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## SEXUAL HARASSMENT LAW—THE JURY IS WRONG AS A MATTER OF LAW

### I. INTRODUCTION

Imagine that you are a waitress and bartender at a country club.<sup>1</sup> After a long day of work, one of your customers offers you a position at a large corporation that you cannot refuse. (If you are male, imagine the waitress is your mother, sister, or wife.) Your customer, Butch, brings you the employment forms and arranges an interview for you. You are hired. You are ecstatic about your increased income and career opportunities with the company. Only two weeks after starting your new job, Butch requests an offsite meeting with you at a local restaurant. You agree. When you arrive at the restaurant, you realize that Butch is not interested in talking about work. He tells you of an affair he had with another married coworker, discusses his own marital problems, and then propositions you to have a “relationship” with him. Disgusted and confused, you leave.

The next day at work you tell your supervisor. You confront Butch, and he promises that it will not happen again. Butch later becomes hostile at work and overly critical of your performance. Whenever you make the slightest mistake, such as a typographical error, Butch tells you that you are incompetent. Additionally, Butch assigns you questionable work projects. For example, you are given an assignment to be done on his computer. When you begin the assignment, a picture of a completely naked woman, his chosen screen saver, appears on the screen. Moreover, Butch unnecessarily touches you every chance he gets and shows you a penis-shaped pacifier on two occasions for no apparent reason. To obtain a promotion as an automotive parts illustrator, others are asked to sketch automotive parts; you, on the other hand, have to sketch a picture of his planter, which is shaped like a man with a penis-shaped cactus protruding from a hole in his pants.

Later that year, Butch posts a “recruitment poster” on a bulletin board portraying you as the president and CEO of the “Man Hater’s Club of America.” The next year, Butch has you “arrested” at work for a charity event. He bails you out but will not take you back to work; he instead takes you to a bar. The next year, Butch requests that you draft the beliefs of the “He-Man Hater’s Club,” which includes the following statements: women are the cause of 99.9 % of stress in men, sperm has a right to live, all great chiefs of the world are men, and prostitution should be legalized. After en-

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1. The following facts are based on *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002).

during three years of this kind of treatment, you decide you can no longer tolerate it. You resign from the company.

After reporting Butch's behavior to your supervisors and the Equal Employment Opportunity Commission (EEOC), you file a claim for sexual harassment. You go to trial. The jury finds in your favor and grants you \$4600 in backpay and \$300,000 in emotional distress damages. On appeal, the jury's verdict is reversed as a matter of law. The appellate court holds that the harassment you experienced for three years was not sufficiently severe or pervasive to alter a term, condition, or privilege of your employment. The holding is based on a reasonable person standard—specifically, what level of conduct a reasonable person considers severe or pervasive. Who is this reasonable person? This holding presents the question: Can a jury composed of twelve people be unreasonable as a matter of law under these circumstances?

The questions presented by the above factual scenario are the subject of this note. Many victims of sexual harassment lose their day in court due to the overzealousness of the federal bench in granting procedural motions—particularly, overturning jury verdicts as a matter of law. The Eighth Circuit is no exception. The Eighth Circuit has raised the bar for what is actionable harassment so high that few plaintiffs ever have their case decided by a jury.<sup>2</sup>

The opening hypothetical is modeled after the 2002 Eighth Circuit case, *Duncan v. General Motors Corp.*<sup>3</sup> An appellate panel's reversal of a jury verdict based on a reasonable person standard is an extreme form of judicial interference with the intended application of the "totality of the circumstances" test. The test is intended to consider all of the instances of harassment collectively rather than judge each instance on its own.<sup>4</sup> Over the years, courts have evaded considering the totality of the circumstances by using many different devices. Lower courts have dodged the test by mini-

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2. See *Duncan v. Gen. Motor Corp.*, 300 F.3d 928 (8th Cir. 2002).

3. *Id.*

4. See *infra* Part II.A. Arguably, the most common way that lower courts misapply the totality of the circumstances test is by misconstruing the severe and pervasive element. This element is used as an escape route for courts to evade trial by simply claiming that the alleged harassment is not severe or pervasive and therefore, not actionable under Title VII. See *Nitsche v. CEO of Osage Valley Elec. Coop.*, 446 F.3d 841, 846 (8th Cir. 2006) (citing *Duncan v. Gen. Motors Corp.*, 300 F. 3d 928 (8th Cir. 2002) (finding that defendant's conduct did not create an actionable hostile environment because the court had previously rejected claims "premised on equally or more egregious facts than those" of the case at hand)); see *Saxton v. Am. Tel. & Tel.*, 10 F.3d 526, 534 (7th Cir. 1993) (citing *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir. 1993) (holding the defendant's conduct was "undoubtedly inappropriate" but was not severe or pervasive)). Each of these cases cited precedent claiming that the alleged conduct was not actionable under Title VII because the conduct was not severe or pervasive under the established legal standard. See also THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES* 21–29 (2005).

mizing the severity or pervasiveness of a defendant's conduct by separately analyzing the incidents, plaintiffs, and combination harassment claims (i.e., racial and sexual harassment are analyzed separately).<sup>5</sup> Additionally, courts have evaded the test by citing only a particular part of Supreme Court dicta, thus misinterpreting the Court's intent and ultimately undermining the plaintiff's claim.<sup>6</sup> Furthermore, courts have evaded the test by overzealously

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5. It is common for courts to minimize the severity of harassment, undermining the totality of the circumstances test, by completely separating the incidents, severing combination or multiple harassment claims, and dividing up the targets—considering each target individual's experience rather than considering the cumulative effect of these incidents on the environment as a whole. M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311 (1999). See, e.g., *Vigil v. City of Las Cruces*, No. 96-2059, 1997 WL 265095, at \*1-3 (10th Cir. May 20, 1997) (analyzing racial and sexual harassment separately and ultimately finding that the conduct was not severe or pervasive); *Weiss v. Cola-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (finding that the incidents were relatively isolated instead of considering the entire spectrum of behavior); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213-14 (7th Cir. 1986), *overruled by Saxton v. Am. Tel. & Tel.*, 10 F.3d 526, 533 (7th Cir. 1993) (considering the incidents separately rather than collectively); *Hosey v. McDonald's Corp.*, C. No. AW-95-196, 1996 WL 414057, at \*2-3 (D. Md. May 17, 1996) (analyzing the incidents separately and essentially disregarding them as harmless teenage teasing instead of considering the total effect that the conduct had on the plaintiff). See also Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002) ("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.").

6. Courts have evaded Supreme Court instructions by both citing and applying a specific fraction of dicta from a case instead of looking at the broad intent of the Court and by ignoring its standard completely. Elisabeth A. Keller & Judith B. Tracy, *Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-Examining Supreme Court Precedent*, 15 DUKE J. GENDER L. & POL'Y 247, 256-57 (2008). Lower courts will cite only a specific portion of Supreme Court dicta, playing on its words, in order to support a distorted application of the totality of the circumstances test with authority. Professors Keller and Tracy find that lower courts have not consistently or rationally applied this [totality of the circumstances] standard. This is not the result of a failure of the Supreme Court to establish a workable and fair standard, nor is it due to an absence of scholarly or judicial analysis of those standards. Nevertheless, troubling and confusing precedent is created and followed because too often Supreme Court cases are relied on for only the narrowest propositions. *Id.* at 249 (citing THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES 1 (2005)). For example, in *Mitchell v. Pope*, the court found that the defendant's conduct was "reprehensible" and "crass and juvenile" but concluded that the conduct was simply "horseplay." 189 F. App'x 911, 913-14 (11th Cir. 2006). The term "horseplay" was taken from *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998). In pulling the term "horseplay" from *Oncale* and applying it to the facts of *Mitchell*, the court failed to recognize that *Oncale* used the term in the context of analyzing male-on-male harassment—not male-on-female harassment at issue in *Mitchell*. *Id.* The court in *Mitchell* essentially took the term, "horseplay," out of context and applied it to a scenario that the Supreme Court had not intended.

granting summary judgment for defendants in sexual harassment cases.<sup>7</sup> Lastly, the most offensive judicial avoidance of the totality of the circumstances test is reversing jury verdicts as a matter of law.<sup>8</sup> Judgment as a matter of law is arguably the most offensive procedural device because it invades the province of the jury and undermines the "reasonable person" standard applicable in these cases.<sup>9</sup> The judicial misapplication of the test creates extremely inconsistent findings of what conduct is considered severe or pervasive. Disparate judgments issued throughout the circuits reveal this inconsistency.<sup>10</sup>

Due to the fact that there is a plethora of legal commentary critiquing the courts' use of the previously-mentioned devices, this note will analyze the problems that result when jury verdicts are overturned as a matter of law.<sup>11</sup> Overturning jury verdicts enables the judiciary to manipulate the outcomes of hostile environment sexual harassment claims, thereby undermining the efficacy of Title VII. Part II provides background necessary to understand this problem. In Part III, this note proposes modifications and additions to the law that may remedy or reduce the problems created by the judicial evasion of the totality of the circumstances test. Finally, this note concludes in Part IV that the application of the totality of the circumstances test—used to determine whether harassment is actionable—must be altered or correctly applied in order to ensure plaintiffs a more just remedy, as op-

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7. The complex and conflicting accounts of misconduct in Title VII cases often cannot be adequately resolved at the pretrial stage of litigation, such as summary judgment. Medina, *supra* note 5, at 317. Due to the fact that many discrimination cases "'depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant.'" Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environments Cases*, 34 WAKE FOREST L. REV. 71, 95 (1999) (quoting Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994)). At the summary judgment stage, a judge is not supposed to determine or weigh the credibility of evidence; for that reason, it is inappropriate to grant a summary judgment motion when conflicting testimony exists (which frequently occurs in Title VII cases) because the judge cannot determine whose story is the correct replication of the facts. *Id.* at 102.

8. See *infra* Part II.C. See also *infra* Part III.A. Reversing a jury's verdict may be the greatest judicial interference with the intended application of the "totality of the circumstances" test because a jury has already found that severe or pervasive harassment occurred.

9. See *infra* Part II.C.

10. Courts in different jurisdictions continue to look at similar circumstances and reach opposite results, arguably because of the imprecision of the "totality of the circumstances" test. Debra D. Burke, *Workplace Harassment: A Proposal for a Bright Line Test Consistent with the First Amendment*, 21 HOFSTRA LAB. & EMP. L.J. 591, 602-03 (2004); see also 2 EMPLOYMENT DISCRIMINATION COORDINATOR, ANALYSIS OF FEDERAL LAW § 48:9 (2008) (providing a summary of the differing Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits' decisions as to what particular conduct is severe); MERRICK T. ROSSEIN, 1 EMPLOYMENT DISCRIMINATION: LAW & LITIGATION § 5:15 (2008) (analyzing what conduct is found to be sufficiently severe or pervasive among the circuits).

11. See *infra* Part II.D.

posed to the current standard, which permits judges to easily overturn jury verdicts as a matter of law.

## II. BACKGROUND

Before discussing a solution to the problem of overturning judgments as a matter of law in sexual harassment cases, it is necessary to discuss the background from which the problem stems. This section first introduces the fundamentals of sexual harassment law.<sup>12</sup> Second, it traces the legislative basis for sexual harassment law, examines the role of the Equal Employment Opportunity Commission (EEOC), and reviews the Supreme Court cases that set the standards for the lower courts to follow.<sup>13</sup> Third, this section will discuss the constitutionality of judgment as a matter of law in Title VII cases and its application in the Eighth Circuit.<sup>14</sup> Finally, the problems that sexual harassment creates and exacerbates in the workplace and society will be canvassed.<sup>15</sup>

### A. Fundamentals of Sexual Harassment Law

Modern sexual harassment law recognizes two different theories of sexual harassment.<sup>16</sup> The first type, the quid pro quo claim, is actionable under Title VII when the discriminatory conduct is linked to a tangible employment action.<sup>17</sup> The second type is the hostile environment claim,<sup>18</sup> which is extensively discussed in this note. A hostile environment occurs when a harasser's misconduct has "the purpose or effect of unreasonably interfering with [the target's] work performance or creating an intimidating, hostile, or offensive work environment."<sup>19</sup> In order for a plaintiff to prevail on a hostile environment claim, a plaintiff must prove: (1) that he or she is a member of a protected class; (2) that he or she was subjected to unwelcome

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12. See *infra* Part II.A.

13. See *infra* Part II.B.

14. See *infra* Part II.C.

15. See *infra* Part II.D.

16. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). The two types of harassment, named "quid pro quo" and "hostile work environment," were terms coined by Catherine MacKinnon and did not appear in the statutory text. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998). The terms first appeared in *Henson v. Dundee* and were acknowledged by the Supreme Court in *Meritor. Id.* (citing *Meritor*, 477 U.S. at 65; *Henson v. Dundee*, 682 F.2d 897, 909 (11th Cir. 1982)).

17. *Meritor*, 477 U.S. at 65. Before courts recognized the hostile environment claim, only sexual harassment that sought or required employees "to submit to sexual demands as a condition to obtain employment or to maintain employment or to obtain promotions" was actionable under Title VII. *Id.* at 68.

18. *Id.* at 65.

