

125. *See, e.g.,* *Rocha Vigil v. City of Las Cruces*, 113 F.3d 1247 (10th Cir. 1997) (unpublished table decision), *text at* 1997 WL 265095, at **6-**7; *Champion*, 1995 WL 488333, at *8. *But see* *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (allowing aggregation of both sexually and racially hostile incidents); *Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1032-35 (5th Cir. 1980).

126. *See* *Beiner*, *supra* note 8, at 108-12 (citing and describing cases). Forell and Matthews argue that victims of harassment should be permitted to choose how they characterize cases involving harassment based on more than one protected status. CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* 92-93 (2000). Forell and Matthews, however, are concerned that stereotypes and prejudices about race may interfere with and distract from plaintiff's allegations about sexual harassment. *Id.* at 88-89. *See also* Tam B. Tran, *Title VII Hostile Work Environment: A Different Perspective*, 9 J. CONTEMP. LEGAL ISSUES 357, 376-78 (1998) (arguing in favor of considering both statuses at once and describing cases in which this was done). *See generally* Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992).

127. *See, e.g.,* *Hosey v. McDonald's Corp.*, No. AW-95-196, 1996 WL 414057, at *3 (D. Md. May 17, 1996), *aff'd*, 113 F.3d 1232 (4th Cir. 1997).

Indeed, although two courts have questioned the result in that case,¹²⁸ a KeyCite search on Westlaw revealed that over seventy-nine cases have cited *Saxton* positively on its severe or pervasive analysis.¹²⁹

In a glaring example of poor use of precedent, the Sixth Circuit relied on *Fleenor v. Hewitt Soap Co.*¹³⁰ to affirm a summary judgment motion granted by the trial court in *Gwen v. Regional Transit Authority*.¹³¹ In *Fleenor*, the plaintiff was subjected to repeated unwanted sexual advances and harassment for a two-week period. This harassment included a coworker's exposing his genitals to the plaintiff, threats to force plaintiff to engage in oral sex, and, on one occasion, the same coworker "stuck a ruler up Plaintiff's buttocks."¹³² The court upheld the trial court's dismissal of the complaint for failure to plead a basis for imputing liability to the employer.¹³³ The court in *Gwen* relied on *Fleenor* to grant summary judgment to the defendant-employer based on the insufficiency of the severity or pervasiveness of the harassment.¹³⁴

In *Gwen*, the plaintiff provided evidence that a co-worker had exposed himself to the plaintiff twice, and, during one of these episodes, made "rude and inappropriate comments" to her.¹³⁵ When the plaintiff's husband complained of the conduct to the plaintiff's supervisor, the supervisor replied, "[s]ounds like something Earl [the harasser] would do."¹³⁶ In addition to the exposure incidents, the plaintiff also stated that the co-worker had been harassing her for some time. The court did not consider these additional incidents because they were raised for the first time in her response to the employer's summary judgment motion.¹³⁷ The court of

128. See *Cooke v. Stefani Mgmt. Serv., Inc.*, 250 F.3d 564, 568 (7th Cir. 2001); *Butta-Brinkman v. FCA Int'l, Ltd.*, 950 F. Supp. 230, 233-34 (N.D. Ill. 1996).

129. The search was conducted on September 7, 2001. *Saxton* had been cited positively over three hundred times. Seventy-nine of those cases cited it based on headnote 6, which relates to the application of the severe or pervasive standard to the facts of the case.

130. 81 F.3d 48, 48 (6th Cir. 1996).

131. 7 Fed. Appx. 496, 501-02 (6th Cir. 2001).

132. *Fleenor*, 81 F.3d, at 49.

133. *Id.* at 50-51. In reaching this decision, the appellate court held the plaintiff to a higher pleading standard than is required under liberal federal notice pleading rules. In particular, the court repeatedly stated that "the plaintiff is capable of pleading with requisite specificity" and "[t]he plaintiff is capable of stating specific facts." *Id.* at 50. Federal notice pleading rules require no such specificity except in cases of fraud. FED. R. EVID. 8 & 9(b). Thus, this case appears wrongly decided even on this ground.

134. *Gwen*, 7 Fed. Appx. at 502.

135. *Id.* at 498.

136. *Id.* at 498 n.2.

137. *Id.* at 500.

appeals, like the trial court, did not believe that the repeated exposure incidents were sufficiently severe or pervasive to make it to the jury and upheld summary judgment.¹³⁸ In so doing, the court relied heavily on *Fleenor*, stating “[t]he co-worker harassment in *Fleenor* was both more severe and more pervasive than that at issue here.”¹³⁹ It cited no other case for its position in this regard. Yet, *Fleenor* was not resolved on the severity or pervasiveness element, but instead on the plaintiff’s failure to impute liability. This is a gross misuse of inapposite precedent.

This is not the only example of bad precedent leading to bad decisions in the Sixth Circuit. The controversial case, *Rabidue v. Osceola*,¹⁴⁰ continues to be cited in that circuit in spite of its being overruled by the Supreme Court in *Harris v. Forklift Sys., Inc.*¹⁴¹ Yet, this case has subsequently been positively cited for its help in determining whether conduct was sufficiently severe to be actionable. A KeyCite headnote search of the applicable headnote revealed that twelve cases cited the case positively after 1993—the year of the Supreme Court’s decision in *Harris*.¹⁴² Courts continue to cite this case in spite of its apparently being overruled by *Harris*.

These cases show that at least some courts believe fairly severe behaviors are not harassment. In the case of summary judgment, according to the courts, no “reasonable person” would find these behaviors sufficiently severe or pervasive to alter the conditions of employment. Are the courts correct in this regard? Social science paints a different picture of what people find harassing.

IV. USING SOCIAL SCIENCE IN THE COURTS TO DEFINE HARASSMENT

Social science research has great potential to inform the manner in which the courts define sexual harassment. Court interpretations, in this

138. *Id.* at 501. Summary judgment was also upheld because the court found as a matter of law that the employer took “prompt remedial action in response” to her complaint. The plaintiff requested, on her doctor’s advice, that she be transferred to a position that would result in no contact with her harasser. The employer did not do this for her. *Id.* at 502.

139. *Id.* at 501.

140. 805 F.2d 611, 611 (6th Cir. 1986).

141. 510 U.S. 17, 22 (1993). For cases suggesting that *Rabidue* has been overruled in part, see *Scheske v. Kirsch Div. of Cooper Indus., Inc.* 30 F.3d 134 (6th Cir. 1994) (unpublished table decision), *text* at 1994 WL 276892, at **1; *Bartholomew v. Delahaye Group, Inc.*, 1995 WL 907897, at *4 (D.N.H. 1995).

142. This search was conducted on September 6, 2001.

particular area, can have a distinct effect not only on the outcomes of lawsuits but also on employer policies and therefore on the workplace of the average American.¹⁴³ Although “[s]ocial science research on sexual harassment is still in its infancy,”¹⁴⁴ what social scientists have found to date can help judges and jurors determine whether and what type of activities on the job should be actionable.

This is especially true in the case of the “severe or pervasive” standard, one of the most frequently litigated issues in sexual harassment cases. Indeed, it is an issue the courts often are asked to assess on a motion for summary judgment. It has been argued that judges are granting summary judgment in these cases too frequently, with several problematic results.¹⁴⁵ First, to the extent that harassment law is based on community standards of appropriate behavior in the workplace, by taking these cases away from the jury, judges are not allowing a community standard to develop. This can be a source of confusion for both employers and workers. If employers and employees do not know what a jury would find sexually harassing, how are employers to assess situations that come up at work and how are workers to avoid behaviors that may offend co-workers? Instead, all too often such assessments are left in the hands of one person—a federal judge—who, given his status, may not be in the best position to make that assessment.¹⁴⁶

143. In her description of the creation and implementation of a sexual harassment policy at the University of Louisville, Mary Hawkesworth explained that “changing law and court decisions have greater influence on administrative decisions than principled feminist arguments.” Mary Hawkesworth, *Challenging the Received Wisdom and the Status Quo: Creating and Implementing Sexual Harassment Policy*, 9 NWSA J. 94, 111 (1997).

144. Pryor et al., *supra* note 11, at 69.

145. See Beiner, *supra* note 8, at 98–101.

146. The demographics of the federal judiciary, in this regard, are telling. By the end of Clinton’s second term, 49% “of all active lower court judges were appointed by Democrats.” Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Gary Zuk, *Make-Up of the Federal Bench*, 84 JUDICATURE 253, 253 (2001). However, this number is fleeting. President George W. Bush has fifty-seven vacancies to fill, which will result in a clear Republican majority in the district courts. *Id.* In addition, only 43.8% of appellate judges had been appointed by Democratic presidents by the end of Clinton’s term in office. *Id.* When President Bush fills existing vacancies, Republicans will have a “solid majority” in the appellate courts. *Id.* The majority of federal judges are Republican appointees. See Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL’Y 835, 839, 842 n.14 (1998); Christopher M. Alexander, *Crushing Equality: Gender Equal Sentencing in America*, 6 AM. U. J. GENDER & L. 199, 224 n.181 (1997). See generally Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUSTICE SYS. J. 219, 243 (1999) (examining relationship between judges’ voting records and political affiliation). Most are male and relatively wealthy. See Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Gary Zuk, *Clinton’s Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 242, tbl.1 (Mar.–Apr. 2001) (showing wealth of Clinton appointees). Their ability to empathize with

Second, the end result in these cases may well be that plaintiffs who have meritorious claims—judged by a true community standard—are being shunted out of court unnecessarily. Hopefully, social science data on what people believe is harassing will prevent judges from rushing to judgment in these cases, but instead convince them that the issue might well be one for the jury.

