IS RELIGIOUS HARASSMENT "MORE EQUAL?"*

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I. INTRODUCTION

A worker who claimed to be of Jewish ancestry and faith is repeatedly referred to by his employer as "the Jew-boy," "the kike," the "Christ-killer," and the "goddamn Jew";[1] a woman in the workplace is subjected to a constant display of "girlie" posters in work areas that she has to frequent;[2] an African-American is subjected to racial epithets, "nigger jokes," and racial graffiti by his coworkers throughout his employment.[3] In each of these situations, either a supervisor or the employer was responsible for the activity or condoned the activity by fellow workers.[4] All three of these situations are actionable under Title VII of the Civil Rights Act of 1964[5] as a form of discriminatory harassment because they deny the employees "the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[6] However, some groups are

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* *See generally* GEORGE ORWELL, ANIMAL FARM (1945).

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1 Compston v. Borden, Inc., 424 F. Supp. 157, 158 (S.D. Ohio 1976).

2 *See* Stair v. Carpenters, 62 Empl. Prac. Dec. (CCH) ¶ 42,602, at 77,252 (E.D. Pa. 1993); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1490 (M.D. Fla. 1991).

3 Daniels v. Essex Group, Inc., 937 F.2d 1264, 1266 (7th Cir. 1991); *see also* Rodgers v. Western-Southern Life Ins. Co., 63 Fair Empl. Prac. Cas. (BNA) 694, 696 (7th Cir. Dec. 17, 1993).

4 *See supra* notes 1-3 (listing cases of employer-condoned or initiated harassment). A critical element to finding an employer liable for the acts of his supervisors and other employees is the agency principle of *respondeat superior*. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986) (declining to issue a definitive rule regarding employer liability, stating that "employers are not always automatically liable for sexual harassment by their supervisors" but noting that "absence of notice to an employer does not necessarily insulate that employer from liability"). For further discussion of *Meritor*, see *infra* notes 6, 7, 50-53, 62 and accompanying text.

5 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. V 1994) [hereinafter Title VII] (prohibiting an employer from discriminating against employees on the basis of race, color, religion, sex or national origin).

6 *Meritor*, 477 U.S. at 65. *Meritor* is the first of only two cases that the Supreme Court has heard on harassment. While *Meritor* specifically recognized a claim for sexual harassment, the Court implicitly approved claims for racial, national origin, and

now demanding that a different standard be used to judge religious harassment.

As harassment law developed, the courts[7] and the EEOC[8] stated that racial harassment equaled national origin harassment equaled religious harassment equaled (belatedly) sexual harassment. However, when the EEOC recently proposed guidelines which incorporated this idea,[9] they were met with fierce resist-

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religious harassment. *Id.* at 65-66. More recently, in Patterson v. McLean Credit Union, 491 U.S. 164, 180-81 (1989), the Court more specifically stated its view that racial harassment in employment is actionable under Title VII which prohibits harassment that creates a hostile or offensive working environment.

[7] *See, e.g., Meritor*, 477 U.S. at 57 (sexual harassment); Daniels v. Essex Group, Inc. 937 F.2d 1264 (7th Cir. 1991) (race harassment); Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372 (7th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987) (race harassment); Harris v. Int'l Paper, 765 F. Supp. 1509 (D. Me. 1991) (race harassment); Boutros v. Canton RTA, 62 Fair Empl. Prac. Cas. (BNA) 369 (6th Cir. 1993) (national origin harassment); Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475 (6th Cir. June 30, 1989) (national origin/race harassment); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1972) (national origin harassment); Turic v. Holland Hospitality, Inc., 842 F. Supp. 971 (W.D. Mich. 1994) (religious harassment); Turner v. Barr, 806 F. Supp. 1025 (D.D.C. 1992), *reh'g denied*, 65 Fair Empl. Prac. Cas. (BNA) 909 (Jan. 13, 1993) (religious harassment); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (religious harassment).

[8] *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1994) [hereinafter EEOC Guidelines]. In the EEOC Guidelines published July 1, 1988, the Equal Employment Opportunity Commission (EEOC) stated that the principles enunciated "continue to apply to race, color, religion or national origin" discrimination. 29 C.F.R. § 1604.11(a) n.1; *see also* EEOC Compl. Man. (BNA) § 615.7(b), ¶ 3106, at 3219 (1988) ("The principles involved with regard to sexual harassment continue to apply to harassment on the basis of race, color, religion or national origin.").

[9] Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (1993) (to be codified at 29 C.F.R. § 1609) (proposed October 1, 1993) [hereinafter Harassment Guidelines]. Earlier, in 1980, the EEOC issued Guidelines on Discrimination Because of Sex, *see supra* note 8, and Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606 (1994). The Guidelines on Discrimination Because of National Origin read in relevant part:

> The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

Id. at § 1606.1. The Commission specifically spelled out the definition for national origin hostile environment in the following terms:

> Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.

Id. at § 1606.8(b). It is not clear why no guidelines were drafted specifically to address the other classes of discrimination mentioned in Title VII—namely, race, color and

ance[10] and the EEOC was forced to withdraw them. The question now is: Should all harassment be treated equally and judged by a single standard? Compounding this question is the increasing demand for limits on the law of harassing environment which itself impinges on First Amendment rights.[11]

Resistance to the proposed Guidelines has primarily[12] come from religious groups who are concerned that the new Guidelines, drafted in part in response to and in support of recent sexual harassment cases banning the display of sexual-content posters and magazines in the workplace, will curtail First Amendment freedom of religious expression.[13] The executive director of the Christian Coalition referred to the Guidelines as "Draconian regulations . . . that have the potential to turn the workplace into a religious-free zone."[14] Critics have expressed concern that the proposed guidelines would lead to frequent conflicts among workers of differing faiths and to conflicts in circumstances where an employer espouses certain religious views on a voluntary basis.[15] Still other critics have expressed concern that employers would prohibit even

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religion. For further discussion of the Guidelines on Discrimination Because of Sex, see *infra* notes 37-41.

10 *See* Richard B. Schmitt, *EEOC Guidelines Threaten to Pit Church vs. State in Workplace*, WALL ST. J., June 8, 1994, at B9 (noting that the EEOC received more letters and comments of outrage and concern than it had ever received before).

11 The imposition of sanctions under Title VII seems to necessarily conflict with the First Amendment to the Constitution, which protects freedom of speech and of religion. Typical sanctions under Title VII would prohibit the display of sexually-graphic materials in the workplace. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1523 (M.D. Fla. 1991). Other sanctions might prohibit an employer from proselytizing to his employees concerning his religious beliefs. *See* Meltebeke v. Bureau of Labor & Indus., 63 Fair Empl. Prac. Cas. (BNA) 709, 709-10 (Or. Ct. App. May 19, 1993).

12 *See* Frank Swoboda, *EEOC'S Emerging Religious Harassment Guidelines Worry Employer, Others*, WASH. POST, Jan. 30, 1994, at H2. Certain feminist groups are also up in arms over the proposed regulations on First Amendment grounds, stating, "'we feel the proposed guidelines go too far and threaten to have a wide-ranging adverse impact on protected speech in workplaces where most American adults spend most of their active hours.'" *Id.* (quoting Cathy E. Crosson of Feminists for Free Expression). The results, argued the Feminists for Free Expression, would be a standard so broad "'as to include classically protected, and not particularly discriminatory, speech such as a satirical feminist poster attributing social ills to white men.'" *Id.* (quoting Cathy E. Crosson of Feminists for Free Expression).

13 Schmitt, *supra* note 10, at B9.

14 *Id.*

15 *Id.* On the other hand, other religious groups appear to welcome the new proposed Harassment Guidelines. *Id.* A spokesman for the American Jewish Congress endorsed the Harassment Guidelines, saying that without them, there is "a message that religious harassment is less important than other forms of harassment and not a problem. We think that is exactly the wrong message to send." *Id.*

appropriate religious expression - such as the wearing of crosses and yarmulkes - to avoid being sued.[16]

This Article will (1) review the development and presumed uniformity of harassing environment theory as applied to different protected categories; (2) review the language and intent of the proposed Guidelines; and (3) review recent religious harassment decisions and suggested standards for judging religious harassment to determine whether the courts and standards impermissibly encroach on First Amendment freedom of religious rights. In conclusion, we will make recommendations as to whether all harassment should be judged by the same standard relative to the competing interests of the First Amendment and Title VII.

II. JUDICIAL DEVELOPMENT OF "UNIFORM" STANDARDS

A. *Development of Harassing Environment Theory for Race, National Origin, and Religion*

The stated purpose of Title VII of the Civil Rights Act of 1964 was to make it an unlawful employment practice for an employer to discriminate against an individual because of his race, color, religion, sex, or national origin with respect to compensation, terms, conditions, or privileges of employment.[17] As originally interpreted by the courts, Title VII addressed discriminatory practices emanating from economic disparities in treatment, but not from psychological disparities in treatment.

The determination that the prohibition on discrimination under Title VII extended to harassment in the workplace was first made in 1971 in a race discrimination case, *Rogers v. EEOC*.[18] In this case, the court recognized for the first time that "employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse"[19] and that the wording "terms,

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16 *Id.*

17 42 U.S.C. § 2000e-2(a)(1). Title VII reads in relevant part:

> It shall be an unlawful employment practice for an employer:
> (1) to fail or refuse to hire or 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.

18 454 F.2d 234, 237-39 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The plaintiff, an Hispanic nurse, successfully alleged that she was permitted only to attend to patients of her ethnic origin and not to others, and that she was eventually fired because of her race. *Id.* at 237.

19 *Id.* at 238. Specifically, the court explained:

> Time was when employment discrimination tended to be viewed as a

conditions or privileges of employment" in the Act covered a working environment heavily charged with hostility directed to those protected under the Act.[20] In explaining the need for the courts to expand the protection of Title VII to cover harassment in the workplace, the *Rogers* court presaged the beginning of the expanded coverage of Title VII and its inevitable conflict with the First Amendment:

> Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstructive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become injustices of the morrow. . . . We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of ethnic discrimination. . . . [E]mployees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and . . . the phrase "conditions, terms, and 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.[21]

Since the *Rogers* decision by the Fifth Circuit, courts have unhesitatingly applied the "hostile environment" concept of harassment to cases of racial and national origin discrimination.[22] These

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> series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues.

Id.

20 *Id.*

21 *Id.*

22 *See, e.g.*, Ways v. City of Lincoln, 871 F.2d 750, 755 (8th Cir. 1989) (holding that a city police officer was subjected to a racially-hostile environment); Degrace v. Rumsfeld, 614 F.2d 796, 804-07 (1st Cir. 1980) (applying the hostile environment theory where supervisors allowed racial harassment of co-employees); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 515 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (finding impermissible segregation and discrimination where on-duty white firefighters excluded black firefighters from a supper club); Gray v. Greyhound Lines, 545 F.2d 169, 176 (D.C. Cir. 1976) (holding that hostile environment which consisted of discriminatory hiring practices that affected plaintiff's psychological well-being was sufficient to establish plaintiff's standing); Rogers v. EEOC, 454 F.2d 234, 238-39 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (holding that a working environment "heavily charged" with discrimination violates Title VII); EEOC v. Murphy

harassment cases, for the most part, address situations in the workplace where employees are subjected to racial name-calling[23] and graffiti found in common areas.[24]

Religious harassment under Title VII was first recognized in 1976 in *Compston v. Borden, Inc.*[25] The court found that plaintiff Compston was verbally abused by his supervisor after Compston casually mentioned that he believed in the basic tenets of Judaism.[26] In some respects, the court treated the case as one of both religious and national origin harassment.[27] In the few cases of religious harassment to reach federal courts from 1976 to the 1990s, religious harassment has been treated the same as race and national origin harassment, and the latter have been cited as support for the former.[28]

B. Development of Harassing Environment Theory for Sex

There may be several explanations for why sexual harassment initially lagged behind the recognition of other forms of harass-

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Motor Freight Lines, 488 F. Supp. 381, 384 (D. Minn. 1980) (involving instances of racial harassment which led to employer liability for hostile environment); United States v. City of Buffalo, 457 F. Supp. 612, 639 (W.D.N.Y. 1978) (finding a pattern of discriminatory practice against blacks and women); Croker v. Boeing Co., 437 F. Supp. 1138, 1193 (E.D. Pa. 1977) (recognizing that racially-demeaning language helped to create a racially-hostile environment); Murry v. American Standard, Inc., 373 F. Supp. 716, 717 (E.D. La.), *aff'd*, 488 F.2d 529 (5th Cir. 1973) (finding racism and a hostile environment where employer referred only to a black employee as "boy").