19. 29 C.F.R. § 1604.11(a)(3) (2008).

sexual harassment; (3) that the harassment complained of was based on sex; (4) that the harassment complained of affected a term, condition, or privilege of his or her employment; and (5) that liability can be imputed to the employer.<sup>20</sup>

For a hostile environment claim to be actionable under Title VII, the harassment must be severe or pervasive enough to make the environment abusive.<sup>21</sup> The fact finder must consider the totality of the circumstances to determine whether an environment meets this standard.<sup>22</sup> Included in this analysis are the following factors: “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 employee’s work performance.”<sup>23</sup>

The use of the totality of the circumstances test was influenced by the EEOC and became law when the Supreme Court adopted the test.<sup>24</sup> The EEOC guidelines suggested that courts look at the entire record and the totality of circumstances, including the nature of the sexual advances and the context in which the advances occurred, on a case by case basis to determine whether sexual misconduct constituted actionable harassment under Title VII.<sup>25</sup> The totality of the circumstances test was extensively discussed in *Harris v. Forklift Systems*.<sup>26</sup> The EEOC guidelines and the Supreme Court directives permitted lower courts a large amount of flexibility in applying the test.<sup>27</sup>

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20. *Erenberg v. Methodist Hosp.*, 357 F.3d 787, 792 (8th Cir. 2004) (citing *Carter v. Chrysler Corp.*, 173 F.3d 693, 700 (8th Cir. 1999)).

21. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The Court reasoned that “whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.” *Id.* at 23.

22. *See generally id.*

23. *Id.* (holding that psychological harm is a relevant factor to be taken into account in determining if sexual harassment occurred, but also holding that no single factor is required).

24. 29 C.F.R. § 1604.11(b) (2008); *see also Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986).

25. 29 C.F.R. § 1604.11(b).

26. *See generally Harris*, 510 U.S. at 17.

27. *See id.* at 24–25 (1993) (Scalia, J., concurring). Justice Scalia, referring to the totality of the circumstances test advocated by the Court, concluded that, “[o]ne of the factors mentioned in the Court’s nonexhaustive list—whether the conduct unreasonably interferes with an employee’s work performance—would, if it were made an absolute test, provide greater guidance to juries and employers.” *Id.*

## B. Creation of the Totality of the Circumstances Test

### 1. *Legislative Provisions*

Congress enacted the Civil Rights Act of 1964 (“Title VII”) to “make-whole” employees who had been aggrieved by employment discrimination.<sup>28</sup> Title VII states, in relevant part:

It shall be an unlawful employment practice for an employer. . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.<sup>29</sup>

The Chair of the House Rules Committee introduced the proposal to add “sex” to the prohibited categories only days before the bill was voted on by the House.<sup>30</sup> There is little legislative history discussing the addition of sex to Title VII because the proposal was intended to defeat the bill.<sup>31</sup> Congress enacted Title VII “to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place.”<sup>32</sup> Additionally, Title VII was enacted with the primary objectives to influence conduct and avoid harm.<sup>33</sup>

Title VII designated the EEOC as the gatekeeper for discrimination claims by requiring employees to file a charge with the agency as a precondition to accessing the judicial forum.<sup>34</sup> The EEOC developed guidelines interpreting the statute, but the primary authority for interpretation remained with the judiciary.<sup>35</sup> Although the EEOC guidelines were not binding, courts used the guidelines to help develop legal rules and discrimination policies for Title VII cases.<sup>36</sup> The EEOC also implemented procedural regulations

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28. Medina, *supra* note 5, at 318; *see also* 29 C.F.R. § 1608.1 (2008).

29. 42 U.S.C.A. § 2000e-2 (a)(1) (West 2008).

30. Medina, *supra* note 5, at 319.

31. *Id.* (citing 110 Cong. Rec. 2577–84 (daily ed. Feb. 8, 1964)). Professor Medina makes the valid conclusion in her article that even though the legislators’ motives initially may not have been to prohibit sexual harassment, the language of Title VII expressly prohibits the employment practice of sexual harassment. *Id.*

32. 29 C.F.R. § 1608.1 (b) (2008).

33. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (holding that Title VII’s objective “like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm”)).

34. Medina, *supra* note 5, at 321.

35. *See id.* To clarify, the EEOC’s duty was to investigate harassment claims and to attempt to conciliate the claim outside of the court system. *Id.*

36. *See id.* at 322. The EEOC guidelines served as an “administrative interpretation of the Act [Title VII] by the enforcing agency,” and the guidelines, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed



such as requiring employers to maintain personnel records that revealed the gender, ethnic, and racial diversity of their employees.<sup>37</sup> Additionally, the EEOC was an educational resource for aggrieved employees seeking recourse through litigation.<sup>38</sup>

Eight years later, Congress passed the Equal Employment Opportunity Act of 1972 citing evidence that women and minorities continued to experience a high unemployment rate, a low occupational status, and, consequently, low income levels.<sup>39</sup> Yet again in 1991, Congress responded to the Supreme Court's and the EEOC's failure to enforce antidiscrimination policies and address the problem of widespread workplace sex discrimination by increasing the private remedies available to those who had experienced intentional or malicious discrimination.<sup>40</sup> The Civil Rights Act of 1991 established that a Title VII claimant was entitled to a jury trial if he or she was seeking compensatory or punitive damages.<sup>41</sup> The Act had two primary purposes: (1) "to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions"; and (2) "to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination."<sup>42</sup> The Act was considered controversial, and legislators expressed fears that the Act would create "a lawyer's mecca" and "an employer's nightmare."<sup>43</sup> In order to prevent the enactment of the "lawyers-get-rich-quick bill,"<sup>44</sup> the Act provided that damages would be capped—with a maximum ranging from \$50,000 to

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judgment to which courts and litigants may properly resort for guidance." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) and Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976)).

37. Medina, *supra* note 5, at 322.

38. See 29 C.F.R. §1604.11(f) (2008). The EEOC enforced regulations advising employers to take every precautionary measure to prevent sexual harassment from occurring, such as educating employees about their rights to file a harassment claim and the procedure for doing so. *Id.*

39. 29 C.F.R. § 1608.19 (b) (2008).

40. Medina, *supra* note 5, at 324. See also H.R. REP. NO. 102-40, pt. 2 (1991), as reprinted in 1991 U.S.C.C.A.N. 694.

41. H.R. REP. NO. 102-40, pt. 2. The Act provided that limited punitive damages were available "'if the complaining party demonstrate[d] that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'" Medina, *supra* note 5, at 326–27 (quoting 42 U.S.C. § 1981a(b)(1)). Compensatory damages were to be granted to the prevailing plaintiff for "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. . . .'" *Id.* at 327 (quoting 42 U.S.C. § 1981a(b)(3)).

42. H.R. REP. NO. 102-40, pt. 2.

43. Medina, *supra* note 5, at 312 (citing 136 CONG. REC. H6753 (daily ed. Oct. 22, 1990); 137 CONG. REC. S15365–66 (daily ed. Oct. 29, 1991) (remarks of Senator Mikulski)).

44. *Id.* at 326 n. 51 (citing 136 CONG. REC. H6753 (daily ed. Aug. 3, 1990)).

\$300,000—depending on the number of employees working for an employer.<sup>45</sup>

## 2. *The Development of Sexual Harassment Law by the Supreme Court*

The Supreme Court first recognized sexual harassment as actionable under Title VII in *Meritor Savings Bank v. Vinson*.<sup>46</sup> In that case, the Court set out two types of harassment: (1) harassment conditioning employment benefits on sexual favors, and (2) harassment creating a hostile or offensive working environment without affecting economic benefits.<sup>47</sup> Further, the Court declared that the language of Title VII did not limit a claim of sexual harassment to those claims that involved financial or other tangible forms of discrimination.<sup>48</sup> The Court consulted the EEOC guidelines to develop the hostile environment claim.<sup>49</sup> Additionally, the Court implemented a severe or pervasive standard which states that in order for sexual harassment to be actionable, it must be sufficiently severe or pervasive as to alter the conditions of employment and create an abusive working environment.<sup>50</sup>

Subsequently, the Supreme Court clarified the standard for analyzing sexual harassment cases in 1993.<sup>51</sup> In *Harris v. Forklift Systems, Inc.*, the Supreme Court further explained the totality of the circumstances test.<sup>52</sup> The

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45. *Id.* at 327 (citing 42 U.S.C. § 1981a (b)(3)).

46. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

47. *Id.* at 65. The Court looked to the EEOC Guidelines. *Id.* (citing 29 C.F.R. § 1604.11(a) (1985)). In addition, *Meritor* established that the correct inquiry to determine whether sexual harassment has taken place should be whether the conduct is “unwelcome” rather than whether the victim entered into a “voluntary” relationship with an employer. *Id.* at 68. *Meritor* briefly touched on employer liability holding that employers are not automatically liable for sexual harassment in the workplace, but that liability should be determined by common law agency principles. *Id.* at 72.

48. *Id.* at 64. The Court explained that the “phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.” *Id.* (citing *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). To further clarify, a significant change in employment status is one which involves a tangible employment action such as hiring, firing, failing to promote, reassigning with significantly different responsibilities, or causing a significant change in benefits. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (citing *Crady v. Liberty Nat’l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) (describing adverse changes in employment as: termination, a demotion, a less distinguished title, a material loss of benefits, diminished responsibilities, or other indications of adversity based on the particular set of facts at hand)).

49. *Meritor*, 477 U.S. at 65 (citing 29 C.F.R. § 1604.11(a)(3)).

50. *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

51. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

52. *Id.*

totality of the circumstances test was used to determine whether the harassment was egregious enough to violate Title VII.<sup>53</sup> The Court took a “middle path,” finding that actionable harassment existed somewhere between conduct that was merely offensive and conduct that caused “tangible psychological injury.”<sup>54</sup> The Court held that the determination of whether conduct was actionable included both an objective and subjective component.<sup>55</sup> As the court explained:

[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, . . . the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends *Title VII’s broad rule of workplace equality*.<sup>56</sup>

The Court explained that the totality of the circumstances test “is not, and by its nature cannot be, a mathematically precise test.”<sup>57</sup> Further, the Court gave a nonexclusive list of factors to be considered which included the following: “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 employee’s work performance.”<sup>58</sup>

In his concurrence, Justice Scalia foreshadowed the future complications that lower courts would experience in implementing the test.<sup>59</sup> He concurred with the court’s decision stating that

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53. *See id.* at 21.

54. *Id.*

55. *Id.*

56. *Id.* at 21–22 (emphasis added).

57. *Harris*, 510 U.S. at 22.

58. *Id.* at 23. The court explained that any relevant factor may be considered, including an employee’s psychological well-being, but that no factor was determinative or required in order for an abusive environment to be considered severe or pervasive. *Id.*

59. *Id.* at 24–25 (Scalia, J., concurring).

[a]s a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages. . . . Be that as it may, I know of no alternative to the course the Court today has taken. One of the factors mentioned in the Court's nonexhaustive list—whether the conduct unreasonably interferes with an employee's work performance—would, if it were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute. . . . I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts.<sup>60</sup>

Five years after *Harris*, the Supreme Court of the United States again discussed the totality of the circumstances test in *Oncale v. Sundowner Offshore Services, Inc.*, which held that a Title VII violation does not have to be motivated by sexual desire to support a claim of sex discrimination.<sup>61</sup> Essentially, the Court broadened the test by emphasizing that the severity of the harassment should be evaluated considering all the circumstances, which “requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.”<sup>62</sup> The Court stated that

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60. *Id.* Justice Scalia's insightful reasoning further considered the standard (the totality of the circumstances test):

“Abusive” (or “hostile,” which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb “objectively” or by appealing to a “reasonable person[’s]” notion of what the vague word means. Today’s opinion does list a number of factors that contribute to abusiveness, . . . but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. . . . One might say that what constitutes “negligence” (a traditional jury question) is not much more clear and certain than what constitutes “abusiveness.” Perhaps so. But the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under this statute “abusiveness” is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation.

*Id.* at 24. Justice Scalia predicted that the totality of the circumstances test and the methods employed to determine if conduct was severe or pervasive would increase employment discrimination litigation (hence, “expansive vistas”). *See id.* Future cases reveal just the opposite. The totality of the circumstances test is used to decrease litigation by manipulating the test to find misconduct not actionable under the severe or pervasive standard. *See supra* notes 5–8. To explain, the application of the totality of the circumstances test reduces litigation by allowing courts to resolve Title VII claims on summary judgment motions. *See supra* note 7.

61. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). The Court addressed fears that liability for same-sex harassment would turn Title VII into a “general civility code for the American Workplace,” but it pointed out that Title VII had other safeguards to prevent such a “code” from developing; specifically the Court declared that a same-sex plaintiff would still have to prove her claim under the severe or pervasive standard determined by the totality of the circumstances test. *Id.* at 80–81.

62. *Id.* at 81. The Court used a helpful analogy to describe how important the context of

[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.<sup>63</sup>

*Oncale* significantly broadened the scope of harassment and reinforced the importance of considering the entire context in which the alleged misconduct occurred.

The cases addressed in this section indicate that the Supreme Court intended a wide range of factors to be considered under the totality of the circumstances test. *Meritor*, *Harris*, and *Oncale* each broadened the types of behavior that can be actionable harassment and provided guidance to the lower courts in implementing the totality of the circumstances test. The following section will discuss the lower courts' interpretation of the totality of the circumstances test. The section will analyze the lower courts' use of judgment as a matter of law in Title VII cases and its potential interference with the totality of the circumstances test.