A great deal of social science research has focused on what sorts of behaviors are deemed sexually harassing.¹⁴⁷ This research should be useful in legal settings to determine what sorts of behaviors are actionable as sexual harassment. If, as the Supreme Court has declared, we are to judge sexual harassment from the perspective of the “reasonable person,”¹⁴⁸ this research should provide information on what constitutes harassment to the average person. One problem with generalizing about what constitutes harassment is that perceptions vary based on a variety of factors. This might well make consensus with respect to any given fact pattern difficult to reach.¹⁴⁹ Yet, judges and jurors are asked to make this assessment. Social science can provide these decisionmakers with some information where currently they often rely on their own suppositions about what “reasonable people” believe.

Another problem with using a consensus-based approach is that there may be a gap between perceptions and how harassment actually operates. For example, studies show that many women who are being harassed would not necessarily identify their situation as harassment.¹⁵⁰ Still, it may make sense to set the legal standard to protect other women who

the common worker may be reasonably questioned. See Irene Padavic & James D. Orcutt, *Perceptions of Sexual Harassment in the Florida Legal System: A Comparison of Dominance and Spillover Explanations*, 11 GENDER & SOC. 682, 688–89, 693 (1997) (finding, in a study of the Florida judiciary, that awareness of gender-typing forms of behavior was less for male judges than female judges, and decreased for male judges based on age; “nearly half of the female judges reported that male judges have made jokes or demeaning remarks about women, and one-third of them indicated that male judges have subjected female attorneys to verbal sexual advances.”); Goodman-Delahunty, *supra* note 77, at 541 (stating that “[a]bsent guidance on how the objective standard is to be applied, courts may substitute their own judgment for that of the harasser. . . . Numerous commentators have expressed concern that judges are too untrustworthy to perform this task”).

147. See, e.g., Jasmine Tata, *The Structure and Phenomenon of Sexual Harassment: Impact of Category of Sexually Harassing Behavior, Gender, and Hierarchical Level*, 23 J. OF APPLIED SOC. PSYCHOL. 199, 199 (1993). See also *infra* Part V.

148. See *supra* notes 32–36 and accompanying text.

149. Susan Sheffey & R. Scott Tindale, *Perceptions of Sexual Harassment in the Workplace*, 22 J. APPLIED SOC. PSYCHOL., 1502, 1515 (1992).

150. See, e.g., Louise F. Fitzgerald, Sandra L. Shullman, Nancy Bailey, Margaret Richards, Janice Swecker, Yael Gold, Mimi Ormerod & Lauren Weitzman, *The Incidence of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 171 (1988); Hanrahan, *supra* note 13, at 43.

experience these behaviors as harassing by making them actionable even though not all women (or men, for that matter) would perceive them to be so. This implicates the underlying policies of Title VII. Precisely what do we expect this legislation to do?

A. METHODOLOGICAL PROBLEMS

Several methodological problems arise in adopting wholesale into the court system social science explanations of harassment.¹⁵¹ These problems arise out of the nature of studies that have attempted to determine what people perceive to be sexual harassment. Researchers have used two basic types of studies in an attempt to assess perceptions of sexual harassment. The first are survey studies in which subjects are asked whether or not they believe certain types of behaviors are sexual harassment.¹⁵² Usually these surveys require a yes or no answer, with some having a "don't know" option. The second technique is to use scenario studies, during which the researcher asks subjects whether they consider certain factual scenarios to be sexual harassment.¹⁵³ Sometimes the scenario will be a sentence long and other times a more fully developed fact pattern will be provided. This allows the researcher to manipulate certain aspects of the fact pattern in order to assess what variables affect such perceptions. The subjects are asked to rank the extent to which the scenario constitutes sexual harassment on a five- or seven-point scale, where one is "not at all" and seven is "very harassing."¹⁵⁴ These techniques have several problematic features that decrease their usefulness and credibility in the court system. However, they still provide some very powerful and valuable information about what people perceive to be sexual harassment.

First, there is a problem of terminology. Behaviors categorized as sexual harassment by social scientists may not be the same sorts of behaviors that the courts characterize as sexual harassment.¹⁵⁵ Few studies

151. Social scientists themselves acknowledge that there are problems. See, e.g., Barbara A. Gutek, Maureen Ann O'Connor, Renée Melancon, Margaret S. Stockdale, Tracey M. Geer & Robert S. Done, *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCHOL., PUB. POL'Y, & L. 596, 604 (1999) (acknowledging that social science is "not designed for legal use").

152. Gutek et al., *supra* note 151, at 603.

153. See *id.*

154. See *id.*

155. Indeed, some social scientists recognize this. See, e.g., Arvey & Cavanaugh, *supra* note 11, at 42 (noting the failure of studies to incorporate the severe or pervasive standard); Waldo, Berdahl

use the legal standard for assessing whether the scenario or particular behavior involved constitutes sexual harassment. For example, subjects are not asked whether, looking at the totality of the circumstances, the behavior is sufficiently severe or pervasive to alter the conditions of employment. Thus, study subjects are often left relying on their own personal definitions of sexual harassment rather than the standard that the Court has provided.¹⁵⁶ While some social scientists have studied the impact of the severity of the harassment on perceptions,¹⁵⁷ few have focused on the effect of repetitive behaviors in judgments about what constitutes harassment.¹⁵⁸ Yet, repetition is key to the legal standard. However, these studies still provide useful information. Even under the legal standard, if less severe behaviors were repeated, they at least arguably would meet the current "pervasive" standard used by the courts. Overall, the definitional dilemma may not prove all that problematic. It might well simply signal that the courts have been too limited in defining what behaviors are sexually harassing. If social scientists find that people consider certain behaviors harassing that are not currently actionable, courts should be responsive and adapt to this community norm.

Another problem with social science studies is they often do not consider particular contexts in which harassing behaviors might occur.¹⁵⁹ Studies that simply ask whether a particular behavior is or is not harassment suffer especially from this inadequacy. This is problematic because the Supreme Court has emphasized that the context in which the

& Fitzgerald, *supra* note 11, at 60 (psychologists study "psychologically abusive experiences," not "legal liability").

156. See Arvey & Cavanaugh, *supra* note 11, at 43. In addition, social scientists do not all use the same definition of sexual harassment. Louise F. Fitzgerald & Alayne J. Ormerod, *Breaking the Silence: The Sexual Harassment of Women in Academia and the Workplace*, in *PSYCHOLOGY OF WOMEN* 553, 554 (Florence L. Denmark & Michele A. Paludi eds., 1993); John B. Pryor, *The Lay Person's Understanding of Sexual Harassment*, 13 *SEX ROLES* 273, 273 (1985); John B. Pryor & Jeanne D. Day, *Interpretations of Sexual Harassment: An Attributional Analysis*, 18 *SEX ROLES* 405, 405 (1988); Bonnie S. Dansky, Dean G. Kilpatrick, Benjamin E. Saunders, Heidi S. Resnick, Connie L. Best, Rochelle Fishman Hanson & Michael E. Saladin, *Sexual Harassment: I Can't Define It but I Know It When I See It*, (1992) (on file with author); Tata, *supra* note 147, at 200; Sheffey & Tindale, *supra* note 149, at 1502-03 (citing a variety of definitions).

157. See *infra* Part V.

158. See *infra* Part V.

159. See Barbara A. Gutek & Maureen O'Connor, *The Empirical Basis for the Reasonable Woman Standard*, 51 *J. SOC. ISSUES* 151, 159-60 (1995) (criticizing studies that attempt to assess the difference between male and female perceptions of what constitutes harassment based on insufficient use of actual case fact patterns); Kimberly A. Lonsway, *Sexual Harassment Mythology: An Emerging Framework*, at 15 (ABF Working Paper No. 9719 (1998)). Some studies, of course, are notable exceptions. See, e.g., Richard L. Wiener, Barbara A. Watts, Kristen H. Goldkamp & Charles Gasper, *Social Analytic Investigation of Hostile Work Environments*, 19 *LAW & HUM. BEHAV.* 263, 267 (1995) (relying on the facts of two actual lawsuits in the design of their study).

alleged harassing behaviors occur is of particular importance in assessing whether the behavior meets the legal definition. The Supreme Court's position in this regard is not unreasonable. A pat on the back from a fellow female co-worker for a job well done is very different from a pat on the back from a male supervisor accompanied by a leer.