[23] *See, e.g.*, Erebia v. Chrysler Plastic Prod. Corp., 772 F.2d 1250, 1258 (6th Cir. 1985) (finding that Mexican-American supervisor was subjected to racial slurs by hourly employees which employer ignored).

[24] *See, e.g.*, Daniels v. Essex Group, Inc., 937 F.2d 1264, 1266-68 (7th Cir. 1991) (involving an African-American subjected to racial epithets and graffiti written on the bathroom walls); Harris v. Int'l Paper, 765 F. Supp. 1509, 1517-21 (D. Me. 1991) (finding harassment where an African-American was subjected to racial graffiti at his work station as well as racial epithets from other workers and supervisors).

[25] 424 F. Supp. 157, 160-61 (S.D. Ohio 1976). While the court recognized that Compston had been harassed, the court awarded only nominal damages of $50 dollars and denied punitive damages upon finding that Compston's firing was job-related. *Id.* at 163.

[26] *Id.* at 158. Borden challenged Compston's cause of action in part on the fact that he was not Jewish. *Id.* at 161. Compston testified that "when he was a young child his maternal grandmother informed him that his paternal grandmother was Jewish." *Id.* He was not a practicing Jew, and the court found his "grasp of the fundamental tenets of Judaism . . . a rather poor one." *Id.* Nonetheless, the court found that he was harassed because his supervisor believed him to be Jewish. *Id.*

[27] *See id.* at 160. "Title VII has from its enactment proscribed discrimination 'against any individual with respect to his . . . religion . . . or national origin.'" *Id.*

[28] *See, e.g.*, Smallzman v. Sea Breeze, 60 Fair Empl. Prac. Cas. (BNA) 1031 (D. Md. Jan, 7, 1993); Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984); Obradovich v. Federal Reserve Bank, 569 F. Supp. 785 (S.D.N.Y. 1983).

ment as a form of discrimination. First, gender was a "tag-on" to Title VII; at the time, Congress did not consider gender discrimination to be as serious as other forms of discrimination.[29] Further, the issue involves much more subtle variables. Reflecting this, courts originally did not treat sexual harassment as the equivalent of other forms of harassment, and the early federal sexual harassment cases were unsuccessful.[30]

The case of *Corne v. Bausch & Lomb, Inc.*[31], the first reported sexual harassment case, is illustrative. In *Corne*, the plaintiffs alleged that they were forced to resign from their jobs because of their supervisor's verbal and sexual advances, which made their jobs intolerable. Their claim was denied because the court found that the harassment arose from the "personal proclivity, peculiarity or mannerism" of the supervisor and not from any company policy.[32] The court further argued that nothing in the Act could be "reasonably construed to have it apply to 'verbal and physical sexual advances' by another employee, even though he be in a super-

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29 The inclusion of sex as a protected category under Title VII was a last minute addition to the bill in an attempt to thwart the bill's passage into law. *See* 110 CONG. REC. 2577-84, 2718-21 (1964); *see also* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 233-34 (1985) (characterizing women as "accidental beneficiar[ies]" of the Civil Rights Movement); Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 299 n.1 (1991). When finally conceived, the Act was designed only to protect minorities and females. It was not until 1976 that the Supreme Court made clear that Title VII protects all employees—even white males—from discrimination in employment on the basis of race, color, sex, religion, and national origin. *See* McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 278-79 (1976).

30 ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE 17 (1990). Most of these cases were factually similar and involved tangible economic benefits or "sex for benefits" scenarios. *Id.* The cases were unsuccessful despite the growing number of women entering the work force during the 1970s and the growing number of discrimination complaints received by the EEOC. *Id.*

31 390 F. Supp. 161 (D. Ariz. 1975), *vacated on procedural grounds*, 562 F.2d 55 (9th Cir. 1977). The first sexual harassment case to go to court was Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. Aug. 9, 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), which was decided in 1974 but not reported until several years later.

32 *Corne*, 390 F. Supp. at 163; *see also* Ludington v. Sambo's Restaurants, Inc. 474 F. Supp. 480, 482, 483 (E.D. Wis. 1979) (holding that plaintiffs subjected to "obscene and vulgar suggestions and physical conduct" by their supervisor were not protected by Title VII because they did not allege that their termination due to the harassment was in any way approved by the employer). The *Corne* reasoning ignored both the language in Title VII and Title VII precedent, which both held that employers are generally liable for the acts of their supervisors. *See* 42 U.S.C. § 2000e(b) (treating employers' agents as employers for purposes of liability); *see also* Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977) (citations omitted) (holding an employer liable for discriminatory discharge by supervisor).

visory capacity, where such complained of acts or conduct had no relationship to the nature of the employment."[33]

Taking their signal from *Corne*, subsequent courts ignored Title VII precedent involving other protected categories and, when addressing the unique elements in sexual harassment cases, consistently found that the conduct challenged was not subject to Title VII sanctions because it was due to interpersonal strife.[34]

A cause of action for sexual harassment was ultimately recognized in 1976 in *Williams v. Saxbe*.[35] In this case, a district court was once again asked to determine whether unwelcome sexual advances by a supervisor against an employee constituted a violation of Title VII. The plaintiff alleged that once she refused the advances, the supervisor harassed, humiliated, and finally fired her. The court held that there was a cause of action under Title VII because "the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated."[36]

Spurred by *Saxbe* and the complexity of the issues involved in particular with sexual harassment, the EEOC in 1980 passed Guidelines[37] which recognized two forms of sexual harassment, "quid pro quo"[38] and "hostile environment,"[39] and more clearly defined for

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[33] *Corne*, 390 F. Supp. at 163.

[34] Terry M. Dworkin et al., *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 SAN DIEGO L. REV. 125, 125 (1988) (noting that courts initially found sexual harassment claims to be outside the scope of Title VII protection).

[35] 413 F. Supp. 654, 657 (D.D.C. 1976).

[36] *Id.* at 657-58.

[37] EEOC Guidelines, 29 C.F.R. § 1604.11. In 1980, the EEOC issued guidelines that included sexual harassment as prohibited conduct. 45 Fed. Reg. 74,676 (1980); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1985) (adopting the hostile environment sexual harassment theory). The Guidelines on Discrimination Because of Sex issued in 1985 more specifically defined sexual harassment. *See* 29 C.F.R. § 1604.11(a). The EEOC relied on the prior decisions involving harassment based on other classifications in creating sexual harassment guidelines. *Meritor*, 477 U.S. at 65; 45 Fed. Reg. 74,676.

The EEOC Guidelines are interpretive regulations. Although they do not have the force of law, they have been relied on by numerous courts in sexual harassment cases. *See, e.g.*, Downes v. FAA, 775 F.2d 288 (Fed. Cir. 1985); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). The Supreme Court had its first opportunity to discuss the Guidelines in 1986 and cited them with approval, stating: "'[W]hile not controlling upon the courts by reason of their authority, [the Guidelines] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Meritor*, 477 U.S. at 65 (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976).

[38] *See Henson*, 682 F.2d at 904 (noting that a typical "quid pro quo" harassment plaintiff is usually a female who was asked or required to submit to sexual advances as

the courts the scope of the latter violation.[40] In a later explanation of the Guidelines, the EEOC, while recognizing the unique nature of sexual harassment, stated that the principles enunciated "continue to apply to race, color, religion or national origin" discrimination.[41]

Despite these "early" equations of sexual harassment with harassment based on other categories, "quid pro quo" harassment was accepted by the courts[42] long before they were willing to recognize

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a condition to retention or advancement of a job or benefit). Typically, a "quid pro quo" case involves an employee asked by a supervisor to engage in sexual conduct in exchange for employment benefits. *See id.* at 902. A "quid pro quo" case may also include a threat to the employee of economic loss unless she acquiesces. *See, e.g.*, Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644 (6th Cir. 1986); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Boyd v. James S. Hayes Living Health Care Agency, 671 F. Supp. 1155 (W.D. Tenn. 1987); Pease v. Alford Photo Indus., 667 F. Supp. 1188 (W.D. Tenn. 1987); Stringer v. Pennsylvania Dep't of Community Affairs, 446 F. Supp. 704 (M.D. Pa. 1978); Heelan v. Johns-Manville Corp. 451 F. Supp. 1382 (D. Colo. 1978); Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), *remanded for trial de novo sub nom.* Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980).

39 *See* CATHERINE MCKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32-47 (1979) (making, for the first time, a distinction between the two kinds of sexual harassment); *see also* CONTE, *supra* note 30, at 17. The distinction between the two types of discrimination is often blurred, and some courts suggest that it is inappropriate to try and distinguish the two. *See* Mitchell v. OsAir, Inc., 629 F. Supp. 636, 643 (N.D. Ohio 1986) (stating, in reference to the hostile environment, that "[t]he threat of loss of work explicit in the *quid pro quo* may be only implicit without being any less coercive"); *see also* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 485 n.22 (1991); *Tomkins*, 568 F.2d at 1046 n.1 (claiming harassment under both "quid pro quo" and "hostile environment" theories).

40 EEOC Guidelines, 29 C.F.R. § 1604.11(a). In specific, the Guidelines stated:

> 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; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (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.

Id.

41 *Id.*; EEOC Compl. Man. § 615.7(b) (1988).

42 *See* Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (recognizing that sexual harassment and religious harassment can both take the form of "quid pro quo" and "workplace hostile environment"). In the "quid pro quo" form of religious harassment, an employee is asked by a supervisor to alter or renounce his religious beliefs in return for some job benefit, whereas "quid pro quo" sexual harassment arises when an employee is similarly threatened if she refuses the supervisor's sexual advances. *See* Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (citations omitted).

a cause of action for "hostile environment" sexual harassment. Several justifications for not recognizing a sexually-harassing environment included that the advances were personally and sexually based, not gender based,[43] and that a hostile environment was not possible without a showing of economic loss.[44] Thus, courts continued to find it easier to acknowledge that racial, ethnic, and religious harassment could cause psychological harm with job-related consequences than to acknowledge it in sexual harassment cases.

It was not until 1981, in *Bundy v. Jackson*,[45] that a court finally recognized a cause of action for hostile environment sexual harassment. Bundy was subjected to repeated requests by her supervisors for sexual favors. She complained about these advances to a senior supervisor, only to be told that "any man in his right mind would want to rape you."[46] Using the growing body of racial and ethnic hostile environment precedents, the court concluded that a sexually-discriminatory work environment violated Title VII.[47]

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[43] *See, e.g.*, Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977); Neeley v. American Fidelity Assurance Co., 17 Fair Empl. Prac. Cas. (BNA) 482, 484, 485 (W.D. Okla. Feb. 21, 1978) (considering employees' testimony that they had been consistently subjected to sexual remarks and jokes, girlie pictures and offensive touching, yet finding such conduct not actionable under Title VII where the defendant was unaware of conduct and employment was not conditioned on submission to sex).

[44] The first case which implicitly rejected the economic loss requirement for sexual harassment hostile environment causes of action was Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627, 1633 (W.D. Okla. May 30, 1980) (adopting a "totality of the circumstances" approach). Two years later, the Eleventh Circuit provided an analytical framework for "hostile environment" sexual harassment cases and permanently eliminated the requirement that a plaintiff suffer tangible economic harm in order to prevail. *See* Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

Another early justification for the failure to recognize a sexually-harassing environment was that men harassing women was not a form of discrimination covered by Title VII because women could also harass men. *See* Barnes v. Costle, 561 F.2d 983, 990 & n.55 (D.C. Cir. 1977) (rejecting this justification); *see also* Dworkin, *supra* note 34, at 125-26.

[45] 641 F.2d 934, 943-44 (D.D.C. 1981).

[46] *Id.* at 940.

[47] *Id.* at 945. The court stated that:

> The relevance of these "discriminatory environment" cases to sexual harassment is beyond serious dispute. Racial or ethnic discrimination against a company's minority clients may reflect no intent to discriminate directly against the company's minority employees, but in poisoning the atmosphere of employment it violates Title VII. . . . Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?

Id.; *see also* Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications*

In 1982, the Eleventh Circuit, in setting out an analytical framework for hostile environment sexual harassment cases in *Henson v. City of Dundee*,[48] again equated sexual harassment with racial harassment, stating:

> 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.[49]

When the Supreme Court adopted the sexual harassment hostile environment theory in 1986 in *Meritor Savings Bank v. Vinson*,[50] the first harassment case to reach the Supreme Court, it cited with approval the *Bundy* and *Henson* language equating racial and sexual harassment.[51] The Court pointed out that harassing environment had already been recognized for other Title VII categories such as race, religion, and national origin, and that "nothing in Title VII suggests that a hostile environment based on discrimina-

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of the "Reasonable Woman" Standard in Sexual Harassment Cases, 61 FORDHAM L.R. 773, 781 n.47 (1993) (citing *Bundy*, 641 F.2d at 940, 945).