### C. Judgment as a Matter of Law

Under the Federal Rules of Civil Procedure, judgment as a matter of law is granted "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue . . . ."<sup>64</sup> It is questionable, however, whether the use of judgment as a matter of law is appropriate in Title VII cases because the totality of the circumstances test makes the standard "that of the reasonable person."<sup>65</sup>

Furthermore, "judgment as a matter of law is proper 'when all the evidence points in one direction and is susceptible to no reasonable interpretation supporting the jury verdict.'"<sup>66</sup> Many sexual harassment claims consist

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harassment is in determining if the alleged behavior constituted harassment. *Id.* "A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on 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." *Id.*

63. *Id.* at 81–82.

64. FED. R. CIV. P. 50(a)(1)(A).

65. *See supra* Part II.B.

66. *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 933 (8th Cir. 2002) (citing *Blackmon v. Pinkerton Sec. & Investigative Servs.*, 182 F.3d 629, 635 (8th Cir. 1999)).

of varying recollections of events by both the plaintiff and harasser;<sup>67</sup> therefore, it is difficult to understand how the version of events a jury chooses to believe could often be wrong as a matter of law under a reasonable person standard. A judge using this procedural device after a jury has already found for the plaintiff is problematic because a jury has already decided, under the facts presented, that the defendant's conduct created a hostile environment. Essentially, a judge or appellate panel that overturns a jury verdict under a reasonable person standard is stating that the members of the jury were not reasonable people.

This section presents three constitutional considerations that arise when a jury's verdict is overturned as a matter of law in a Title VII case. The plaintiff's right to have his or her day in court,<sup>68</sup> the right to a jury trial,<sup>69</sup> and the right to have an impartial fact finder<sup>70</sup> will be considered. Afterward, legal precedent in the Eighth Circuit will be discussed.<sup>71</sup>

### 1. *Constitutional Considerations & Title VII*

Although the Supreme Court has decided that granting motions for judgment as a matter of law or overturning jury verdicts as a matter of law is constitutional, some argue that it is not.<sup>72</sup> Arthur Miller, a Harvard Law professor, claimed that “[o]verly enthusiastic use of summary judgment means that trial worthy cases will be terminated . . . on motion papers, possibly compromising the litigants’ constitutional rights to a day in court and jury trial.”<sup>73</sup> He argued that when verdict motions are viewed “without the safeguards and environment of a trial setting, courts may be tempted to treat

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67. *Cf. Beiner, supra* note 6, at 102–03. The differing perceptions of the facts existing between the plaintiff and the harasser make the determination of the facts “troublesome” for courts, yet they are comfortable using the procedural device of summary judgment as well. *Id.*

68. *See* U.S. CONST. amend. VII.

69. *Id.* In civil cases, the right to an impartial jury is inherent in the Seventh Amendment. *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981) (citing *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3d Cir. 1965)).

70. *McCoy*, 652 F.2d at 657 (“the Constitution guarantees . . . a fair and impartial jury”).

71. *See generally infra* Part II.C.2.b.

72. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1067 (2003). Miller argued that if a court finds a case “a close call” then summary judgment is inappropriate. Because Miller uses the terms summary judgment, directed verdict, and judgment as a matter of law interchangeably throughout his article, it is not a stretch to apply his reasoning to judgment as a matter of law. *See also* Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 166–67 (2007).

73. Miller, *supra* note 72, at 1071.

the evidence in a piecemeal rather than cumulative fashion . . . .”<sup>74</sup> Although Professor Miller was specifically referencing summary judgment motions, he loosely applied the same arguments to directed verdict motions and judgment as a matter of law motions.<sup>75</sup> This application makes sense because each of these motions determines “whether a reasonable jury could find for the nonmoving party.”<sup>76</sup> Thus, they employ the same standard. The totality of the circumstances, conceivably, is not considered when judges review the trial record in a piecemeal manner on appeal; therefore, there is a potential risk that the test will be incorrectly applied, arguably infringing on the plaintiff’s right to a jury trial.

In the past, courts have contemplated this probable constitutional infringement. The Seventh Amendment guarantees that “the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court in the United States, than according to the rules of common law.”<sup>77</sup> In *Baltimore & Carolina Line, Inc. v. Redman*, the Supreme Court decided that a verdict may be constitutionally dismissed on the merits under common law principles, and thus this procedure did not violate the Seventh Amendment.<sup>78</sup> On the contrary, Professor Suja Thomas has argued that this case was wrongly decided by erroneously describing the common law procedures.<sup>79</sup> Professor Thomas argued that under common law, if a court determined that the verdict was not supported by the evidence, the court could not enter judgment for the party who lost, but rather would grant a new trial.<sup>80</sup> Thomas indicated that the fact that *Redman* allowed a judge to decide “both the sufficiency of the evidence and the outcome of the case” was a violation of common law principles.<sup>81</sup> As a result, *Redman* drastically changed the role of the jury by effectively restricting the right to a jury trial.<sup>82</sup>

Nevertheless, judgment as a matter of law has corrected the misapplication of law in certain cases and has been a valuable procedural device that has promoted efficiency in the courts.<sup>83</sup> Issues arise, however, when a court applies Rule 50 with a “result-oriented [and] efficiency-motivated” goal

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74. *Id.*

75. *See generally id.* at 1072.

76. *See* Thomas, *supra* note 72, at 166–67.

77. *See* *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 656–57 (1935) (quoting U.S. CONST. amend. VII). In *Redman*, the Court held that reversing a verdict as a matter of law on appeal is constitutional and that a new trial is not required.

78. *Id.* at 661.

79. Thomas, *supra* note 72, at 168.

80. *Id.* at 168–69.

81. *Id.* at 168.

82. *Id.* Professor Thomas explains that “*Redman* was a drastic change to the jurisprudence of the Court on the role of the jury.” *Id.*

83. *Cf.* Miller, *supra* note 72, at 1075.

because it increases the risk that the judge will decide the case arbitrarily, thus curtailing litigants' access to trials—and obviously, a jury.<sup>84</sup>

Historically under the common law, the constitutionally permissible procedure was to grant a new trial—not to impose a directed verdict (i.e. judgment as a matter of law).<sup>85</sup> In *Slocum v. New York Life Insurance Co.*, the Supreme Court analyzed the possible constitutional encroachments.<sup>86</sup> In *Slocum*, the Court found that because a court could reevaluate the facts and grant judgment to the losing party under judgment notwithstanding the verdict, the procedure was unconstitutional.<sup>87</sup> If the facts of a case are undisputed or accepted as true from the pleadings, a court may constitutionally determine the judgment as a matter of law; however, a court may not constitutionally examine the sufficiency of the evidence to determine the verdict.<sup>88</sup> In Title VII cases, when verdicts are overturned as a matter of law on the severe or pervasive standard, the appellate panel may be perceived to be weighing the sufficiency of the evidence. This weighing of the evidence is not constitutionally permissible under the Seventh Amendment.<sup>89</sup>

Additionally, under the Seventh Amendment, judges decide legal issues and juries decide factual issues.<sup>90</sup> Congress intended the court's role to be supervisory and directive, and the jury's role was to make the ultimate determination of factual issues.<sup>91</sup> In *Slocum*, the Court, referencing these varying roles, explained, “[o]nly through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other, is to impinge on that right.”<sup>92</sup> The reasonable person standard employed by the totality of circumstances test in Title VII cases, presents a question of fact—whether harassment is severe or pervasive enough that a reasonable person would find that it altered the terms or conditions of his or her employment.<sup>93</sup> This question calls for a determination of the facts. It is the jury's role to resolve it.<sup>94</sup>

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84. *Id.* at 1076.

85. Thomas, *supra* note 72, at 168–69.

86. See *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364 (1913) (holding that it was impermissible for a court to reexamine the facts of a dispute other than according to the rules of common law).

87. Thomas, *supra* note 72, at 175 (citing *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 399 (1913)).

88. *Id.* at 166, 175.

89. *Id.*

90. *Id.* at 166, 168.

91. *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 382 (1913).

92. *Id.*

93. See *supra* Part II.B.

94. See *Slocum*, 228 U.S. at 382.



Another constitutional consideration that arises in Title VII cases when a judge overturns a jury verdict as a matter of law is the due process right to an impartial decision maker.<sup>95</sup> Initially it may be difficult to identify how this due process issue arises in a Title VII case. Certain sources have revealed, however, that some judges may be biased against Title VII claims.<sup>96</sup> For example, the Eighth Circuit's Gender Fairness Task Force Report revealed that twenty-nine percent of plaintiffs' attorneys and eleven percent of defendants' attorneys reported that judges indicated that sex discrimination cases as "frivolous, unimportant, or undeserving of federal court time."<sup>97</sup> The report also found that one-third of plaintiffs' attorneys and one-quarter of defendants' attorneys reported that "sex discrimination cases had been pushed through the courts without adequate time for discovery [and] with some frequency."<sup>98</sup> Moreover, over fifty percent of plaintiffs' attorneys found that the discovery in such cases was inappropriately intrusive compared to 17.3 percent of defendants' attorneys.<sup>99</sup> The majority of judges expressed no opinion on whether discovery in Title VII cases was inappropriately intrusive.<sup>100</sup> It is fair to question the impartiality of judges if some judges regard Title VII cases based on sex as frivolous and other judges are neutral on the statement.<sup>101</sup>

Additionally, the report exposed that unwanted sexual attention is an issue in the courtroom.<sup>102</sup> Usually in the form of "gender-based incivility," unwanted behaviors include sexually suggestive comments, unprofessional types of address, distasteful remarks about appearance, offensive jokes, and being mistaken for a "non-lawyer."<sup>103</sup> A small percentage of judges reported that they experienced unwanted sexual attention, and women reported significantly more experiences than men. Some even reported that the offender was a judge.<sup>104</sup> A noteworthy finding of the report was that most courtroom employees were unaware of their sexual harassment policy, and even some

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95. See U.S. CONST. amend. V & VI. See also *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981) (citing *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3d Cir. 1965)).

96. See Gender Fairness Task Force, *Final Report and Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 CREIGHTON L. REV. 9, 15 (1997) [hereinafter *Fairness Task Force*]. See also *Catchpole v. Brannon*, 36 Cal. App. 4th 237 (Cal. Ct. App. 1995).

97. *Fairness Task Force*, *supra* note 96, at 15.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 73. The report states "the great majority of judges," but does not list the actual percentage of judges who were neutral to the statement. *Id.*

102. *Fairness Task Force*, *supra* note 96, at 18-20.

103. *Id.* at 18.

104. *Id.* at 19.

courts in the Eighth Circuit reported that they had no written Equal Employment Opportunity complaint policy.<sup>105</sup>

In one case, *Catchpole v. Brannon*, the judicial hostility of the trial judge in a sexual harassment case was clear to the appellate court.<sup>106</sup> In *Catchpole*, the judge basically cross-examined the target of the harassment in a condescending manner, asking questions such as, “[D]id you blame yourself for letting this happen?” and “Did you ever consider just leaving without your clothes?”<sup>107</sup> On appeal, the plaintiff claimed that the judge “displayed a belief that sexual harassment cases are relatively unimportant and invoked sexual stereotypes in evaluating [the victim’s] behavior and credibility.”<sup>108</sup> The verdict was reversed, and the court granted the plaintiff a new trial after the appellate court found that the trial judge “conveyed the sense he considered sexual harassment cases ‘detrimental to everyone concerned’ and a misuse of the judicial system.”<sup>109</sup> Ultimately, the court found that the plaintiff was not given a fair trial and that it was doubtful that the trial judge was impartial.<sup>110</sup> In summary, the evidence of judicial bias towards Title VII plaintiffs raises the question of whether Title VII cases are adjudicated by neutral judges.

## 2. *Application of Judgment as a Matter of Law in Title VII Cases*

### a. Importance of a jury trial under the reasonable person standard

Congress granted Title VII plaintiffs the right to a jury trial in the Civil Rights Act of 1991.<sup>111</sup> Furthermore, jury trials provide plaintiffs with the benefit of “secret deliberations and the rendering of relatively impartial decisions by a group of citizens representing society rather than deferring to the opinions, reasoning, and conclusions of a single judge.”<sup>112</sup> Justice Blackstone recognized the importance of jury trials

explain[ing]: [A] competent number of sensible and upright jurymen . . . will be found the best investigators of truth and the surest guardians of public justice. . . . Every new tribunal, erected for the decisions of facts,

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105. *Id.* at 20.

106. 36 Cal. App. 4th 237 (Cal. Ct. App. 1995).

107. *Id.* at 257.

108. *Id.* at 249.

109. *Id.* at 249. The Court also found that the judge’s “predetermined disposition” made him likely to rule against her solely based on her status as a woman. *Id.* at 248.

110. *Id.* at 262.

111. H.R. REP. NO. 102-40, pt. 2, at 29. Any party may demand a jury trial in cases where compensatory or punitive damages are sought under Title VII. *Id.*

112. Miller, *supra* note 72, at 1077.

without the intervention of a jury . . . is a step towards establishing aristocracy, the most oppressive of absolute governments.<sup>113</sup>

The Supreme Court continues to support jury trials by repeatedly expressing the value of reconciling factual discrepancies by "citizens who represent the community at large."<sup>114</sup> Additionally, the reasonable person standard is best assessed when courts and judges allow the jury to perform its primary function: "to make commonsense determinations about human behavior, reasonableness, and state of mind based on objective standards."<sup>115</sup> Judgment as a matter of law takes this determination away from the jury.