The result is that researchers have often studied what is essentially sexual harassment in a vacuum. Real sexual harassment fact patterns are complex. Rather than giving subjects developed factual scenarios that reflect this complexity, even in the second type of study, they often instead give two or three lines of description of the alleged harassment.¹⁶⁰ The assessors are not given both sides of the story, but instead a fact pattern that they must accept as "true." In addition, they are given the perspective of the "omniscient observer."¹⁶¹ Thus, these assessments, far from incorporating the "totality of the circumstances" approach that the Court requires, end up being assessments of sexual harassment without context or viewpoint. A recent study by Barbara A. Gutek and Maureen O'Connor sought to remedy these difficulties by providing full-blown fact patterns using both "sides of the story."¹⁶²

Both types of studies suffer from bias. By asking subjects whether the conduct in question constitutes sexual harassment, subjects will incorporate into their answers any sort of bias they might have with regard to sexual harassment—whether they are supportive of the legal concept or not. While this has led some researchers to ask whether conduct was "sexual" in nature¹⁶³ or to assess whether the behavior was "appropriate,"¹⁶⁴ rather than use the term "sexual harassment" in survey instruments, most simply ask whether the behavior is harassing or constitutes sexual harassment. Hence, bias can play a part in these assessments. Yet, these are the questions posed to jurors and judges during trial. So, in a sense, although bias might well play some part in that assessment during research, it likely also will play some part during jury deliberations. Of course, jurors might assess a

160. Gutek et al., *supra* note 151, at 604. See also Douglas D. Baker, David E. Terpstra & Bob D. Cutler, *Perceptions of Sexual Harassment: A Re-Examination of Gender Differences*, 124 J. PSYCHOL. 409, 413-14 (1990) (opining that the lack of differences in gender perceptions in their study might be due to the specificity used in their scenarios).

161. Gutek et al., *supra* note 151, at 604-05.

162. *Id.* at 605-06. See also Barbara K. Burian, Barbara J. Yanico & Charles R. Martinez, Jr., *Group Gender Composition Effects on Judgments of Sexual Harassment*, 22 PSYCHOL. OF WOMEN Q. 465, 467 (1998) (noting studies do not present perceivers with competing perspectives in scenarios).

163. See, e.g., James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED SOC. PSYCHOL. 543, 549 (1995).

164. See Gutek et al., *supra* note 151, at 607 (noting this).

situation differently if there could be legal and monetary consequences than if their assessments will have no real effect. Although it would be difficult to assess the degree of difference, it seems safe to assume that jurors will be more circumspect in assessing a situation as sexual harassment than would a research subject. Still, these surveys should provide a rough estimate of what sorts of behaviors people believe to be harassing.

Additional methodological problems implicate the use of these studies in the courts. Most of the social science research on this issue has been conducted by studying undergraduates.¹⁶⁵ Undergraduate students may not have as much experience in the workforce and may have never had to face a situation where their livelihoods depended on dealing with daily harassment. Thus, their opinions on harassment might vary greatly from working Americans who rely on their jobs for food, clothing and shelter.¹⁶⁶ Indeed, studies show that younger people define sexual harassment more narrowly.¹⁶⁷

The United States Merit Systems Protection Board ("USMSPB") is one of the more reliable series of studies of working populations.¹⁶⁸ The USMSPB studies survey federal government employees, and therefore do not suffer from the deficiencies of undergraduate-based studies. While the USMSPB studies suffer from the bias problems described above, they provide a good look at a large working population. This Article relies on the USMSPB studies throughout and indicates where a study cited involves

165. See Frazier et al., *supra* note 13, at 22–23, 34–35. But see Jennifer L. Hurt, Jillian A. Maver & David Hofmann, *Situational and Individual Influences on Judgments of Hostile Environment Sexual Harassment*, 29 J. APPLIED SOC. PSYCHOL. 1395, 1412 (1999). Frazier, Cochran and Olson argue that this is problematic because undergraduates appear to find less behaviors harassing. See Frazier et al., *supra* note 13, at 25. Undergraduates, on average, have less experience in the workplace and may not be able to recognize the impact that such behaviors have on working individuals. Also, undergraduates are less likely to have had to work to feed, clothe and house themselves. This can shape one's perspective on harassment. Indeed, one study indicated that workers will perceive some of the same events as more harassing than students. See Baker et al., *supra* note 160, at 412–13.

166. See David E. Terpstra & Douglas D. Baker, *A Hierarchy of Sexual Harassment*, 121 J. PSYCHOL. 599, 604 (1987) (noting that in a study of both undergraduates and working women, more working women found certain behaviors harassing than did their undergraduate counterparts); Baker et al., *supra* note 160, at 412–15 (describing study showing differences in perceptions of harassment between working men and women and men and women students; "students have probably experienced less harassment simply because of their relative youth and limited work experience").

167. See Gutek et al., *supra* note 151, at 606 (citing several studies); Baker et al., *supra* note 160, at 412–13.

168. See USMSPB, *supra* note 11; Terri C. Fain & Douglas L. Anderton, *Sexual Harassment: Organizational Context and Diffuse Status*, 17 SEX ROLES 291, 296 (1987) (noting that 1981 study is "the best of the samples").

undergraduates so that readers may consider these methodological difficulties in the course of reading this Article.

Another problem is that social scientists from diverse disciplines are studying harassment, which results in a variety of theories with differing methodologies. Therefore, some of their conclusions are still preliminary in nature. Social scientists also have not been studying harassment all that long—a little over twenty years.¹⁶⁹ The studies do not appear wholly conclusive,¹⁷⁰ although social scientists have developed a significant body of research in the area that is most important for purposes of this Article—perceptions of what is harassment. Few researchers have made an effort to tailor their research for use in the legal system.¹⁷¹ Richard L. Weiner and Linda E. Hurt have developed what they term “social analytic jurisprudence”—an analysis that “combines empirical investigation of social and psychological reality with traditional legal analysis.”¹⁷² These scholars make an effort to understand legal doctrine and “pose research questions in a way that bears directly on the legal issues that give rise to the questions.”¹⁷³ Their research has been helpful in the debate over the reasonable woman standard. As more social scientists focus on the issues arising in the courtrooms, more and more studies relevant to the development of sexual harassment law should become available, providing data that may be more directly applicable to legal assessments of what is harassment.

B. HOW AND WHO MIGHT USE SOCIAL SCIENCE IN SEXUAL HARASSMENT CASES

Perception data in particular would be useful for purposes of assessing sexual harassment fact patterns under the “reasonable person” standard.

169. See James E. Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 SOC. & SOC. RES. 3, 6 (1989).

170. See, e.g., Gutek & O'Connor, *supra* note 159, at 154–56 (describing studies that have shown a difference between male and female perceptions of what constitutes harassment and studies that have shown no difference).

171. See, e.g., Mary A. Gowan & Raymond A. Zimmermann, *Impact of Ethnicity, Gender, and Previous Experience on Juror Judgments in Sexual Harassment Cases*, 26 J. APPLIED SOC. PSYCHOL. 596 (1996) (study attempting to assess how potential jurors would perceive behaviors that could be deemed harassing).

172. Richard L. Wiener & Linda E. Hurt, *Social Sexual Conduct at Work: How Do Workers Know When It Is Harassment and When It Is Not?*, 34 CAL. W. L. REV. 53, 70 (1997).

173. *Id.* at 71.

Two different groups could benefit from this information. First, judges and jurors could find it helpful in assessing what a “reasonable person” finds harassing. Second, policy makers, whether they be appellate courts, legislatures or the EEOC itself, could find it helpful in setting new standards or in reforming old standards of sexual harassment. As one group of researchers has explained:

[D]istinctions between what laypersons or harassment recipients regard as serious versus less severe harassment may provide legal experts and policy analysts with what a “reasonable person” (or a “reasonable woman”) would regard as sexual harassment. For example, such research may prevent some forms of harassment from being dismissed as “horseplay” or, relatedly, prevent women who are affected adversely by harassment from being labeled as “hypersensitive” or “neurotic.”¹⁷⁴

Right now, many assessments are left in the hands of individual trial judges or, in some cases, panels of appellate judges. Without using this research, judges are left to impose their own, perhaps stereotyped, views of what is and is not appropriate workplace behavior.¹⁷⁵ Because it is often a judge who is making these decisions at the summary judgment or judgment as a matter of law stage of the process, this information should be useful to the judge in simply deciding whether the information should get to the jury. While a single judge sitting in judgment of what a reasonable person would perceive as harassing is of greater concern, for reasons more fully explained below,¹⁷⁶ than a truly representative jury, both could benefit from a more complete understanding of what is deemed harassing not only by victims of harassment but also by the public at large. From this point, it is a matter of policy as to whose account of what is harassment, if there is indeed a difference in perceptions, will be given preeminence in the law.

V. SOCIAL SCIENCE DATA ON PERCEPTIONS OF WHAT CONSTITUTES SEXUAL HARASSMENT

Preliminary research indicates that sexual harassment is a function of both personal and situational factors.¹⁷⁷ Social scientists have concentrated

174. James E. Gruber, Michael Smith & Kaisa Kauppinen-Toropainen, *Sexual Harassment Types and Severity: Linking Research and Policy*, in *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES* 151, 157 (Margaret S. Stockdale ed., 1996).