48 682 F.2d 897, 903-05 (11th Cir. 1982).

49 *Id.* at 902. The court further stated:

> A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment. There is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered tangible job detriment.

Id.

50 477 U.S. 57, 66 (1986).

51 *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)). The *Meritor* Court cited numerous racial and ethnic hostile environment cases and ultimately adopted the *Henson* criteria in defining the elements of a hostile environment cause of action. *See id.* at 66-69. Specifically, *Henson* provided that the trier of fact must find that: (1) the employee is a member of a protected group; (2) "the employee was subjected to unwelcome sexual harassment"; (3) "the harassment complained of was based on sex"; (4) "the harassment complained of affected a 'term, condition, or privilege of employment'"; and (5) the employer, under the doctrine of respondeat superior, "knew or should have known of the harassment in question and failed to take prompt remedial action." *Henson*, 682 F.2d at 903-05 (citations omitted). A number of courts have embraced these standards. *See, e.g.*, Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988); Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987); Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1983 (1987); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). For a thorough discussion of the parameters of the elements mentioned in the *Meritor* decision, see Adler & Peirce, *supra* note 47, at 785-798.

tory *sexual* harassment should not be likewise prohibited."[52] The Court also cited the EEOC Guidelines[53] with approval.

C. *Differences in Fact If Not in Name*

In spite of the equation of sexual harassment with race, ethnic, and religious harassment in the landmark cases,[54] and by the EEOC[55], these causes of action were often not treated equally by the courts. Although the same general standard was stated, the application resulted in differences.[56] Courts assumed that racial, religious, or ethnic slurs and depictions alter the employment conditions and create an abusive working atmosphere more than gender-related actions.[57] Women often had to show more frequent, and/or more severe incidents, in order to successfully make a harassing environment claim.[58] For example, many courts would

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[52] *Meritor*, 477 U.S. at 66.

[53] *Id.* at 65. In adopting the EEOC Guidelines and declining to require any showing of tangible injury, the Court stated, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.*

[54] *See id.* at 66; *Henson*, 682 F.2d at 902; Bundy v. Jackson, 641 F.2d 934, 945 (D.D.C. 1981). In one opinion, Justice Brennan, writing for the Supreme Court, observed that Title VII "on its face treats each of the enumerated categories exactly the same." Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9 (1989). Accordingly, the Justice concluded that the legislative history behind the passage of the statute is applicable to both race and sex, and that the standards enunciated in the opinion "apply with equal force to discrimination based on race, religion, or national origin." *Id.*

[55] EEOC Guidelines, 29 C.F.R. § 1604.11(a) n.1 ("The principles involved here continue to apply to race, color, religion or national origin."); EEOC Compl. Man., *supra* note 8, at § 615.7 (providing that the principles applicable to sexual harassment "continue to apply to harassment based on race, color, religion or national origin").

[56] *See, e.g.*, Rodgers v. Western-Southern Life Ins. Co., 63 Fair Empl. Prac. Cas. (BNA) 694, 699 (7th Cir. Dec. 17, 1993) (finding that sales managers' references to a black associate as "nigger" contributed to a hostile work environment because no single act contributes more to an abusive working environment than the use of an unambiguous racial slur). *But see* Saxton v. AT&T, 10 F.3d 526, 534 (7th Cir. 1993) (holding that an employee's repeated subjection to several instances of physical touching by her employer was not sufficient to give rise to a cause of action for sexual harassment).

[57] *See, e.g., Rodgers*, 63 Fair Empl. Prac. Cas. at 699.

[58] *See* EEOC Guidelines, 29 C.F.R. § 1604.11(b). Whether conduct is sufficiently pervasive to constitute actionable sexual harassment under Title VII depends on "the totality of the circumstances." *Id.*; Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986); Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 650 (6th Cir. 1986). Such a showing generally requires the plaintiff to demonstrate a pattern of offensive behavior. King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) (citation omitted) ("Although a single act can be enough . . . generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident."); *accord* Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990) (stating that the fact finder must look not only to the frequency of the incidents but to their severity as well); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511 (11th Cir. 1989) (stating

not consider calling a woman "honey"[59] the equivalent of calling a black man "boy."[60] Part of the difference in treatment is exemplified by the different burden of proof some courts required for sexual harassment cases.

1. Requiring Proof of Psychological Harm

One significant difference between the treatment of sexual harassment causes of action by the courts and other forms of harassment cases under Title VII was the necessity in several circuits for women to prove psychological harm to recover.

This requirement was first enunciated in a Sixth Circuit deci-

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that the trier of fact must evaluate the frequency as well as gravity of the incidents); Moylan v. Maries County, 792 F.2d 746, 749-50 (8th Cir. 1986) (citation omitted) (requiring a continuous, nontrivial pattern of harassment); Downes v. FAA, 775 F.2d 288, 293 (D.C. Cir. 1985) (stating that isolated or trivial remarks are not enough).

Several courts, however, have found that a single but particularly egregious incident may amount to sexual harassment if it involves unwelcome, intentional touching of the victim's intimate body parts. *See, e.g.*, Gilardi v. Schroeder, 672 F. Supp. 1043, 1046-47 (N.D. Ill. 1986) (citations omitted) (finding sexual harassment where plaintiff was drugged and raped by employer then fired at the behest of employer's wife); Barrett v. Omaha Nat'l Bank, 584 F. Supp. 22, 30 (D. Neb. 1983), *aff'd*, 726 F.2d 424 (8th Cir. 1984) (finding sexual harassment where plaintiff was subjected to offensive touching and sexual comments while in a moving vehicle). *But see Saxton*, 10 F.3d at 534 (refusing to find harassment despite repeated incidents of touching).

The EEOC appears to concur in these decisions and noted that "[m]ore so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment." EEOC, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT, N-915-050 (BNA) 89, 105 (March 19, 1990).

[59] *See* Walsh, *Confronting Sexual Harassment at Work*, WASH. POST, July 21, 1986, Washington Business, at 1 ("When women perceive that things like 'honey' and 'sweetie' make them uncomfortable on the job, it's against the law.") *quoted in* Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 9 n.29 (1990). *But see* Delgado v. Lehman, 665 F. Supp. 460, 468 (E.D. Va. 1987) (finding sexual harassment where a male supervisor consistently demeaned women by referring to them as "babes," repeatedly used the term "women" in a disparaging fashion, and constantly interrupted the women but not men employees).

[60] In general, it takes only a few clearly racist remarks to have a racially-harassing environment, especially if they occur in a limited period of time. *See, e.g., Rodgers*, 63 Fair Empl. Prac. Cas. at 699-700 (finding that a supervisor's repeated use of the term "nigger" created a hostile environment, and rejecting the employer's claim that the statement "you black guys are too fucking dumb to be insurance agents" was a motivational tool, not harassment). *But see* Davis v. Montsano Chem. Co., 858 F.2d 345, 350 (7th Cir. 1988) (stating that the employer is not charged with discharging "all Archie Bunkers in its employ" nor with purging all racially-offensive speech); North v. Madison Area Ass'n for Retarded Citizens, 844 F.2d 401, 409 (7th Cir. 1987) (finding two or three comments over a 10-year period insufficient to establish harassment); Lenoir v. Roll Coater, Inc., 63 Fair Empl Prac. Cas. (BNA) 1346, 1353 (N.D. Ind. Apr. 13, 1992) (rejecting an employee's claim of unfavorable treatment due to insufficient evidence of harassment of white staff).

sion, *Rabidue v. Osceola Refining Co.*.[61] In that case, the Sixth Circuit interpreted the Supreme Court's *Meritor* decision to require actual proof of a "hostile . . . or offensive work environment that affected seriously the psychological well-being of the plaintiff."[62] The Seventh, Eleventh, and Federal Circuit Courts also adopted this added requirement for sexual hostile environment cases[63] but not for other hostile environment cases based on race, religion, or national origin.[64] This added requirement was rejected by the Supreme Court in its recent decision, *Harris v. Forklift Systems, Inc.*.[65]

In rejecting the *Rabidue* standard, the Court in *Harris* also

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61 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

62 *Id.* Reference to the psychological well-being of the victim was first mentioned by the Fifth Circuit when it found that a racially-hostile environment is actionable under Title VII. *See* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). In describing the reach of Title VII, the Fifth Circuit noted that "[o]ne 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.* The Sixth Circuit in *Rabidue* misinterpreted the Fifth Circuit by turning the above observation into a requirement. *See Rabidue*, 805 F.2d at 619. The Sixth Circuit also interpreted *Meritor* and other sexual harassment cases as requiring proof of psychological injury. *See id.* at 618-19. However, the Supreme Court in *Meritor* was merely citing *Rogers* to affirm that sexual harassment could have the same consequences, *i.e.*, psychological harm, as other forms of harassment and thereby alter the terms of employment. *See Meritor*, 477 U.S. at 65-66. Nowhere did the Supreme Court in *Meritor* use the *Rogers* decision to require a showing of psychological harm in sexual harassment cases. *See id.* at 66. Further, the EEOC specifically rejected the serious psychological harm requirement established by *Rabidue*. *See* EEOC, POLICY GUIDANCE, *supra* note 58, at 102 n.20.

The *Rabidue* decision was strongly criticized by some courts for its holding that Title VII was not meant to change a workplace heavily permeated with sex. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991); *see also* Andrews v. City of Philadelphia, 895 F.2d at 1485 (citation omitted) (contrasting *Rabidue*).

63 *See* King v. Board of Regents, 898 F.2d 533 (7th Cir. 1990); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503 (11th Cir. 1989); Downes v. FAA, 775 F.2d 288 (Fed. Cir. 1985).

64 *See, e.g.*, Davis v. Monsanto Chem. Co., 858 F.2d 345, 348 (6th Cir. 1988) ("*Rabidue* does not apply to racially hostile work environment claims."); Wall v. AT&T Technologies, Inc., 754 F. Supp. 1084, 1091, 1095 (M.D.N.C. 1990) (instructing that the plaintiff in a racial harassment case must prove that "the alleged conduct constituted an unreasonably abusive work-related environment or adversely affected the reasonable employee's ability to do his or her job" and that "the factfinder must examine the evidence both from an objective perspective and from the point of view of the victim").

65 114 S.Ct 367, 370 (1993). "Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive . . . there is no need for it also to be psychologically injurious." *Id.* at 371. Justice O'Connor, writing for the majority, characterized the *Harris* decision as taking the middle road between holding employers responsible for

quoted from *Meritor*, this time to stress that not all behavior is actionable,[66] and that it must be sufficiently severe so that the reasonable person would find it hostile or abusive. The Court also cited *Rogers v. EEOC*, the original race harassment case, as an especially egregious example of harassment, but one which did not set a benchmark;[67] less egregious behavior could also qualify as harassment if it merely "detract[s] from . . . job performance, discourage[s] employees from remaining on the job, or keep[s] them from advancing in their careers."[68] Further, the *Harris* Court stated that behavior which creates an environment "abusive to employees because of their race, gender, religion, or national origin" is in violation of Title VII. Thus, *Harris* again reiterates the long-standing proposition that the standard for proving harassment should be the same for all categories of protected individuals.

2. The "Unwelcomeness" Requirement

Historically, the plaintiff's burden of proof in a discrimination case based on disparate treatment—of which harassment is a subset—was fourfold as set forth in the seminal discrimination case of *McDonnell-Douglas Corp. v. Green*.[69] *McDonnell-Douglas* required the plaintiff to prove that: (1) he or she belonged to a protected group; (2) was qualified and applied for the position; (3) was not selected for the position; and (4) the position remained open and was filled by a similarly-qualified employee from outside the protected group.[70]

The complainant in a Title VII action was thus required to carry the initial burden of establishing a *prima facie* case of discrimination (racial, sexual, national origin, or religious). Once the plaintiff established a *prima facie* case of discrimination, the burden shifted to the employer to "articulate some legitimate, nondiscriminatory reason for the [employment decision]."[71] Finally, if the de-

"merely offensive" conduct and requiring that women suffer an emotional breakdown before they could sue. *Id.* at 370.

66 *Id.*

67 *Id.* at 371 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)). Justice Ginsburg, in a concurrence, cited the Sixth Circuit *Davis* case and noted that while *Davis* involved race, "that difference does not alter the analysis; except in the rare case in which a bona fide occupational qualification is shown." *Id.* at 372 (Ginsburg, J., concurring) (citing Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)) (other citations omitted).

68 *Id.* at 371.

69 411 U.S. 792, 802 (1973).

