EMPLOYMENT LAW—SEXUAL HARASSMENT—TO STATE A VALID CAUSE OF ACTION FOR HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT AGAINST A SUPERVISOR, A FEMALE PLAINTIFF MUST ALLEGE THAT THE HARASSING CONDUCT OCCURRED BECAUSE OF HER SEX, AND THAT A REASONABLE WOMAN IN THE PLAINTIFF'S POSITION WOULD DEEM THE HARASSING CONDUCT TO BE SUFFICIENTLY SEVERE OR PERVASIVE TO ALTER HER EMPLOYMENT CONDITIONS AND CREATE A HOSTILE WORKING ATMOSPHERE; EMPLOYER LIABILITY IS DEPENDENT ON THE TYPE OF DAMAGES SOUGHT—*Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 626 A.2d 445 (1993).

Sexual harassment has been the most dominant workplace issue in the United States in recent years.[1] The visibility of sexual harassment has been fostered by the controversial Hill-Thomas hearings,[2] the Navy "Tailhook" scandal,[3] and recent harassment al-

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[1] *See* Anna Sobkowski, *I've Been Sexually Harassed. How Do I Get Back On Track?*, EXECUTIVE FEMALE, July/Aug. 1993, at 59. Sobkowski noted that sexual harassment has dominated the press more than any other workplace issue in the 1990s. *Id.* Although the public tends to focus its attention on the details of each harassment episode, Sobkowski recognized that there may be a more important concern for sexual harassment victims—"what to do in the aftermath." *Id.*

[2] *See* Monica L. Sherer, *No Longer Just Child's Play: School Liability Under Title IX For Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2119-20 (1993) (stating that American society, due to events such as the Hill-Thomas hearings, has been compelled to confront the issue of workplace sexual harassment); *see also* Stacy J. Cooper, Comment, *Sexual Harassment and the Swedish Bikini Team: A Reevaluation of the "Hostile Environment" Doctrine*, 26 COLUM. J.L. & SOC. PROBS. 387, 387 (1993). Cooper recognized that the October 1991 Thomas hearings were not the first time that the issue of sexual harassment has been heard by the Senate. *Id.* (citation omitted). However, these hearings opened the floodgates to an unprecedented amount of public debate and commentary on the issue. *Id.*

Sexual harassment complaints rose 45% in the year following Anita Hill's allegations against now Supreme Court Justice Clarence Thomas. Claudia MacLachlan, *Harassment Charges Up One Year After Hill*, NAT'L L.J., Oct. 26, 1992, at 7. MacLachlan noted that Hill, by providing women with the knowledge and courage to speak out, has caused this surge of grievances. *Id.* The Equal Employment Opportunity Commission (EEOC) reported 9953 complaints for the year ending October 1, 1992, an increase of 2546 claims from the prior year, which ended immediately before the hearings. *Id.* Additionally, in the six-month period from October 1, 1991 to March 31, 1992, federal and state employment practice agencies reported an increase of more than 1600 sexual harassment complaints. Randall Samborn, *Bias Law Booms: Huge Verdicts, New Laws Rock the Employment Litigation Bar*, NAT'L L.J., July 27, 1992, at 1.

[3] Sherer, *supra* note 2, at 2119-20 (citing the Tailhook incident as an event that heightened public awareness of sexual harassment); Eric Schmitt, *Wall of Silence Impedes Inquiry Into A Rowdy Navy Convention*, N.Y. TIMES, June 14, 1992, at A1 (calling the incident the "military's most notorious sexual harassment scandal"). In September 1991, hundreds of officers gathered at the 35th annual convention of the Tailhook

legations against many prominent members of the United States Senate.[4] Public recognition, discussion, and debate have been generated by this volatile issue, leaving many American workers both outraged and confused as to whether, why, and what type of sexual harassment actually occurred in certain instances.[5]

Association, a group comprised of both active-duty and retired naval aviators. *Id.* In a hotel hallway, masses of these officers formed a gauntlet, ambushing and assaulting unsuspecting women. *Id.* Each evening during the convention, "groups of officers in civilian dress suddenly turned violent, organizing with military precision into drunken gangs that shoved terrified women down the gauntlet, grabbing at their breasts and buttocks and stripping off their clothes." *Id.* at A34.

In the aftermath of the incident, more than 70 officers were implicated in either the hotel assaults or in a subsequent cover-up, and the complaints cited at least 26 female victims. *Id.* One female officer filed a grievance with Rear Adm. John W. Snyder Jr., who at the time was head of the Patuxent River Naval Air Test Center in Maryland. *Id.* It was alleged that Snyder, in response to the officer's complaint, stated "[t]hat's what you get for going to a hotel party with a bunch of drunk aviators." *Id.* The outrage over the "Tailhook" scandal was based upon such responses, and also on the failure of the Navy's "top brass" to assume responsibility and be held accountable for the disgraceful event. *See* Kurt A. Johnson, *Military Department General Counsel As "Chief Legal Officers": Impact On Delivery Of Impartial Legal Advice At Headquarters And In The Field,* 139 MIL. L. REV. 1, 75 (1993).

[4] *See Wandering Hands,* THE ECONOMIST, Dec. 5, 1992, at 27 (recognizing that but for the Anita Hill testimony at the 1991 hearings, sexual harassment allegations against senators might never have been exposed). The most serious allegations have centered around Oregon Senator Bob Packwood, a liberal Republican. *Id.* Since his 1969 entrance into the Senate, Senator Packwood had been considered a strong ally of women's rights. *Id.* It was alleged, however, that for 21 years Senator Packwood engaged in repeated sexual misconduct toward 10 women lobbyists and staff members. *Id.* Packwood, after apologizing, underwent treatment to determine whether alcohol was responsible for his conduct. *Id.* Other senators have similarly attracted the harassment spotlight, including Daniel Inouye of Hawaii, who was accused of forcing a woman to engage in sexual relations and was also privately accused of harassment by nine other women; David Durenburger of Minnesota, who was accused of raping a woman in 1963; and Brock Adams of Washington, who was accused by eight women complaining that they were harassed and/or drugged by him. *Id.* A potential conflict arises, however, because senators are exempt from federal sexual harassment laws. *Id.* Two female senators, Dianne Feinstein and Patty Murray, have vowed to eliminate the exemption. *Id.*

Many senators have appeared to be insensitive to the issue of sexual harassment. *See, e.g.,* John Taylor, *Men on Trial II,* N.Y. MAG., Dec. 16, 1991, at 30. For example, Senator Alan Simpson of Wyoming, implying that Anita Hill's allegations were an attempt to sabotage Thomas's career, stated "it gets all tangled up in this sexual harassment crap." *Id.* at 36.

[5] *See* Sobkowski, *supra* note 1, at 59. In her article, Sobkowski includes advice for harassment victims from Peter Van Schaick, an employee-rights attorney from Glen Ridge, New Jersey. *Id.* at 60-61. Van Schaick recommends that victims of sexual harassment commence litigation only as a final option. *Id.* at 60. Instead, he maintains, it is most important for women to "regain a feeling of control." *Id.* at 61. Consulting an attorney as an adviser, or having an attorney contact the accuser's employer to request action, are both recommended by Van Schaick as methods of regaining control. *Id.* Finally, Van Schaick recognizes that if a victim of sexual harassment can

Sexual harassment was first recognized as an actionable form of sex discrimination in 1976.[6] Since then, the number of reported incidents of sexual harassment has risen drastically,[7] with one study estimating that ninety percent of all working women believe they have been harassed in the workplace because of their sex.[8] In 1980, the Equal Employment Opportunity Commission (EEOC), empowered with enforcing the provisions of Title VII of the Civil Rights Act of 1964,[9] issued Guidelines[10] recognizing that sexual

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learn to effectively negotiate, she can strengthen her ability to control the aftermath and outcome of a harassing experience. *Id.*

6 Maria M. Carillo, *Hostile Environment Sexual Harassment By A Supervisor Under Title VII: Reassessment Of Employer Liability In Light Of The Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 45 (1992-93) (citations omitted); *see* Williams v. Saxbe, 413 F. Supp. 654, 657-58 (D.D.C. 1976) (holding that sexual conduct directed towards a female plaintiff by her supervisor occurred because of her sex and was actionable under Title VII of the Civil Rights Act of 1964), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240, 1240-48 (D.C. Cir. 1978). *See infra* note 66 (quoting Title VII).

The term "sexual harassment" was coined in 1975 by Lin Farley, an activist professor at Cornell University, who taught a course entitled "Women at Work." Peter Wyden, *Sexual Harassment*, GOOD HOUSEKEEPING, July 1993, at 121.

7 Anne B. Fisher, *Sexual Harassment: What To Do*, FORTUNE, Aug. 23, 1993, at 84. The number of sexual harassment complaints filed with the EEOC almost doubled from 1988 to 1992, with 10,532 complaints registered in the year 1992 alone. *Id.* This number is especially startling in light of a 1991 study conducted by two professors at the University of St. Thomas in St. Paul, Minnesota, which revealed that only two percent of women in a nationwide survey who admitted being sexually harassed had filed formal harassment complaints. *See id.*

Other studies have demonstrated the increased prevalence of workplace sexual harassment in the U.S. in recent years:

> We have reason to believe that verbal and physical sexual harassment is widespread, with risk estimates for women ranging from about 40-90%. Perhaps the best data on prevalence comes from a carefully designed, random-sample survey of Federal government employees in 1981, where 42% of the approximate 10,648 women responding (representing 694,000 federally employed women with an 85% overall return rate) reported that they had been sexually harassed on the job in the two years immediately prior to the survey. In the U.S. Merit Systems Study (1981), 62% of women had experienced severe sexual harassment (e.g. deliberate touching), and 20% reported actual or attempted rape or assault.

JEAN A. HAMILTON ET AL., *The Emotional Consequences of Gender-Based Abuse in the Workplace: New Counseling Programs for Sex Discrimination*, 1987 WOMEN AND THERAPY 155, 159.

8 *See* Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, And Social Implications Of The "Reasonable Woman" Standard In Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 803 (1993) (citing David E. Terpstra & Susan E. Cook, *Complainant Characteristics and Reported Behaviors and Consequences Associated with Formal Sexual Harassment Charges*, 38 PERSONNEL PSYCHOL. 559, 559 (1985)).

9 Pub. L. No. 88-352, July 2, 1964.

10 *See* 29 C.F.R. § 1604.11 (1993). Although not having the effect of law, these Guidelines have been utilized by many courts as interpretative authority. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (finding that the EEOC Guide-

harassment is broken down into two categories—quid pro quo and hostile work environment.[11]

Hostile work environment sexual harassment was first addressed by American courts in 1981.[12] It was not until 1986, however, that the United States Supreme Court, in *Meritor Savings Bank v. Vinson*,[13] analyzed this form of harassment.[14] The Court held that to be actionable, the complained of conduct had to be severe or pervasive enough to alter the plaintiff's employment conditions and create a hostile or abusive work environment.[15]

In July of 1993, the New Jersey Supreme Court was called upon for the first time to define the standards of hostile work environment sexual harassment.[16] In a unanimous five justice opinion,[17] the court held in *Lehmann v. Toys 'R' Us. Inc.* that to state a valid claim for hostile work environment sexual harassment, a female plaintiff must first allege that the discriminatory conduct oc-

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lines, "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance'") (quotations omitted). *See infra* note 59 for a further discussion of the EEOC Guidelines.