175. *See id.* at 153–54.

176. *See infra* Part VI.

177. *See* Pryor et al., *supra* note 11, at 78; John B. Pryor, Christine M. LaVite & Lynnette M. Stoller, *A Social Psychological Analysis of Sexual Harassment: The Person/Situation Interactions*, 42 *J. VOCATIONAL. BEHAV.* 68, 77 (1993).

on various aspects of sexual harassment that may have relevance to developing legal standards.¹⁷⁸ This Article focuses on one area of that research: perceptions of what constitutes harassing behavior. To the public, and indeed, at times, to judges,¹⁷⁹ this seems to be the most puzzling question.

While studies have looked at the effects of a variety of factors that influence perceptions of sexual harassment, some factors have surfaced consistently from study to study as having an impact on that assessment. Louise F. Fitzgerald, Suzanne Swan, and Vicki J. Magley identify three categories prevalent in psychological definitions of harassment that have an effect on perceptions: (1) stimulus factors, such as frequency of harassment, duration of harassment, and the intensity of the harassment;¹⁸⁰ (2) contextual factors, such as organizational tolerance of sexual harassment and “permissive management norms to higher levels of sexual harassment”;¹⁸¹ and (3) individual factors, such as “victimization history, personal resources, attributions,” victim attitude and control.¹⁸²

While context is important, the courts have not been all that consistent in considering the context and cumulative impact of sexual harassment. As demonstrated earlier, courts often pull incidents of harassment apart, finding that each individual instance (or, sometimes, a short series of incidents) does not meet the legal definition as a matter of law.¹⁸³ Social scientific studies, likewise, often ignore context. While ignoring context may be misleading insofar as it will not provide the full picture of a situation that people will deem harassing,¹⁸⁴ it does provide information

178. Early on in their study of harassment, social scientists and legal scholars as well, *see* MACKINNON, *supra* note 13, at 217–18, posited that sexual harassment was not about sex, but instead about power. *See* DuBois et al., *supra* note 11, at 733; John B. Pryor & Lynnette M. Stoller, *Sexual Cognition Processes in Men High in Likelihood to Sexually Harass*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 163 (1994); John A. Bargh & Paula Raymond, *The Naive Misuse of Power: Nonconscious Sources of Sexual Harassment*, 51 J. SOC. ISSUES 85, 85–86 (1995).

179. *See, e.g.*, Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994) (“There is no uniform attitude towards the role of sex nor any agreement on what is appropriate for inclusion in a code governing sexual conduct.”).

180. Fitzgerald et al., *supra* note 13, at 15–16.

181. *Id.* at 17.

182. *Id.* at 18.

183. *See infra* Part III.B. *See also* Beiner, *supra* note 8, at 101–02.

184. *See* Fitzgerald et al., *supra* note 13, at 20. As they state, “[a]ttempts to develop purely ‘objective’ definitions of severity based on cumulated ratings of research participants or even harassment victims, *absent any attention to context, vulnerability, or outcome* are not only oversimplified but misleading, and may be vulnerable to misinterpretation when used, as they

about what people perceive harassment to be and should help inform the legal standard.

In her study of the five different categories of harassment proposed by F.J. Till, Jasmine Tata found three factors significant in affecting what people perceive to be sexually harassing behavior: (1) the nature of harassing behavior; (2) gender of subject; (3) hierarchical position of harasser vis a vis harassee (i.e., co-worker, supervisor, subordinate).¹⁸⁵ In an effort to determine what is deemed sexual harassment by the average person, studies discussing the nature of behavior that people find harassing will be discussed. More research is necessary to determine how the factors identified by Tata, as well as other factors, might interact to affect perceptions of harassment.¹⁸⁶

In addition to Tata's three categories, social scientists have tried to assess the impact of other factors on whether particular workplace behaviors are perceived as sexual harassment. Included in their studies have been such disparate factors as education level,¹⁸⁷ personal experience with sexual harassment,¹⁸⁸ sex-role identity,¹⁸⁹ attitudes toward sexual harassment,¹⁹⁰ sexual orientation,¹⁹¹ the marital status of the harasser and victim,¹⁹² feminist ideology,¹⁹³ race and ethnicity,¹⁹⁴ and other individual

invariably will be, in court." *Id.* The concerns of these social scientists should be noted; however, right now the courts are doing just that—with the absence of information about perceptions.

185. See Tata, *supra* note 147, at 207. See also Paula A. Barr, *Perceptions of Sexual Harassment*, 63 SOC. INQUIRY 460, 467 (1993) (study of undergraduates showing differences in perception based on severity of incidents). But see Aaron Groff Cohen & Barbara A. Gutek, *Dimensions of Perceptions of Social-Sexual Behavior in a Work Setting*, 13 SEX ROLES 317, 325–26 (1985) (study of undergraduates that suggests people place "little emphasis on variables that directly assess the sexual and harassing nature of the incident, and place more weight on the personal aspects of the incident and on the interpersonal relationship between those involved"); Wiener & Hurt, *supra* note 172, at 96 (finding "no observable patterns that tied severity of the behavior to judgments of hostile work environment harassment").

186. Fitzgerald et al., *supra* note 13, at 16.

187. See, e.g., Fain & Anderton, *supra* note 168, at 301–02 (examining impact of education based on 1981 USMSPB study).

188. See, e.g., Inger W. Jensen & Barbara A. Gutek, *Attributions and Assignment of Responsibility in Sexual Harassment*, 38 J. SOC. ISSUES 121, 126 (1982).

189. See, e.g., Gary N. Powell, *Effects of Sex Role Identity and Sex on Definitions of Sexual Harassment*, 14 SEX ROLES 9, 11 (1986).

190. See, e.g., Richard C. Sorenson, Mary G. Mangione-Lambie & Rebecca C. Luzzio, *Solving the Chronic Problem of Sexual Harassment in the Workplace: An Empirical Study of Factors Affecting Employee Perceptions and Consequences of Sexual Harassment*, 34 CAL. W. L. REV. 457, 490 (1998) (reporting a survey of military personnel revealing that "attitudes towards sexual harassment are the best predictor of perceived seriousness and recommended actions in sexual harassment incidents").

191. See, e.g., Giuffre & Williams, *supra* note 13, at 384, 392–93.

192. See, e.g., Pryor, *supra* note 156, at 274 (citing studies involving marital status of harasser); Dara A. Charney & Ruth C. Russell, *An Overview of Sexual Harassment*, 151 AM. J. PSYCHIATRY 10,

factors.¹⁹⁵ Indeed, too many discrete factors have been studied to discuss them in detail in the context of this Article. In addition, research on many of these factors is still ongoing and findings are preliminary. Therefore, those findings will not be discussed here.

A. THE NATURE OF THE HARASSING BEHAVIOR

1. Categories and Definitions of Harassing Behavior

Social scientists have developed several different categorical approaches to what constitutes sexually harassing behavior.¹⁹⁶ James Gruber developed the Inventory of Sexual Harassment (“ISH”). The ISH encompasses three general categories of harassing behaviors, including verbal requests, verbal comments and nonverbal displays.¹⁹⁷ Within each category, Gruber identified subcategories of behavior that varied in

11 (1994) (same); Fain & Anderton, *supra* note 168, at 302–03 (noting marital status of victim affects likelihood of being harassed); James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOC. SCI. Q. 814, 815 (1986) (citing studies of unmarried women).

193. See, e.g., Fitzgerald et al., *supra* note 13, at 19 (citing studies); Daniel A. Thomann & Richard L. Wiener, *Physical and Psychological Causality As Determinants of Culpability in Sexual Harassment Cases*, 17 SEX ROLES 573, 575 (1987) (citing studies).

194. See, e.g., Fain & Anderton, *supra* note 168, at 302; Giuffre & Williams, *supra* note 13, at 387–92; Gowan & Zimmermann, *supra* note 171, at 610 (reporting a study showing no difference in perceptions based on ethnicity); Michael A. Plater & Robert E. Thomas, *The Impact of Job Performance, Gender, and Ethnicity on the Managerial Review of Sexual Harassment Allegations*, 28 J. OF APPLIED SOC. PSYCHOL. 52, 64–67 (1998); Gail E. Wyatt & Monika Riederle, *The Prevalence and Context of Sexual Harassment Among African American and White American Women*, 10 J. OF INTERPERSONAL VIOLENCE 309, 310–17 (1995). Race is a factor that has been overlooked by researchers in this area. See Sorenson et al., *supra* note 190, at 462–63. For the potential impact of race on sexual harassment, see Jann H. Adams, *Sexual Harassment and Black Women: A Historical Perspective*, in *SEXUAL HARASSMENT: THEORY, RESEARCH AND TREATMENT* 213 (William O'Donohue ed., 1997).