More importantly and specifically pertinent to a Title VII jury trial, social science studies show that people generally agree on what type of misconduct constitutes sexual harassment.<sup>116</sup> Jurors tend to be reasonable people. Therefore, when a judge overturns a jury verdict as a matter of law, he or she is essentially claiming to be more reasonable than the jury. Moreover, research shows that people consider a broader range of conduct to be sexual harassment than courts recognize as legally actionable under Title VII.<sup>117</sup> In addition, people are logical in their approach to evaluating sexual harassment. For example, typically the more severe the incident, the more likely people will perceive it as sexual harassment.<sup>118</sup> In addition, studies show that the conduct is not generally considered harassment until it reaches a certain level of frequency.<sup>119</sup> Studies also indicate that the more frequent the harassment is, the more people will consider the behavior to be harassing.<sup>120</sup> Furthermore, studies revealed that when frequency increased, more people found the harasser responsible and deserving of disciplinary treat-

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113. *Id.* at 1077-78 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*380).

114. *Id.* at 1078.

115. *Id.* at 1134.

116. UNITED STATES MERIT SYSTEM, PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES viii (1995) at 7, tbl.1. [hereinafter USMSPB]. ("The report discusses the results of a study undertaken by the board to determine the nature and extent of sexual harassment in the Federal Government. The results of the current study indicate that unwanted sexual attention remains a widespread problem in the Federal sector").

117. *Id.* at 45, tbl.1. See *infra* Part II.C.2.b (providing examples of the range of behaviors that courts in the Eighth Circuit are finding actionable).

118. 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).

119. Jennifer L. Hurt, Jillian A. Maver & David Hoffman, *Situational and Individual Influences on Judgments of Hostile Environment Sexual Harassment*, 29 J. APPLIED SOC. PSYCHOL. 1395, 1397 (1999).

120. Daniel A. Thomann & Richard L. Wiener, *Physical and Psychological Causality as Determinants of Culpability in Sexual Harassment Cases*, 17 SEX ROLES 573, 585 (1987).

ment.<sup>121</sup> These studies support the notion that jurors are capable of making appropriate decisions in sexual harassment cases. The factors that the previous studies use as variables—the severity and frequency of the harassment—are consistent with the legal standards jurors are asked to apply. In summary, it should be a rare occurrence when a court reverses a jury verdict under the reasonable person standard in sexual harassment cases.

Comparably, a study of federal employees revealed that over fifty percent of men and women found the following behavior to be sexually harassing: pressure for sexual favors; deliberate touching or cornering; suggestive letters, calls, or materials; pressure for dates; suggestive looks or gestures; and sexual teasing, jokes, or remarks.<sup>122</sup> The federal study shows that a majority of people find a broader scope of behavior to be sexual harassment than the appellate courts.<sup>123</sup> If the majority of people believe these types of behaviors constitute sexual harassment, courts should consider this data when deciding to overturn a jury's verdict.

b. Judgment as a matter of law in the Eighth Circuit

In the Eighth Circuit, *Duncan v. General Motors Corp.* provides an example of a case in which the court overturned the jury verdict for the plaintiff as a matter of law on appeal.<sup>124</sup> In *Duncan*, Diana Duncan was a bartender at a country club until one of her customers, James Booth, arranged for her to interview for a position at General Motors Corporation (GMC).<sup>125</sup> Only two weeks after working at the corporation, he asked her to meet him for an off-site meeting.<sup>126</sup> During the meeting he informed her of his marital problems and his affair with another woman at work, and then propositioned her to have a sexual relationship with him.<sup>127</sup> She refused his offer and confronted him about his inappropriate behavior at work.<sup>128</sup> After the rejection, Booth became hostile and more critical of her work.<sup>129</sup>

Furthermore, over the course of her employment, Booth requested that Duncan complete many questionable tasks.<sup>130</sup> He required her to complete an assignment on his computer that displayed a completely naked woman as

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121. *Id.*

122. USMSPB, *supra* note 116, at 7, tbl.1.

123. *Cf.* BEINER, *supra* note 4, at 29–30.

124. *See* *Duncan v. Gen. Motors Corp.*, 300 F.3d 928 (8th Cir. 2002).

125. *Id.* at 931.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Duncan*, 300 F.3d at 931–32. Duncan worked at General Motors Corporation from August 1994 to May 1997. *Id.*

the screen saver.<sup>131</sup> He unnecessarily touched her whenever she would hand him the telephone.<sup>132</sup> Also on two occasions, he showed her a pacifier that was shaped like a penis.<sup>133</sup>

Shortly thereafter, when she applied for a promotion, Booth required that she draw a penis shaped planter; however, other applicants were required to draw automotive parts.<sup>134</sup> Subsequently, Booth posted a recruitment poster that portrayed Duncan as the president and CEO of the Man Hater's Club of America.<sup>135</sup> Furthermore, Booth had Duncan "arrested" at work as part of a charity event, but when he bailed her out he would not return her to work despite her protests; instead, he took her to a bar.<sup>136</sup> Lastly, Booth asked Duncan to type a draft of the beliefs of the He-Men Women Hater's Club, which included such items as "sperm has a right to live" and "prostitution should be legalized."<sup>137</sup> Duncan resigned two days after Booth requested she draft the previous beliefs.<sup>138</sup>

After hearing these facts, twelve jurors found that Booth's misconduct was severe or pervasive enough to create a hostile environment for Diana Duncan.<sup>139</sup> A district judge allowed the jury's verdict to stand even after the defendant's motion for judgment as a matter of law.<sup>140</sup> Thus, the jury and judge who witnessed the facts developed at trial believed a verdict for Duncan was warranted. The Eighth Circuit Court of Appeals reasoned, "Booth's actions were boorish, chauvinistic, and decidedly immature, but we cannot say they created an objectively hostile work environment permeated with sexual harassment."<sup>141</sup> Furthermore, the court concluded that "the evidence

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131. *Id.* at 931. Booth claimed his computer was the only one with the available software. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 931-32. Duncan was applying for an illustrator's position at the company. *Id.* at 931. In order to prove her artistic ability, Booth required that she draw a planter on his desk. *Id.* at 932. The planter was a man wearing a sombrero with a cactus protruding like a penis out of a hole in the front of his pants. *Id.* at 931. She was treated completely differently than the other employees. Ultimately, Duncan did not get the promotion because she lacked a college degree. *Id.* at 932.

135. *Duncan*, 300 F.3d at 932. The poster listed the membership qualifications as: "Must always be in control of: (1) Checking, Savings, all loose change, etc.; (2) (Ugh) Sex; (3) Raising children our way!; (4) Men must always do household chores; (5) Consider T.V. Dinners a gourmet meal." *Id.*

136. *Id.*

137. *Id.* at 932.

138. *Id.*

139. *Id.* at 933. The Court of Appeals disagreed, stating, "We conclude as a matter of law that [Duncan] did not show a sexually harassing hostile environment sufficiently severe or pervasive so as to alter the conditions of her employment, a failure that dooms Duncan's hostile work environment claim." *Id.* at 935.

140. *Id.* at 933.

141. *Duncan*, 300 F.3d at 935. Further, the court held, "It is apparent that these incidents

[was] sufficient to support the jury finding that the harassment was based on sex," yet the court overturned the jury's verdict for Diana Duncan.<sup>142</sup>

Subsequently, forty-four courts have followed *Duncan*, and one hundred and forty-four courts have cited it to date.<sup>143</sup> The vast number of courts that rely on *Duncan* suggests that *Duncan* is a pivotal case. Furthermore, *Duncan* heightened the level of misconduct needed for harassment to be actionable in the Eighth Circuit.<sup>144</sup> As a result, subsequent courts have cited *Duncan* as precedent essentially permitting defendants to escape liability under the severe or pervasive standard.<sup>145</sup>

To illustrate, *Cottrill v. MFA, Inc.* is an Eighth Circuit case that cited *Duncan* as precedent for the severe or pervasive standard.<sup>146</sup> In *Cottrill*, a manager installed a peephole and a two way mirror in the single restroom provided for women at a company that employed 1900 workers.<sup>147</sup> The manager watched the plaintiff two to three times daily over a five year period.<sup>148</sup> The plaintiff also testified on numerous occasions that there was a clear sticky substance—cornstarch—on the toilet seat and toilet paper holder.<sup>149</sup> As a result of exposure to the substance, the plaintiff sought medical treatment for sporadic rashes.<sup>150</sup> The trial court granted summary judgment to MFA and the appellate court affirmed citing *Duncan*.<sup>151</sup> The court held that the trial court did not err in finding that Cottrill failed to establish a

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made Duncan uncomfortable, but they do not meet the standard necessary for actionable sexual harassment." *Id.*

142. *Id.* at 934.

143. Lexis Nexis Shepard's Report of *Duncan v. Gen. Motor Corp.*, 300 F.3d 928 (8th Cir. 2002) current through Feb. 4, 2009. This citation refers to the electronic Lexis Nexis feature called "Shepardize" which lists every source in which a case has been cited. [hereinafter Shepard's Report]. *Duncan* has been cited a total of 280 times for the following: (1) distinguished by courts 11 times; (2) followed by courts 44 times; (3) cited by courts 144 times; (4) cited in the Eighth Circuit 135 times; (5) cited once in annotated statute; (6) cited in 13 Law Reviews or periodicals; (7) cited in 11 treatises; (8) cited in 51 briefs; and (9) cited in 59 motions. *Id.* It is important to note that the courts that merely cite *Duncan* compare the facts of *Duncan* to the facts at issue.

144. The fact that over one hundred courts have cited *Duncan* proves that *Duncan* is being used as a reference for the applicable standard.

145. To further clarify, these courts are using *Duncan* as an example of what type of conduct is not severe or pervasive. This comparison ultimately allows these courts to find for the defendant by claiming that the defendant's behavior was not as severe or pervasive as the facts of *Duncan*.

146. 443 F.3d 629, 638 (8th Cir. 2006).

147. *Id.* at 631.

148. *Id.*

149. *Id.* at 633.

150. *Id.* at 631.

151. *Id.* at 638.

question of material fact as to whether the alleged harassment was severe or pervasive enough to create a hostile work environment.<sup>152</sup>

Shortly thereafter in 2006, *Powell v. Yellowbook USA, Inc.* cited *Duncan* as a reference for the severe or pervasive standard.<sup>153</sup> In *Powell*, a co-worker solicited the plaintiff for sex, tried to convert the plaintiff to her religion, and spiked her beverage—a diet Pepsi—with methamphetamine.<sup>154</sup> The plaintiff filed three claims under Title VII for sexual harassment, religious harassment, and retaliation.<sup>155</sup> The district court granted summary judgment to Yellowbook on all claims.<sup>156</sup> The appellate court upheld this decision citing *Duncan*, holding that the sexual harassment experienced by Powell was not severe or pervasive.<sup>157</sup> The appellate court specifically compared the propositioning for a sexual relationship in *Duncan* to that in *Powell* and as a result found the conduct was not actionable under Title VII.<sup>158</sup> *Powell* is a prime example of how *Duncan* has affected the severe or pervasive standard in the Eighth Circuit.

In addition, at least one court has cited *Duncan* in a case involving a male plaintiff and a male harasser.<sup>159</sup> In *Nitsche v. CEO of Osage Valley Electric Cooperative*, the male plaintiff, nicknamed stub,<sup>160</sup> experienced verbal harassment, offensive sexual banter, obscene gestures, and sexual jokes.<sup>161</sup> Moreover, on one occasion he was physically assaulted when an employee rubbed a shovel between his legs.<sup>162</sup> Although this type of misconduct occurred throughout the plaintiff's twenty years of employment, the court, citing *Duncan*, found that the conduct was not severe or pervasive.<sup>163</sup> The court reasoned that Nitsche's claim was not actionable because other

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152. *Cottrill*, 443 F.3d at 638. Although the defendant pleaded guilty to a Class "C" felony for invasion of privacy, the employer was not held liable for a Title VII violation because the court held the conduct was not severe or pervasive. *Id.* at 633, 638. The court held that the plaintiff had "not established that the alleged harassment was objectively 'so intimidating, offensive, or hostile that it poisoned the work environment.'" *Id.* at 639 (internal citations omitted). This statement arguably does not comport with the Supreme Court's objectives for the totality of the circumstances test. *See supra* Part II.B. Moreover, the court in *Cottrill* cited *Duncan* and imposed an even higher bar for misconduct to be actionable by suggesting that the work environment need to be "poisoned." *Cottrill*, 443 F.2d at 639.

153. 445 F.3d 1074, 1077 (8th Cir. 2006).

154. *Id.* at 1076.

155. *Id.*

156. *Id.*

157. *Id.* at 1077.

158. *Id.*

159. *See Nitsche v. CEO of Osage Valley Elec. Coop.*, 446 F.3d 841 (8th Cir. 2006).

160. *Id.* at 843. The co-worker called him stub because his fingers were short which allegedly indicated that he had a short penis. *Id.*

161. *Id.* at 843–44. Additionally, Nitsche found mice and snakes in his lunch box, was the subject of a demeaning poem, and was frequently called other crude names. *Id.*

162. *Id.* at 843.