11 *See* Carillo, *supra* note 6, at 58. In order to prove a valid claim of quid pro quo sexual harassment, a plaintiff must show that there was an unwelcome request or demand for sexual favors, and employment conditions were positively or negatively affected as a result of compliance with or rejection of these requests or demands. *See* Steven B. Harz & Leslie A. Lajewski, *Sexual Harassment Law In The Workplace*, ESSEX COUNTY BAR FOUNDATION CHRONICLE, Dec. 1993, at 1. Examples of such conduct deemed quid pro quo sexual harassment include when an employee is discharged for refusing to submit to a supervisor's sexual advances; when an employee's position is abolished after refusing to comply with a supervisor's sexual demands; and when an employee is given uncharacteristically poor evaluations or reprimands because of the employee's failure to submit to the sexual requests of a supervisor. *Id.* at 12. The New Jersey Supreme Court has found that quid pro quo harassment occurs when an employer conditions a worker's employment on the worker's submission to sexual demands. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601, 626 A.2d 445, 452 (1993). Quid pro quo sexual harassment involves either explicit or implicit threats that if employees do not consent to a supervisor's demands, they will lose tangible job benefits or suffer adverse employment privileges. *Id.* Hostile work environment sexual harassment arises when an employee is harassed to such a degree that the employee's work environment becomes hostile. *Id.*

12 Adler & Pierce, *supra* note 8, at 780 (citing Bundy v. Jackson, 641 F.2d 934 (D.D.C. 1981)).

13 477 U.S. 57 (1986).

14 Adler & Pierce, *supra* note 8, at 781 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)).

15 *Meritor*, 477 U.S. at 67 (citation omitted).

16 Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 602, 626 A.2d 445, 453 (1993).

17 *Id.* at 627, 626 A.2d at 466. Chief Justice Wilentz and Justices Clifford, O'Hern, and Stein joined Justice Garibaldi in her ruling for the modification, affirmance, and remand of the appellate division's judgment. *Id.*

curred because of her gender.[18] The court further required that a reasonable woman[19] in the plaintiff's position would deem such conduct sufficiently severe or pervasive to alter her employment conditions and create an offensive, hostile, or intimidating working atmosphere.[20] In addition, the court posited that an employer would be held strictly liable for a supervisor's conduct when computing equitable damages and relief.[21] Furthermore, the court held that an employer could also be vicariously liable, under agency principles, for compensatory damages which exceed equitable damages and relief.[22] The court asserted, however, that an employer would not be liable for punitive damages unless the employer ratified, participated or acquiesced in the harassment.[23]

In August of 1981, Theresa Lehmann began her employment at Toys 'R' Us as a file clerk and during the next few years was promoted into various supervisory positions.[24] In late 1985, Toys 'R' Us hired Dan Baylous as Director of Purchasing Administration.[25] Lehmann, among other employees, was under Baylous's direct supervision.[26] Lehmann was given favorable evaluations and promotions by Baylous and in late 1986 became the Systems Analyst for the Purchasing Department.[27] A few months later, Lehmann began to notice Baylous engaging in what she believed to be

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18 *Id.* at 603, 626 A.2d at 453.

19 *Id.* Justice Garibaldi reasoned that the standard set forth in *Lehmann*, where the plaintiff was a female, would be tailored to female plaintiffs generally, because the majority of plaintiffs in sexual harassment cases are women. *Id.* at 604, 626 A.2d at 454. The majority maintained, however, that this standard also applied to harassment of men by women, women by women, and men by men. *Id.* In making this determination, the court recognized that the New Jersey Law Against Discrimination (LAD) barred homosexual as well as heterosexual harassment. *Id.* The only difference for a male plaintiff, the court stressed, would be that the plaintiff would have to allege conduct that a reasonable man would believe created a hostile working environment towards men and that such conduct altered his working conditions. *Id.* *See infra* note 56 for a detailed discussion of the LAD.

20 *Id.* at 603-04, 626 A.2d at 453.

21 *Id.* at 626, 626 A.2d at 465.

22 *Id.* at 623, 626, 626 A.2d at 464, 465.

23 *Id.* at 625, 626 A.2d at 464 (citing Shrout v. Black Clawson Co., 689 F. Supp. 774, 783 (S.D. Ohio 1988)).

24 T.L. v. Toys 'R' Us, Inc., 255 N.J. Super. 616, 620, 605 A.2d 1125, 1127 (App. Div. 1992). Lehmann was initially hired as a file clerk in the Purchasing Department. *Id.* She was promoted several times to positions such as Data Entry Supervisor and Purchase Order Management Supervisor. *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 620-21, 605 A.2d at 1127. Baylous and Lehmann had a close, daily working relationship and met weekly in his office. *Id.* at 621, 605 A.2d at 1127.

offensive sexual behavior toward other female employees.[28]

Baylous's allegedly harassing conduct was soon directed towards Lehmann.[29] According to Lehmann, Baylous told her on at least two occasions in early 1987 to expose her breasts to male employees[30] and at various other times commented on her anatomy.[31] Lehmann alleged that another incident occurred while in Baylous's office in January of 1987, whereby Baylous lifted the back of her shirt exposing her brassiere.[32]

On January 22, 1987, Lehmann's first complaint about Baylous's conduct was made to Bill Frankfort, Baylous's direct supervisor.[33] Frankfort instructed the plaintiff to handle the problem herself and not to report the complaint to Howard Moore, the Ex-

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28 *Id.* Lehmann recorded numerous instances where Baylous touched or grabbed female employees. *Lehmann*, 132 N.J. at 595, 626 A.2d at 449. At a Christmas party Lehmann witnessed Baylous place his hands on a female employee from behind. *Id.* Lehmann alleged that the woman found the touching offensive and that the woman angrily told Baylous to take his hands off of her. *Id.* On another occasion, Lehmann and two other female employees were in Baylous's office. *T.L.*, 255 N.J. Super. at 621, 605 A.2d at 1127. One woman had changed into jeans after wearing a dress in the morning, and the plaintiff testified that "Don put his hands on [the woman's] waist and asked her if she had gone home for a quickie." *Id.*

29 *See T.L.*, 255 N.J. Super. at 621, 605 A.2d at 1127.

30 *Id.* at 621-22, 605 A.2d at 1127-28. Lehmann testified that Baylous instructed her to have an employee rewrite a 300-page purchase order. *Lehmann*, 132 N.J. at 595, 626 A.2d at 449. When she mentioned that the employee would be angry, Baylous told her to "'[j]ust lean over his desk and show him your tits . . . .'" *Id.* On another occasion, the plaintiff asserted that she and Baylous were discussing a new potential boss for the company and she related to him that she was nervous because he was reputed to have a quick temper. *T.L.*, 255 N.J. Super. at 622, 605 A.2d at 1128. Baylous replied, "'[W]ell, just stick your tits out at him as if you're brave and act as if you're brave.'" *Id.*

31 *T.L.*, 255 N.J. Super. at 622, 605 A.2d at 1128. For example, on one occasion Baylous told Lehmann to "'write a memo to cover [your] ass, . . . because you have such a cute little ass.'" *Id.*

32 *Lehmann*, 132 N.J. at 596, 626 A.2d at 449-50. The plaintiff claimed that while in Baylous's office on this occasion, she was looking out his window at scaffolding. *Id.* at 598, 626 A.2d at 451. Although Lehmann didn't see anyone, she assumed that window washers were present. *T.L.*, 255 N.J. Super. at 622, 605 A.2d at 1128. At that point, Baylous lifted her shirt over her shoulders and told her to "'give them a show.'" *Lehmann*, 132 N.J. at 596, 626 A.2d at 450. In support of the plaintiff's contention, Marlene Pantess, a fellow employee, testified that Lehmann had come running out of Baylous's office and had cried to her that he had lifted her shirt. *Id.* However, according to Jeffrey Wells, the head of personnel at Toys 'R' Us, there had been no window washing at the building in January of 1987. *T.L.*, 255 N.J. Super. at 630, 605 A.2d at 1132. Toys 'R' Us also contacted the company that washed the windows at the office, and was advised that they had done no work during that time frame. *Id.* at 628, 605 A.2d at 1131.

33 *Lehmann*, 132 N.J. at 596, 626 A.2d at 450. Lehmann requested anonymity in her complaint and told Frankfort that she was afraid to confront Baylous directly. *Id.*

ecutive Vice President in charge of purchasing.[34] On January 26, 1987, Eric Jonas, the Manager of Employee Relations, called Lehmann and another female employee to his office to discuss their allegations against Baylous.[35] At the meeting, Lehmann was told that management would confront Baylous,[36] and a few days later, Frankfort informed Lehmann that management had done so.[37]

Despite Frankfort's assurances, Lehmann claimed that Baylous's behavior did not improve.[38] In early February of 1987, Baylous allegedly threatened to "take advantage" of the plaintiff.[39] Lehmann contacted Jonas about this threat and was told to begin memorializing such harassing incidents.[40] In the following weeks, Lehmann noted several more incidents involving comments and touchings by Baylous.[41] In early March, Lehmann once again informed both Frankfort and Jonas that Baylous's harassing conduct had not ceased.[42] Lehmann testified that Jonas first responded by questioning her rationality and then offered to transfer her away from Baylous, a suggestion which Lehmann promptly rejected.[43]

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[34] *Id.* Frankfort explained that the Vice President was a "'straight-laced'" family man, and did not want Lehmann to inform him. *Id.* On January 26, 1987, Lehmann delivered a letter to Frankfort detailing her complaint of sexual harassment, but it was not opened until after her resignation in April of 1987. *T.L.*, 255 N.J. Super. at 623, 605 A.2d at 1128.

[35] *T.L.*, 255 N.J. Super. at 623, 605 A.2d at 1128. During this encounter, both Lehmann and her co-worker told Jonas of specific harassing incidents involving Baylous. *Id.* They presented to Jonas six or seven names of fellow employees who had complained about Baylous's behavior. *Id.* Lehmann also told Jonas that she wanted Baylous's conduct stopped, but did not want him to be fired. *Id.*

[36] *Id.* Jonas told Lehmann that because she requested anonymity, the situation would be harder to handle, but assured her that "'he could handle it by saying that someone had complained, and that should be enough to make him stop.'" *Id.*

[37] *Id.* Lehmann testified that she felt a sense of relief and figured that the problem would end. *Id.*, 605 A.2d at 1128-29.

[38] *Lehmann*, 132 N.J. at 597, 626 A.2d at 450.