195. See, e.g., Fain & Anderton, *supra* note 168, at 303–04 (noting effect of age in 1981 USMSPB study); Fitzgerald et al., *supra* note 13, at 18–19 (discussing how individual factors might affect perceptions of sexual harassment); Carol A. Ford & Francisco J. Donis, *The Relationship Between Age and Gender in Workers' Attitudes Toward Sexual Harassment*, 130 J. PSYCHOL. 627 (1996) (examining age); Tricia S. Jones, Martin S. Remland & Claire C. Brunner, *Effects of Employment Relationship, Response of Recipient and Sex of Rater on Perceptions of Sexual Harassment*, 65 PERCEPTION AND MOTOR SKILLS 55, 56, 59 (1987) (citing studies as well as describing their own regarding effect of victim response on perceptions of harassment).

196. See Fitzgerald et al., *supra* note 13, at 9 (noting that “there is a considerable variance in the range of behaviors assessed by harassment surveys, a state of affairs yielding conflicting frequency estimates and fluctuating prevalence rates”). While differences in definition will cause problems in determining the frequency of harassment, it should not cause too much difficulty for assessing what people find harassing.

197. James E. Gruber, *A Typology of Personal and Environmental Sexual Harassment: Research and Policy Implications for the 1990s*, 26 SEX ROLES 447, 452–60 (1992).

severity. Fitzgerald, Swan, and Magley, developed a model based on increasing severity that roughly models the division between hostile environment and quid pro quo sexual harassment.¹⁹⁸ Known as the Sexual Experiences Questionnaire, or “SEQ,” these categories were developed to test forms of male-on-female sexual harassment. The SEQ identifies three general categories of sexual harassment: “gender harassment (i.e., lewd comments and negative remarks about women), unwanted sexual attention (i.e., unwanted touching and pressure for dates), and sexual coercion (i.e., sexual bribery and threats).”¹⁹⁹ Yet, other researchers have divided up sexual harassment into other categories. Tata used the categories developed early on by Till, which, like the SEQ, created categories based on severity. These categories include:

- (a) gender harassment, or generalized sexist remarks and behavior;
- (b) seductive behavior, or offensive but sanction-free sexual advances;
- (c) sexual bribery, or solicitation of sexual activity by promise of rewards; (d) sexual coercion, or solicitation of sexual activity by threat of punishment; and (e) sexual assault, or gross sexual imposition.²⁰⁰

The SEQ appears to collapse Till’s third, fourth and fifth categories into one, which is sensible, given the widespread agreement on this category of sexual harassment.

The USMSPB specifically has studied what sorts of behaviors people find sexually harassing as well as the incidence and type of sexual harassment that occurs among federal employees. For a number of reasons, the USMSPB provides some of the most reliable data on sexual harassment.²⁰¹ The USMSPB breaks down sexual harassment into six different behaviors, including: (1) “uninvited letters, telephone calls, or materials of a sexual nature”; (2) “uninvited and deliberate touching, leaning over, cornering, or pinching”; (3) “uninvited sexually suggestive looks or gestures;” (4) “uninvited pressure for sexual favors;” (5) “uninvited pressure for dates;” and (6) “uninvited sexual teasing, jokes, remarks or questions.”²⁰² One category that the USMSPB has missed that social scientists have included in their constructs is behavior commonly

198. See Fitzgerald et al., *supra* note 13, at 11 & fig.2-1 (showing interrelationship between the three forms of harassment and the legal categories).

199. Waldo et al., *supra* note 11, at 60 (emphasis omitted); Fitzgerald et al., *supra* note 13, at 11–13 & tbl.2-2, (arguing that the SEQ is the “most conceptually and technically sophisticated available”).

200. Tata, *supra* note 147, at 200–01 (citation omitted).

201. See Fain & Anderton, *supra* note 168, at 296.

202. USMSPB, *supra* note 11, at 5.

known as “gender harassment,” or negative behaviors that are directed at someone because of their gender, but do not have any “sexual” connotation to them.²⁰³ For example, a male supervisor who hates women might consistently refer to the women who work for him in a derogatory fashion. In spite of the USMSPB’s failure to include this category in their study, the Supreme Court has made clear that it can constitute sexual harassment.²⁰⁴

For purposes of organization, this Section will roughly follow the lead of the SEQ and discuss perceptions from severe to less severe behaviors. It will also rely heavily on the USMSPB study, which has categories of harassment that fit within at least two of the SEQ categories. To the extent other studies use differing categories, the author will endeavor to fit them in as well as possible with the corresponding applicable SEQ category. Once again, more research needs to be done to fine-tune the factors that affect a person’s perception of harassment.²⁰⁵ As a general matter, the more severe the behavior, the more likely people will perceive it to be sexual harassment.²⁰⁶ In examining these categories, it is surprising how much consensus exists on what constitutes sexual harassment.

2. The Obvious: Sexual Coercion (i.e., Sexual Bribery and Threats)

With so much emphasis in the press and commentary on the lack of understanding as to what constitutes harassing behavior, it is interesting to note that a great deal of consensus exists that more “obvious” types of behaviors are harassing. These “more obvious” forms of harassment include sexual bribery, sexual coercion and sexual assault.²⁰⁷ Studies of both working populations and students overwhelmingly show that people agree that sexual propositions tied to a job threat,²⁰⁸ or a job

203. See generally Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Schultz, *supra* note 46.

204. See *supra* notes 46–47 and accompanying text. Other federal entities have researched the prevalence of this form of harassment. See, e.g., DEP’T OF DEF., *supra* note 1, at 11–12 (showing that 63% of military women and 15% of men surveyed experienced this type of behavior).

205. See, e.g., Fitzgerald et al., *supra* note 13, at 16 (noting “[l]ittle is formally known concerning the impact of multiple perpetrators, harassment of an individual as opposed to a group, or restricted possibilities for escape, although the relationship between such factors and severity of appraisal and outcomes is intuitively reasonable and documented in a variety of court cases”).

206. See, e.g., Christopher W. Williams, Richard S. Brown & Paul R. Lees-Haley, *An Attributional (Causal Dimensional) Analysis of Perceptions of Sexual Harassment*, 25 J. APPLIED SOC. PSYCHOL. 1169, 1174 (1995) (reporting that in a study of students, perceptions of harassment increased with the severity of the incident).

207. Tata, *supra* note 147, at 207.

208. See Douglas D. Baker, David E. Terpstra & Kinley Larntz, *The Influence of Individual Characteristics and Severity of Harassing Behavior on Reactions to Sexual Harassment*, 22 SEX ROLES

enhancement²⁰⁹ constitute sexual harassment.²¹⁰ These behaviors fit within the quid pro quo category, which the Court has held creates strict liability for the employer.²¹¹ Yet, the Court has attached strings even to this form of harassment that suggests an adjustment to the standard based on perception data.²¹²

3. Physical Touching and Threats

In addition, consensus arises on other behaviors that do not fit within the quid pro quo category. People believe that physical touching of a sexual nature, such as touching a woman's breast,²¹³ constitutes sexual harassment. Additionally, consensus exists on behaviors that are more imposing, such as behaviors that are physically threatening, or involve threats or coercion, which are generally considered harassing.²¹⁴ Rape, as well as physical assaults, are considered sexual harassment.²¹⁵

305, 313 tbl.I (1990) (discussing a study of undergraduate students that showed 98% perceived such behavior as harassment); Dansky et al., *supra* note 156, at tbl.I (discussing a 1989 national study of 4009 women—85.8% of those who experience this behavior found it harassing); Alison M. Konrad & Barbara A. Gutek, *Impact of Work Experiences on Attitudes toward Sexual Harassment*, 31 ADMIN. SCI. Q. 422, 429 tbl.I (1986) (explaining a 1980 telephone survey of over 1200 working men and women in the Los Angeles area in which 94.5% of men and 98% of women perceived request for sexual relations accompanied by job threat for not complying as sexual harassment and in which 91.9% of men and 95.8% of women perceived request for date accompanied by job threat for not complying as sexual harassment); Terpstra & Baker, *supra* note 166, at 602; Tata, *supra* note 147, at 207 (showing no gender effects for sexual bribery, sexual coercion, and sexual assault).

209. See Baker, Terpstra & Larntz, *supra* note 208, at 313 tbl.I (noting a study of undergraduate students showed 98% perceived such behavior as harassment); Dansky et al., *supra* note 156, at tbl.I (reporting that 83.0% of women experiencing such behavior found it harassing); Terpstra & Baker, *supra* note 166, at 602.

210. See Fitzgerald & Ormerod, *supra* note 156, at 559–60 (recounting studies).

211. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998).

212. See *infra* notes 259–62 and accompanying text.

213. See CAHILL, *supra* note 3, at 58 (discussing a survey of five firms from the U.S. and Austria, in which 91% of employees surveyed believed a vignette that included grabbing a woman's breast was "absolutely illegal" and 7% believed it "probably illegal"); Baker et al., *supra* note 208, at 313 tbl.I (stating 99% of undergraduates studied believed fingers straying to breast scenario constituted sexual harassment); Dansky et al., *supra* note 156, at tbl.I (finding that 90.2% of women experiencing such behavior found it harassing); Terpstra & Baker, *supra* note 166, at 602 (reporting that 98% agreed that physical contact of a sexual nature constituted harassment).