163. *Id.* at 846.

courts—referring to *Duncan*—had rejected “claims premised on equally or more egregious facts.”<sup>164</sup>

In *Tatum v. Arkansas Department of Health*, like *Duncan*, the jury found for the plaintiff; however, in *Tatum*, the district court judge granted judgment as a matter of law to the defendant, and this was affirmed on appeal.<sup>165</sup> Jane Tatum worked in an atmosphere that tolerated sexual jokes, cartoons, and gags.<sup>166</sup> She was not personally offended until another employee, Robert McCuan, accosted her in the break room.<sup>167</sup> McCuan approached Tatum from behind and said, “I want you.”<sup>168</sup> He then grabbed her hand, placed it on his penis, and said, “See how hard it is? Doesn’t that feel good?” Tatum immediately jerked her hand away, and returned to her office in a state of shock.<sup>169</sup> She told no one about the incident.<sup>170</sup> Later, McCuan asked Tatum to come over to his home for the weekend because his family and granddaughter would be out of town.<sup>171</sup> After this, Tatum reported both incidents to her administrator.<sup>172</sup> After she reported the incident, Tatum confronted McCuan in his office with her supervisor, and McCuan screamed “Get out of my office now.”<sup>173</sup> Tatum’s supervisor later told her she would “have hell to pay” if she pursued her complaint any further.<sup>174</sup> The company began an investigation and another employee reported that McCuan had harassed her as well.<sup>175</sup> Tatum eventually resigned, and McCuan was never punished for his misconduct.<sup>176</sup> Comparatively, the harassment is conceivably more severe than that alleged in *Duncan*.<sup>177</sup>

The jury found for Tatum, awarding her \$300,000—the highest amount of damages available under Title VII’s capped damages provision.<sup>178</sup> Yet, she ultimately did not prevail. The district court granted the employer’s motion for judgment as a matter of law, finding that Tatum did not prove that the harassment was sufficiently severe or pervasive under the

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164. *Id.* at 846.

165. 411 F.3d 955, 958 (8th Cir. 2005).

166. *Id.* at 957. The administrator of the office stated that she did not approve of some of the employees’ activities and found the activities to be inappropriate, but a verbal warning was the only reprimand that was given. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Tatum*, 411 F.3d at 957.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 958.

176. *Id.*

177. *Cf. Tatum*, 411 F.3d at 958; *Duncan v. Gen. Motors Corp.*, 300 F.3d 928 (8th Cir. 2002).

178. *Tatum*, 411 F.3d at 958.



totality of the circumstances test.<sup>179</sup> The three previous cases reveal the effect that *Duncan* has had in developing precedent in the Eighth Circuit.

#### D. Sexual Harassment Effects Created By the Current Judicial Treatment of Title VII Cases

In order to understand the evolution of harassment from society to the workplace to the courtroom, the phenomenon of workplace sexual harassment needs to be examined. The following section discusses the numerous problems that result in the workplace and society from the current judicial application of the totality of the circumstances test in Title VII cases. First, this section will reflect on how Title VII impacts the workplace. Second, the societal problems that result from the judicial application of the test will be presented.

##### 1. *Impact in the Workplace*

Reports reveal that “[b]etween one quarter and one half of all women have been sexually harassed sometime during their working lives.”<sup>180</sup> Moreover, the impact of sexual harassment on the workplace is costly for both employers and employees.<sup>181</sup> A study of federal employees estimated that sexual harassment cost the federal government (as an employer) \$327 million over a two-year period.<sup>182</sup> Additionally, employers incur substantial costs because sexual harassment results in “reduced productivity, low morale, absenteeism, employee turnover, litigation costs-damages, [and] attorney fees.”<sup>183</sup>

Furthermore, the financial loss to victimized employees may be hard to estimate adequately because many incidents of sexual harassment are not reported.<sup>184</sup> Also, a problem in calculating the costs exists because the effects of sexual harassment may take years to surface.<sup>185</sup> In only a two year

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179. *Id.*

180. BARBARA A. GUTEK, *SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS* 58 (1985).

181. See UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TECHNICAL ASSISTANCE PROGRAM, *SEX DISCRIMINATION ISSUES A-2, A-3* (1998) [hereinafter U.S.E.E.O.C.].

182. USMSPB, *supra* note 116, at 26. These results are from the years 1992 to 1994.

183. U.S.E.E.O.C., *supra* note 181, at A-2. A “study in *Working Woman* magazine states that sexual harassment costs a typical Fortune 500 company \$6.7 million in absenteeism, low morale, lower productivity and employee turnover.” *Id.* at A-2-A-3.

184. See USMSPB, *supra* note 116, at 35 & tbl.11.

185. Cf. BEINER, *supra* note 4, at 186–89 (citing Bonnie S. Dansky & Dean G. Kilpatrick, *Effects of Sexual Harassment, in SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 164, 166–67 (William O’Donohue ed., 1997)). A study of the long term effects of sexual harassment showed that the average time elapsed between experiencing the ha-

period, a 1994 survey showed that sexual harassment cost federal employees \$4.4 million dollars in lost wages.<sup>186</sup> The impact on employees who have experienced sexual harassment varies, including using sick leave, using annual leave, taking leave without pay, receiving or needing medical and/or emotional help, being reassigned or fired, transferring to a new job, quitting without a new job, or suffering a decline in productivity.<sup>187</sup> This survey estimated the costs to be as follows: “[j]ob turnover \$24.7 million, [s]ick leave \$14.9 million, [i]ndividual productivity \$93.7 million, [and] [w]orkgroup productivity \$193.8 million,” totaling a cost of \$327.1 million for harassment in the federal government alone.<sup>188</sup>

In addition to the economic costs it imposes, sexual harassment exacerbates workplace sex segregation.<sup>189</sup> As a result of sex segregation, lower level jobs are filled by young women and supervisors usually are men.<sup>190</sup> The segregation is so prevalent that “approximately [fifty] percent of all workers would need to switch to different occupational categories to achieve the even distribution of men and women across occupations.”<sup>191</sup> Moreover, segregation in the workplace does not translate to separate but equal treatment because females “generally [have] lower status in society, garner less pay, and have less prestige than male-dominated jobs.”<sup>192</sup> Furthermore, research shows that the “glass ceiling” still exists in America; women are still “targets of discrimination at work, both in terms of earnings and promotions to positions of power, such as executive positions in corporations.”<sup>193</sup> It has been estimated that women earn twenty-five percent less than men.<sup>194</sup> In 2004, the United States Department of Labor reported that the disparity in wages between males and females is found in various fields

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harassment and its effects was eleven years. *Id.* Accordingly, there is a lack of correlation between the harassing incident and the later resulting effects.

186. USMSPB, *supra* note 116, at 26.

187. *Id.* at 26, tbl.6. The cited table shows the “[p]ercentage of respondents who experienced sexual harassment and took or experienced the indicated action[s] [between] 1987 and 1994.” *Id.*

188. *Id.* at 26.

189. GUTEK, *supra* note 180, at 39–40.

190. *Id.*

191. Peter Glick & Susan T. Fiske, *Sex Discrimination: The Psychological Approach*, in *SEX DISCRIMINATION IN THE WORKPLACE* 155, 165 (Faye J. Crosby, Margaret S. Stockdale & S. Ann Ropp eds., 2007) (citing IRENE PADAVIC & BARBARA RESKIN, *WOMEN AND MEN AT WORK* (2d ed. 2002)).

192. *Id.* at 165.

193. *Id.* at 158. See also Deborah L. Rhode & Joan C. Williams, *Legal Perspectives on Employment Discrimination*, in *SEX DISCRIMINATION IN THE WORKPLACE* 235 (Faye J. Crosby, Margaret S. Stockdale & S. Ann Ropp eds., 2007).

194. Barbara R. Bergmann, *Discrimination through the Economist’s Eye*, in *SEX DISCRIMINATION IN THE WORKPLACE* 213, 218 (Faye J. Crosby, Margaret S. Stockdale & S. Ann Ropp eds., 2007).

of work.<sup>195</sup> “For example, among lawyers, women earn 73% of what men earn; among CEOs, 70%; among bartenders, 81%; and among nurses, 87%.”<sup>196</sup> Shockingly, the report discovered that even female dishwashers make an average of \$2,000 less per year than male dishwashers.<sup>197</sup> As a matter of fact, in 2000, women only made 71.5 cents for every dollar made by a man.<sup>198</sup>

Moreover, sexual harassment occurs in the legal profession.<sup>199</sup> Is sexual harassment law effective if the harassing behavior is fostered and tolerated throughout the legal profession by those who are supposed to uphold the law? Women practicing law reported that they heard sexist jokes and remarks, were informally referred to by first name, were asked about their professional status, and received compliments about appearance rather than achievement.<sup>200</sup> Another study reported that although there were few differences between male and female lawyers’ speech patterns, both male and female clients demonstrated greater deference to male lawyers.<sup>201</sup> In addition, female attorneys indicated that judges addressed male attorneys differently—giving them more attention and credibility—because of their gender.<sup>202</sup> Findings such as these support the notion that gender discrimination (a Title VII violation on the basis of “sex”) affects the legal community and that the discrimination extends from the courtroom to client interactions. Because sexual harassment perpetuates the submissive status of women, decreases work productivity, and is costly for both employers and employees, it is in the best interest of employers to reduce, correct, and prevent

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195. Rhode & Williams, *supra* note 193, at 239 (citing U.S. Department of Labor, Bureau of Labor Statistics, *Household Data, Annual Averages* (2004)).

196. *Id.*

197. *Id.* (citing U.S. Department of Labor, Bureau of Labor Statistics, *Household Data, Annual Averages* (2004)).

198. Linda Hamilton Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, in *SEX DISCRIMINATION IN THE WORKPLACE* 295 (Faye J. Crosby, Margaret S. Stockdale, & S. Ann Ropp eds., 2007) (citing American Association of University Women Educational Foundation, *Women at Work*, tbl. State-by-state data on women’s and men’s educational attainment and earnings by educational attainment, (2003), available at [http://www.aauw.org/research/statedata/table\\_data.pdf](http://www.aauw.org/research/statedata/table_data.pdf)). Women participating in this study had a four-year degree and worked full-time year round, but they still made less than men. *Id.*

199. Susan R. Furr, *Men and Women in Cross-Gender Careers*, in *THE PSYCHOLOGY OF SEX, GENDER, AND JOBS: ISSUES AND SOLUTIONS* 47 (Louis Diamant & Jo Ann Lee eds., 2002) (citing Patricia MacCorquodale & Gary Jensen, *Women in the Law: Partners or Tokens?*, 7 *GENDER & SOC’Y*, 582, 582–93 (1993)). See also *id.* at 50 (citing Bryna Bogoch, *Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction*, 31 *LAW & SOC’Y REV.* 677, 677–712 (1997)).

200. *Id.*

201. *Id.* (citing Bogoch, *supra* note 199, at 677–712). This study focused on the dominance expressed in male and female speech patterns. *Id.*

202. Furr, *supra* note 199, at 50–51.

problems of sexual harassment before the harassment reaches the level of severity actionable under Title VII.<sup>203</sup>

## 2. *Influence on Society*

An interesting Saint Louis University Law Journal comment reads, "Little girls grow up believing they can do anything. However, do we want to tell those same young girls that they can grow up to do anything they choose, yet they cannot complain about harassment . . . ?"<sup>204</sup> This statement questions the values that society is teaching children about sexual harassment and gender; specifically, it suggests what society teaches little girls about entering into workplaces that are traditionally male oriented.<sup>205</sup> Often children are told that they can grow up to be anything and to "dream big." The current state of the law begs the question: is there equal opportunity for our future generations to "dream big" and to do so without the reality of sexual harassment?

Sociocultural theory suggests that sexual harassment is a reflection of the "differential distribution of power and status" between men and women in society.<sup>206</sup> Generally, sexual harassment is used as a mechanism for maintaining male dominance over women in the workplace and in society.<sup>207</sup> This view supports the notion that "society rewards males for assertive and aggressive sexual behavior and rewards women for being acquiescent, compliant, and passive."<sup>208</sup> Psychologists hypothesize that the power struggle existing between the sexes is one of the most important determinants of societal attitudes regarding gender stereotypes and sex discrimination.<sup>209</sup> Stereotypical, psychological assumptions based on gender create sex stereotypes in society that spill over into the workplace and ultimately result in males being the preferred sex in employment contexts.<sup>210</sup> If sexual harassment law reduced workplace sex stereotyping by providing equal opportunity to women, the occurrence of societal stereotyping would be minimized. On the other hand, if society refused to embrace sex stereotypes, sexual discrimination and harassment in the workplace would be minimized. It is

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203. See generally U.S.E.E.O.C., *supra* note 181.

204. Emily E. Rushing, Comment, *So Much for Equality in the Workplace: The Ever-Changing Standards For Sexual Harassment Claims Under Title VII*, 45 ST. LOUIS U. L.J. 1389, 1409 (2001).

205. *Id.*

206. GUTEK, *supra* note 180, at 14 (citing Sandra S. Tangri, Martha R. Burt & Leonor B. Johnson, *Sexual Harassment at Work: Three Explanatory Models*, 38 J. OF SOC. ISSUES 33 (1982)).

207. *Id.* at 14–15.

208. *Id.* at 15.

209. Glick & Fiske, *supra* note 191, at 159.

210. *Id.* at 170.

unclear whether society is creating the spillover or inadequate equal opportunity and ineffective sexual harassment law is prolonging the problem.