[39] *Id.* During this incident, Lehmann informed Baylous that she felt ill while in his office, and that if she fainted, to "'just kick me into the hall.'" *Id.* Baylous responded that if this occurred, he would "'take advantage of [her].'" *Id.*

[40] *Id.*

[41] *Id.* Lehmann's sister, another co-worker, experienced an incident where Baylous had approached her from behind and rubbed her shoulders. *Id.* The plaintiff also observed Baylous remarking on another female employee's anatomy. *Id.*

[42] *Id.*

[43] *Id.* Lehmann responded that she loved her job, had done nothing wrong, and that she was not the person that should be transferred. *Id.* She also told Jonas that her father and husband were upset and wanted her to resign. *T.L.*, 255 N.J. Super. at 624, 605 A.2d at 1129. Jonas advised her not to resign because she had not received her bonus check. *Id.* Soon thereafter, Lehmann again became offended by Baylous's conduct during a meeting at which they were both in attendance. *Lehmann*, 132 N.J. at 597, 626 A.2d at 450. At this meeting, Baylous offered to those in attendance that he and a female employee were not both ill as a result of "'sexual intimacy.'" *Id.*

Finally, dissatisfied with the efforts of Jonas and Frankfort, Lehmann brought her complaints to the Executive Vice President in charge of purchasing on April 6, 1987.[44] Later that day, Lehmann was called to meet with Laurie Lambert in the personnel department.[45] Lambert reiterated the offer to transfer Lehmann, and Lehmann again refused.[46]

The following day, citing personal reasons, Lehmann gave Baylous a two-week notice of her resignation.[47] Later that afternoon, Lehmann was again called to Lambert's office.[48] Lambert offered Lehmann a transfer for the third time and also recommended that Lehmann approach Baylous directly with her allegations.[49] Lehmann refused both suggestions.[50] Moments later, Baylous entered the room and Lehmann finally confronted him.[51] Lehmann testified that Baylous was initially apologetic,[52] but soon thereafter denied her accusations and became very angry.[53] Lehmann left Toys 'R' Us after this confrontation, claiming that she could never return to work there.[54]

Lehmann filed a civil action in the New Jersey Superior Court, Law Division, against Toys 'R' Us, Don Baylous, and Jeffrey Wells, a human resources manager.[55] The complaint alleged that Lehmann had been subjected to hostile work environment sexual har-

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44 *Id.* Lehmann complained that she was being forced to leave the company, and Moore was upset that he had not been apprised of the situation. *Id.*

45 *Id.* At this meeting, Lehmann informed Lambert of all of her complaints against Baylous. *Id.*

46 *Id.* at 597-98, 626 A.2d at 450. Lehmann again voiced her protest against being transferred, asking, "'[W]hy should I have to transfer when I worked so hard for this job that I love after six years of being in this company?'" *Id.* at 598, 626 A.2d at 450.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*, 626 A.2d at 451.

51 *Id.* Lehmann testified that she felt trapped and upset by the situation, but nevertheless told Baylous everything about which she had been complaining. *T.L.*, 255 N.J. Super. at 626, 605 A.2d at 1130.

52 *Id.* Lehmann recalled that Baylous "'apologized in the beginning. Then he started to deny things, but I do remember him saying that he would try to keep his hands in his pockets.'" *Id.*

53 *Id.* Baylous denied the sweater lifting incident that had allegedly occurred in his office. *Id.* Lehmann asserted that Baylous then became increasingly angry and she became "hysterical." *Id.* Baylous also testified that he "'admitted being a very touchy person'" but only in a social, nonsexual manner. *Id.* at 627, 605 A.2d at 1130.

54 *Id.* at 626, 605 A.2d at 1130. Lehmann maintained "'that they took a hostile work environment and made it even worse,'" and claimed she could not return to work at Toys 'R' Us because of the forced confrontation to which she was subjected. *Id.*

55 *Lehmann*, 132 N.J. at 593, 626 A.2d at 448.

assment in violation of New Jersey's Law Against Discrimination (LAD).[56] The trial court dismissed the plaintiff's hostile work envi-

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[56] *Id.* Lehmann's complaint alleged that this harassment had caused her pain and suffering, anxiety, humiliation, health problems, medical expenditures, lost wages and pension benefits, and financial losses due to attorney's fees and litigation expenses. *Id.* In addition, Lehmann alleged claims separate from the LAD action including battery, negligence, intentional infliction of emotional distress, and intentional interference with contractual relations. *Id.*

In support of her harassment claim, Lehmann's attorney sent her to a psychologist in 1989 for evaluation. *T.L.*, 255 N.J. Super. at 626, 605 A.2d at 1130. She was diagnosed as having a "simple phobia" attributable to sexual harassment in the workplace. *Id.* at 626-27, 605 A.2d at 1130. The psychologist testified that:

> "It may not be that it was herself that was being touched and violated at that point, but after she experienced the personal invasion, after she was either touched or remarks were made against her, hearing about those remarks, hearing that they are continuing, seeing other people being touched, hearing about other people being touched, certainly contributes to the continued feeling of being uncomfortable in that atmosphere."

Id. at 627, 605 A.2d at 1130.

Lehmann brought her claim under the New Jersey Law Against Discrimination, and the New Jersey Supreme Court recognized that the main purpose of the LAD, enacted in 1945, is "'nothing less than the eradication 'of the cancer of discrimination.'" *Lehmann*, 132 N.J. at 600, 626 A.2d at 451-52 (quoting Fuchilla v. Layman, 109 N.J. 319, 334, 537 A.2d 652, 660 (1988) (quoting Jackson v. Concord Co., 54 N.J. 113, 124, 253 A.2d 793, 799 (1969))). The New Jersey Supreme Court had previously recognized that the LAD sought to ensure a workplace which is free from discrimination. *Fuchilla*, 109 N.J. at 334, 537 A.2d at 660. The *Lehmann* court continued this reasoning by further condemning gender-based discrimination, which the court labeled as "'peculiarly repugnant in a society which prides itself on judging each individual by his or her merits.'" *Lehmann*, 132 N.J. at 600, 626 A.2d at 452 (quoting Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 96, 570 A.2d 903, 906 (1990) (citation omitted)).

The LAD explicitly bans sex-based employment discrimination:

> It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:
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> a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, [or] sex . . . of any individual, to refuse to hire or employ or to bar or to discharge . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

N.J. STAT. ANN. § 10:5-12(a) (West 1993).

Because the LAD's legislative history failed to mention sexual harassment, the New Jersey Supreme Court has often looked to Title VII federal precedent for guidance in this area. *Lehmann*, 132 N.J. at 600, 626 A.2d at 452. In analyzing unlawful discrimination claims brought under the LAD, the New Jersey Supreme Court adopted the United States Supreme Court's approach to interpreting discrimination claims under Title VII. *Grigoletti*, 118 N.J. at 97, 570 A.2d at 907. The Supreme Court has employed the *McDonnell Douglas* test, and the New Jersey judiciary has utilized this approach as a starting point for actions brought under the LAD. *Id.* at 97-98, 570 A.2d at 907 (quotation omitted); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The New Jersey Supreme Court explained the analysis of the *McDonnell Douglas* approach:

ronment sexual harassment claim.[57]

The appellate division unanimously reversed the dismissal of the sexual harassment claim and remanded the case to the trial court for further analysis.[58] Despite agreeing that the trial court

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> The *McDonnell Douglas* approach established the elements of a *prima facie* case of unlawful discrimination. The plaintiff must demonstrate by a preponderance of the evidence that he or she (1) belongs to a protected class, (2) applied and was qualified for a position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after rejection the position remained open and the employer continued to seek applications for persons of plaintiff's qualifications. Establishment of the *prima facie* case gives rise to a presumption that the employer unlawfully discriminated against the applicant. The burden of going forward then shifts to the employer to rebut the presumption of undue discrimination by articulating some legitimate, nondiscriminatory reason for the employee's rejection. The plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate nondiscriminatory reason articulated by the defendant was not the true reason for the employment decision but was merely a pretext for discrimination. In such cases the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff; only the burden of going forward shifts.

Grigoletti, 118 N.J. at 98, 570 A.2d at 907 (quoting Andersen v. Exxon Co., 89 N.J. 483, 492-93, 446 A.2d 486, 490-91 (1982)).

[57] *Lehmann*, 132 N.J. at 593, 626 A.2d at 448. Following a six day bench trial, all of the plaintiff's causes of action, except for the battery claim against Baylous, were dismissed. *Id.* The trial court awarded Lehmann $5000 in punitive damages, finding that Baylous's single, nonconsensual touching of her constituted a battery. *T.L.*, 255 N.J. Super. at 616, 605 A.2d at 1125.

[58] *Lehmann*, 132 N.J. at 593, 626 A.2d at 448. The appellate division ruled that the lower court applied the wrong legal standard in assessing the sexual harassment claim, and remanded the case for further factual analysis. *Id.* The law division judge set forth the following law and reasoning which was rejected by the appellate division:

> In the case at bar, plaintiff has not proffered enough evidence to show that defendant, Baylous, acted intentionally to harass plaintiff because she was a woman. Additionally, plaintiff has not proven that the discrimination was pervasive and regular. The complained of conduct creates a hostile work environment when it is repeated to the point where it is routine and becomes a condition of employment.
>
> Assuming that all incidents plaintiff and plaintiff's witnesses testified to occurred, Baylous' actions, although annoying, were not sufficiently outrageous to sustain plaintiff's allegations. A review of the record indicates that Baylous touched plaintiff and other employees in an asexual manner on a number of occasions. This type of touching does not amount to sexual harassment or discrimination. Baylous made several rude and off color comments to plaintiff and other employees. Off color remarks are insufficient to create a sexually hostile work environment. Also the evidence does not indicate that Baylous' vulgarity affected the totality of the work environment. On the contrary, several witnesses testified that Baylous' actions did not offend them. Baylous' behavior with regard to the sweater-lifting incident was improper and child-like. However, the sweater-lifting incident combined with rude

had applied the wrong legal standards in analyzing the LAD claim, the appellate division split three ways in determining both the appropriate standards to be applied to the hostile work environment claim and the extent of Toys 'R' Us's liability for its supervisor's actions.[59] Both Lehmann and Toys 'R' Us, Inc. appealed the ap-

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comments and occasional asexual touchings does not amount to a sexually hostile environment.

An important factor in this Court's determination is the amount of time over which the alleged acts of harassment occurred . . . . Thus, this Court finds that the conduct plaintiff complained of did not occur regularly over a sufficiently lengthy period of time to become a "condition" of plaintiff's employment.

T.L., 255 N.J. Super. at 631-32, 605 A.2d at 1133 (citations omitted). The judge also posited that although Baylous's conduct affected Lehmann adversely, a reasonable person in Lehmann's position would not have been affected. *Id.* at 632, 605 A.2d at 1133.

[59] *Lehmann*, 132 N.J. at 593-94, 626 A.2d at 448. First, Judge Shebell stated that "'a more structured test is required at this juncture.'" *T.L.*, 255 N.J. Super. at 642, 605 A.2d at 1139 (citation omitted). Judge Shebell adopted, with certain modifications, the first four prongs of the five-part test utilized in *Andrews v. City of Philadelphia*. *Id.* at 635-38, 605 A.2d at 1135-37 (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)). The *Andrews* test required that: "(1) the employees suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability." *Andrews*, 895 F.2d at 1482. Judge Shebell rejected the respondeat superior principles used by the *Andrews* court and instead held that an employer was strictly liable for hostile work environment sexual harassment by a supervisor. *T.L.*, 255 N.J. Super. at 638-40, 605 A.2d at 1137-38.

In a concurring opinion, Judge D'Annunzio agreed with the majority view in general, but did not subscribe to the court's adoption of strict liability principles. *T.L.*, 255 N.J. Super. at 644, 605 A.2d at 1140 (D'Annunzio, J.A.D., concurring). Instead, the judge posited that liability should be based on respondeat superior principles and, alternatively, on the inadequate response of an employer who has knowledge that an employee is creating a hostile work environment. *Id.* (D'Annunzio, J.A.D., concurring).