70 *See id.*; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 & n.6 (1981) (reiterating and explaining the *McDonnell-Douglas* standard).

71 *Burdine*, 450 U.S. at 253 (quoting *McDonnell-Douglas*, 411 U.S. at 802).

fendant carried this burden, the plaintiff had the final opportunity to prove that the defendant employer's proffered "legitimate" reasons for his actions were merely a pretext for illegal discrimination.[72]

The Supreme Court in *Mc Donnell-Douglas* opened the door to variations on this formula by commenting in a footnote that the facts clearly vary from case to case and that the *prima facie* proof required above is not necessarily applicable in every respect to differing factual situations.[73] Although courts have acknowledged that claims of harassment might be analyzed pursuant to the *McDonnell-Douglas* formula,[74] they have generally chosen to follow a somewhat different burden of proof first developed in the previously-mentioned Eleventh Circuit sexual harassment case, *Henson v. City of Dundee*,[75] and subsequently endorsed by the Supreme Court in the *Meritor* decision.[76] Specifically, those requirements are: (1) the employee is a member of a protected group; (2) "the employee was subject to unwelcome sexual harassment"; (3) "the harassment complained of was based upon sex"; (4) "the harassment complained of affected a 'term, condition, or privilege of employment'"; and (5) the employer, under the doctrine of *respondeat superior*, "knew or should have known of the harassment in question and failed to take prompt remedial action."[77]

The key distinction between the *McDonnell-Douglas* formula and that set forth in *Henson* is requirement number five, which fo-

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[72] *Id.* (citing *McDonnell-Douglas*, 411 U.S. at 804).

[73] *McDonnell-Douglas*, 411 U.S. at 802 n.13. In *Compston v. Borden*, for example, the court used the *McDonnell-Douglas* reasoning to relieve the plaintiff from showing that he belonged to a racial minority and to place the burden on the defendant employer to prove that the plaintiff was not Jewish and therefore not entitled to protection from religious discrimination. *See* Compston v. Borden, 424 F. Supp. 157, 161 (S.D. Ohio 1976) (citing *McDonnell-Douglas*, 411 U.S. at 802 n.13).

[74] *See, e.g.*, Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) ("Although such a claim of sexual harassment might be analyzed under the familiar Title VII disparate treatment formula, we think that a somewhat different order of proof is appropriate."); Hampton v. Conso Prod., 808 F. Supp. 1227, 1236 (D.S.C. 1992) (adopting a formula different from that espoused in *McDonnell-Douglas* for a hostile environment race harassment claim).

[75] 682 F.2d 897, 903-05 (11th Cir. 1982).

[76] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-69 (1986).

[77] *Henson*, 682 F.2d at 903-05; *see Meritor*, 411 U.S. at 66-69. Although the Court in *Meritor* used the term "respondeat superior," this element, as it has been interpreted, more accurately reflects a negligence standard for employer liability that basically restates the "fellow-servant" rule. *See* Hirschfield v. New Mexico Corrections Dep't, 916 F.2d 572 (10th Cir. 1990); Guess v. Bethlehem Steel Corp., 913 F.2d 463 (7th Cir. 1990); Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

cuses on the responsibility of the employer for the harassment. In the usual disparate treatment case, once the plaintiff has proved that he/she was discriminated against in fact by some employment decision or policy, the focus shifts to the question of the employer's motive: was there an intent to discriminate along impermissible lines such as race, sex, national origin, or religion?[78] The distinction between the two formulas is based on the fact that harassment claims usually involve "an intentional assault on the individual's innermost privacy."[79] Consequently, once the plaintiff has proved that the alleged conduct occurred, the inquiry in hostile environment cases focuses on the responsibility of the employer for the harassment under the theory of *respondeat superior* and not on the issue of intent.[80] The plaintiff must then demonstrate that the employer had actual or constructive knowledge of the existence of a harassing work environment and took no immediate and appropriate corrective action.[81] To do this, the plaintiff must prove either that complaints were made to the employer or that the harassment was so pervasive that employer awareness could be inferred.[82]

A number of circuit courts have embraced the *Henson* formula as to sexual harassment causes of action,[83] and a number of circuits

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78 *See* Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (explaining that the thrust of the *McDonnell-Douglas* scheme is "to bring the litigants and the court expeditiously and fairly to [the] ultimate question" of whether "the defendant intentionally discriminated against the plaintiff").

79 Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981).

80 *But see* Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1509 (11th Cir. 1989) ("The plaintiff must prove that the discrimination is intentional."); Wyerick v. Bayou Steel Corp., 887 F.2d 1271, 1274 n.6 (5th Cir. 1989) (citation omitted) (requiring proof of intentional discrimination in a sexual harassment case).

81 EEOC Guidelines, 29 C.F.R. § 1604.11(d).

82 *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958) (stating that a master is liable for the tort of his servant if the servant "was aided in accomplishing the tort by the existence of the agency relation"). If the plaintiff's liability stems from a quid pro quo case of harassment by supervisory personnel, the employer is held strictly liable. Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982); EEOC Guidelines, 29 C.F.R. § 1604.11(c).

83 *See, e.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990); Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988); Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987); Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). While these courts have all embraced the *Henson* formula, some have done so by adding other requirements to the plaintiff's burden of proof. *See supra* notes 72-76 and accompanying text (discussing decisions that added a "psychological injury" requirement to the plaintiff's burden of proof).

have retailored the *Henson* formula to fit racial harassment, national origin harassment, and religious harassment cases.[84] Generally, except in sexual harassment cases,[85] courts do not usually require that the harassment victim prove the "unwelcomeness" of the harassment.[86] There appears to be a strong presumption in race, national origin, and religion cases that discriminatory acts and comments such as jokes, graffiti, etc. are *per se* offensive. For obvious reasons, however, this is not so in sexual harassment cases where sexual advances may be welcome. This then makes the burden somewhat harder on a plaintiff to prove the unwelcomeness, especially in instances where the plaintiff had earlier welcomed the advances[87] or "gave as good as she got" and later soured on the sexual office banter.[88]

What is clear from this review of the development of harassing environment law is that sexual harassment was seldom treated as the equivalent of harassment on the basis of religion, race, or national origin. Animus,[89] unwelcomeness, and resultant harm were

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84 *See* Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475, 485 (6th Cir. 1989) (adopting Sixth Circuit *Rabidue* sexual harassment formula, which is based on *Henson*, for a race harassment situation); Boutros v. Canton RTA, 62 Fair Empl. Prac. Cas. (BNA) 369, 373 (6th Cir. June 30, 1993) (adopting *Rabidue* formula in a national origin harassment case); Thomas v. Shoney's Inc., 845 F. Supp. 388, 390-91 (S.D. W. Va. 1994) (adopting *Henson* formula in race harassment case); Hampton v. Conso Prod., Inc., 808 F. Supp. 1227, 1236 (D.S.C. 1992) (adopting the *Henson/Meritor* formula in a race harassment case); *see also* Meltebeke v. Bureau of Labor & Indus., 63 Fair Empl. Prac. Cas. (BNA) 709 (Or. Ct. App. May 19, 1993); Beasley v. Health Care Serv. Corp., 940 F.2d 1085 (7th Cir. 1991); Vaughn v. AG Processing, Inc., 459 N.W. 2d 627 (Iowa 1990).

85 *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'."). This finding also supports the EEOC Guidelines which define sexual harassment as "unwelcome . . . verbal or physical conduct of a sexual nature." EEOC Guidelines, 29 C.F.R. § 1604.11(a).

86 *But see* Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1513-14 (D. Me. 1991) (noting the confusion generated by conflicting decisions of the First Circuit and focusing on two requirements at "the core of a hostile environment racial harassment claim: (1) unwelcome, pervasive racial conduct or speech affecting the terms and conditions of the victim's employment, and (2) knowledge by the employer").

87 *See, e.g.*, Shrout v. Black Clawson Co., 689 F. Supp. 774, 779 (S.D. Ohio 1988) (finding that after employee terminated consensual affair with supervisor, she was subjected to harassment and retaliation).

88 Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 1326-27 & n.8 (S.D. Miss. 1986) (finding the fact that plaintiff used vulgar language, made sexual jokes, frequently participated in sexual banter,and then withdrew from such behavior insufficient to show that the continuing activity by coworkers was no longer welcome), *aff'd*, 824 F.2d 971 (5th Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988).

89 *But see* Brown v. EMEPA, 61 Fair Empl. Prac. Cas. (BNA) 1104, 1106, 1107 (5th Cir. May 4, 1993) (requiring showing of animus to establish racial harassment); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1509, 1511 (11th Cir. 1989) (requir-

commonly assumed in religion, race, or national origin categories,[90] even when the comments were dismissed by defendants as bantering or "just joking." Courts were reluctant to view gender-based comments in the same light,[91] partly because such comments could be welcome, but also because they "merely" involved "sexual banter." As more courts began to embrace the view that sexual harassment was not about sex but about abuse of power, the standard also began to change. It is these recent changes that have led to a call for a separate standard for religious harassment.

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ing proof of animus in race harassment case); Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372, 1381 (7th Cir. 1986) (requiring showing of animus in a race harassment case); Morales v. Dain, Kalman, & Quail, Inc., 467 F. Supp. 1031, 1039 (D. Minn. 1979) (requiring showing of animus to establish national origin harassment).

90 *See* Shapiro v. Holiday Inns, Inc., 1990 WL 44472 (N.D. Ill. April 6, 1990) (religious harassment); Weiss v. United States, 595 F. Supp. 1050, 1055-56 (E.D. Va. 1984) (religious harassment); *Morales*, 467 F. Supp. at 1039-43 (religious harassment); Compston v. Borden, Inc., 424 F. Supp. 157, 161 (S.D. Ohio 1976) (religious harassment).

The Sixth Circuit, relying on the *Henson* prototype, set forth a multi-factored test for sexual harassment in *Rabidue v. Osceola Refining Co.* Rabidue v. Osceola Refining Co., 805 F.2d 611, 619-20 (6th Cir. 1986). This test was applied in other Sixth Circuit sexual harassment decisions. *See* Boutros v. Canton RTA, 62 Fair Empl. Prac. Cas. (BNA) 369, 373 (6th Cir. June 30, 1993); Yates v. Avco Corp., 43 Fair Empl. Prac. Cas. (BNA) 1595, 1598-1600 (6th Cir. May 21, 1987); Highlander v. KFC Nat'l Management, 805 F.2d 644, 650 (6th Cir. 1986). Yet, despite these decisions, the Sixth Circuit chose to establish a different racial harassment standard which identified only two requisite elements for a racially hostile work environment claim: "'[R]epeated slurs and management's tolerance and condonation of the situation.'" Davis v. Monsanto, 858 F.2d 345, 348-49 & nn.1-2 (6th Cir. 1988). Under this standard, the plaintiff need neither prove that his tangible productivity declined as a result of the harassment or that the instances were related in either time or type. *See id.*

The Fourth Circuit used two different standards in a case addressing both racial and sexual harassment. *See* Wall v. AT&T Technologies, 754 F. Supp. 1084, 1091, 1095 (M.D.N.C. 1990). In *Wall*, the plaintiff, a black female, alleged that she was subjected to both offensive racial remarks and lewd, lascivious comments regarding her anatomy. *Id.* at 1087-88. In analyzing whether the plaintiff had stated a prima facie cause of action for each claim, the court applied one standard to the race issue and another formula to the sex issue. *Id.* at 1091, 1095 (citations omitted). The court relied on the two-prong test of *Davis* in judging the racial harassment claim and a standard requiring the evidence to be examined from both an objective and subjective perspective in judging the sexual harassment claim. *Id.* (citations omitted).

91 The *Davis* court noted that while a number of circuits apply the same legal standard in both racial and sexual harassment cases, the standards need not necessarily be the same. *Id.* at 348 n.1. The court went on to explain that in other areas of civil rights law, the Supreme Court has applied different standards to race and sex: classifications based on sex have been accorded an intermediate level of scrutiny while a more severe standard, strict scrutiny, has been applied to the review of classifications based on race. *Id.* The court noted that this is the case even though the two different standards emanate from the same constitutional provision. *Id.*

D. *Recent Judicial Developments in Harassment Law*

Sexual harassment cases in recent years have been primarily responsible for shaping the major developments in harassment law, despite the fact that this type of harassment was belated in being recognized at all. In part, sexual harassment's prominence has been due to the national media attention resulting from the televised testimony of Professor Hill and then-Supreme Court nominee Clarence Thomas in 1991.[92] The subsequent surge of repressed anger generated by these hearings[93] in turn helped ease the passage[94] of the Civil Rights Act of 1991.[95] One of the changes made by the Act allows women and those subjected to religious and disability harassment to sue for damages and to benefit from jury trials.[96] This again, in part, has generated an upswing in harassment cases.[97] Another part of the Civil Rights Act of 1991 created the Glass Ceiling Commission to help address other issues facing women and minorities in the workplace.[98] One result of the increased focus on women's workplace issues and, specifically, sexual

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92 *See, e.g.*, Jill Abramson & David Shribman, *High Court Drama: Sex Harassment Furor Jeopardizes Thomas, Embarrasses Politicians*, WALL ST. J., Oct. 9, 1991, at A1; Elizabeth Kolbert, *Sexual Harassment At Work Is Pervasive, Survey Suggests*, N.Y. TIMES, Oct. 11, 1991, at A1; Daniel Goleman, *Sexual Harassment: About Power, Not Sex*, N.Y. TIMES, Oct. 22, 1991, at B5; *Sex, Lies & Politics*, TIME, Oct. 21, 1991, 34-66.