Yet, sexual harassment persists and its victims are left with inadequate remedies. Twenty percent of victims of sexual harassment are hesitant to take formal action, because they "[do] not think anything [will] be done."<sup>211</sup> Unremedied sexual harassment leaves members of society with serious issues, such as emotional and physical problems, to resolve at their own cost.<sup>212</sup> For example, lowered self-esteem can result from a targeted employee feeling as if his or her physical qualities may have been the basis for hiring or promotion rather than his or her work capabilities and achievements.<sup>213</sup> The psychological effects of sexual harassment vary depending on the severity of the harassment but include: anger, fear, depression, anxiety, helplessness, and vulnerability.<sup>214</sup> If untreated, the psychological effects can lead to "[a]nxiety disorders including panic disorder and generalized anxiety disorder; somatoform disorders, various forms of depression, and [even] post traumatic stress disorder."<sup>215</sup> Furthermore, physical symptoms may result from sexual harassment such as digestive and appetite disorders, sleep problems, headaches, and uncontrollable crying spells.<sup>216</sup>

As previously mentioned, victims of sex discrimination are often reluctant to take action; one reason is that the cost of litigation is high and the probability of success is low.<sup>217</sup> Discrimination lawsuits also frequently restrict personal relationships and resources and may continue for years at a time, costing thousands of dollars.<sup>218</sup> Another reason for this reluctance is that people do not like to be portrayed as victims because "it erodes their sense of control and self-esteem and involves the unpleasantness of identifying a perpetrator."<sup>219</sup> To summarize, unremedied sexual harassment detrimentally impacts society and leaves victims physically and psychologically impaired without compensation or rehabilitation.

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211. USMSPB, *supra* note 116, at 35 & tbl.11. This table shows the reasons why victims chose not to take formal action in response to unwanted sexual attention in 1994. *Id.*

212. *Cf.* BEINER, *supra* note 4, at 186–87.

213. *Id.* at 186.

214. *Id.* at 187 (citing Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 30 (1993)).

215. *Id.* (citing Jane Goodman-Delahunty & William E. Foote, *Compensation for Pain, Suffering, and Other Psychological Injuries: The Impact of Daubert on Employment Discrimination Claims*, 13 BEHAV. SCI. & L. 183, 195 (1995)).

216. *Id.*

217. Rhode & Williams, *supra* note 193, at 243–44. A national survey revealed that "of those who reported unfair treatment in the workplace, about a third did nothing." *Id.*

218. *Id.* at 244.

219. *Id.* at 243.

Victims are thus forced to choose between seeking costly legal redress that will likely be unsuccessful, continuing to work in a hostile environment, or resigning from their employment. The right to work in an environment free from harassment and to have the harassment remedied if it does occur are both underlying purposes of Title VII.<sup>220</sup> Overturning jury verdicts as a matter of law obstructs the statute's purposes from being effectuated and requires reformation of the judicial management of Title VII cases.<sup>221</sup>

### III. PROPOSAL

Over ninety percent of employment discrimination claims are settled before trial.<sup>222</sup> Courts use the procedural motions of summary judgment and judgment as a matter of law as a means to resist trial on the merits and to manipulate the outcome of Title VII claims.<sup>223</sup> Judgments as a matter of law can be a helpful procedural device for the judiciary, but the application of this device can become problematic when it is inappropriately applied or applied in questionably close cases.<sup>224</sup> Different theories have been proposed to explain the trend of granting summary judgment and overturning verdicts as a matter of law.<sup>225</sup> The theories that have been proposed are as follows: judicial hostility towards employment discrimination plaintiffs, judicial disbelief that sexual discrimination causes an actionable injury, judicial belief that a certain amount of sex discrimination and harassment are acceptable in the workplace, judicial mistrust of juries, the fear of reduced judicial efficiency or overloaded court dockets, and lastly, the possibility that employers have more financial assistance to provide more aggressive litigation tactics than a targeted employee.<sup>226</sup> Regardless of what the underlying reason may be for the judicial restraint exercised in Title VII cases, the fact is that few Title VII plaintiffs ever get their day in court.<sup>227</sup>

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220. See 29 C.F.R. § 1608.1 (2008).

221. See BEINER, *supra* note 4, at 180; see also *infra* Parts III.A & B which provide proposals for reformation.

222. Beiner, *supra* note 7, at 96 (citing *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997)).

223. See generally Beiner, *supra* note 7, at 71; see also Medina, *supra* note 4, at 311.

224. See Medina, *supra* note 5, at 316. Medina finds that excessive use of summary judgment to minimize litigation costs and to prevent meritless claims is unnecessary because procedural safeguards already exist under Title VII. *Id.* These safeguards—the EEOC procedural requirements, the Federal Rules of Civil Procedure 11 and 12, and the restraint of capped damages created by the Civil Rights Act of 1991—are sufficient to eject frivolous claims of harassment. *Id.* See generally Beiner, *supra* note 7, at 71.

225. Medina, *supra* note 5, at 315–16, 337–38; see also Beiner, *supra* note 5, at 807.

226. Medina, *supra* note 5, at 315–16, 337–38; see also Miller, *supra* note 72, at 1046.

227. See United States Equal Employment Opportunity Commission, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 - FY 2008*, available at

The result of keeping sexual harassment and discrimination cases from a jury determination is that targets of sexual harassment and discrimination are unjustifiably left without a remedy.<sup>228</sup>

Since the enactment of Title VII, the standard of actionable legal harassment has evolved in the court system.<sup>229</sup> Courts currently evade the severe or pervasive standard and the totality of the circumstances test by overturning jury verdicts on appeal.<sup>230</sup> First, this section proposes that future courts should refuse to overturn jury verdicts as a matter of law under the reasonable person standard because juries are reasonable people and the procedure is constitutionally questionable.<sup>231</sup> Second, this section proposes that the overturning of jury verdicts and the disparate treatment of sexual harassment cases by the judiciary could be reduced if *Duncan* cases were reversed,<sup>232</sup> judges were required to attend legal education courses on sexual harassment,<sup>233</sup> more female judges were appointed,<sup>234</sup> and additional federal legislation and regulations were enacted.<sup>235</sup>

#### A. Discontinue Overturning Jury Verdicts as a Matter of Law

Overturning a jury verdict for a plaintiff is the most severe judicial invasion of the totality of the circumstances test, because a jury has already decided, using the same test, that the misconduct did create a hostile environment.<sup>236</sup> This reversal is problematic in the context of sexual harassment cases because the test employs a reasonable person standard. In addition, the standard under the totality of the circumstances test is both objective and subjective, which makes it difficult for an appellate judge to determine an employee's perception of the work environment from the trial record alone.<sup>237</sup> When judicial intervention results in a jury's verdict being over-

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<http://www.eeoc.gov/stats/harass.html>. (In 2008, there were 13,867 receipts of sexual harassment claims, but only 3395 merit resolutions).

228. BEINER, *supra* note 4, at 20. Studies have shown that Title VII plaintiffs "fare better before juries than judges." *Id.* In addition, the mere fact that juries have found for the plaintiff and judges on appeal have subsequently reversed the verdict suggests that juries are more pro-plaintiff than judges.

229. *Cf.* Burke, *supra* note 10, at 591.

230. *See infra* Part III.A.1.

231. *See infra* Part III.A.1-2.

232. *See infra* Part III.B.1.

233. *See infra* Part III.B.2.

234. *See infra* Part III.B.3.

235. *See infra* Part III.B.4.

236. *See supra* Part I and notes 4-8. Juries should create the reasonable person standard because juries are the "better gauge of community and national norms" rather than Article III judges, because they are the actual participants in the workforce. *See* Medina, *supra* note 5, at 317.

237. BEINER, *supra* note 4, at 102.

turned, many different issues arise. This section will first discuss the judiciary's possible misidentification of the reasonable person as a judge instead of the jury. Next, this section will reveal how overturning jury verdicts as a matter of law creates fundamental constitutional issues.

1. *The Duncan Problem*<sup>238</sup> and *Misidentification of the Reasonable Person*

A study of the United States Courts of Appeals revealed that in most Title VII cases courts did not mention the reasonable person standard when analyzing the severe or pervasive element.<sup>239</sup> Reasonable people, in the form of juries, have found conduct such as the alleged harassment in *Duncan* to be severe or pervasive; yet judges reverse these verdicts, holding that such harassing behavior is not severe or pervasive enough to be legally actionable.<sup>240</sup> In *Duncan* the appellate court reasoned, “[A]s a matter of law, she has failed to show that these occurrences in the aggregate were so severe and extreme that a reasonable person would find that the terms or conditions of Duncan’s employment had been altered.”<sup>241</sup> Both this statement and the court’s holding—overturning the jury verdict as a matter of law—propose that no reasonable jury could find the behavior severe or pervasive under the applicable standard.<sup>242</sup> The court’s finding is illogical because twelve jurors previously decided that the conduct was severe or pervasive under the totality of the circumstances test. The court in *Duncan* wrongly overturned the jury’s verdict.

The *Duncan* problem is the most extreme form of judicial disregard of the totality of the circumstances test.<sup>243</sup> When a judge overturns a jury ver-

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238. “The *Duncan* problem” is a term that will be used here to illustrate the issue of judges overturning jury verdicts as a matter of law in Title VII cases; it not only refers to *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002), but also to any appellate case in which the jury has found for the plaintiff under the totality of the circumstances test and a judge subsequently overturns the verdict as a matter of law.

239. Beiner, *supra* note 5, at 808 (citing Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 584–85 (2001)). Professor Beiner finds that the results of this study are “odd given Supreme Court precedent.” *Id.* The Juliano & Schwab study also found that pretrial motion in sexual harassment cases were increasingly being used to dispose of cases. *Id.*

240. See, e.g., *Tatum v. Ark. Dep’t of Health*, 411 F.3d 955, 958 (8th Cir. 2005). See also *supra* Part II.C.2. *Duncan* will be referenced many times in this section of the note because it is a primary example of a court evading the totality of the circumstances test. *Duncan v. Gen. Motors Corp.*, 300 F.3d 928 (8th Cir. 2002).

241. *Duncan*, 300 F.3d at 934.

242. See *id.* at 936. This citation directs the reader to the holding of *Duncan*; the court obviously did not state that its own holding was illogical. My conclusion demonstrates how courts are misidentifying the reasonable person in Title VII cases like *Duncan*.

243. See *supra* notes 4–8 for examples of the other types of judicial disregard of the



dict as a matter of law in a Title VII case based on sex, the judge is holding that the jury was wrong as a matter of law. Essentially, the judge who overturns the jury's verdict is deciding that the twelve members of the jury—who heard the live testimony and determined that the facts of the case supported the cause of action—were unreasonable. Therefore, the judge or the appellate panel asserts that they are the “reasonable person”—not the jurors. Moreover, in *Duncan* the trial judge who heard the live testimony did not overturn the jury's verdict, which implies that the appellate court is suggesting that both the trial judge and the jury assessed the evidence improperly.

In addition to disregarding the jurors' assessment of the facts, the *Duncan* problem creates faulty precedent for later courts to follow.<sup>244</sup> Faulty precedent is created when a court employs one or more of the previously mentioned devices<sup>245</sup> to evade the totality of the circumstances test—consequently, creating a line of dubious precedent in a circuit. To explain, *Duncan* allows courts to grant summary judgment motions for employers under the severe or pervasive standard in questionable cases. This judicial intervention that occurs before a jury gets the case also results in misapplication of the totality of the circumstances test.

*Duncan* is a key example of the judiciary evading the totality of the circumstances test.<sup>246</sup> First, the court minimized the severity of the misconduct by characterizing the conduct as “a single request for a relationship, . . . four or five isolated incidents of [a coworker] briefly touching her hand, a request to draw a planter, and teasing,” thus omitting the charity arrest and the hostility *Duncan* experienced.<sup>247</sup> In addition, *Duncan* dismissed the Su-

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totality of the circumstances test.

244. Cf. BEINER, *supra* note 4, at 21. Professor Beiner discusses the creation of faulty precedent finding that the “[s]ubsequent courts will use one extremely close case to justify summary disposition in succeeding close cases in the same circuit, thereby expanding that case's reach.” *Id.* The Shepard's Report of *Duncan* reveals that faulty precedent will also be created in other circuits. See Shepard's Report, *supra* note 143.

245. See *supra* notes 4–8.

246. Shepard's Report, *supra* note 143. Furthermore, another illustration of the backlash that *Duncan* created is *Tatum v. Ark. Dep't of Health*, 411 F.3d 955 (8th Cir. 2005). See also *supra* Part II.C (discussing the facts of *Tatum*). Comparable to *Duncan*, in *Tatum*, the district court deprived *Tatum* of justice—overturning the jury's verdict as a matter of law and evading the totality of the circumstances test by: (1) misinterpreting “severe or pervasive” as “severe and pervasive”; and (2) reversing the verdict for *Tatum*. *Id.* at 958 (emphasis added). In order to prevent the undermining of a plaintiff's right to trial, “if reasonable minds could differ regarding the interpretation of important evidence,” a motion for summary judgment, directed verdict, or judgment as a matter of law should fail. Miller, *supra* note 72, at 1036–37. The district court should not have granted the employer's motion for judgment as a matter of law because a reasonable jury already found for *Tatum*; the motion should have failed.