Finally, Judge Skillman, concurring in part and dissenting in part, rejected the majority's use of the *Andrews* test and urged the use of the EEOC's Guidelines. *Id.* at 648, 605 A.2d at 1142 (citing 29 C.F.R. § 1604.11) (Skillman, J.A.D., concurring in part and dissenting in part). These Guidelines state in pertinent part:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a)(3). The Guidelines further provide that:

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

29 C.F.R. § 1604.11(b). After discussing these Guidelines, Judge Skillman concluded

pellate division's ruling to the New Jersey Supreme Court, which granted certification[60] to identify these applicable standards.[61]

The New Jersey Supreme Court's decision in *Lehmann* was founded upon a combination of United States Supreme Court rulings and other federal precedent,[62] as well as a re-evaluation of existing New Jersey case law.[63] *Rogers v. EEOC*,[64] a 1971 Fifth Circuit landmark decision, was the first case to recognize that a discriminatory work environment could establish a valid cause of action.[65] Specifically, the Court of Appeals for the Fifth Circuit held that a Hispanic plaintiff could maintain a Title VII cause of action[66] by showing that her employer, by discriminating against its Hispanic clientele, created an offensive work environment.[67] By so ruling,

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that agency principles should govern an employer's vicarious liability for supervisory sexual harassment of an employee. *T.L.*, 255 N.J. Super. at 660, 605 A.2d at 1149 (Skillman, J.A.D., concurring in part and dissenting in part).

60 *Lehmann*, 132 N.J. at 594, 626 A.2d at 449.

61 *Id.*

62 Rocco Cammarere, *Court Defines Sexual Harassment Test*, N.J. LAWYER, July 19, 1993, at 1. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (holding that hostile work environment sexual harassment was a violation of Title VII); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (defining the standards of a hostile work environment sexual harassment claim brought under Title VII); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (recognizing that a discriminatory work environment can be the basis of a Title VII action).

63 *See, e.g.*, Erickson v. Marsh & McLennan Co., 117 N.J. 539, 569 A.2d 793 (1990) (holding that sexual harassment claims based on submission or coercion are prohibited by the LAD); Muench v. Township of Haddon, 255 N.J. Super. 288, 605 A.2d 242 (App. Div. 1992) (interpreting the LAD as prohibiting hostile and pervasive nonsexual harassment).

64 454 F.2d 234 (5th Cir. 1971).

65 *Meritor*, 477 U.S. at 65 (citing *Rogers*, 454 F.2d at 238). The plaintiff in *Rogers*, Josephine Chavez, was employed by Texas State Optical, and on April 11, 1969, filed a complaint with the EEOC alleging employment discrimination against her employers. Rogers v. EEOC, 316 F. Supp. 422, 423 (E.D. Tex. 1970). Mrs. Chavez, who worked with seven caucasian females, was the only employee with a Spanish surname. *Id.* at 423. The complaint alleged that Mrs. Chavez was abused by her co-workers because of her nationality, and was terminated without reason. *Id.* Mrs. Chavez also added that her employer told her he had to dismiss her because of "friction." *Id.* Finally, the complainant alleged that Texas State Optical provided different treatment to its patients according to their nationality. *Id.* at 425. As to this latter complaint, the district court asserted that Mrs. Chavez lacked standing to assert the claim. *Id.*

66 *See Rogers*, 454 F.2d at 238. Title VII of the 1964 Civil Rights Act states that it is "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." *Id.* (quoting Pub. L. No. 88-352, § 703 (a)(1), July 2, 1964). The *Rogers* court held the position that it was Congress's intent to broadly define employment discrimination in this statute in order to allow for the constant changes that surround this complex area of law. *Id.*

67 *Id.* The Fifth Circuit acknowledged that the petitioner's claim that her employ-

the court expanded an employee's Title VII safeguards beyond economic areas of employment, creating a new psychological zone of protection from employers who discriminate against minority group employees.[68]

Following *Rogers*, the United States Supreme Court recognized for the first time, in *Meritor Savings Bank v. Vinson*,[69] a Title VII claim of hostile work environment sexual harassment.[70] In so ruling, the *Meritor* Court looked to the 1980 EEOC Guidelines which supported the proposition that harassment causing non-economic injury violated Title VII.[71] Accepting the EEOC's proposition that sexual harassment was prohibited by Title VII as a form of sex discrimination, the *Meritor* Court ruled that a work environment, deemed hostile because of discriminatory sexual harassment, was also protected under the statute.[72]

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ers "'segregated the patients'" should be interpreted to charge that they discriminated among their patients on the basis of each individual's national origin. *Id.* at 237.

68 *See id.* at 238. Circuit Judge Goldberg, author of the *Rogers* opinion, addressed this new zone of protection in terms of Title VII's ban on ethnic and racial discrimination, writing:

> Therefore, it is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.

Id.

In dissent, Circuit Judge Roney stressed the belief that the plaintiff's charge was not included within the scope of Congress's Title VII unlawful employment practice provisions. *Id.* at 246 (Roney, J., dissenting). Judge Roney further disputed the majority's contention that an employee's psychological well-being should be afforded discriminatory protection under Title VII, reasoning that there was:

> no indication in the Act or the legislative history that Congress in passing Title VII was concerned about whether an employer's business presents conditions for employment that are environmentally attractive to all, whether the manner of his operation suits everyone, or whether a particular individual might be uncomfortable or have feelings of unhappiness in his employment.

Id.

69 477 U.S. 57 (1986).

70 *Id.* at 66.

71 *Id.* at 65 (citing 29 C.F.R. § 1604.11(a) (1985)). The Court found the EEOC Guidelines supportive of the proposition that regardless of economic injury, sexual harassment in the workplace could be a Title VII infraction. *Id.*

72 *Id.* at 65-66. The United States Supreme Court cited favorably to the ruling established by the Eleventh Circuit in *Henson v. Dundee*. *Id.* at 66-67 (citing Henson v.

In *Meritor*, the Court addressed questions concerning a hostile work environment sexual harassment claim brought under Title VII, and employer liability for the conduct of its supervisors.[73] Mechelle Vinson, a female bank employee, alleged that her supervisor subjected her to repeated sexual demands over a three-year period.[74] Then-Justice Rehnquist, although recognizing a valid sexual harassment claim, noted that not all harassing conduct would affect a "term, condition, or privilege of employment within the realm of Title VII protection."[75] The Justice opined that the objectionable conduct had to be adequately "severe or pervasive" to change the conditions of a plaintiff's employment and create a hostile or abusive work environment.[76]

The Court also rejected the bank's contentions that Congress,

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Dundee, 682 F.2d 897, 902 (11th Cir. 1982)). The *Henson* court squarely addressed the hostile work environment sexual harassment issue, and the *Meritor* Court quoted the following passage from the Eleventh Circuit opinion:

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Id. at 67 (quoting *Henson*, 682 F.2d at 902); *accord* Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983) (recognizing that unwelcome and demeaning sexual behavior directed towards the plaintiff created a hostile working environment); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984) (ruling that a plaintiff must show that the harassment unreasonably hindered the plaintiff's work performance or created a hostile, offensive, or intimidating working environment).

73 *Meritor*, 477 U.S. at 63-68, 69-73.

74 *Id.* at 60. Sidney Taylor hired Vinson as a teller-trainee at the bank. *Id.* at 59. According to Vinson, shortly after her probationary period, Taylor took her out to dinner and suggested a sexual encounter. *Id.* at 60. After initially refusing, Vinson testified that she agreed to this proposition, claiming that she acquiesced out of fear of losing her employment. *Id.* Vinson, although acknowledging between 40 to 50 sexual encounters with Taylor, claimed that Taylor fondled her, exposed himself, and forcibly raped her on various occasions. *Id.* Despite these charges, the respondent never filed a complaint with the bank or reported the harassing conduct to any of Taylor's supervisors. *Id.* at 61. Four years after starting work at the bank, Vinson left Meritor Savings Bank on sick leave, and the bank, characterizing her leave as excessive, discharged her. *Id.* at 60. Vinson subsequently brought this action, seeking injunctive relief, attorney's fees, and punitive and compensatory damages against the bank and Taylor. *Id.*

75 *Id.* at 67.

76 *Id.* (quotation omitted). The Court, citing the EEOC Guidelines, recognized that the main element of all sexual harassment charges was whether the sexual conduct was "unwelcome" by the plaintiff. *Id.* at 68 (citing 29 C.F.R. § 1604.11(a) (1985)). Additionally, the Court found relevant the petitioner's sexually provocative dress and speech in determining whether the respondent's sexual advances were truly unwelcome, and determined that charges of sexual harassment must be viewed by looking at the record as a whole. *Id.* at 69 (citing 29 C.F.R. § 1604.11(b) (1985)).

in implementing Title VII, was concerned only with tangible, economic losses.[77] In addressing the bank's liability for the conduct of its supervisors, the Court failed to issue a concrete ruling, but agreed with the EEOC's proposition that it was Congress's intention to have the courts use agency principles for guidance.[78]

In 1990, the Third Circuit was confronted with the issue of hostile work environment sexual harassment in *Andrews v. City of Philadelphia*.[79] In *Andrews*, two female police officers brought a hostile work environment suit against their direct supervisors, as well as the Mayor, the Police Commissioner, and the City of Philadelphia.[80] In its ruling, the Third Circuit clearly enumerated the requisite elements necessary to bring such a claim under Title VII.[81] First, the court ruled that the employees had to establish that they were the victims of intentional discrimination because of their sex.[82] Second, the majority noted that the discriminatory

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77 *Meritor*, 477 U.S. at 64. Instead, the Court posited that Congress intended "'to strike at the entire spectrum of disparate treatment of men and women'" in employment. *Id.* (quoting Los Angeles Dept. of Water and 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))).

78 *Id.* at 72. The Court concluded that the court of appeals made an error by imposing absolute liability upon employers for their supervisor's sexually harassing conduct, regardless of whether the employer knew or should have known of the behavior. *Id.* at 63, 72. The Court also rejected the bank's contention that Vinson's failure to invoke the bank's grievance procedure shielded it from liability. *Id.* at 72. In so ruling, Justice Rehnquist declared that the existence of a formal grievance procedure and an employer policy prohibiting discrimination, coupled with an employee's failure to use such a device, would not necessarily insulate an employer from liability. *Id.*

79 895 F.2d 1469, 1471 (3d Cir. 1990).

80 *Id.*

81 *Id.* at 1482. *Accord* Muench v. Township of Haddon, 255 N.J. Super. 288, 298-99, 605 A.2d 242, 247-48 (App. Div. 1992) (adopting the five elements set forth in *Andrews* in evaluating a claim under the New Jersey Law Against Discrimination). *See infra* notes 91-95 and accompanying text for a more detailed analysis of *Muench*.

Priscilla Kelsey Andrews and Debra Ann Conn were female members of the Philadelphia Police Department's Accident Investigation Department. *Andrews*, 895 F.2d at 1471. Both officers claimed that they were harassed by co-workers and supervisors because of their sex. *Id.* The conduct included destruction of property, destruction of work product, subjection to abusive and obscene language, harassing telephone calls, and Andrews being severely burned by a lime substance that was placed in her shirt. *Id.* at 1471, 1474.