214. See Thomas Reilly, Sandra Carpenter, Valerie Dull & Kim Bartlett, *Factorial Survey: An Approach to Defining Sexual Harassment on Campus*, 38 J. SOC. ISSUES 99, 107 (1982) (finding high amount of consensus at the "extremes"); Thomann & Wiener, *supra* note 193, at 574 (citing studies).

215. See Baker et al., *supra* note 208, at 313 tbl.I (reporting that 96% of undergraduates studied perceived rape as sexual harassment); Tata, *supra* note 147, at 207; Terpstra & Baker, *supra* note 166, at 602 (also reporting that 96% of undergraduates perceived rape as sexual harassment).

The USMSPB studies support this assessment of what is considered harassment. There is consensus among federal employees that pressure for sexual favors constitutes sexual harassment.²¹⁶ The statistics are startling—over 90% of the over 8,000 federal employees who responded to the survey agreed that such behavior would “definitely” or “probably” constitute sexual harassment.²¹⁷ In addition, over 90% of men and women agreed that deliberate touching or cornering “definitely” or “probably” constitutes sexual harassment.²¹⁸ This is consistent with other studies that have found that behavior that included physical touching was harassing.²¹⁹ Thus, it has become increasingly clear that behaviors that involve physical touching or intimidation are considered sexually harassing by the average worker. Yet, not all courts have acknowledged that this is the case.²²⁰

4. “Ambiguous” Behaviors

Social scientists posit that there is less consensus on other, “more ambiguous” behaviors, although what is considered “ambiguous” seems to vary greatly. Included within behaviors that social scientists have categorized as ambiguous are sexual remarks, gestures, sexist jokes, requests for dates, gender harassment, and other behaviors.²²¹ Many studies support the seeming lack of consensus regarding whether these behaviors constitute harassment.²²² Still, often well over 50% of those surveyed agree that these “less obvious” behaviors constitute harassment as well. Moreover, trends in current research suggest that the percentage of workers who believe even ambiguous behaviors constitute sexual harassment is growing. In addition, research suggests that certain contextual factors may affect whether these lesser forms of behavior will be deemed harassing.

216. See USMSPB, *supra* note 11, at 7 tbl.1 (stating that 99% of women and 97% of men responded that they would “definitely” or “probably” consider such behavior sexual harassment if engaged in by a supervisor and that 98% of women and 93% of men responded that they would “definitely” or “probably” consider such behavior sexual harassment if engaged in by a co-worker).

217. See USMSPB, *supra* note 11, at 2, 7 tbl.1.

218. See *id.* at 7 tbl.1 (stating 98% of women and 93% of men responded that they would “definitely” or “probably” consider such behavior sexual harassment if engaged in by a supervisor and 96% of women and 89% of men responded that they would “definitely” or “probably” consider such behavior sexual harassment if engaged in by a co-worker).

219. See, e.g., Gruber, *supra* note 197.

220. See *supra* Part III.A.

221. See Fitzgerald & Ormerod, *supra* note 156, at 560 (describing gender harassment as ambiguous).

222. See, e.g., Terpstra & Baker, *supra* note 166.

In a study of undergraduate students, David E. Terpstra and Douglas D. Baker found that a clear majority (70–80%) considered directed gestures, propositions not linked to employment, putting an arm around someone, remarks, and unwanted physical contact of a potentially sexual nature to be instances of sexual harassment.²²³ Other studies show similar results. For example, in a study of potential sexually harassing humor in the workplace, Masoud Hemmasi, Lee A. Graf and Gail S. Russ found that men and women agreed on which types of jokes were most offensive.²²⁴

The USMSPB likewise has charted a growing consensus among federal employees that these behaviors are perceived as harassment. Beginning its studies in 1980, the USMSPB has charted a shift in what federal employees believe constitutes harassing behavior, with the definition broadening.²²⁵ As of 1994, well over 50% of the federal employees responding believed that pressure for dates, suggestive looks, gestures, and sexual teasing, jokes and remarks “definitely” or “probably” constituted sexual harassment.²²⁶ Indeed, the lowest percentage was in male respondents’ perceptions that sexual teasing, jokes, and remarks by co-workers constitute sexual harassment. But since 64% of men agreed that this “definitely” or “probably” constituted sexual harassment, this low percentage was still well over 50%.²²⁷ There was clear consensus with respect to “suggestive letters, calls, materials.” Uniformly, over 80% of respondents agreed that this was “definitely” or “probably” sexual harassment.²²⁸

A couple of caveats to applying results from the USMSPB to the population as a whole must be mentioned. First, these statistics reflect that some federal workers thought the behavior “probably” was sexual

223. *Id.* at 602 & tbl.1.

224. Masoud Hemmasi, Lee A. Graf & Gail S. Russ, *Gender-Related Jokes in the Workplace: Sexual Humor or Sexual Harassment?* 24 J. APPLIED SOC. PSYCHOL. 1114, 1122 (1994). Interestingly, sexist jokes that had females as their subjects were considered most offensive. *Id.* Men, however, were more likely to tell such jokes than women. *Id.*

225. The greatest increases have come in what men consider to be sexually harassing. For example, in the 1980 survey, only 47% of men believed that suggestive looks and gestures from a co-worker were sexual harassment. As of 1994, 70% of men surveyed considered such behavior “definitely” or “probably” harassment. USMSPB, *supra* note 11, at 7 tbl.1.

226. *See id.*

227. *See id.* This constituted an increase of 22% among male respondents from the initial survey in 1980, which revealed that only 42% of males believed this behavior to be harassing. *See also* Terpstra & Baker, *supra* note 166, at 603 tbl.1 (finding that 18% of overall sample considered off-color jokes sexual harassment).

228. *See* USMSPB, *supra* note 11, at 7 tbl.1.

harassment. Thus, these responses reflect a level of ambiguity on the part of respondents. They were not always certain (a “definitely” response would have reflected this) that the behaviors described were sexually harassing. Perhaps a more descriptive context would have moved this assessment from probably to definitely. In any event, the behaviors that some people assessed as “probably” sexual harassment still would have raised red flags as questionable interpersonal workplace behavior. These behaviors should alert judges and jurors as well and should not be dismissed without a careful consideration of the context in which the behavior occurred.

Second, the federal government is a particularly aware employer with respect to discrimination. For example, 92% of the federal employees responding said they were aware of sexual harassment policies in place.²²⁹ In addition, 87% of supervisors and 77% of nonsupervisory employees had received sexual harassment training.²³⁰ It is difficult to assess how this training might have affected what employees find harassing, and perhaps may have contributed to the growing consensus among federal employees.²³¹

In spite of a fair degree of consensus among federal employees on behaviors that constitute harassment, there was still anecdotal concern about more ambiguous forms of harassment. Comments in focus groups exemplify typical employee concerns about what does and does not constitute sexual harassment and the need for more precise categories of appropriate and inappropriate behavior.²³² People were concerned that behaviors, when taken out of context, would fit some category of harassment when, from the context, they were not.²³³ The Supreme Court has made the context in which harassment occurs extremely important. Thus, to the extent that the USMSPB has divorced context from its survey instrument, it tells less about harassment than it could.

In a recent study of five United States and Austrian companies, Mia Cahill found a high degree of consensus about three vignettes, only one of

229. *See id.* at vii.

230. *See id.*

231. *But see* Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 *BERKELEY J. EMP. & LAB. L.* 1, 29–38 (2001) (arguing that there is little scientific support for the effectiveness of training programs in curbing sexual harassment in the workplace or in changing employee attitudes toward sexual harassment).

232. USMSPB, *supra* note 11, at 8.

233. *See id.* at 8–11.

which involved physical touching.²³⁴ One of these vignettes, involving gender harassment, depicted a male supervisor telling a woman who works for him that “she has no business being in the management department and that she belongs home in the kitchen.”²³⁵ In addition, when the woman arrived at work, this same supervisor told her, “Why do you bother coming to work? Only men belong here.”²³⁶ There was a great deal of consensus that this gender harassment vignette was improper. Sixty-six percent of those surveyed believed it “absolutely illegal” and 18% believed it “probably illegal,” for a total of 84%.²³⁷ In addition, 65% believed it to be a type of sexual harassment.²³⁸ Thus, even in this traditionally “ambiguous” area, consensus appears to be growing.

5. Factors Affecting Severity Judgments

Social scientists have found that several factors affect whether ambiguous behaviors are deemed severe. Included in these factors are the frequency, intensity and duration of the harassment.²³⁹ Studies have found that whether the behavior is repeated can have an impact on whether it will be deemed harassing.²⁴⁰ In addition, behaviors are considered less severe if they are not “targeted” at a particular individual.²⁴¹ However, the more severe behavior is judged to be, the more likely someone perceiving it will consider it harassment.²⁴²

In a study of undergraduates aimed at perceptions of more ambiguous behaviors, Jennifer L. Hurt, Jillian A. Maver, and David Hofmann set out to assess the effects of the severity of the behavior, its frequency, the victim response, and the general context of the behavior on perceptions of what constitutes harassment.²⁴³ The ambiguous behaviors studied ranged from those that were clearly appropriate (asking for help with work) to clearly inappropriate (trying to kiss and touch a subordinate in the elevator).²⁴⁴ Interestingly, the frequency of the behavior only affected judgments about

234. See CAHILL, *supra* note 3, at 58.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 59. It is not clear upon which law they based their illegality judgment.