93 *See, e.g.*, David Shribman & Jeffrey H. Birnbaum, *Campaign 92: Sen. Specter's Tough Stance Against Anita Hill Haunts Him As Woman's Groups Vent Anger*, WALL ST. J., Apr. 22, 1992, at A20; Jill Abramson, *Women's Anger About Hill-Thomas Hearings Has Brought Cash Into Female Political Causes*, WALL ST. J., Jan. 6, 1992, at A16.

94 *See, e.g.*, Michel McQueen & Jeffrey H. Birnbaum, *Thomas Battle, Duke's Rise In Louisiana Raised Stakes For Bush In Ending Civil Rights Impasse*, WALL ST. J., Oct. 28, 1991, at A18.

95 42 U.S.C. § 1981(a) (1994).

96 *See id.* While no plaintiff could get damages under Title VII until the passage of the Civil Rights Act of 1991, successful claimants in race, color, and national origin cases could get damages by also suing under § 1981 of the Civil Rights Act of 1866. 42 U.S.C. § 1981 (1994). *See* Dworkin, *supra* note 34, at 136-37. While race and national origin claimants briefly lost on this theory in most cases through the Supreme Court decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Civil Rights Act of 1991 effectively overturned this decision. *See* § 1981(a). Sexual, religious, and disability harassment claimants are still not on an equal footing with those claiming race and national origin harassment, however, because the 1991 Act puts limits on the amount of damages available for these claimants. *See id.*

97 *See* Fair Empl. Prac. Summary (BNA) 87, 88 (Aug. 2, 1993) (noting that in 1988, the total number of charges filed with the EEOC or state Fair Employment Practice Agencies numbered 9,099 and that the number swelled to 12,668 in 1992). A spokesperson for the EEOC reported that a total of 14,420 cases were filed with the EEOC in 1994.

98 Pub. L. No. 102-66, § 203, 105 Stat. 1081 (1991) (42 U.S.C. § 2000e note). A commission created under the Act has been investigating causes for the glass ceiling in corporations and universities. *See Shattering Corporate Glass Ceiling Is Daunting Task*, Fair Empl. Prac. Summary (BNA) 55, 60 (May 23, 1994).

harassment, is a more gender-sensitive standard used by some courts.

1. The Reasonable Woman/Victim Standard

The Supreme Court has cautioned that not all harassment violates Title VII: "For . . . harassment to be actionable, it must be 'unwelcome' and sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[99] There are several standards which could be used to judge whether the actions are sufficiently severe or pervasive: that of the victim, the objective reasonable person, or the victim

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[99] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986). The Supreme Court, in citing the EEOC Guidelines with approval in *Meritor*, qualified them by noting that not all workplace harassment rises to the level required by Title VII. *Id.* (citing Rodgers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). In determining the severity of the harassment, the Court directed the trier of fact to examine the "totality of the circumstances" in light of "the record as a whole." *Id.* at 69; *see* EEOC Guidelines, 29 C.F.R. § 1604.11(b); Highlander v. K.F.C. Nat'l Management Co. 805 F.2d 644, 650 (6th Cir. 1986); Ross v. Double Diamond, Inc., 672 F. Supp. 261, 269 (N.D. Tex. 1987).

To establish a claim of discriminatory sexual harassment, a plaintiff must show that her employer subjected her to unwelcome verbal or physical conduct which was offensive to such a degree that it affected an employment term, condition, or privilege. Courts have had numerous opportunities to evaluate "offensive" behavior to determine what verbal or physical conduct rises to the level of actionable harassment. The easiest cases for the courts are those in which the harasser engaged in wrongful physical conduct such as assault, kissing, fondling, and rape. *See, e.g.*, Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988) (involving employer who grabbed and yanked plaintiff's arm); Jones v. Wesco Investments, Inc., 846 F.2d 1154, 1155 (8th Cir. 1988) (involving numerous episodes of touching victim's breasts, pinching, hugging, and kissing); Ross v. Twenty-Four Collection, Inc. 681 F. Supp. 1547, 1550 (S.D. Fla. 1988) (involving an employer who tried to massage the victim, kiss her, and force her to lie in bed with him); Carrero v. New York City Housing Auth., 668 F. Supp. 196, 198 (S.D.N.Y. 1987) (kissing); Pease v. Alford Photo Indus., Inc., 667 F. Supp. 1188, 1191 (W.D. Tenn. 1987) (involving employer who fondled victim's breast, hugged, rubbed, and constantly touched her); Priest v. Rotary, 634 F. Supp. 571, 582 (N.D. Cal. 1986) (involving an employer who on numerous occasions rubbed his body against the plaintiff); Robson v. Eva's Market, 538 F. Supp. 857, 859-60 (N.D. Ohio 1982) (involving plaintiff propositioned, threatened, and assaulted by her employer). *But see* Dockter v. Rudolf Wolff Futures, Inc., 684 F. Supp. 532, 533, 535 (N.D. Ill. 1988) (holding that an employer's "misguided act" of touching victim's breast on one occasion was not sufficient to constitute sexual harassment); Walter v. KFGO Radio, 518 F. Supp. 1309, 1314-15 (D.N.D. 1981) (finding that an employer's alleged pats to plaintiff's bottom and fondling her breast at a job-related conference were not sufficient to establish a prima facie case of harassment); Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 43 (D.D.C. Feb. 26, 1980), *rev'd*, 753 F. 2d 141 (D.C. Cir. 1985), *aff'd in part and remanded sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (finding no sexual harassment where the plaintiff voluntarily engaged in a sexual relationship with her boss and where the affair was unrelated to her job).

and the perpetrator. Traditionally, courts used the reasonable person standard in harassment cases.

The reasonable person standard is an objective standard which first evolved in tort law under the theory of negligence.[100] The EEOC and most federal courts adopted the perspective of the "reasonable person" as the appropriate one to judge behavior in harassment cases,[101] stating, for example that "'no ordinary per-

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100 *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 32, at 174 (5th ed. 1984) (defining the reasonable person as a fictitious person who is "[a] model of all proper qualities, with only those human shortcomings and weaknesses which the community will tolerate on the occasion"). The reasonableness test is intended to reflect changing social mores as well as to represent an objective standard which imposes the same behavior on everyone, thereby limiting political decision-making by a judge. *See id.* at 174; *see generally* Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man"*, 8 RUT.-CAM. L.J. 311 (1977). Courts employing the reasonable person standard compare the action of the individual to the actions that a reasonable person would take under the same circumstances. Similarly, in harassment cases, the law compares the reaction of the offended employee to that of other employees similarly situated. *See* Hollis v. Fleetguard, Inc., 668 F. Supp. 631, 636-37 (M.D. Tenn. 1987) (adopting "the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances"), *aff'd*, 848 F.2d 191 (6th Cir. 1988).

101 *See* Kotcher v. Rosa and Sullivan Appl. Ctr., Inc., 957 F.2d 59, 61 (2d Cir. 1992) (involving egregious conduct that "'no ordinary person would welcome'"); Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 580 (10th Cir. 1990) (finding that a reasonable person in plaintiff's position would not have felt compelled to resign); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 193 (1st Cir. 1990) (adopting the "reasonable person" approach); Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988) (holding that "[a]ny reasonable person would have to regard these cartoons as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse"); Rabidue v. Osceola Ref. Co., 805 F. 2d 611, 620 (6th Cir. 1986) (stating that the trier of fact, when judging the totality of the circumstances with respect to the alleged abusive behavior, must adopt the perspective of a reasonable person); Trotta v. Mobil Oil Corp., 788 F. Supp. 1336, 1350 (S.D.N.Y. 1992) (holding that harassing "conduct must be viewed from the standard of a reasonable person"); Danna v. New York Tel. Co., 752 F. Supp. 594 (S.D.N.Y. 1990) (holding that if the evidence leads a reasonable person in a similar situation to find the environment offensive, then liability should attach under Title VII); Blesedell v. Mobile Oil Co., 708 F. Supp. 1408, 1418 (S.D.N.Y. 1989) (instructing that "[t]he question of whether sexual harassment has created a hostile work environment is based on a reasonableness standard"); Watts v. New York City Police Dep't, 724 F. Supp. 99, 104 (S.D.N.Y. 1989) (stating that harassment exists where a "reasonable person facing the same circumstances would encounter a workplace environment hostile and offensive enough to adversely affect their well-being or work performance"); *Hollis*, 668 F. Supp. at 636-37 (adopting "the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances").

A review of a number of post-*Harris* cases reveals that courts are not consistently following the reasonable person standard perhaps because the standard is clearly subject to interpretation. In fact, courts have taken the opportunity to interpret it as they see fit. *See, e.g.*, Shope v. Board of Supervisors, 63 Empl. Prac. Dec. (CCH) ¶ 42,755 (4th Cir. 1993) (applying the reasonable employee standard). *But see* Whitford v.

son'" would welcome such comments and conduct;[102] "[harassing] conduct must be viewed from the standard of a reasonable person"[103] or "the perspective [is that] of a reasonable person's reaction."[104]

The Ninth Circuit, in its 1991 precedential case, *Ellison v. Brady*,[105] adopted the even more sensitive standard of the reasonable woman. The court explained clearly why the conduct must be judged from the perspective of the female victim: "[w]e adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[106] Its rationale, however, applies to an even broader classification—the reasonable victim.

> If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could

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Frederick Goldman, Inc., 1994 WL 67900 (S.D.N.Y. March 1, 1994) (adopting the reasonable person standard).

102 *Kotcher*, 957 F.2d at 61.

103 *Trotta*, 788 F. Supp. at 1350.

104 *Hollis*, 668 F. Supp. at 636. A number of federal courts have viewed the sexually, racially, and religiously harassing behavior from a slightly different and arguably narrower perspective, that of the "reasonable employee." *See, e.g.*, Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988) (stating that racial harassment should be viewed from a reasonable employee's perspective); Turner v. Barr, 806 F. Supp. 1025, 1027 (D.D.C. 1992) ("All that needs to be established is that the alleged conduct . . . adversely affected the reasonable employee's ability to function in his or her job."); Wall v. AT&T Technologies, Inc., 754 F. Supp. 1084, 1091 (M.D.N.C. 1990) (requiring racial harassment plaintiff to prove that "'the alleged conduct constitute[d] an unreasonably abusive work-related environment or adversely affected the reasonable employee's ability to do his or her job'") (quotation omitted); Shrout v. Black Clawson Co., 689 F. Supp. 774, 777 (S.D. Ohio 1988) (stating that "[t]he trier of fact must adopt the perspective of a reasonable employee when determining whether harassment unreasonably interfered with plaintiff's work performance"); In re Sapp's Realty, No. 11-83 (BOLI Jan. 31, 1985) (defining religious harassment to include "such conduct [which] has the purpose and effect of creating an intimidating, hostile or offensive working environment from the perspective of a reasonable employee in the complainant's situation").

One could argue that there is no real difference between the reasonable person and reasonable employee standards. However, the reasonable employee standard narrows the perspective of the trier of fact considerably. The fact finder is not asked to view the behavior in a complete vacuum but is asked to consider more information relative to the situation. The question is not "How do you perceive this situation?," but, rather, "If you were an employee under the circumstances, how would you feel?"

105 924 F.2d 872, 878 (9th Cir. 1991).

106 *Id.* at 879. *But see* Radtke v. Everett, 61 Fair Empl. Prac. Cas. (BNA) 1644, 1652-53 (Mich. June 2, 1993) (rejecting the reasonable woman standard because it would reinforce sexist attitudes by justifying the stereotype of women as "sensitive and fragile").

> continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy. We therefore prefer to analyze harassment from the victim's perspective.[107]

The "reasonable victim" standard is also an objective standard. Unlike the traditional "reasonable person" standard, however, the reasonable victim standard is not blind to the status of the individual, whether, for example, a woman, an African-American, Franco-American, or Jew.[108] The reasonable victim standard takes into consideration the differences between the victim and those outside the protected group of which the victim is a member.[109] This objective standard only finds harassment where a reasonable victim would find harassment[110] and does not allow for personal peculiarities of the particular victim.[111] A number of federal and state courts have adopted the "reasonable victim" standard not only as to sexual harassment, but also as to cases involving racial discrimination and national origin.[112]

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107 *Ellison*, 924 F.2d. at 878.

108 *See, e.g.*, Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1516 n.12 (D. Me. 1991) (noting, in a race harassment context, that "[t]he appropriate standard to be applied in hostile environment harassment cases is that of a reasonable person from the protected group of which the alleged victim is a member").

109 *See id.* at 1515-16 (footnotes and citations omitted). ("Since the concern of Title VII . . . is to redress the effects of conduct and speech on their victims, the fact finder must 'walk a mile in the victim's shoes' to understand those effects and how they should be remedied.").

110 *Id.* at 1516. The fallacy of this standard is of course two-fold: (1) that the presumption that all people in the same class think alike; and (2) that it is possible for, say, an all white jury to imagine how a reasonable African-American would perceive allegedly harassing behavior. *See id.* at 1515-16. As the *Ellison* court succinctly put it:

> The appropriate standard to be applied in hostile environment harassment cases is that of a reasonable person from the protected group of which the alleged victim is a member. In this instance, because Plaintiffs are black, the appropriate standard is that of a reasonable black person, as that can be best understood and given meaning by a white judge.

Id. at 1516 n.12. Of course, the fact that discrimination cases may now be heard by a jury under the Civil Rights Act of 1991 lends hope that the jury will represent a more varied group of individuals. *See* § 102, 105 Stat. at 1072.

111 *See Ellison*, 942 F.2d at 879. As the *Ellison* court noted:

> In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

Id.

112 *See, e.g.*, Duplessis v. TDC, 62 Fair Empl. Prac. Cas. (BNA) 1301, 1306 (D. Me. Aug. 24, 1993) (judging conduct by what a "reasonable Franco-American" would find

The EEOC also seems to have adopted a "reasonable victim" standard.[113] In its publication entitled *Policy Guidance on Current Issues of Sexual Harassment*, the EEOC recommended that "[i]n determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a 'reasonable person.'" The EEOC further advised that this standard be tempered by taking into consideration "the victim's perspective and not stereotyped notions of acceptable behavior."[114] This language could also be seen as supportive of an "objective/subjective" standard.

Under the "objective/subjective" standard, the court takes into consideration both the perspective of the victim and that of a reasonable person similarly situated.[115] Pursuant to this theory, the plaintiff, for example, in a sexual harassment suit, must show that the alleged harassing conduct affected her personally, the subjective component, and that the conduct would affect an objective

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offensive); Harris v. Int'l Paper, 765 F. Supp. 1509, 1515 (D. Me. 1991) (using *Ellison* and similar cases by analogy in a race harassment case); Austen v. Hawaii, 759 F. Supp. 612, 628 (D. Haw. 1991) (applying the *Ellison* standard in a sex harassment case); Jensen v. Eveleth Taconite Co., 139 F.R.D. 657, 665 (D. Minn. 1991) (using the *Ellison* test to certify a class in a gender discrimination case); Carillo v. Ward, 770 F. Supp. 815, 822 (S.D.N.Y. 1991) (sexual harassment); Smolsky v. Consolidate Rail Corp., 780 F. Supp. 283, 294 (E.D. Pa. 1991) (sexual harassment); Radtke v. Everett, 61 Fair Empl. Prac. Cas. (BNA) 1644, 1653 (Mich. June 2, 1993) (sexual harassment); T.L. v. Toys 'R' Us, Inc., 255 N.J. Super. 616, 634-35, 605 A.2d 1125, 1135 (App. Div. 1992) (sexual harassment).

113 *See* EEOC, POLICY GUIDANCE, *supra* note 58, at 102. Although the EEOC recently published a new Policy Guidance on Sexual Harassment based on the decision in *Harris*, it stated that it saw nothing new in *Harris* and would continue to conduct investigations in hostile environment harassment cases in the same manner as it had previously. *See* Fair Empl. Prac. Summary (BNA) 31, 31 (March 28, 1994).

114 EEOC, POLICY GUIDANCE, *supra* note 58, at 102.

115 Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). The Sixth Circuit in *Rabidue* was the first court to recognize this dual standard. *See id.* The court announced a threshold burden - that the plaintiff first prove that he/she was objectively offended (that all victims similarly situated would be offended). *Id.* Then, the court required the victim to show that he or she was actually or subjectively offended. *Id.*; *cf.* Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) (requiring the plaintiff first to meet a subjective burden and then to meet an objective burden). The Sixth Circuit suggested a number of factors designed to aid the courts in determining whether the objective and subjective components have been satisfied:

> [A] proper assessment or evaluation of an employment environment that gives rise to a sexual harassment claim would invite consideration of such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her co-workers, and supervisors, [and] the totality of the physical environment of the plaintiff's work area. . . .

Rabidue, 805 F.2d at 620.

reasonable person.[116] Some courts hold that the objective component need be measured by an "objective victim"[117] standard instead of an "objective person" standard. This perspective appears to some courts to be the "fairest" way to judge the quality of the harassment and has been adopted by a number of federal courts—most notably the Seventh Circuit—for all types of harassment cases.[118]

The issue of the appropriate standard to use in harassment cases was thoroughly argued in amicus briefs in the latest Supreme Court harassment case, *Harris v. Forklift Systems, Inc.*[119] The Court, however, did not speak directly to the issue, and seemed to follow

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[116] *Rabidue*, 805 F.2d at 620. The rationale behind this standard is best explained in a race harassment case decided by the Seventh Circuit:

> The subjective standard permits a court to give proper weight to the employee's injury in fact, acknowledging the different ways in which a plaintiff initially responds to or copes with harassment. . . . Were the victim's subjective perception of injury the only basis for evaluating a Title VII harassment claim, a court would have no basis for reviewing the reasonableness of each individual claim. Therefore, the objective standard allows the fact-finder to consider the work environment and the instances of harassment against a reasonableness standard. Application of the objective standard permits the evolution of a judicial consensus as to the constitutive elements of cognizable harassment in a hostile work environment.

Daniels v. Essex Group, Inc., 937 F.2d 1264, 1272 (7th Cir. 1991).

[117] *See, e.g., Paroline*, 879 F.2d at 105 (requiring the fact finder to "examine the evidence both from an objective perspective and from the point of view of the victim").

[118] *See, e.g.*, Saxton v. AT&T, 10 F.3d 526, 534 (7th Cir. 1993) (sexual harassment); Rodgers v. Western-Southern Life Ins. Co., 63 Fair Empl. Prac. Cas. (BNA) 694, 699-701 (7th Cir. Dec. 17, 1993) (racial harassment); Daniels v. Essex Group, Inc., 937 F.2d 1264, 1271-72 (7th Cir. 1991) (racial harassment); Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 650 (6th Cir. 1986) (sexual harassment); Hampton v. Conso Prod., Inc., 808 F. Supp. 1227, 1235 (D.S.C. 1992) (racial harassment); Perkins v. General Motors Corp., 709 F. Supp. 1487, 1501 (W.D. Mo. 1989), *aff'd in part, rev'd in part and remanded sub nom.* Perkins v. Spivey, 911 F.2d 22 (8th Cir. 1990), *cert. denied*, 499 U.S. 920 (1991) (sexual harassment); Morgan v. Massachusetts Gen. Hosp., 712 F. Supp. 242, 257 (D. Mass. 1989), *aff'd in part, vacated in part and remanded*, 901 F.2d 186 (1st Cir. 1990) (racial harassment); Spencer v. General Elec. Co., 697 F. Supp. 204, 218 (E.D. Va. 1988) (sexual harassment), *aff'd*, 894 F.2d 651 (4th Cir. 1990).

[119] 114 S. Ct. 367, 370 (1993). Many thought that not only would the Supreme Court adopt a more sensitive standard in *Harris*, but that the Court would also establish more definitive guidelines to replace the relatively vague language which, arguably, left too much room for idiosyncratic views, and, thus, inconsistent opinions. They were disappointed. In reiterating the *Meritor* standard, the Court stated: "This is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises. . . ." *Harris*, 114 S.Ct. at 371. Justice Scalia wrote a brief concurring opinion in *Harris* noting that he was bothered by the vague standard but that he saw no alternative that would be more definitive without being too limiting. *Id.* at 372 (Scalia, J., concurring).

its *Meritor* reasonable person language.[120] Post-*Harris* cases suggest that lower courts are simply following the same perspective as they did prior to the *Harris* decision. It is unfortunate that the Supreme Court did not see fit to give the lower courts more guidance on this issue. Not only is there disparity among the circuits,[121] but within the circuits themselves.[122]

In reiterating the hostile environment harassment standard, the *Harris* Court stated that it specifically was not addressing the EEOC's Proposed Guidelines on harassment.[123] The EEOC, however, chose to read *Harris* as incorporating its somewhat broader definition of the standard. The EEOC stated that the *Harris* decision was consistent with its Guidelines (and its Policy Guidance), and that it did not need to change its enforcement procedures in light of the *Harris* decision.[124] Significantly, the EEOC found that the reasonable person standard used by the Supreme Court was consistent with its previous position that the standard "includes the perspective of the victim," and that this standard and *Harris* apply to all types of hostile environment harassment situations including age and disability.[125] Advocates for a different standard for religious harassment do not want to see a uniform standard adopted;

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120 *See id.* at 370. Specifically, the Court instructed:

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

Id. This phrasing of the standard is open to interpretation. It could be cited to support a reasonable victim, reasonable person, or objective/subjective standard. The most surprising things about the *Harris* decision were its brevity, lack of footnotes (Justice Ginsburg had one footnote in concurring opinion), the speed with which it was rendered, and its unanimity. Only Justices Scalia and Ginsburg wrote brief concurring opinions. *See id.* at 371-73 (Scalia, J., and Ginsburg, J., concurring).

121 *Compare* Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446 (7th Cir. 1994) (applying a subjective/objective test) *with* Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) (following the Ninth Circuit precedent, established prior to the *Harris* decision, which used the "reasonable woman" standard).

122 *See, e.g., Dey*, 28 F.3d at 1463-64 (adopting a subjective/objective test with the threshold test being the subjective prong); Saxton v. AT&T, 10 F.3d 526, 534 (7th Cir. 1994) (applying a subjective/objective test with the threshold test being the objective prong).

123 *Harris*, 114 S.Ct. at 371.

124 *See* Fair Empl. Prac. Summary (BNA) 31, 31 (Mar. 28, 1994) (stating that the decision in *Harris* requires no modification in EEOC policy).

125 *Id.* (quoting Dianna B. Johnston, Director of Title VII Division, EEOC Office of Legal Counsel).

they want to divorce themselves from this more sensitive reasonable victim or objective/subjective standard.

2. Expansion of What Constitutes Harassing Actions

Another recent development from which the religious advocates want to distance religious harassment is exemplified by the decision in *Robinson v. Jacksonville Shipyards, Inc.*,[126] which put significant restraints on freedom of expression. In *Robinson*, in response to evidence that an employer tolerated and condoned pornographic pin-ups and sexually-demeaning cartoons and posters in the workplace, a district court judge in Florida imposed a strong muzzle on the workers. In the first decision of its kind, the federal trial judge, on a finding that the employer had violated Title VII, banned sexually-explicit jokes and comments, magazines, and pin-ups, even in the employees' personal lockers.[127] Pursuant to the order, mere possession of sexually explicit materials constitutes evidence of sexual harassment.[128] The advocates of a separate standard for religion point to these limitations as potential precedent for limiting religious expression. They also fear a possible "spill-over" effect from like decisions which will result in the ban of religious expression in the workplace.

While *Robinson* seems to serve as a rallying point for the religious objectors, the judge's order was novel only to sexual harassment cases. Judges have been using injunctive orders of this kind in racial and ethnic discrimination cases brought under Title VII for quite some time.[129] A similar injunction was also previously

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126 760 F. Supp. 1486 (M.D. Fla. 1991).

127 *Id.* at 1534-38. The court ordered Jacksonville Shipyards to "cease and desist from the maintenance of a work environment that is hostile to women because of their sex and to remedy the hostile work environment through the implementation, forthwith, of the Sexual Harassment Policy, which consists of the 'Statement Of Policy', 'Statement of Prohibited Conduct', 'Schedule of Penalties for Misconduct', 'Procedures for Making, Investigating and Resolving Sexual Harassment and Retaliation Complaints', and 'Procedures and Rules for Education and Training.'" *Id.* at 1541.