The *Andrews* court held that to institute an action for sexual harassment on the grounds of an offensive and intimidating work environment, a plaintiff had to prove "'by the totality of the circumstances, the existence of a hostile or abusive working *environment* which is severe enough to affect the psychological stability of a minority employee.'" *Id.* at 1482 (quoting Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989)).

82 *Id.* The court stated that in sex discrimination cases involving implicit sexual language, propositions, innuendo, or pornographic material, the intent to discrimi-

conduct had to have been pervasive and regular.[83] Third, the court determined that the discrimination had to have detrimentally affected the plaintiffs.[84] Fourth, the majority held that a reasonable person of the same sex in the employee's position would also be detrimentally affected by the conduct.[85] Finally, the *Andrews* court mandated that fact finders should utilize respondeat superior principles in determining an employer's liability for the actions of its supervisors.[86]

Armed with these federal precedents, the New Jersey Supreme Court, in *Erickson v. Marsh & McLennan Co.*,[87] determined whether a plaintiff had established a valid reverse sex discrimination claim under the New Jersey Law Against Discrimination.[88] The court, explaining that the LAD served to promote equal employment opportunities, held that sexual harassment based on submission or

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nate would, as a matter of course, be recognized, and where the conduct was not sexual in nature, as in the *Andrews* case, a more detailed analysis of the facts would be required for a showing of sex-based discrimination. *Id.* at 1482, n.3.

83 *Id.* at 1482. According to the court, pervasive harassment occurs when "'incidents of harassment occur either in concert or with regularity.'" *Id.* at 1484 (quoting Lopez v. S.B. Thomas Inc., 831 F.2d 1184, 1189 (2d Cir. 1987)). *Contra* Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 606, 626 A.2d 445, 455 (1993) (rejecting the "pervasive and regular" element and adopting a "severe or pervasive" standard).

84 *Andrews*, 895 F.2d at 1482.

85 *Id.* The third and fourth elements set forth in *Andrews* presented both a subjective and objective standard, respectively. *Id.* at 1483. The court dictated that the subjective standard set forth in element three would ensure that the specific plaintiff had been aggrieved, while the objective standard, embodied in prong four, would protect employers against hypersensitive employees. *Id.*

In adopting this objective, reasonable woman standard, the Third Circuit recognized that conduct that men might find innocent and harmless could be construed differently by women. *Id.* at 1486 (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984)).

86 *Id.* at 1482. In evaluating employer liability, the court adhered to the use of agency principles. *Id.* at 1486 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986)). Thus, the court held that if it could be proven that management had either actual or constructive knowledge of a sexually hostile work environment, and adequate and prompt remedial action was not taken, the employer would be held liable. *Andrews*, 895 F.2d at 1486. Quoting the Sixth Circuit, which had addressed such employer action two years earlier, the *Andrews* court noted:

> [W]hile Title VII does not require that an employer fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinion in a way that abuses or offends co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.

Id. (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988)).

87 117 N.J. 539, 569 A.2d 793 (1990).

88 *Id.* at 544, 569 A.2d at 795.

coercion was prohibited by the LAD.[89] Although not specifically addressing whether nonsexual conduct could establish a valid hostile work environment claim under the LAD, the court concluded that the LAD's ban on sex discrimination included "coercive" harassment which resulted in a hostile environment.[90]

Following the decision set forth in *Erickson*, the New Jersey Superior Court, Appellate Division, in *Muench v. Township of Haddon*,[91] addressed whether the plaintiff's hostile work environment claim against her supervisor gave rise to a LAD action for sexual discrimination where there was no proof of coercive sexual harassment.[92] In *Muench*, a female police dispatcher, Helen Muench, was continuously harassed in a non-coercive manner by her male supervisor.[93] The court, relying extensively on federal precedent,[94]

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89 *Id.* at 556, 569 A.2d at 801. Erickson made specific allegations of a "paramour claim." *Id.* at 549, 569 A.2d at 798. This claim stated that Erickson was accused of a frivolous sexual harassment claim so that his male supervisor, Frank Hayes, could promote Hayes's female romantic companion. *Id.* The court also addressed the issue of reverse discrimination, mandating that such cases required the plaintiff to make an initial showing to support the inference that the defendant discriminates against the majority. *Id.* at 551, 569 A.2d at 799 (citing Erickson v. Marsh & McLennan Co., 227 N.J. Super. 78, 87, 545 A.2d 812, 816 (App. Div. 1988) (citation omitted)). The court also invalidated Erickson's claim that he was fired because he was a male. *Id.* at 559, 569 A.2d at 803. The majority ruled that if Hayes had wished to promote his paramour, it would not have made a difference to him whether Erickson was male or female. *Id.*

90 *Id.* at 555-56, 569 A.2d at 801. The Division of Civil Rights argued that both sexual harassment that has the effect of creating a hostile work environment, and sexual harassment which demands that submission to sexual advances is a condition of employment, are violative of the LAD's ban against sex discrimination. *Id.*

91 255 N.J. Super. 288, 605 A.2d 242 (App. Div. 1992).

92 *Id.* at 295, 605 A.2d at 246. The *Muench* court recognized that the New Jersey Supreme Court had previously held in *Erickson* that coercive sexual harassment creating a hostile work environment was banned by the LAD. *Id.* (citing *Erickson*, 117 N.J. at 556, 569 A.2d at 801). The court noted, however, that the *Erickson* court was not asked to decide whether nonsexual behavior could give rise to a valid claim of hostile work environment sexual harassment under the LAD. *Id.*

93 *Id.* at 293-94, 605 A.2d at 245. According to Muench, Officer Tortoreto, the plaintiff's supervisor, believed that the dispatcher position was a "job for a male." *Id.* at 293, 605 A.2d at 245. When the plaintiff was hired, Officer Tortoreto allegedly refused to answer her questions regarding office procedures, and often commented that she was "'doing a lousy job.'" *Id.* Additionally, Muench charged that Tortoreto used profanity in Muench's presence and made comments of a sexual nature which offended, but which were not sexual advances towards, the plaintiff. *Id.* at 294, 605 A.2d at 245. For example, on one occasion Tortoreto allegedly boasted to Muench that he had slept with two women the previous night, and at another time made a reference to his genitalia. *Id.*

94 *Id.* at 295-97, 605 A.2d at 246-47 (citations omitted); *see, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (holding that hostile work environment sexual harassment was actionable under Title VII as sex discrimination, and noting that federal guidelines banned such conduct if it intentionally interfered with an employee's work

held that interpreting the LAD as forbidding hostile and pervasive nonsexual harassment would best achieve the LAD's goal of eliminating workplace discrimination.[95]

Against this background of federal and state precedent, the New Jersey Supreme Court, in *Lehmann v. Toys 'R' Us, Inc.*,[96] identified two issues to be answered on appeal.[97] First, the court addressed the applicable standards to be employed in a claim for hostile work environment sexual harassment brought under the LAD.[98] Second, the court analyzed the extent of an employer's liability for sexual harassment by a supervisor who creates a hostile work environment.[99]

Before addressing these main concerns, Justice Garibaldi, writing for the majority, identified several general issues arising out of sexual harassment jurisprudence in New Jersey.[100] Initially, the court noted that the LAD was enacted in 1945 to erase all forms of discrimination, which included providing a discrimination-free work environment to the public.[101] The court recognized that although the statute's legislative history was silent on the area of sexual harassment, the LAD specifically prohibited sex discrimination in employment practices.[102] When confronted with a claim brought under the LAD, the majority noted, the court had often analyzed federal precedent governing Title VII of the Civil Rights Act of 1964 as an integral source of interpretive authority.[103] The

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performance or gave rise to an offensive, hostile, or intimidating work environment); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (ruling that workplace sexual harassment need not exhibit sexual overtones or advances to be protected by Title VII, and holding that "any harassment or other unequal treatment of an employee or a group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII").

95 *Muench*, 255 N.J. Super. at 298, 605 A.2d at 247.

96 132 N.J. 587, 626 A.2d 445 (1993).

97 *Id.* at 592, 600-15, 626 A.2d at 448, 451-59.

98 *Id.*; *see* N.J. STAT. ANN. §§ 10:5-1 to 10:5-42 (West 1993), and *supra* note 56 for a discussion of the LAD.

99 *Lehmann*, 132 N.J. at 592, 615-27, 626 A.2d at 448, 459-66.

100 *Id.* at 600-03, 626 A.2d at 451-53.

101 *Id.* at 600, 626 A.2d at 452 (citing Fuchilla v. Layman, 109 N.J. 319, 334, 537 A.2d 652, 660 (quotation omitted), *cert. denied sub nom.* University of Medicine & Dentistry of N.J. v. Fuchilla, 488 U.S. 826 (1988)) (stating that the purpose of the LAD is "'nothing less than the eradication of the cancer of discrimination.'"). *See supra* note 56 for an analysis of the LAD.

102 *Lehmann*, 132 N.J. at 600, 626 A.2d at 452 (citing N.J. STAT. ANN. § 10:5-12 (West 1993)) (quotation omitted).

103 *Id.* (citation omitted). Justice Garibaldi, although recognizing that the court has been influenced by federal precedent in developing LAD standards, noted that Title VII principles had been applied with flexibility and the court had departed from

court concluded that sexual harassment violated both the LAD and Title VII as a form of sex discrimination.[104]

Justice Garibaldi next explained that sexual harassment jurisprudence was split into two separate arenas—quid pro quo[105] and hostile work environment—and identified the case at bar as belonging to the latter category.[106] The court noted that because hostile work environment sexual harassment was such a recently recognized cause of action under the LAD, much confusion among both labor and management existed as to what type of conduct constituted a valid cause of action.[107] The New Jersey Supreme Court, the majority observed, had never been confronted with defining the elements of a hostile work environment sexual harassment claim before the case *sub judice*.[108] Therefore, the *Lehmann* court announced a new, structured test that the justices

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federal guidelines "'if a rigid application of its standards is inappropriate under the circumstances.'" *Id.* at 600-01, 626 A.2d at 452 (quoting Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 107, 570 A.2d 903, 912 (1990)).

104 *Id.* at 601, 626 A.2d at 452 (citations omitted); *see, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (holding that a Title VII violation would occur "when a supervisor sexually harasses a subordinate because of the subordinate's sex"); Muench v. Township of Haddon, 255 N.J. Super. 288, 298, 605 A.2d 242, 247 (App. Div. 1992) (holding that even nonsexual harassment resulting in a hostile work environment violated the LAD). *See supra* notes 69-78 and accompanying text for a discussion of *Meritor* and *supra* notes 91-95 and accompanying text for an analysis of *Muench*.

105 *Lehmann*, 132 N.J. at 601, 626 A.2d at 452. The prohibition of quid pro quo sexual harassment was illustrated in the EEOC Guidelines:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual.

29 C.F.R. § 1604.11(a)(1)-(2) (1993); *see, e.g.*, Barnes v. Costle, 561 F.2d 983, 984 (D.C. Cir. 1977) (noting that the elimination of a female employee's position in retaliation for her refusal to submit to supervisor's sexual demands constituted illegal sex discrimination). The *Lehmann* court specified several possible adverse employment conditions resulting from an employee's refusal to comply with a supervisor's sexual demands—loss of employment, unfavorable performance evaluations, and failure to be promoted. *Lehmann*, 132 N.J. at 601, 626 A.2d at 452. *See supra* note 11 for a discussion of quid pro quo sexual harassment.