247. Keller & Tracy, *supra* note 6, at 269 (citing *Duncan*, 300 F.3d at 935). Keller and Tracy state:

The dissent skillfully identified some of these shortcomings of the majority opinion's disposition of this case. Judge Arnold found the jury's determination rea-

preme Court's directive and misconstrued the intent of *Harris* by quoting only a narrow portion of the dicta from the case.<sup>248</sup> Finally, the court cited *Baskerville v. Culligan International, Co.*, an extremely deplorable case, to reduce the appearance of severity.<sup>249</sup> After carefully analyzing the steps that the court used to evaluate the facts of *Duncan*, it is apparent that the legal standard applied by the court was not the same totality of the circumstances test that the Supreme Court envisioned.<sup>250</sup> The fact that the case could be considered a close call should have signaled to the Court that the jury should have decided the case and that judgment as a matter of law was inappropriate.<sup>251</sup> In addition to disregarding Supreme Court directives concerning the totality of the circumstances test, overturning jury verdicts as a matter of law under a reasonable person standard raises constitutional concerns.

## 2. *Constitutional Issues Arising from Misusing Judgment as a Matter of Law*

Courts inappropriately grant judgments as a matter of law in the context of hostile environment claims. The use of this procedural tool is, arguably, an encroachment on the plaintiff's constitutional rights—specifically, the plaintiff's right to a jury trial, the right to have his or her day in court, and the right to an impartial fact finder.<sup>252</sup> Before analyzing the constitu-

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sonable and supported by ample evidence; throughout his discussion he recognized appropriate inferences that the jury could have drawn to support its verdict, and noted, quoting circuit precedent, that because there "is no bright line between sexual harassment and merely unpleasant conduct, . . . a jury's decision must generally stand unless there is trial error."

*Id.* (citing *Duncan*, 300 F.3d at 936–38).

248. See *Duncan*, 300 F.3d at 934. *Duncan* cites the rule from *Harris*, stating, "To clear the high threshold of actionable harm, *Duncan* has to show that 'the workplace is permeated with discriminatory intimidation, ridicule, and insult.'" *Id.* (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993)). This single quote of dicta from *Harris* allowed the *Duncan* court to manipulate the Supreme Court Justice's instructions regarding the totality of the circumstances test. See also *supra* Part II. In Part II of this note, the overall implication and the Supreme Court's intention for the actionable level of harassment were provided.

249. See *Duncan*, 300 F.3d at 934 (citing *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995)). In *Baskerville*, the court found that sexual misconduct occurring over a seven month period was not actionable because it did not make the workplace "hellish." *Baskerville*, 50 F.3d at 430. Arguably, the court misapplied the severe or pervasive standard, implementing a hellish standard—a standard the Supreme Court never even referenced, let alone adopted.

250. See, e.g., 29 C.F.R. § 1608.1(b) (2008); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

251. Cf. *Miller*, *supra* note 72, at 1067.

252. See *supra* Part II.C. See also *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981) (citing *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3d Cir. 1965)). See *Miller*, *supra* note 72,

tional considerations, one must recognize that most sexual harassment claims consist of conflicting recollections of alleged misconduct. Thus, it is reasonable to conclude that the question—whether an environment is severe or pervasive—requires many factual issues to be decided by the fact finder in order for either party to prevail.

To begin the analysis, judgment as a matter of law after trial is theoretically not an infringement on a litigant's constitutional rights, because a plaintiff supposedly has had his or her day in court. The case will not be taken from the jury unless the court finds—as a matter of law—that only one reasonable verdict was possible.<sup>253</sup> Arguably, this is why overturning jury verdicts in hostile environment cases under the severe or pervasive standard constitutes a constitutional violation. Cases like *Duncan*—where the jury has found that the misconduct was sufficiently severe or pervasive as to violate Title VII—suggest that the verdict for the plaintiff was not unreasonable. As a matter of fact, more than twelve reasonable people—the jury, the plaintiff's lawyer, the target of the harassment, and the trial judge—all agreed under a reasonable person standard that the verdict should be for the plaintiff. Therefore, in Title VII cases such as *Duncan*, appellate courts should rarely hold the jury verdict unreasonable as a matter of law.<sup>254</sup>

Furthermore, as evidenced through social science research, people generally agree about what types of misconduct are severe or pervasive enough as to be considered sexual harassment, and their judgments tracked the legal standard of severe or pervasive. Therefore, jury verdicts finding that actionable harassment occurred are reasonable and should not be overturned as a matter of law.<sup>255</sup> If verdicts in cases like *Duncan* are reasonable, then the courts have taken away a Title VII plaintiff's day in court by reversing the jury verdict as a matter of law. This amounts to a constitutional violation.

Courts should not use judgment as a matter of law to determine whether a jury correctly assessed the severity or pervasiveness of the alleged ha-

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at 1061–62, 1071. Similarly, Federal Rule of Civil Procedure 38 is consistent with the constitutional requirements of a plaintiff's rights to a day in court, stating, “[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.” FED. R. CIV. P. 38.

253. Miller, *supra* note 72, at 1090–91. Professor Miller concludes that under Rule 50(a) a party's rights to a day in court and resolution by jury were not compromised if the directed verdict (judgment as a matter of law) “only deprived the losing party of the possibility of an unreasonable verdict.” *Id.* at 1091.

254. See, e.g., BEINER, *supra* note 4, at 30; Keller & Tracy, *supra* note 6. See generally *Duncan*, 300 F.3d 928 (8th Cir. 2002). Additionally, the *Duncan* holding has been criticized by many scholars for its application of judgment as a matter of law finding that the conduct was not severe or pervasive.

255. See USMSPB, *supra* note 116, at 7, tbl.1.

rassment because it is the jury's duty to determine the facts.<sup>256</sup> The right to a jury trial is a substantive right, and courts should not trespass on this right unless a jury's verdict is not supported by real evidence.<sup>257</sup> Under the severe or pervasive standard, the jury determines whether they believe the plaintiff's or the defendant's version of the facts; therefore, the issue is a determination of facts under the applicable legal standard, and courts should leave it to the jury to decide. Conversely, judgment as a matter of law after a jury has rendered its verdict is appropriate in Title VII cases only if the jury "misinterpreted the instructions as to the rules of law, misapplied them . . . [or] when it appears that there was no real evidence in support of any essential fact."<sup>258</sup> In summary, juries should be permitted to decide whether the misconduct in any given case is sufficiently severe or pervasive to a reasonable person to be actionable because the function of juries is to draw inferences for either party when one or more facts are in dispute.<sup>259</sup>

Further, judges should not undermine the safeguards that the jury provides to litigants by reversing jury verdicts as a matter of law in Title VII cases. Frequent use of judgment as a matter of law "threatens longstanding constitutional values"; therefore, courts should defer to the use of jury trial.<sup>260</sup> Furthermore, "[t]o honor the rights to a day in court and to jury trial . . . judgment as a matter of law . . . [should] be closely scrutinized and constricted since the safety valve of an opportunity to present one's case in a complete and live format is absent. . . ."<sup>261</sup> Thus, courts should not overturn Title VII cases on the basis that the alleged harassment was not severe or pervasive because if a jury has found that the alleged harassment was severe or pervasive, then the court would be undermining the role of the jury.<sup>262</sup> There is a constitutional guarantee that requires that a "court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact."<sup>263</sup> A court should not question a Title VII plaintiff's credibility or the severity of the alleged harassment after a jury who witnessed the live testimony has already decided the matter.

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256. *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 378-79 (1913).

257. *Id.* at 378. "[The Seventh Amendment's] aim is not to preserve mere matters of form and procedure, but substance of right." *Id.* (quoting *Walker v. New Mexico & S.P.R. Co.*, 165 U.S. 593, 596 (1897)).

258. *Id.* at 379.

259. *Cf.* *Miller*, *supra* note 72, at 1091-92.

260. *Id.* at 1093.

261. *Id.* at 1133.

262. *Cf.* *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 380 (1913) (stating that if the "circuit court of appeals itself determined the facts, without a new trial . . . it assumed a power it did not possess, and cut off the plaintiff's right to have the facts settled by the verdict of a jury.>").

263. *Id.* at 387-88.

Another constitutional issue that arises in overturning jury verdicts as a matter of law in Title VII cases is the due process right to an impartial fact finder.<sup>264</sup> The fact that there may be some judicial hostility towards Title VII plaintiffs makes the impartiality of at least some judges questionable.<sup>265</sup> If judges are permitting sexual harassment in their courtroom, or even more outrageously, participating in some of the misconduct, they are not impartial adjudicators in sexual harassment cases.<sup>266</sup> This judicial hostility theory was proved true in *Catchpole v. Brannon*.<sup>267</sup> The apparent judicial hostility towards Title VII cases suggests that the current judicial treatment of sex discrimination cases infringes on the right to a jury trial guaranteed by the Seventh Amendment.<sup>268</sup> Thus, cases in which the jury finds for the plaintiff but a judge or appellate panel subsequently overturns the verdict are highly suspicious. This type of *Duncan* problem must be addressed by the judiciary.

#### B. Possible Solutions to Decrease Judicial Restraint in Title VII Cases

The current judicial treatment of Title VII cases not only leaves victims of harassment to deal with the effects of harassment by themselves but also exacerbates the existing problems that sexual harassment causes in the workplace and society.<sup>269</sup> In order to reform the current standard of judicial intervention that leads to overturning of jury verdicts as a matter of law, change must occur. The following section proposes judicial and legislative modifications that may help prevent and reduce the *Duncan* problem. This section first proposes that *Duncan* cases should be reversed and that, except in rare cases, jury verdicts should be allowed to stand. Second, this section discusses the benefits of continuing judicial education concerning current sexual harassment issues. Next, this section suggests that appointing more female judges may help remedy the *Duncan* problem. Lastly, this section concludes by proposing that Title VII and the EEOC regulations and procedures should be amended.

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264. See U.S. CONST. amend. V–VI. See also *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981) (quoting *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3d Cir. 1965) (finding that “the right to an impartial jury in civil cases is inherent in the Seventh Amendment’s preservation of a ‘right to trial by jury’ and the Fifth Amendment’s guarantee that ‘no person shall be denied of life, liberty or property without due process of law’”)).

265. See *supra* Part II.C.1.

266. *Supra* Part II.C.1.

267. See 36 Cal. App. 4th 237 (Cal. Ct. App. 1995). This case was previously discussed in Part II.C.1.

268. See *supra* Part II.C.1.

269. See *supra* Part II.D.1.

### 1. *Reverse Duncan Cases & Let the Jury Verdict Stand*

The immediate solution to the *Duncan* problem would be to reverse *Duncan* and its progeny, and let the jury verdicts stand. This solution seems simple, but the costs involved for the plaintiff to continue to win on appeal may render this solution unlikely.<sup>270</sup> If wealthy defendants—likely corporations—continue to appeal Title VII verdicts, the likelihood that a working class employee could continue to financially support the litigation is doubtful. Absent extreme circumstances, the jury verdict should be the final verdict in Title VII cases that are being appealed on the severe or pervasive standard because juries provide the best representation of community norms.<sup>271</sup> Letting jury verdicts stand would prevent personal judicial viewpoints from influencing the reasonable person standard.<sup>272</sup> Moreover, letting jury verdicts stand would likely better comport with the social science research that finds that people perceive sexual harassment to encompass a broader scope of misconduct than does the judiciary.<sup>273</sup>

Another reason courts should not overturn jury verdicts on appeal is that research shows that people are concerned with procedural justice.<sup>274</sup> In order to ensure that society does not lose faith in the justice system or the ability to affect the legal process, judges should not undermine jury verdicts in Title VII cases under the reasonable person standard. The message conveyed to members of society by this constitutionally questionable procedural device is that they are not reasonable. This type of message may result in

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270. In addition to paying fees for their own legal representation, a Title VII plaintiff who does not prevail may even be required to pay the prevailing defendant's costs. See FARRELL ET AL., 21A FEDERAL PROCEDURE, LAWYER'S EDITION § 50:1214 (2008) (finding that most courts presumptively hold that a Title VII defendant is entitled to costs). Moreover, a plaintiff might incur indirect financial costs from engaging in litigation, such as time off work, child care, attorney's fees, etc. See also Theodore Eisenberg & Steward J. Schwab, *Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Court of Appeals* at 1, <http://www.findjustice.com/sub/civil-justice.jsp> (follow "Eisenberg-Schwab Report" hyperlink). This study reports that plaintiffs only win on appeal in 5.8% of cases. *Id.* On the contrary, defendants win on appeal almost half of the time. *Id.* These statistics may deter plaintiffs from pursuing an appeal due to the risk of loss involved.

271. See BEINER, *supra* note 4, at 30.

272. See *id.* Letting the juries decide would also help employers. *Id.* To explain, if these hostile environment cases were allowed to go to the jury (thus, developing a community standard), employers would be able to better assess employee complaints and prevent offensive behaviors. *Id.*

273. See *id.*; cf. USMSPB, *supra* note 116, at 7 tbl.1.

274. Susan Bisom-Rapp, Margaret S. Stockdale & Faye J. Crosby, *A Critical Look at Organizational Responses to and Remedies for Sex Discrimination*, in SEX DISCRIMINATION IN THE WORKPLACE 273, 278 (Faye J. Crosby, Margaret S. Stockdale, & S. Ann Ropp eds., 2007). The studies conducted found that although "well-intentioned policies and procedures" seemed nondiscriminatory, in actuality, these "fair-looking procedures" prolonged discrimination. *Id.*

a loss of faith in the legal system, which could cause an array of problems.<sup>275</sup>

Reversing cases that cause the *Duncan* problem would result in correct interpretation of Supreme Court precedent.<sup>276</sup> Professor Theresa Beiner argues that small steps work best for accomplishing long lasting change.<sup>277</sup> Besides promoting procedural justice and community norms, reversing *Duncan* cases would set better precedent and prevent further judicial misapplication of the totality of the circumstances test.<sup>278</sup> Reversing *Duncan* cases will not be an easy feat, but it would be a small step in the right direction.