128 *Id.* app. at 1542. Among other things, the policy adopted prohibits "displaying pictures, posters, calendars, graffiti, objects, promotional materials, reading materials, or other materials that are sexually suggestive, sexually demeaning, or pornographic, or bringing into the JSI work environment or possessing any such material to read, display or view at work." *Id.* The defendant in *Robinson* has appealed to the U.S. Circuit Court of Appeals on the grounds that the order violates the employees' First Amendment right to free expression. Although free speech has always been considered a foundation of American jurisprudence and a fundamental principle guiding our democratic system, it has not, until recently, been given more than limited attention in the private workplace.

129 *See, e.g.*, EEOC v. Beverage Canners, Inc., 897 F.2d 1067, 1072 (11th Cir. 1990) (granting an injunction to stop inflammatory, racially offensive remarks made by

used in the one federal religious harassment case in which the plaintiff was still working for the defendant at the time of judgment.[130] Seen in this light, then, the *Robinson* injunction is consistent with the oft-stated goal of equal treatment of all harassment.

III. THE PROPOSED GUIDELINES

Another recent milestone in the development of harassment law was the issuance by the EEOC of new Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability [Harassment Guidelines].[131] In issuing the Proposed Guidelines on Harassment in October of 1993, the EEOC stated it was merely trying to put in one place policies applying to all types of harassment that were previously scattered and that it was not doing anything new.[132] The EEOC enunciated a number of reasons for drafting new guidelines: (1) the utility of having consistent and consolidated guidelines which give specific standards for harassment under the various discrimination statutes; (2) the importance of drawing attention to forms of harassment

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plant supervisors in the presence of African-American employees); Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) (requiring an employer to take immediate action to prevent employees from expressing bigoted opinions); Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1527-29 (D. Me. 1991) (mandating an employer to implement specific programs to remedy a Title VII violation); Ways v. City of Lincoln, 705 F. Supp. 1420, 1423 (D. Neb. 1988) (requiring an employer to devise a plan subject to court approval to end racial hostility in the workplace), *aff'd*, 871 F.2d 750 (8th Cir. 1989); Butler v. Coral Volkswagen, Inc., 629 F. Supp. 1034, 1041-42 (S.D. Fla. 1986) (granting injunctive relief which required the managerial staff to attend training classes, discuss racial discrimination issues with all employees, and establish a grievance procedure to eradicate workplace harassment).

130 *See* Turner v. Barr, 806 F. Supp. 1025, 1030 (D.D.C. 1992) (granting an injunction to protect from further harassment, stating that "[d]efendant, its agents, servants, and employees, shall hereafter refrain from any racial, religious, ethnic, or other remarks or slurs contrary to their fellow employees' religious beliefs"); *see also* Snell v. Suffolk County, 611 F. Supp. 521, 528, 532 (E.D.N.Y. 1985) (finding the work environment hostile to blacks and hispanics and ordering the warden to forbid all racial, ethnic, and religious slurs and jokes as well as the use of certain epithets such as "kike," "spic," "polack," "nigger").

131 Harassment Guidelines, *supra* note 9, at 51266.

132 Fair Empl. Prac. Summary (BNA) 48 (May 25, 1994). While the national origin guidelines would be superseded by the proposed Harassment Guidelines, the EEOC hastened to point out that the Harassment Guidelines do not represent a departure from previous policy but merely a consolidation and clarification thereof. *Id.* Further, harassment of a sexual nature, as opposed to harassment based on gender, will continue to be governed by the old Sexual Harassment Guidelines because of the unique issues that it raises about human interaction relative to other forms of harassment. *Id.* The Proposed Guidelines are patterned on the EEOC's Policy Guidelines on Sexual Harassment, which was issued in 1990. *Id.* (quoting Elizabeth Thorton, EEOC Acting Legal Counsel).

other than sex which has recently received the most attention; (3) offering more guidance than did the previous national origin guidelines; (4) drawing attention to the new Disabilities Act; and (5) highlighting the importance of the fact that sexual harassment is not limited to harassment of a sexual nature, but also covers gender animus.[133]

The Harassment Guidelines arguably were not new in that they reiterated longstanding statements from the EEOC and the top federal courts that all harassment is equal.[134] However, the EEOC's *publication* of a broad-spectrum approach which specifically treats all harassment as equal[135] proved to be highly controversial. It generated so much comment, especially from religious groups,[136] that the EEOC decided to extend the comment period,[137] Congress held hearings,[138] and more than 100 members of Congress supported a resolution calling for the EEOC to withdraw the Guidelines.[139] In August 1994, Congress approved and the President signed an appropriations bill which instructed the EEOC to throw out the draft guidelines and start over again.[140] A future consolidation of guidelines on harassment should not, however, be

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133 Harassment Guidelines, *supra* note 9, at 51266-67.

134 *But see supra* note 90 (concerning the few cases which have stated that racial harassment and sexual harassment should not be subjected to the same standard of review).

135 *See* Harassment Guidelines, *supra* note 9, at 51266-67 (covering harassment on the basis of race, color, religion, gender, national origin, age, and disability, and prohibiting harassment because one's relatives, friends, or associates belong to one of the protected categories). Conduct that "denigrates or shows hostility or aversion toward an individual" because of his or her membership in one of these categories is forbidden. *Id.* at 51269.

136 Fair Empl. Prac. Summary (BNA) 55, 55 (May 23, 1994). Groups such as the Traditional Values Coalition, the American Family Association, and the Family Research Council have flooded Congress with thousands of letters and comments. Schmitt, *supra* note 10, at B9. At a press conference where Senator Howell Hefflin announced that the Senate would hold hearings on the Guidelines on June 9, 1994, he stood next to boxes which he claimed contained 47,000 "petitions of outrage" collected by John Hagee Ministries. Fair Empl. Prac. Summary (BNA) 61, 62 (June 6, 1994). Until the religious groups launched their organized campaign against the proposed Harassment Guidelines, most comments on them centered on the reasonable person standard. Fair Empl. Prac. Summary (BNA) 47, 48 (April 25, 1994) (quoting Elizabeth Thorton, EEOC Acting Legal Counsel).

137 59 Fed. Reg. 24,998 (1994). Other groups raising First Amendment objections were the American Civil Liberties Union and People for the American Way. Fair Empl. Prac. Summary (BNA) 55, 55 (May 23, 1994).

138 Fair Empl. Prac. Summary (BNA) 67, 68 (June 20, 1994).

139 Schmitt, *supra* note 10, at B9.

140 Jay W. Waks & Christopher R. Brewster, *Proposed EEOC guidelines on "religious harassment" provoked a firestorm of criticism, causing the agency to pull back - for now*, NAT'L L.J., Sept. 12, 1994, at B5.

counted out. In instructing the EEOC to start over, both the House and the Senate conferees expressly rejected proposals to bar the EEOC from drafting regulations which cover religion.[141]

A. What the Guidelines Said

The crux of the wave of opposition to the Harassment Guidelines is found in the new definition of harassment:

> Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:
> (i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;
> (ii) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
> (iii) Otherwise adversely affects an individual's employment opportunities.[142]
> Harassing conduct includes, but is not limited to, the following:
> (i) Epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to race, color, religion, gender, national origin, age, or disability; and
> (ii) Written or graphic material which denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age, or disability and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.[143]

Importantly, as noted above, the Harassment Guidelines purport to clarify the perspective from which the allegedly harassing conduct should be judged:

> The standard for determining whether verbal or physical conduct relating to race, color, religion, gender, national origin, age, or disability is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive. The "reasonable person" standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability.[144]

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141 *Id.*

142 Harassment Guidelines, *supra* note 9, at 51269.

143 *Id.*

144 *Id.* Because the Harassment Guidelines propose to adopt the "reasonable person" standard and then modify that standard with consideration of race, color, gender, national origin, religion, age, and disability, the actual standard the EEOC proposes remains unclear.

B. Why Is the Language So Controversial?

In reviewing the strident opposition to the Harassment Guidelines, two issues form the focus of the hue and cry: (1) The vagueness of the definition of harassment allows too much for the idiosyncracies of protected classes, arguably impinging on the free exercise of religion; and (2) the standard enunciated for judging harassment is too narrowly drawn to protect the First Amendment rights of the religious.

The language, in part, makes conduct illegal if it "otherwise adversely" affects "an individual's employment opportunities." Again, this language is not a marked departure from previous interpretations of Title VII. However, it is receiving increased attention.[145] Focusing on this standard arguably could result in findings for plaintiffs in "close-call" cases. This is inappropriate in religion cases, it is argued, because the rights of the religiously-motivated actor are guaranteed greater deference.

Additionally, some argue that the "written or graphic material" language, especially in conjunction with "*otherwise*," opens the door wider for finding workplace conduct "offensive" to a pro-

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The EEOC recently published Policy Guidance on Current Issues of Sexual Harassment to aid the trier of fact in determining whether harassment is sufficiently severe or pervasive. *See* EEOC, POLICY GUIDANCE, *supra* note 58, at 102. The EEOC cited six factors to consider in reaching a "hostile environment" determination:

1. whether the conduct was verbal, physical, or both;
2. how frequently it was repeated;
3. whether the conduct was hostile and patently offensive;
4. whether the alleged harasser was a co-worker or a supervisor;
5. whether others joined in perpetrating the harassment;
6. whether the harassment was directed at more than one individual.

Id.

145 *See* Fair Empl. Prac. Summary (BNA) 47, 48 (April 25, 1994). Francine Weiss, a plaintiffs attorney of the Washington D.C. firm Kalijarvi & Chuzi, stated that the sentence is an open door, particularly helpful to women who, because of prior offensive comments, have avoided activities necessary for promotion. *Id.* Concern over the impact of the vagueness of the definition also centers on the First Amendment right to freedom of speech. Often language which denigrates or shows hostility may also be classified as political speech, a form of speech protected under the First Amendment. A woman may find it harassing to have a male colleague tell her that she should be home with her children, but his political or religious persuasion may arguably protect these opinions. Likewise, in Berkman v. New York, 580 F. Supp. 226, 231 (E.D.N.Y. 1983), *aff'd*, 755 F.2d 913 (2d Cir. 1985), a female firefighter established a claim for sexual harassment in the workplace based upon "blatant sexual mockery" in the form of graffiti and cartoons on the communal bulletin board and displayed generally around the firehouse. In particular, one of the cartoons which the court found especially egregious displayed a woman firefighter at a male urinal. *Id.* at 231 n.7. Viewed from a First Amendment perspective, however, the cartoon merely represented the men's political statement in the face of a court order to set aside positions for women.

tected individual because such language is open to too broad an interpretation.[146] For example, one commentator noted that, under this language, a Jewish employee could be found to have offended an Islamic coworker by simply posting a photograph of the Wailing Wall in the office.[147] Another commentator, Representative Howard McKeon, who introduced a resolution to delete religious harassment from the EEOC Guidelines, claimed that without a separate rule for religion, employees could be accused of religious harassment if they wore a necklace with a crucifix or a Star of David, or kept a Bible on their desk.[148]

The second issue, whether what is really a "reasonable victim" standard should be applied to all forms of harassment, was raised above. The argument again is that religion should be accorded separate status due to its unique classification. These issues will be discussed in light of the recent rise in religious harassment cases and the interpretations they have engendered.[149]

IV. A Shifting Standard

Each side in the debate over the appropriate standard for religious harassment has precedent it can cite. Advocates for the position that all harassment should be treated equally can cite consistent language in Supreme Court and lower court opinions,[150] as well as in EEOC statements. Opponents wishing to distance religious harassment from sexual harassment can cite the development of harassment law as showing that sexual harassment has, in fact, been treated differently, and that treating religious harass-

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146 Schmitt, *supra* note 10, at B9.

147 *Id.* (quoting Robert Cynkar, an attorney for a conservative religious group opposing the EEOC Guidelines). *See* Brown v. Polk County, 68 Fair Empl. Prac. Cas. (BNA) 648 (8th Cir. July 31, 1995) (en banc) (reversing order that required county employee Brown, a supervisor of fifty employees, to take religious objects off his wall and away from his desk). For a more detailed history of the *Brown* case, see *infra* note 163.

148 Fair Empl. Prac. Summary (BNA) 61, 62 (June 6, 1994).

149 *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534 (M.D. Fla. 1991) (granting an injunction to quash all sexual depictions and expressions from the workplace, which brought the ACLU to the defense of the employer on First Amendment grounds in amicus curae briefs filed with the circuit court, whose decision is still pending).