239. See Fitzgerald et al., *supra* note 13, at 11; Gruber et al., *supra* note 174, at 167.

240. See, e.g., Thomann & Wiener, *supra* note 193, at 585.

241. See Gruber et al., *supra* note 174, at 164.

242. See, e.g., Thomann & Wiener, *supra* note 193, at 585.

243. Hurt et al., *supra* note 165, at 1396–1400.

244. *Id.* at 1403.

whether it was harassment when the behavior hit a certain level of severity. As the researchers explained, “the behavior had to be at least moderately severe before frequency mattered in considering a situation to be sexual harassment.”²⁴⁵

Other social scientists have found the repeated nature of the behavior to have an impact on whether it will be perceived as harassment.²⁴⁶ In a study of 196 undergraduate students, Thomann and Wiener discovered:

The findings indicate that as an accused harasser’s request becomes more flagrant and more frequent, decision makers are increasingly likely to perceive the incident to be a sexual advance . . . For instance, when there are multiple occurrences of the incident, individuals are more likely to view the behavior as harassment, attribute a greater degree of responsibility to the alleged perpetrator, and recommend more severe disciplinary sanctions.²⁴⁷

Thus, as the behavior escalates in severity and frequency, it is more likely to be perceived as harassment.

VI. ON REASONABLENESS AND CONSENSUS

One fundamental problem with the use of reasonableness in assessing the offensiveness of sexually harassing behavior is in deciding who is the reasonable person. Indeed, social science suggests that such an objective standard may not be achievable in this context.²⁴⁸ It has been assumed, through the discussion of the data, that if there is some sense among a significant number of American workers about whether a certain behavior constitutes sexual harassment, the courts should apply the common perception. This, however, while having facial appeal given the “reasonable person” standard, is far from obvious.

It may be that the law should be more aspirational than the “reasonable person’s” perception—based on social science data—of what is harassment. Perhaps this perception does not mesh with actual victim

245. *Id.* at 1406.

246. *See, e.g.*, Thomann & Wiener, *supra* note 193, at 573–74. *See also* Dansky et al., *supra* note 156, at tbl.3 (discussing a survey of sexually harassed women that indicated that 72.4% of those harassed experienced a series of incidents); Fitzgerald et al., *supra* note 13, at 15 (citing studies linking frequency of incidents to perceptions of severity).

247. Thomann & Wiener, *supra* note 193, at 585.

248. *See, e.g.*, Hurt et al., *supra* note 165, at 1401 (noting that “sexual harassment is a matter of subjective judgment”). *But see* Gruber et al., *supra* note 174, at 153 (suggesting an objective standard may be achievable).

experiences or simply reinforces norms that are discriminatory toward women.²⁴⁹ Given that women have possessed and continue to possess less power in American society than men, this consensus-based approach runs the risk of perpetuating already discriminatory norms. Indeed, people who experience harassment firsthand may have conditions of their employment changed in spite of the common person's perception that the alleged harassing incidents were not severe or pervasive enough to constitute harassment. Much depends on whether reasonableness is set by a doctrinal, normative or descriptive standard.²⁵⁰ By doctrinal, the reasonable person standard is determined by what society decides MUST (OR MUST NOT) be considered harassment. By normative, the reasonable person standard is set by what society decides, for policy reasons, SHOULD be deemed harassment. By descriptive, the standard is based on actual perceptions of what constitutes harassment. The standard could be based entirely on the victim's perspective. If that were the case, studies showing what actual victims perceive to be harassing—a descriptive account based on victim perceptions—would inform the legal standard.

The approach suggested above is based on one version of the descriptive account, that is, it is based on what people (not necessarily those who have experienced harassment) actually perceive as sexual harassment. This approach runs the risk of giving short shrift to the perceptions of those people who have the most information about the impact of harassment—the actual victims. While one might be reluctant to run this risk, this approach might hold more appeal for the courts who have already downplayed victim's accounts by separating out the "objective" from the "subjective" standard. In addition, the courts appear to accept a descriptive account. It is a fairly common sense method of approaching the issue, given that the court has adopted a "reasonable person" standard. One way to figure out what reasonable people believe is to survey and ask them. Indeed, adoption of the reasonable woman standard itself came from studies that were based on the manner in which harassing behavior is perceived by men and women and the differences in those perceptions. Thus, it should be a more comfortable stretch for the courts to look at general perception data to arrive at what the "reasonable person" deems

249. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1205–17 (1998) (discussing how the dynamics of sexual harassment perpetuate masculine norms and traditional power structure in the workplace).

250. See Wiener & Hurt, *supra* note 172, at 74 (noting that "[t]he rules of conduct that the law promulgates originate from a normative model of how workers interact at work").

harassing.²⁵¹ Until more data are available on actual victim perceptions, this may provide the best hope of reform.

Even considering the perception data, one might well be concerned about the one, ten, thirty or even forty-nine percent of people who disagree that the behaviors in question constitute harassment. Once again, much depends on how the legal standard should be set. In sexual harassment cases, as in most civil cases, the plaintiff need only prove her case by a preponderance of the evidence.²⁵² The Supreme Court has instructed that this “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’”²⁵³ As a practical matter, some judges translate this into percentages; this means that the jury must believe that there is a greater possibility than 50% that the plaintiff has proven his or her case.²⁵⁴

Translating that into what reasonable people believe, is it reasonable to assume that if greater than 50% of Americans perceive a particular behavior is sexual harassment that the courts should determine it to be so? Not necessarily. Partly, this is because of the methodological limitations already mentioned regarding this data (i.e., lack of context, use of students, inherent bias in surveys). Such studies however, should influence courts when considering whether summary disposition is appropriate in a particular case if it involves behaviors that social science reveals most people perceive as harassing. If surveys indicate that a majority of people surveyed believed a particular behavior harassing, let the jury decide, given the context, whether it constitutes harassment in the particular case. In addition, it should help jurors assess whether behaviors would be harassing to the “reasonable person.” Of course, the samples discussed above were not surveys of “most Americans.” Indeed, they are limited by the populations studied. This is the reason the USMSPB studies were frequently discussed; these studies reflect perceptions of federal employees

251. I admit to being pragmatic in my approach. Absent a sweeping reconceptualization of sexual harassment by the courts, small steps tend to provide the best hope of actual results in real cases.

252. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE § 65, at 319 (2d ed. 1994); JOHN W. STRONG, 2 MCCORMICK ON EVIDENCE § 339, at 438 (4th ed. 1992).

253. *Concrete Pipe & Prods. of Cal., Inc., v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring)).

254. See *United States v. Shonubi*, 895 F.Supp. 460, 471 (E.D.N.Y. 1995) vacated by 103 F.3d 1085 (2d Cir. 1997) (“A survey of judges in the Eastern District of New York found general agreement that ‘a preponderance of the evidence’ translates into 50+ percent probability.”).

nationwide and have a large number of survey respondents (8,000+).²⁵⁵ Thus, they provide a pretty good litmus test of which behaviors people perceive as, at least arguably, harassing.

As for the one, ten, thirty or even forty-nine percent who disagree, well, that's in the nature of any legal standard. There will always be those who do not believe the particular conduct is (or should be) actionable. Tort law suffers from similar problems with respect to the determination of negligence.²⁵⁶ People who do not believe such behaviors are harassing, "thicker" skinned plaintiffs, will not sue if such behaviors are directed at them. While this means that the occasional "thicker" skinned individual may cause his company to become liable for sexual harassment (given that he evaluates his behavior as nonharassing and therefore may engage in such conduct), the point of sexual harassment law is to allow women and men to work in a nondiscriminatory environment. While some may create such a discriminatory environment unwittingly, the legal system need not accommodate their minority view over that of the majority who would recognize the behavior as harassing. Social science data can provide information that supports the majority position and helps substantiate the reactions of most workers as not those of the "eggshell plaintiff," but instead as those of the common "reasonable person." This should result in fewer dismissals before the case goes to the jury.

Certainly, it is better to use social science data than what many courts are doing now. All too often the courts' accounts appear based upon the individual perceptions of trial judges instead of considering the empirical research described above.²⁵⁷ Indeed, at present a decided gap exists between what judges consider to be harassment and what the "common person" who has been identified and studied by social scientists considers to be harassment. Thus, while it might be nice to have a standard that is actually based on what affects the conditions of employment from the victim's perspective, given the gap between common perceptions of what is

255. USMSPB, *supra* note 11, at 2 (noting a 61% return rate resulting in over 8000 questionnaires being returned).

256. See generally Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863 (2001).

257. See *Lipsett v. U. of Puerto Rico*, 740 F. Supp. 921, 925 (D.P.R. 1990) (noting jurors have common knowledge of what constitutes a hostile work environment); Dolkart, *supra* note 32, at 200 (observing that "[w]ithout guidance concerning how to interpret the evidence, any form of reasonableness standard is vulnerable to the incorporating of the trier of fact's own perception of what is reasonable"). Donna Shestowsky, *Where Is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials*, 51 STAN. L. REV. 357, 358 (1999) (noting that judges assume "that what constitutes sexual harassment is common knowledge").

harassment and what judges are doing in real cases, the standard should be set by referencing the body of empirical knowledge about how the common person perceives harassment, at least for the time being. At this level, the courts would be lowering the bar for actionable conduct and allowing more plaintiffs to reach a jury.