## 2. *Continuing Legal Education for Judges*

One solution to bridge the gap between what judges and the common worker find to be sexual harassment is to require judges to attend continuing legal education courses that focus on current legal barriers and social science research. If judges used social science research, the severe or pervasive standard would develop into a true reasonable person standard rather than the personalized standard of a judge or judges.<sup>279</sup> Continuing education for judges may prove beneficial to Title VII plaintiffs and may help to provide more consistent judicial decisions regarding what type of misconduct meets the severe or pervasive standard. Additionally, this continuing education for judges may also bring the judicial restraint problem to judges' attention, which may help reduce the frequency of its occurrence.

## 3. *Appoint More Female Judges*

An increase in the number of female judges would likely reduce the occurrence of the *Duncan* problem. The current lack of female judges may encourage the oppression of women in and out of the court room.<sup>280</sup> In the past, courts have analyzed the question of who is the reasonable person—

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275. *Cf. id.* at 276. The types of problems that may result from such lack of faith in the legal process are: a further resistance to report meritorious sexual harassment claims which would result in even more unremedied victims; victims taking justice into their own hands for lack of a legal remedy; and possible disregard and disdain for the laws and the legal system.

276. *See supra* Part II.C.

277. BEINER, *supra* note 4, at 40. Professor Beiner finds that “[a]bsent a sweeping reconceptualization of sexual harassment by the courts, small steps tend to provide the best hope of affecting actual results in real cases.” *Id.*

278. *Cf. id.* at 28–29.

279. *Id.* at 30, 40–45. Social science research “provide[s] information that supports the majority position and helps substantiate the reactions of most workers.” *Id.*

280. *Cf. BEINER, supra* note 4, at 30.

the reasonable man, woman, or victim.<sup>281</sup> In *Oncala v. Sundowner Offshore Services, Inc.*, the Supreme Court directed the courts to use the reasonable person standard, considering all the circumstances in a subjective and objective manner.<sup>282</sup> The problem with applying the reasonable person standard in Title VII cases is that these cases are not proceeding past summary judgment, or if they do, they are being overturned by judicial panels as a matter of law on appeal.<sup>283</sup> Therefore, logistically the reasonable person in a Title VII case is a judge or the appellate panel.<sup>284</sup> The problem with a judge or panel acting as the reasonable person is that the objective viewpoint becomes that of the judge.<sup>285</sup>

Because the majority of judges are male,<sup>286</sup> the objective viewpoint generally becomes narrowed to a man's viewpoint. To illustrate this concept, research indicates that women experience harassment twelve times more frequently than men and that the problem is "a far more serious problem for women than for men."<sup>287</sup> Logically, if a woman is more likely to experience sexual harassment, it is more likely that a female judge will be able to better perceive—drawing from personal experiences—what level of harassment is severe or pervasive to a woman.<sup>288</sup>

Additionally, women judges may render different judgments in analyzing the severe or pervasive standard, because women typically identify more behavior to be sexual harassment than men.<sup>289</sup> For example, Judge Posner, in *Baskerville v. Culligan International Company*, found that the harassing behavior was not severe or pervasive explaining:

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281. *See id.* at 47–49. *See also* David Schultz, *From Reasonable Man to Unreasonable Victim?: Assessing Harris v. Forklift Systems and Shifting Standards of Proof and Perspective in Title VII Sexual Harassment Law*, 27 SUFFOLK U. L. REV. 717 (1993) (analyzing the different criticisms that emerged from applying the reasonable women or victim standard versus the reasonable person standard). Professor Schultz asks the problematic question, "How c[an] male juries or judges truly . . . know what offends a reasonable woman?" *Id.* at 739; *see also* Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law—Will it Really Make a Difference?*, 26 IND. L. REV. 227 (1993).

282. 523 U.S. 75, 81 (1998).

283. *See* BEINER, *supra* note 4, at 30.

284. *Id.*

285. *Id.*

286. *Id.* at 30, 36–41.

287. STEPHEN J. SCHULOFER, UNWANTED SEX, THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 172–73 (Harvard University Press) (1998).

288. BEINER, *supra* note 4, at 56 (citing Elizabeth L. Shoenfelt et al., *Reasonable Person versus Reasonable Women: Does It Matter?*, 10 AM. U.J. GENDER SOC. POL'Y & L. 666 (2002)). Studies show that females are better than males at understanding the perspectives of others. *Id.*

289. *Id.* at 55 (citing Richard L. Wiener, *Social Analytic Jurisprudence in Sexual Harassment Litigation: The Role of Social Framework and Social Fact*, 51.1 J. SOC. ISSUES 167, Spring 1995, at 167, 169 (detailing studies) (citations omitted)).



It is no doubt *distasteful to a sensitive woman* to have such a *silly man* as one's boss, but only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the manager's] patter substantially more distressing than heat and cigarette smoke of which the plaintiff does not complain.<sup>290</sup>

The result of *Baskerville* arguably may have been different if the judge was female rather than male. It is unlikely that a female judge would have analyzed the facts in the same manner even if she found there to be no violation of Title VII. As previously discussed, women typically experience more sexual harassment than men; therefore, a female judge would more likely understand how a female plaintiff perceived the defendant's behavior in any given case. Further, Judge Posner's determination that only a hypersensitive woman would find the defendant's behavior distressing may not be an accurate description of how women actually feel.

It is logical to conclude that if women identify a broader range of conduct as harassment that a female judge will interpret the severe or pervasive standard more broadly than a male judge. It is probable that a broader interpretation of the standard would favor affirming jury verdicts rather than overturning them as a matter of law. Appointing more female judges may reduce the amount of judicial restraint practiced in Title VII cases.

#### 4. *Enact Additional Federal Legislation & Supplement the EEOC Regulations*

Although women have made progress in the workplace, “[i]t has been four decades since passage of legislation guaranteeing equal pay and equal employment opportunity . . . and the nation is nowhere close to achieving either.”<sup>291</sup> In order to remedy the continuing inequalities that persist in the workplace and diminish the incidents of sexual harassment, the legislative and EEOC provisions need to be amended.<sup>292</sup>

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290. 50 F.3d 428, 431 (7th Cir. 1994) (emphasis added). In *Baskerville*, the plaintiff was bothered over a seven month period by her regional manager, who made “um um um” noises at her, constantly called her pretty girl, and on one occasion made masturbation gestures. *Id.* at 430. Simply put, a female judge may have found that just because the defendant did not expose himself, show her dirty pictures, or explicitly ask her for a date or sexual relationship did not mean that his language and gestures alone were not actionable under Title VII's severe or pervasive standard. *Cf. id.*

291. Rhode & Williams, *supra* note 193, at 235.

292. One possible speculation to be made is that the legislature has not been predominantly concerned with remedying sexual harassment because of the male dominance that exists historically in Government leadership. *Id.* at 240. Note that “[w]omen comprise over half of the voting public, but only 16% of their congressional representatives and governors and 20% of their state legislators.” *Id.* “The United States ranks sixty-sixth in the world in

New legislation is needed to increase accountability. Social science research has established that when accountability is increased for the fairness of decision making, bias is reduced.<sup>293</sup> Requiring employers to report their employee selection procedure reduces bias because it increases accountability. Clearly, an employer will be less likely to make employment decisions based on sex if he knows that he will have to account for his discriminatory decision making. The law should require employers to provide information on their employees' race, ethnicity, and sex—specifically, information relating to recruitment, hiring, promotion, and retention.<sup>294</sup> By requiring such reporting, accountability would increase and the effectiveness of equal opportunity programs could be more accurately determined.<sup>295</sup> If this increased accountability made equal opportunity programs more effective and reduced bias, sexual harassment could be reduced as well. Generally, if the frequency of sexual harassment decreased, the amount of Title VII litigation would decrease, and the *Duncan* problem would no longer be an issue.

One reason that employers are deterred from collecting this type of employment information is that it could be particularly useful to plaintiffs if a subsequent discrimination suit were to arise.<sup>296</sup> Unquestionably, if an employer were sued for sex discrimination or harassment, past collected employment information would strengthen a plaintiff's allegations if the data showed discriminatory impact. New legislation requiring that the data be disclosed before a Title VII violation is alleged would diminish the problems associated with reporting because it would create a legal obligation.<sup>297</sup> In addition, a safeguard could be created by courts and legislatures that would demand the reported data remain confidential.<sup>298</sup> A confidentiality requirement would insulate employers from the risk of having the information used against them in court, but it would also cultivate greater knowledge of ongoing sex discrimination in the workplace.<sup>299</sup> Some bar associations have initiatives, such as the "No Glass Ceiling Initiatives," which ask law firms to create employment goals providing that women are adequately represented in partnership and leadership positions.<sup>300</sup> Initiatives such as these would promote gender equality in the workplace and would reduce

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electing female political leaders." *Id.*

293. *Id.* at 259.

294. *Id.*

295. *Id.*

296. *Id.*

297. Rhode & Williams, *supra* note 193, at 259.

298. *Id.*

299. *Id.* Authors Deborah Rhode and Joan Williams propose that professional organizations supporting the advocacy of women in employment, such as women's rights groups and certain media groups, could request this information if it was sought to show gender equality. *Id.* at 159–60.

300. *Id.* at 260.

sexual harassment and discrimination because they would help reduce the superior power position of males and level the playing field while requiring accountability of employers.<sup>301</sup> In addition, government accountability for gender equality should be increased.<sup>302</sup>

Moreover, the EEOC policies should be reformed. Professor Linda Hamilton Krieger suggests that the EEOC should amend its guidelines to provide "more vigorous enforcement of existing laws."<sup>303</sup> She also suggests an information sharing system implemented by Congress that would require the federal government to make the information obtained from employers available to the public.<sup>304</sup> Krieger proposes that releasing this information to the public will persuade employers to comply with Title VII.<sup>305</sup> Releasing information would be persuasive because the investing public would no longer support the employer, which would ultimately cause the employer to reform its employment practices.<sup>306</sup> The public currently has no access to this information because under Title VII the EEOC is prohibited from releasing this information.<sup>307</sup> Furthermore, information is not accessible to the public because employers use arbitration agreements containing mandatory confidentiality provisions as a condition of hiring and confidentiality clauses in settlement agreements, and courts issue protective orders during discovery that keep Equal Employment Opportunity compliance information confidential.<sup>308</sup> Krieger's proposals may not prove to be successful, but the suggested modifications are a starting point for the much needed reformation of sexual harassment law.

Another addition that could be made to Title VII is commentary to the statute. Congress could supplement Title VII with extensive case law and illustrative examples to effectively communicate the intended enforcement of the statute.<sup>309</sup> For example, if the Legislature provided extensive examples of the misconduct that constitutes severe or pervasive harassment in differing situations and cited prior cases for explanatory purposes, the trier

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301. *Cf. id.*

302. *Id.*

303. Krieger, *supra* note 198, at 313.

304. *Id.* Krieger lists specific descriptions of the type of information that she would require employers to release to the public through the EEOC, such as the number of sex discrimination charges filed with enforcement agencies and the description of the issue alleged in each complaint. *See id.* at 320 (providing a more extensive list of suggestions).

305. *Id.* at 313–14.

306. *Id.*

307. *Id.* at 315–17.

308. *Id.*

309. Hopefully, this type of addition would be as beneficial to sexual harassment law as the Restatement of Contracts (Second) Commentary is to the analysis of the common law of contracts. The commentary would not be mandatory but would provide links to case citations, which would enable fact finders to more easily follow legislative directives for Title VII.

of fact would have a more concrete standard with which to compare the facts of case at hand. Directive commentary would reduce the occurrence of the *Duncan* problem because it would classify actionable harassment in more distinct categories. Essentially, more distinct categories would prohibit the judiciary from misconstruing the severe or pervasive standard of the totality of the circumstances test.

#### IV. CONCLUSION

This note attempts to provide additional considerations that may reduce the amount of judicial intervention exercised in hostile environment cases. The current standard permits judges to overturn jury verdicts as a matter of law in questionable cases. In order to avoid further consequences in the workplace and society, sexual harassment precedent must be reformed. In Title VII cases, the reversal of a jury verdict as a matter of law is the most severe judicial invasion of the totality of the circumstances test. Equally important, reversing jury verdicts undermines the role of the jury and the effectiveness of Title VII.

In order to enable a true reasonable person standard to evolve, judges need to let jury verdicts stand. Letting jury verdicts stand would help plaintiffs receive compensation and would help to more effectively promote equality in the workplace. In addition to letting the verdict stand, courts should refrain from using the procedural device—judgment as a matter of law—in future Title VII cases. Furthermore, providing judicial educational courses, appointing more female judges, and enacting additional legislation and regulations would significantly reduce the occurrence of the *Duncan* problem. The application of the totality of the circumstances test must be either altered or correctly applied in order to ensure plaintiffs a more just remedy. When courts begin to correctly implement the totality of the circumstances test, the *Duncan* problem will no longer be an issue.

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