106 *Lehmann*, 132 N.J. at 601, 626 A.2d at 452. In contrast to quid pro quo harassment, the EEOC Guidelines define hostile work environment sexual harassment as occurring if "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." 29 C.F.R. § 1604.11(a)(3) (1993).

107 *Lehmann*, 132 N.J. at 602, 626 A.2d at 452.

108 *Id.*, 626 A.2d at 453; *cf.* Erickson v. Marsh & McLennan Co., 117 N.J. 539, 555-57, 569 A.2d 793, 801-02 (recognizing that sexually hostile work environment allegations can be the basis of a claim under the LAD, but not defining the elements of such an action).

hoped would be enforceable as well as comprehensible to both employers and employees.[109]

In announcing the test, the *Lehmann* majority set forth and analyzed the four requisite elements to maintain a valid cause of action for hostile work environment sexual harassment.[110] In order for conduct to be actionable, the court maintained, a plaintiff would have to demonstrate that the alleged conduct (1) would not have taken place but for the gender of the employee and (2) was so "severe or pervasive" that it would make a (3) reasonable woman[111] believe that (4) her working conditions had been altered, creating an abusive or hostile work environment.[112]

The court first analyzed the initial element, requiring an employee to show that the harassment she encountered occurred because of her sex.[113] In satisfying this requirement, the majority explicated, it is critical for a plaintiff to prove that the complained of conduct would not have occurred had the plaintiff been a mem-

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[109] *Lehmann*, 132 N.J. at 603-04, 626 A.2d at 453. The court stressed the importance of enacting a standard that would apprise employees of their rights, protect employees from the harms of a hostile working environment, and allow employers to modify their conduct and policy guidelines in accordance with the law. *Id.* at 603, 626 A.2d at 453.

[110] *Id.* at 603-04, 626 A.2d at 453. Justice Garibaldi, in setting forth the new standard, agreed with the lower court majority that a structured definition of hostile work environment sexual harassment needed to be established. *Id.* at 603, 626 A.2d at 453. The majority was also cognizant of Appellate Judge Skillman's dissent, which expressed the need for a flexible standard that would allow for the evolution of this new area of law. *Id.* The court found that the EEOC Guidelines were not adequately structured to define the elements of this action. *Id.* Finally, the court rejected, as did the dissent below, the *Andrews* standard set forth by the Third Circuit, finding it to be analytically deficient. *Id.* *See supra* notes 79-86 and accompanying text for a discussion of the *Andrews* decision.

[111] Justice Garibaldi proffered that a reasonable woman standard would be used in the instant case, because in both the case at bar and the majority of sexual harassment actions, the plaintiff is female. *Lehmann*, 132 N.J. at 604, 626 A.2d at 454. The court noted, however, that the standard would apply to all forms of sexual harassment, both heterosexual and homosexual. *Id.* The court asserted that in reverse discrimination cases involving a male plaintiff, the plaintiff would be required "to allege conduct that a reasonable man would believe altered the conditions of his employment and created a working environment that was hostile to men." *Id.* In order to invoke this presumption, the justice observed, the male plaintiff would be required to make the additional showing that the defendant was among the uncommon group of employers that discriminates against the traditionally privileged male population. *Id.* at 605-06, 626 A.2d at 454-55 (citing *Erickson*, 117 N.J. at 551, 569 A.2d at 799).

[112] *Id.* at 603-04, 626 A.2d at 453. The court noted that the first prong of the test was separable from the latter three elements, which required an interdependent analysis. *Id.* at 604, 626 A.2d at 453.

[113] *Id.* at 604-06, 626 A.2d at 454-55. The majority noted that this initial element had to be proven by a preponderance of the evidence. *Id.* at 604, 626 A.2d at 454.

ber of the opposite sex.[114] The court dictated, however, that a plaintiff would not be required to show that the employer had intentionally discriminated against her.[115] Justice Garibaldi next promulgated that in situations where the alleged conduct was sexual in nature, such as sexual touchings or comments, this first element would be satisfied.[116] The court further acknowledged that the harassing conduct need not be overtly sexual for a successful claim, but in those non-sex based situations, the plaintiff must make a prima facie showing that, but for her sex, the conduct would not have occurred.[117]

The majority next explained the second prong of the court's new test, requiring that the alleged conduct be "severe or pervasive."[118] Justice Garibaldi emphasized that the harassing conduct itself, and not its effects on the work environment or the plaintiff, should be measured against this severe or pervasive standard.[119] Adopting this element, the court reasoned, would align New Jersey law with United States Supreme Court precedent in Title VII law, which employs identical "severe or pervasive" language.[120] At the same time, the court rejected the Third Circuit's "regular and pervasive" standard, which was set forth in *Andrews* and adopted by the New Jersey Superior Court, Appellate Division.[121] The court reasoned that the *Andrews* standard was not only inconsistent with Supreme Court precedent,[122] but would also serve to bar claims based on a single, severe incident, or those founded on multiple

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114 *Id.* The court cautioned that no LAD violation exists when a supervisor's behavior is equally offensive to all workers and not directed towards members of a particular sex. *Id.*

115 *Id.* Recognizing that the LAD served to eliminate both intentional and unintentional discrimination, the majority omitted intent as an element of a hostile work environment sexual harassment claim. *Id.* at 604-05, 626 A.2d at 454.

116 *Id.* at 605, 626 A.2d at 454.

117 *Id.* (citations omitted); *see, e.g.*, Muench v. Township of Haddon, 255 N.J. Super. 288, 292, 605 A.2d 242, 244 (App. Div. 1992) (holding that hostile and pervasive non-sexual harassment of a female police dispatcher, which occurred because of her sex, violated the LAD); Andrews v. City of Philadelphia, 895 F.2d 1469, 1471, 1485 (3d Cir. 1990) (finding that sexual harassment existed when female police officers, because of their sex, were subjected to, among other things, theft and vandalism of their personal property by co-workers on the force).

118 *Lehmann*, 132 N.J. at 606-07, 626 A.2d at 455.

119 *Id.* at 606, 626 A.2d at 455 (citing Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)).

120 *Id.* (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

121 *Id.* (citations omitted); *see* T.L. v. Toys 'R' Us, Inc., 255 N.J. Super. 616, 636, 605 A.2d 1125, 1136 (1992) (citing *Andrews*, 895 F.2d at 1482).

122 *Lehmann*, 132 N.J. at 606, 626 A.2d at 455. *See Meritor*, 477 U.S. at 67 (holding that for sexual harassment to be actionable, the conduct must be sufficiently severe or pervasive to cause the requisite harm).

but random acts of harassment.[123]

After reasoning that the objectionable conduct had to be sufficiently severe or pervasive to state an actionable claim under the LAD, Justice Garibaldi announced the requisite level of harm necessary to bring such an action.[124] In reaching the standard, the majority considered the fourth prong of the new test and, in so doing, addressed a disagreement that had divided the federal circuit courts for several years.[125] The court, by adopting the view held by the First, Second, Third, Eighth, Ninth and D.C. Circuits, held that the plaintiff had to prove that the harassing conduct was sufficiently severe or pervasive to alter the victim's employment conditions, thus creating an abusive working environment.[126] In so ruling, the majority rejected the position held by the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits that the plaintiff had to show that the victim's psychological well-being was seriously affected by the harassing conduct.[127] The majority reasoned that although the

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123 *Lehmann*, 132 N.J. at 606, 626 A.2d at 455. The court espoused that although it would be rare that a single incident of harassment would be severe enough to state a valid claim, this remote possibility should not be precluded. *Id.* at 606-07, 626 A.2d at 455. Further, the court reasoned that the LAD was enacted to prevent any harm arising from hostile work environments, and its remedies should not be afforded solely to cases where there are multiple incidents of harassment. *Id.* at 607, 626 A.2d at 455. The court supported its proposition by illustrating that most cases of hostile work environment sexual harassment involve incidents that, when taken alone, would not meet the requisite level of severity but, when considered cumulatively, would be sufficiently pervasive to create a hostile environment. *Id.* (citation omitted); *see Ellison*, 924 F.2d at 878 (noting that "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct"); Burns v. McGregor Elec. Indus., 955 F.2d 559, 564 (8th Cir. 1992) (noting that "'each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes'") (quoting Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991)).

124 *Lehmann*, 132 N.J. at 607-11, 626 A.2d at 455-57.

125 *See id.* at 607-08, 626 A.2d at 455-56.

126 *Id.* at 608, 626 A.2d at 456 (citations omitted); *see* Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992); *Ellison*, 924 F.2d at 878 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 897-98 (1st Cir. 1988); Minteer v. Auger, 844 F.2d 569, 570 (8th Cir. 1988); Vinson v. Taylor, 753 F.2d 141 (D.C. Cir 1985).

127 *Lehmann*, 132 N.J. at 608, 626 A.2d at 455-56 (citations omitted); *see, e.g.*, Rabidue v. Osceola Refining Co., 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (holding that a plaintiff must prove psychological injury in order to succeed in a Title VII hostile work environment sexual harassment action). In *Rabidue*, Vivienne Rabidue, the plaintiff, was subjected to continuous demeaning and degrading sexual behavior by her supervisor, Doug Henry. *Id.* at 624 (Keith, J., concurring in part and dissenting in part). Henry regularly voiced anti-female obscenities, constantly using such terms as "'whores,'" "'cunt,'" "'pussy,'" and "'tits.'" *Id.* In addition, the judge acknowledged that Henry specifically remarked about the plain-

LAD sought to prevent psychological damage of harassment victims, it was also tailored to alleviate other personal hardships.[128] If recovery was limited only to situations where serious psychological harm had occurred, the court maintained, the LAD's remedial function would not adequately be served.[129] Thus, the majority ruled that the conduct of the harasser, and not the injury to the plaintiff, had to be adequately severe or pervasive to state an actionable claim under the LAD.[130]

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tiff, "'All that bitch needs is a good lay,'" and referred to her as "'fat ass.'" *Id.* Despite this blatant harassment, the majority surprisingly held that the "obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees." *Id.* at 622. In addition, the majority commended and quoted the district court below, which stated:

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

Id. at 620-21 (citing *Rabidue*, 584 F. Supp at 430).

Judge Keith, in the dissenting portion of his separate opinion, characterized Doug Henry's views as "primitive," and stated that they indeed created an anti-female atmosphere. *Id.* at 625 (Keith, J., concurring in part and dissenting in part). Thus, Judge Keith expressed the firm conviction that the majority erred in ruling that Henry's conduct did not create an anti-female work environment. *Id.* at 623 (Keith, J., concurring in part and dissenting in part).

128 *Lehmann*, 132 N.J. at 608-09, 626 A.2d at 456. A National Organization of Women attorney, Anne Clark, stressed that psychological damage should not be the standard in sexual harassment cases. *See* Fisher, *supra* note 7, at 88. Clark proclaimed that "'[y]ou shouldn't have to suffer a nervous breakdown before you can make a claim.'" *Id.* The LAD cites other specific sufferings that warrant redress:

> The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act.

N.J. STAT. ANN. § 10:5-3 (West 1993).