A. WHAT THE REASONABLE PERSON BELIEVES VERSUS WHAT JUDGES BELIEVE

The social science data described above show a high degree of agreement about certain behaviors constituting harassment. Yet, some courts have yet to acknowledge these behaviors as harassment, and some have actually granted summary judgment in cases involving these actions.

The obvious behaviors include sexual or physical coercion, including threats of job detriment as a result of the victim's refusal to engage in sexual acts with the harasser. Yet, cases exist in which the courts do not find these types of threats harassing.²⁵⁸ While at first this category seems to line up with the quid pro quo category of harassment, the Supreme Court has made clear that a mere "threat" does not fit the quid pro quo category unless it is actually carried out.²⁵⁹ In *Ellerth* and *Faragher*, the Court required that a plaintiff show a "tangible job detriment" before asserting a quid pro quo claim.²⁶⁰ Yet, studies seem to suggest that a threat is enough for people to consider the behavior not only harassment, but a severe form of harassment.²⁶¹ Given the high degree of consensus that such threats are harassing, they should fall in the quid pro quo category, thereby creating vicarious liability with no possibility for the employer to take advantage of the defense provided by *Ellerth* and *Faragher*. While the lack of action on the threat likely will affect damages, this does not change the alteration of the plaintiff's work environment—she is now laboring under a threat of adverse employment action or being denied a benefit for not acceding to her supervisor's demands for sexual favors.

258. The most noteworthy instance of this is *Burlington Indus., Inc. v. Ellerth*, in which Kimberly Ellerth felt that her job was threatened by the offending supervisor. 524 U.S. 742, 747–48 (1998). Yet, distinguishing between cases in which threats are carried out and those in which they are not, the Court concluded that Ellerth's case should be analyzed as a hostile environment case, resulting in an affirmative defense being available to the employer. *Id.* at 751–54.

259. *Ellerth*, 524 U.S. at 751, 761.

260. *Id.* at 751–54. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1997).

261. See Gruber et al., *supra* note 174, at 160.

In addition, a high degree of agreement exists with respect to “less severe” behaviors. For example, a large percentage of people believe sexual touching is sexual harassment. Yet, in some cases involving blatant sexual touching, the courts have granted summary judgment for the defendant.²⁶² Indeed, in their study of reported sexual harassment cases in the ten years since *Meritor*, Juliano and Schwab found that physical harassment of a sexual nature occurred in 41.8% of cases studied.²⁶³ Yet, the plaintiff won in only 59.5% of these cases.²⁶⁴ Given the common perception that sexualized touching (i.e., touching someone’s breast, buttocks, etc.) is harassing, how can the courts not let these cases go to the jury for “reasonable people” to make the final decision about context?

Finally, there seems to be growing agreement even about more ambiguous behaviors. For example, the USMSPB shows many federal workers surveyed believed that pressure for sexual favors and physical intimidation were sexual harassment.²⁶⁵ However, cases were described earlier, involving both behaviors, in which the court granted motions to dismiss or motions for summary judgment.²⁶⁶ Yet, studies show that the majority of people surveyed believe pressure for dates, suggestive looks, gestures and sexual teasing “probably” or “definitely” constituted sexual harassment.²⁶⁷ In these cases, the jury didn’t even get a chance to hear the plaintiff’s story.²⁶⁸ In addition, studies show that the repeated nature of the behavior has an impact on these perceptions.²⁶⁹ Yet, even in cases of repeated harassment, courts have been reluctant to allow the cases to go forward.²⁷⁰

262. See, e.g., *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 528 (7th Cir. 1993); *Hosey v. McDonald’s Corp.* 1996 WL 414057 (D. Md. May 17, 1996), *aff’d*, 113 F.3d 1232 (4th Cir. 1997); *Blankenship v. Parke Care Centers, Inc.*, 913 F. Supp. 1045 (S.D. Ohio 1995). See also *supra* Part III.A (discussing these cases).

263. Juliano & Schwab, *supra* note 74, at 567 & tbl.1.

264. *Id.* In addition, physical harassment of a nonsexual nature (e.g., hitting) occurred in 8.6% of cases. *Id.* Plaintiffs in these cases fared better—winning 62.8% of the time. See *id.*

265. USMSPB, *supra* note 11.

266. See, e.g., *Gwen v. Reg’l Transit Auth.*, 7 Fed.Appx. 496, 498 (6th Cir. 2001) (affirming the district court’s grant of summary judgment in favor of the defendant); *Gregory v. Daly*, 78 F. Supp. 2d 48, 48 (N.D.N.Y. 1999) (granting defendant’s motion for summary judgment). But see *EEOC v. R & R Ventures, Inc.*, 244 F.3d 334, 337 (4th Cir. 2001) (reversing trial court’s grant of summary judgment); *supra* notes 85–90, 101–04, 110–21, and accompanying text (discussing these cases).

267. See *supra* notes 222–27 and accompanying text.

268. See *supra* note 265 and Part III generally. See also Juliano & Schwab, *supra* note 74, at 570 tbl.2b (showing only 2.2% of cases decided by jury trial and 3.6% by both bench and jury trial).

269. See *supra* notes 245–48 and accompanying text.

270. See *supra* notes 85–127 and accompanying text.

Not every case must go to the jury. Certainly, the Supreme Court's position that every offhand comment does not equal sexual harassment has some appeal. But the courts are dismissing some close cases under the supposition that the "reasonable person" would not deem the behaviors involved harassing. Social science, however, shows that the courts may have this perception wrong. If the courts allow these cases to go to the jury, this will inform both employers, employees and the courts themselves about what sorts of behaviors juries believe are acceptable and not acceptable in the workplace.

B. A DIFFERENT APPROACH BASED ON EFFECT

Another approach to determining whether the behavior rises to the level of actionable conduct is to focus on the effect of the behavior on the victim's ability to do his or her job. The standard requires that the harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"²⁷¹ It may be easier to assess whether harassment is actionable by focusing on how it might affect the conditions of the worker's employment. From this perspective, the fundamental issue is whether the victim is working under different conditions because of the harassing conduct. This approach allows the courts to refocus their (and that of the factfinder in the particular case) attention on what makes conduct actionable in the first place under Title VII: that it has the effect of discriminating based on a term, condition or privilege of employment as set out in that statute.²⁷²

Relevant questions that a jury or judge (sitting as factfinder or deciding a motion for summary judgment or judgment as a matter of law) should consider using such a standard become much more focused on the actions of the alleged harasser and the "objective" effects of the harasser's behavior. First and foremost would be consideration of the perpetrator's actual behaviors. In addition, a juror could consider how the actual victim's employment conditions were affected by the actions of the harasser. Would the victim be reasonable in feeling differently about going to work each day? Do the actions of the harasser have implications for how the victim performs his or her job? Such questions would look at the effects of the behavior on actual working conditions.

271. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (internal citation omitted).

272. 42 U.S.C. § 2000e-2(a)(1) (1994).

This also should aid both jurors and the courts in considering the context in which the behavior occurs. In order to determine whether a victim's conditions of employment were altered, a jury necessarily would consider the context in which the behaviors occur. The conditions of a "reasonable person's" employment may not be affected by an offhand compliment from a coworker. On the other hand, they might well be affected by a proposition from one's direct supervisor. It also should help the courts to avoid dividing up incidents so that the cumulative effect is not truly considered. Instead, the courts necessarily would consider how a victim's employment was affected using all the incidents of harassment. While it is easy to consider each incident in a vacuum when the only determination is whether they are sufficiently severe or pervasive to meet some abstract standard (often seemingly contained uniquely within that judge's view of the working world), it is harder to disaggregate incidents when asked to consider whether a series of five actions would alter the conditions of the victim's employment the moment after the fifth incident occurred.

Perhaps this refocus on the effects of the behaviors and the alteration of the victim's employment that the behaviors caused would better serve the courts as well as employers and employees in considering whether incidents truly constitute actionable harassment.

VI. CONCLUSION

The purported confusion among American workers about what constitutes sexual harassment is not wholly supported by studies conducted by social scientists. On the contrary, in spite of the popular myth that people do not know how to behave in the workplace, there is a growing consensus among American workers about what constitutes sexual harassment. The myth of ambiguity, perpetuated by those in positions of power in society (resulting in their media access), seems to be subversively undermining sexual harassment law in the courts. Whether this is a result of societal backlash against sexual harassment law or corporate and societal hostility toward working women is difficult to assess. Perpetuation of this myth, however, must stop. It is time to acknowledge the consensus among the general public so that the courts can move forward in the development of sexual harassment law.

Furthermore, the courts' lack of understanding about what many workers have come to understand is sexually harassing is most disturbing. Sexual harassment persists as a form of discriminatory workplace conduct