129 *Lehmann*, 132 N.J. at 609, 626 A.2d at 456. Additionally, the court reasoned that discrimination in the form of sexual harassment "'threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State.'" *Id.* (quoting N.J. STAT. ANN. § 10:5-3 (West 1993)).

130 *Id.* at 609-10, 626 A.2d at 456; *accord Ellison*, 924 F.2d at 878 (holding that plain-

The court further noted that in cases where psychological harm does arise, the extent of the plaintiff's injury would factor into damage calculations but would not be used as an element of the cause of action.[131] Additionally, the court observed, this new standard would not require a victim to show economic loss and would allow a plaintiff to recover in situations where the harassing conduct was not directed towards her.[132]

Addressing the third element of the newly-created standard, the *Lehmann* court determined that in an action for hostile work environment sexual harassment, the fact finder should analyze the issue from the perspective of a reasonable woman.[133] Justice Garibaldi, in reasoning for the majority, noted that an objective, gender-specific standard was the most appropriate analysis for sexual harassment litigation.[134] The majority posited that a reasonable-

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tiffs do not have to be subjected to harassment until they are seriously affected psychologically in order to bring an actionable claim under Title VII). *See also* Carrero v. New York City Hous. Auth., 890 F.2d 569, 578 (2d Cir. 1989) (stating that an employee does not have to endure degrading and demeaning conduct on a continuing, long-term basis before being protected by Title VII remedies).

131 *Lehmann*, 132 N.J. at 610, 626 A.2d at 457.

132 *Id.* at 610-11, 626 A.2d at 457. The court instructed that a plaintiff, in order to show that her work environment was hostile, could use evidence demonstrating that other employees of the same sex were harassed. *Id.* at 611, 626 A.2d at 457. The court recognized that witnessing the harassment of same-sex employees would reinforce a plaintiff's perception that her work environment has become hostile. *Id. See, e.g.*, Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985) (holding that the defendant's harassment of other employees who were working in close proximity to the plaintiff, was directly relevant to the issue of whether a hostile environment was created in violation of Title VII).

133 *Lehmann*, 132 N.J. at 611-12, 626 A.2d at 457-58. In the less frequent cases where the plaintiff is male, the court instructed, a reasonable man standard would apply. *Id.* at 612, 626 A.2d at 458. Some legal commentators have criticized the use of a reasonable woman standard. *See, e.g.*, Robert Unikel, Comment, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 Nw. U. L. Rev. 326 (1992). Unikel rejected the legal usage of the reasonable woman standard as socially undesirable, legally inappropriate, and practically ineffective. *Id.* at 370. The author commented that:

> because the reasonable woman standard explicitly focuses on a person's gender group membership and implicitly requires that 'reasonableness' be applied in a manner that reflects the totality of a person's group affiliations, the standard effectively adopts a group rights perspective. Such a perspective is fundamentally inconsistent with the individualistic principle of formal equality that underlies the American legal system as a whole and the reasonableness principle in particular."

Id. See supra notes 19 and 111 for a further discussion of the reasonable woman standard.

134 *Lehmann*, 132 N.J. at 612, 626 A.2d at 458. Judge Damon Keith, in his critical dissent in *Rabidue v. Osceola Refining Co.*, has generally been credited with the advent of the reasonable woman standard in case law. Penny L. Cigoy, Comment, *Harmless Amusement or Sexual Harassment?: The Reasonableness Of The Reasonable Woman Standard*,

ness standard would better serve the LAD's goal of eliminating discriminatory behavior because the courts would now focus on the legality of the defendant's conduct, rather than on the plaintiff's subjective reactions.[135] Additionally, the majority elucidated that as society's perception of sexual harassment continues to evolve, the flexible reasonable woman standard would also continue to develop.[136]

The court dictated that only one type of claim would be barred by employing the reasonable woman standard.[137] Idiosyncratic responses by overly-sensitive plaintiffs to behavior that would not be considered harassing to an objective woman, the court reasoned, would not state a valid claim under this new standard.[138] Conversely, the court announced, this flexible standard would also enable a "tough and resilient" plaintiff to recover for conduct that she did not consider harassing, but when objectively viewed, the behavior would be deemed sufficiently offensive and severe to create a hostile work environment.[139]

In support of the adoption of a gender-specific test, the court recognized that inherent differences in male and female perspectives exist on sexual harassment in the workplace.[140] A reasonable

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20 PEPP. L. REV. 1071, 1079 (1993) (citing Rabidue v. Osceola Refining Co., 805 F.2d 611, 623-28 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part), *cert. denied*, 481 U.S. 1041 (1987)). *See supra* note 127 for an analysis of Judge Keith's dissent.

135 *Lehmann*, 132 N.J. at 612, 626 A.2d at 458.

136 *Id.* The court acknowledged, however, that incorporating society's views through the use of a reasonable woman standard could also pose certain dangers. *Id.* The court noted that the LAD, as remedial legislation, was concerned with changing standards of conduct. *Id.* By employing a reasonableness standard, the majority warned, courts should not hold that existing levels of discrimination are per se reasonable or that reasonable women would expect sexual harassment when employed in a male-dominated work environment. *Id.*

137 *Id.* at 613, 626 A.2d at 458.

138 *Id.* at 613-14, 636 A.2d at 458-59. The court stated, however, that these subjective reactions would have relevancy when determining compensatory damages. *Id.* at 613, 626 A.2d at 458. The court further observed that such subjective responses were not an element of the cause of action for hostile work environment sexual harassment. *Id.*

139 *Id.*

140 *Id.* at 614-15, 626 A.2d at 459. Legal analysts have also noted these differing gender perspectives in the workplace, and the interaction of men and women at work has come under close scrutiny. *See, e.g.*, Anne C. Levy, *Sexual Harassment Cases in the 1990s: "Backlashing" the "Backlash" Through Title VII*, 56 ALBANY L. REV. 1, 50 (1992). Levy maintained that although people may observe sexual interplay as a form of harmless amusement between men and women, this behavior has more serious undertones. *Id.* Levy postulated that it is more accurate to categorize this interplay as an attempt by men, the gender with organizational power, to keep women in their historically subordinate role. *Id.*

person standard, the majority argued, would ignore this distinction and focus on the male perspective, which the court maintained is viewed by society as more normal.[141] The court concluded that when fact finders apply this standard, they must be cognizant and respectful of these different gender perspectives.[142]

The New Jersey Supreme Court stated that once the elements of sexual harassment have been established against a supervisor, it must be determined whether the employer can be held vicariously liable for its supervisor's harassing conduct.[143] The majority noted that the court had not addressed this issue subsequent to the LAD's 1990 amendment, which made all common law tort remedies available to superior court plaintiffs.[144] Justice Garibaldi

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Another commentator has observed that men generally perceive sexual conduct and comments as "harmless amusement." Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989). The author asserted that whereas men tend to find sexual conduct directed towards them as flattering or harmless, women are more likely to view such behavior as intimidating and hostile. *Id.* at 1205-06 (citing BARBARA GUTEK, SEX AND THE WORKPLACE 47-54 (1985)).

141 *Lehmann*, 132 N.J. at 614, 626 A.2d at 459. The court explained that a possible reason for the difference in gender perspectives is that women are subjected to a society replete with sexual violence. *Id.* at 615, 626 A.2d at 459. Thus, the court noted, women may view sexual behavior in an inappropriate setting as menacing. *Id.* The New Jersey Supreme Court recognized that this issue was squarely addressed by the Fifth Circuit in *Ellison v. Brady*. *Id.* (citing Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991)). The Lehman court noted the *Ellison* court's statement that:

> [B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

Id. (quoting *Ellison*, 924 F.2d at 879).

142 *Id.* The court also addressed the concern that women have been a minority in many workplace settings. *Id.* Due to this status, the court reasoned, it is more difficult for women to gain recognition and credibility among co-workers, and can result in a loss of self-confidence and interfere with employment advancement and success. *Id.* (citing Abrams, *supra* note 140, at 1208-09.)

143 *Id.* at 615-16, 626 A.2d at 459-60.

144 *Id.* at 616, 626 A.2d at 460 (citations omitted). The court cited the LAD amendment, which states in pertinent part that "[u]pon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in this suit. All remedies available in common law tort actions shall be available to prevailing plaintiffs." *Id.* (citing N.J. STAT. ANN. § 10:5-13 (West 1993)). Prior to 1990, the court noted, some compensatory relief was afforded to plaintiffs under the LAD. *Id.* (citing Jackson v. Concord Co., 54 N.J. 113, 125-28, 253 A.2d 793, 800-01 (1969); Gray v. Serutto Builders, 110 N.J. Super. 297, 317, 265 A.2d 404, 415 (Ch. Div. 1970)). The *Lehmann* court illustrated, however, that the main form of available relief for pre-1990 LAD violations was equitable in nature. *Lehmann*, 132 N.J. at 616, 626 A.2d at 460

agreed with the opinion of the appellate division in finding that an employer should be held strictly liable for equitable damages and relief resulting from a supervisor's sexual harassment of an employee.[145] The LAD's curative purpose of abolishing workplace harassment and discrimination, the court reasoned, would best be served by holding an employer directly responsible for restoring an employee to her pre-harassment status quo.[146] The majority elucidated that the employer is not only the party with the power to effectuate such remedial restoration, but is also best suited to impose measures to prevent future workplace harassment.[147]

Alternatively, the majority recognized that different considerations should apply in assessing employer liability standards for compensatory damages[148] because the employer is not the only party

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(citing Shaner v. Horizon Bancorp., 116 N.J. 433, 436-37, 561 A.2d 1130, 1132-33 (1989)).

Similarly, commentators have noted that the enactment of the 1991 Civil Rights Act on the federal level has increased the potential for recovery in sexual harassment actions. *See, e.g.*, Terry M. Dworkin, *Harassment in the 1990s*, BUSINESS HORIZONS, Mar.-Apr. 1993, at 55. Dworkin noted that the passage of this bill was facilitated by the public awareness generated from the Hill-Thomas hearings. *Id.* One year earlier, President Bush had vetoed an almost identical bill, terming it a quota bill. *Id.* After the bill was reintroduced in 1991, Bush again threatened to use his veto power. *Id.* Dworkin stated, however, that soon after the debates Bush deserted the quota objections and signed the bill into law. *Id.*

According to Dworkin, the Act increased the available remedies for employment discrimination victims by allowing employees to sue for compensatory and punitive damages, along with the standard equitable relief afforded by Title VII. *Id.* Prior to the 1991 Act, injunctive relief was the main Title VII remedy. *Id.* Pursuant to the 1991 Act, Dworkin noted that damages included recovery for emotional pain and suffering and other nonpecuniary losses. *Id.* Additionally, the author recognized that the Act made jury trials available to plaintiffs seeking damages. *Id.* Because juries are presumed to favor the employee side of litigation, this new measure would have a great impact upon a victim's recovery. *See id.*

145 *Lehmann*, 132 N.J. at 616-17, 626 A.2d at 460. The court set forth a non-exclusive list of equitable damages: front and/or back pay, hiring or reinstating the harassed employee, discharging, disciplining, or transferring the harasser, and taking remedial and preventive measures at the workplace. *Id.*

146 *Id.* This strict liability standard for equitable damages and relief applies to cases involving both quid pro quo and hostile work environment sexual harassment committed by agents and supervisors. *Id.* at 617, 626 A.2d at 460; *see also* Harz & Lajewski, *supra* note 11, at 12.

147 *Lehmann*, 132 N.J. at 617, 626 A.2d at 460.

148 Compensatory damages are defined as those that:

> will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury. Damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him. The rationale behind compensatory damages is to restore the injured party to the position he or she was in prior to the injury."

BLACK'S LAW DICTIONARY 390 (6th ed. 1990) (citation omitted).

capable of providing such relief.[149] The court conformed with the intentions and instructions of both the New Jersey Legislature and the United States Supreme Court by holding that agency principles should govern employer liability for compensatory damages.[150] Further, the court recognized that negligence, as set forth in the *Restatement (Second) of Agency*, also provided an additional basis for employer liability.[151] Although declining to set forth a specific negligence standard for sexual harassment claims, the court noted that

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149 *Lehmann*, 132 N.J. at 617, 626 A.2d at 460.

150 *Id.* The court noted that the New Jersey Legislature amended the LAD to make available all common law tort remedies. *Id.* See *supra* note 144 for a discussion of the 1990 LAD amendment. Judge Skillman, in the appellate opinion below, rendered the following assertion as to the availability of compensatory damages: "I would conclude that claims for any compensatory damages which are not equitable in nature should be subject to common law rules of liability, including general principles of agency law." T.L. v. Toys 'R' Us, Inc., 255 N.J. Super. 616, 660, 605 A.2d 1125, 1149 (App. Div. 1992) (Skillman, J.A.D., concurring in part and dissenting in part). Moreover, the New Jersey Supreme Court noted that the United States Supreme Court, in *Meritor Savings Bank v. Vinson*, suggested that agency principles should be applied to Title VII cases. *Lehmann*, 132 N.J. at 618, 626 A.2d at 461 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986)). Justice Garibaldi further noted that the *Meritor* Court had rejected an automatic, strict liability rule for hostile work environment supervisory sexual harassment. *Id.* (citing *Meritor*, 477 U.S. at 72). Although the *Meritor* Court failed to issue a definitive standard for employer liability, Justice Garibaldi noted that the Supreme Court did agree with the EEOC that Congress intended the courts to employ agency principles for guidance in this field. *Id.* Specifically, the *Lehmann* court quoted the following passage from the United States Supreme Court's *Meritor* decision:

> While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.

Id. (quoting *Meritor*, 477 U.S. at 72) (citation omitted)).

151 *Lehmann*, 132 N.J. at 621, 626 A.2d at 462. Specifically, the court noted that Section 219 of the RESTATEMENT (SECOND) OF AGENCY, which outlined a master's liability for the torts committed by a servant, mandated that:

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

Id. at 619, 626 A.2d at 461-62 (quoting RESTATEMENT (SECOND) OF AGENCY § 219 (1958)).

workplace sexual harassment would be considered foreseeable regardless of whether an employer has established and enforced anti-harassment policies.[152] The absence of such policies, the court warned, would provide strong evidence of negligent conduct by the employer.[153]

Finally, the majority addressed the issue of punitive damages,[154] concluding that such damages would be awarded only in cases demonstrating egregious conduct on the part of the wrongdoer.[155] An employer should be held liable for punitive damages, the court instructed, only where upper management participated in the harassment or acted with willful indifference.[156]

Subsequent to the *Lehmann* decision, the United States

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[152] *Id.* at 621, 626 A.2d at 462. The court elucidated that the absence of anti-harassment policies would not automatically give rise to negligence, and, conversely, the presence of such mechanisms would not automatically shield an employer from liability. *Id.*, 626 A.2d at 463. The majority recognized, however, that an employer could establish evidence of due care by installing preventative mechanisms in the following manner:

> Employers that effectively and sincerely put five elements into place are successful at surfacing sexual harassment complaints early, before they escalate. The five elements are: policies, complaint structures, and that includes both formal and informal structures; training, which has to be mandatory for supervisors and managers and needs to be offered for all members of the organization; some effective sensing or monitoring mechanisms, to find out if the policies and complaint structures are trusted; and then, finally, an unequivocal commitment from the top that is not just in words but backed up by consistent practice.

Id. at 621-22, 626 A.2d at 463 (quotation omitted).

[153] *Id.* at 622, 626 A.2d at 463.

[154] *Id.* at 624, 626 A.2d at 464. Punitive, or exemplary damages:

> are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by the circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior . . . . [P]unitive or exemplary damages are based upon an entirely different public policy consideration—that of punishing the defendant or of setting an example for similar wrongdoers . . . . In cases in which it is proved that a defendant has acted willfully, maliciously, or fraudulently, a plaintiff may be awarded exemplary damages in addition to compensatory or actual damages.

BLACK'S LAW DICTIONARY 390 (6th ed. 1990).

[155] *Lehmann*, 132 N.J. at 624-25, 626 A.2d at 464 (quoting Leimgruber v. Claridge Assocs., 73 N.J. 450, 454, 375 A.2d 652, 654 (1977)).

[156] *Id.* at 625, 626 A.2d at 464 (citing Shrout v. Black Clawson Co., 689 F. Supp. 774, 783 (S.D. Ohio 1988) (holding that an employer, in an action for supervisory sexual harassment, could be held liable when the employer participated in, ratified, or acquiesced in the wrongdoing)).

Supreme Court recently addressed, for the second time, the issue of workplace sexual harassment.[157] Specifically, in *Harris v. Forklift Systems, Inc.*, the Court was asked to resolve the conflict existing in the federal circuit courts over whether a plaintiff should be required to show psychological damage before being able to recover under Title VII.[158] In arriving at the same conclusion as the *Lehmann* court, the United States Supreme Court held that for conduct to be actionable as hostile work environment sexual harassment, the behavior need not affect the plaintiff's psychological well-being or cause her to suffer psychological injury.[159] Thus, by mirroring the standard set forth in *Lehmann*, the Supreme Court resolved the division existing at the federal level on the psychologi-

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157 Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993). *See generally* Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law—Will it Really Make a Difference?*, 26 IND. L.J. 227 (1993). Lester noted that the Supreme Court issued its first sexual harassment opinion in *Meritor*. *Id.* at 231 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)). *See supra* notes 69-78 and accompanying text for a discussion of *Meritor*.

158 *Harris*, 114 S. Ct. at 370. Theresa Harris was a manager at Forklift Systems, Inc., and Charles Hardy was the company's president. *Id.* at 369. Throughout Harris's employment at Forklift, she was often subjected to unwanted sexual innuendos because of her gender. *Id.* On one occasion, Hardy, in front of a group of employees, asked Harris to go to a hotel so they could negotiate her raise. *Id.* Hardy would also ask female employees, including Harris, to retrieve coins from the front pocket of his pants. *Id.* At other times he would throw objects in front of Harris and other women and ask them to pick them up, and would also make sexual comments about Harris's clothing. *Id.* Another time, when Harris was negotiating a deal with a Forklift customer, Hardy asked her, in front of her co-employees, "'What did you do, promise the guy . . . some [sex] Saturday night?'" *Id.*

Hardy's behavior was not always overtly sexual in nature, but rather sexist and derogatory towards the female gender. *See id.* On various occasions, in front of Harris's associates, Hardy stated, "'You're a woman, what do you know,' and 'We need a man as the rental manager,'" and on at least one occasion referred to her as a "'dumb ass woman.'" *Id.*

See supra notes 127-30 and accompanying text for a discussion of the circuit court division over the psychological damage issue.

159 *Id.* at 371. The district court below held that Hardy's actions did not create a hostile environment because, although some of his behavior offended Harris, and would offend a reasonable woman, it was not "'so severe as to be expected to seriously affect [Harris's] psychological well-being.'" *Id.* at 369-70 (quoting the district court opinion) (citation omitted). The Supreme Court also reaffirmed that Title VII was not limited to economic or tangible discrimination. *Id.* at 370 (citing *Meritor*, 477 U.S. at 64). Justice O'Connor, writing for a unanimous Court, stated that the Court's decision was a compromise between making actionable any offensive conduct, and requiring the conduct to result in psychological injury. *Id.* at 370. The Court further instructed that Title VII would come into play, and a defendant's behavior would be deemed harassing, before a plaintiff suffers a nervous breakdown. *Id.*

Justice Scalia, concurring in the judgment, stated that the "abusive" or "hostile" standard adopted in the *Meritor* decision was vague. *Id.* at 372 (Scalia, J., concurring). Further, the Justice proclaimed that "no test [is] more faithful to the inherently vague statutory language than the one the Court today adopts," and for those reasons concurred with the majority opinion. *Id.*

cal damage issue, and held that as long as a work environment has become abusive or hostile, a plaintiff does not have to prove psychological damage.[160]

The New Jersey Supreme Court's decision in *Lehmann* should be applauded for its liberal and innovative stance on the issue of sexual harassment. This new test will make it easier for a plaintiff to prove a valid cause of action, as a result of both its objective, reasonable woman standard, and also due to the ability of a plaintiff to recover without having to prove psychological injury.

The courtroom, however, is not the most effective arena for ridding society of workplace sexual harassment. Realistically, in order to curb the worldwide[161] problem of workplace sexual harassment, both management and employees need to restructure their beliefs and policies. Mandatory harassment policies and grievance procedures on the part of employers, coupled with required attendance for employees at educational and awareness seminars, need to be implemented on the national level as a starting point for the cure.

It is unrealistic, however, to assume that this problem will be instantly remediated. One possible approach to the problem is for an employer or company to implement mandatory, binding, and final arbitration agreements for their employees.[162] This approach would not only address the grievances much faster, but would also serve to alleviate the increasing backlog of federal cases. By having both the accused harasser and alleged victim actively participate with management in the arbitration process, a more universal awareness will be created in furtherance of the goal of reducing the incidence of sexual harassment.

Some commentators believe that the sexual harassment problem will be cured through demographic realignment; it is pro-

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160 *Id.* at 371.

161 *See* Dworkin, *supra* note 144, at 56. Dworkin observed that the worldwide struggle against sexual harassment has reached all corners of the globe. *See id.* For example, the author illustrated that Japanese courts have recently recognized that country's first successful sexual harassment claim, and awarded 16 million yen to the victim. *Id.* at 56-57. In Britain, the author maintained, where sexual harassment complaints have increased by 50%, the government has intervened with an anti-harassment campaign. *Id.* at 57. Additionally, Dworkin noted, harassing behavior has become criminalized in some European Community countries. *Id.*

162 *See ADR Seminar on Sexual Harassment*, ARB. J., June 1993, at 23. An example given in the seminar involved opposing parties who together select a joint investigatory team comprised of both a man and woman. *Id.* The parties then agreed on an arbitration process involving two mediation sessions. *Id.* If unsuccessful, the plan dictated, the mediating team would report to management who, upon request, would issue a recommendation for action. *Id.*

jected that by the year 2000 women will comprise nearly fifty percent of the workforce.[163] This will have the resulting effect of enabling women to influence the workplace and instill a more gender-neutral work environment. Hopefully, this will set in motion, and eventually achieve, society's ultimate goal of completely eradicating sexually hostile work environments.

Thomas E. Claps

163 *See* Dworkin, *supra* note 144, at 56.