150 *See, e.g.*, Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) ("Religious harassment, like sexual harassment, can take many forms. . . . Continuous abusive language, whether racist, sexist, or religious in form, can often pollute a healthy working environment by making an employee feel uncomfortable or unwanted in his surroundings.").

ment under separate standards would thus not be a radical departure.

There is, of course, precedent within Title VII itself for treating religious discrimination differently from other types of Title VII discrimination. Congress authorized, and the Supreme Court has liberally construed case law to allow, discrimination by religious organizations.[151] More importantly for our purposes, the use of a different standard in Title VII religious accommodation cases has been recognized in order to accommodate constitutional rights regarding religion. A different standard is used to judge the reasonableness of accommodation for religious practices[152] than is used in judging reasonable accommodation for disabilities. The requirement of religious accommodation for religious practices has been tempered by the adoption of a *de minimis* standard to meet the First Amendment government neutrality requirement.[153] Precedent clearly supports but does not mandate a different standard.

The two most commonly-suggested alternatives are (1) to exempt virtually all religiously-related speech from harassment law because First Amendment religious rights trump the equality interests protected under Title VII, or (2) to require proof of animus or intent in order to make a religious harassment case. Either of these would clearly give great protection and latitude to religious speech in the workplace. The question is, would they give adequate protection to those wishing to avoid such speech? Do they tilt the playing field too much in the direction of the aggressively religious?

A. Traditional Cases

Complaints of religious harassment, which have been less frequent[154] than race, ethnic, or gender harassment, are growing.[155]

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151 *See* Fair Empl. Prac. Summary (BNA) 73, 73 (July 4, 1994). The Employment Non-Discrimination Act of 1994, designed to prohibit discrimination on the basis of sexual orientation, exempts religious organizations and educational institutions significantly connected to religious organizations, from the ban on using sexual orientation for employment decisions. *Id.* The bill, introduced in July, is expected to have a better chance of passage than previous such bills. *Id.* at 73-74.

152 42 U.S.C. §§ 2000e to 2002a (1988) (requiring accommodation of religious practices).

153 *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986); Transworld Airlines v. Hardison, 432 U.S. 63 (1977); *see generally* David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992).

154 Fair Empl. Prac. Summary (BNA) 61, 62 (June 6, 1994).

155 Fair Empl. Prac. Summary (BNA) 87, 88 (Aug. 2, 1993) (showing that between

In 1993, approximately five percent of the 16,000 harassment complaints received by the EEOC were based on religious harassment.[156] While few complaints have resulted in appellate decisions, all successful federal religious harassment decisions through 1994 have two things in common: the individuals were harassed because they were Jewish[157] and they all are clear examples of harassment with animus. In each case, the plaintiff endured a series of anti-Semitic remarks for a sustained period before bringing suit.

For example, in *Compston v. Borden*,[158] the first case to recognize religious harassment, Compston was continuously referred to both within and outside his presence as "Jew-boy," "the kike," "the Christ-killer," the "damn Jew," and "the goddam Jew," after casually mentioning to his supervisor that he believed in the basic tenets of Judaism.[159] In a later case, *Weiss v. United States*,[160] Weiss was similarly taunted by a coworker and his supervisor for two years with slurs such as "Jew faggot," "resident Jew," "rich Jew," and "Christ killer," when they discovered he was Jewish.[161] This uniform factual history might now be used to support the use of an animus standard in new religious harassment cases. Most of these new harassment cases involve proselytizing Christians.

1988 and 1993, 46.6% of harassment claims filed with the EEOC were for racial harassment, 41.8% for sex, 15.85% for national origin, and 3.6% for religion).

156 Schmitt, *supra* note 10, at B9.

157 *See, e.g.*, Smallzman v. Sea Breeze, 60 Fair Empl. Prac. Cas. (BNA) 1031 (D. Md. Jan. 7, 1993); Shapiro v. Holiday Inns, Inc., 1990 WL 44472 (N.D. Ill. Apr. 6, 1990); Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984); Obradovich v. Federal Reserve Bank, 569 F. Supp. 785 (S.D.N.Y. 1983) (religious and national origin harassment); Compston v. Borden, 424 F. Supp. 157 (S.D. Ohio 1976); *see also* Goldberg v. City of Philadelphia, 1994 WL 313030 (E. D. Pa. June 29, 1994); Turner v. Barr, 806 F. Supp. 1025 (D.D.C. 1992) (religious and racial harassment), *reh'g denied*, 65 Fair Empl. Prac. Cas. (BNA) 909 (Jan. 13, 1993); Meek v. Michigan Bell Tel. Co., 483 N.W.2d 407 (Mich. Ct. App. 1991) (religious and sexual harassment); *cf.* Baker v. United States, 1989 WL 37151 (D.D.C. Mar. 28, 1989) (finding that Jewish plaintiff did not substantiate alleged harassment). Other religion cases, primarily involving attempted imposition of employer Christian ideas on nonbelievers, have been brought under failure to accommodate theories. *See supra* notes 152-53 (listing statutory and case law).

158 424 F. Supp. 157 (S.D. Ohio 1976).

159 *Compston*, 424 F. Supp. at 158. There was also evidence that Compston and his partner were put "under a microscope" and were in a no-win situation because Compston was believed to be Jewish. *Id.*

160 595 F. Supp. 1050 (E.D. Va. 1984).

161 *Id.*. at 1053. Other comments included "nail him to the cross" and "you killed Christ, Wally, so you'll have to hang from the cross." *Id.*

B. The Animus Standard

Proponents of a separate standard for religion have most commonly argued that only animus-based religious statements, actions, and depictions should be considered in determining whether there is harassment.[162] This would clearly allow the kinds of faith-based activity that proponents fear would be banned if religion were treated like sexual harassment. These fears are not based on the precedent involving religious harassment, but on the sexual harassment cases such as *Robinson* and the expression of its ideas in the proposed EEOC Guidelines.[163]

The problem with the use of an animus standard is that it does not give adequate protection to the religious rights of the employee. The employees' right to be free from having their employer's or coworkers' beliefs forced on them, against their religious beliefs (or lack thereof), would become meaningless.[164] This is illustrated by the 1993 Oregon case of *Meltebeke v. Bureau of Labor & Industries.*[165]

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[162] *See* Mark Curriden, *Defenders of the Faith*, A.B.A. J. Dec. 1994, at 86 (noting that a rapidly growing, aggressive Christian bar is fighting such claims, along with what they view as assaults on religious freedom).

[163] *See supra* note 9 and accompanying text (discussing the EEOC Guidelines); *see also* Brown v. Polk County, 10 Indiv. Empl. Rts. Cas. (BNA) 15 (8th Cir. Oct. 6, 1994), *reversed in part*, 68 Fair Empl. Prac. Cas. (BNA) 648 (8th Cir. July 31, 1995) (en banc). In *Brown*, Polk County ordered Brown, a supervisor, to stop using county resources to support a religious organization and to ensure that the work environment was free of religious proseltyzing, witnessing, and counseling because these activities had contributed to severe problems in the area Brown supervised. *Id.* at 17. When problems continued and Brown's supervisor visited his office, he told Brown to remove the things on his wall and desk "that may be considered offensive to employees." *Id.* Brown then took a Bible from his desk drawer and asked if that had to go, too, and he was told yes. *Id.* When this was challenged, the majority of the court, on appeal, admitted that "the instruction to remove Brown's Bible, in particular, may have been overzealous and offensive." *Id.* at 20. The court upheld the lower court's ruling, however, because Brown did not object to the instruction at the time, and he did not attempt to prove the removal substantially burdened his religious practice. *Id.* In a strong dissent, Judge Arnold noted that, "It simply is not an establishment of religion to allow individuals to display items of religious significance in their offices." *Id.* at 21 (Arnold, J., dissenting).

In a rehearing en banc, Judge Arnold, now writing for the majority, reversed the order as to the Bible and the wall decorations after finding that there was no evidence thay they were offensive to employees or disrupted word. Brown v. Polk County, 68 Fair Empl. Prac. Cas. (BNA) 648, 654 (8th Cir. July 31, 1995) (en banc). Similarly, the infrequent, spontaneous prayers were "inconsequential" and had no demonstrated detrimental effect on employees. *Id.* at 653-54.

[164] *Cf.* 1 Americans with Disabilities Cas. (BNA) 495, 497 (D.E. Pa. 1994) (rejecting the animus requirement for investigation of workplace injury claims even though investigation, by definition, has a disparate impact on the disabled).

[165] 63 Fair Empl. Prac. Cas. (BNA) 709 (Or. Ct. App. May 19, 1993).

Meltebeke, the sole proprietor of a painting business, was an evangelical Christian who felt it was his "duty to tell others, especially nonbelievers, about God and sinful conduct."[166] In carrying out that duty, Meltebeke invited his employee to go to church with him at least twice a week, told him he was a sinner and was going to hell because he lived with his girlfriend, witnessed to the employee's mother and girlfriend, and told the employee that in order to be a good painter, it was necessary to be a good Christian. Meltebeke also told the employee he wanted to work with a Christian because a Christian would not steal. After one month, Meltebeke fired the employee for poor performance.

The employee subsequently filed a claim with the Bureau of Labor and Industries ("BOLI"), which found Meltebeke liable[167] for religious harassment under its definition of religious harassment, which included making religious advances where "'such conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment.'"[168] In a three-way split decision, the appellate court overturned the ruling.

Judge Warren, writing for the majority, focused on whether BOLI had deprived Meltebeke of his right to free exercise of his religious beliefs and speech under the Oregon Constitution.[169] Judge Warren found that enforcement of BOLI's harassment ruling would only incidentally interfere with religious freedom[170] and, thus, could be justified by the showing of an overriding governmental interest. Judge Warren further found that while preventing religious discrimination was an overriding interest, BOLI's test of what constituted religious discrimination was not essential to advancing that interest because it was not the least restrictive means available to accomplish it.[171] Requiring an animus or intent to dis-

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166 *Id.* at 710.

167 *Id.* Meltebeke was assessed $3,000. *Id.* at 713 (Edmonds, J., concurring).

168 *Id.* at 710 (quoting In re Sapp's Realty, No. 11-83 (BOLI Jan. 31, 1985)) (finding religious harassment a form of religious discrimination). Applying a reasonable employee standard, BOLI concluded:

> From the perspective of a 20 year old employee with Complainant's education [complainant had not completed high school] and experience, and in a situation where he worked closely with his harasser/employer, [petitioner's] religious conduct was sufficiently pervasive to alter the conditions of the employer's working environment, and had the effect of creating an intimidating and offensive working environment.

Id. at 711.

169 *Id.* (quoting OR. CONST. art. I, §§ 2, 3).

170 *Id.* It only incidentally interfered because the rule could be enforced without burdening religious freedom. *Id.*

171 *Id.* at 712. A less-restrictive alternative was necessary in order to protect the

criminate standard could have made BOLI's restriction constitutional.[172]

In a special concurrence, Judge Edmonds took a more absolutist position advocated by some of the opponents to the Proposed Guidelines. The concurring judge found that BOLI's rule was facially unconstitutional because it directly interfered with religious freedom by prohibiting "religious advances."[173] Further echoing proponents of a separate standard, Judge Edmonds found that religious harassment could not be equated to sexual harassment because "[r]eligious advances or expression are protected expressly and require accommodation" while sexual harassment has no constitutional protection.[174] Particularly troubling to the concurring judge was the fact that the extent of an employer's religious expression would be controlled by the reasonable employee, which is not synonymous with the protection afforded by the Constitution.

Moreover, Judge Edmonds found that Meltebeke's actions were not harassing because they were not motivated by animus. Judge Edmonds stated that there was no generalized "right to be free from religious expression in the workplace,"[175] only a right to

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right of minorities to engage in religious practices that the majority (and hence, the reasonable person) would find objectionable. *Id.*

[172] *Id.* The court found that requiring an intent to discriminate would be a less-restrictive alternative, although not necessarily the least restrictive, and stated that a First Amendment restriction could only be upheld if it were the least-restrictive alternative. *Id.*

[173] *Id.* at 713 (Edmonds, J., concurring). Judge Edmonds noted that "BOLI's rule makes expression of religious opinion unlawful even though an employer does not discriminate because of the employee's religion." *Id.* at 713-14 (Edmonds, J., concurring). Moreover, Judge Edmonds declared, "'Religious advances' necessarily includes religious expression and, therefore, the rule directly targets religious expression." *Id.* at 716 (Edmonds, J., concurring).

Of course, even when legislation is designed to prevent a religious practice, it is not *a priori* unconstitutional and may be justified by a compelling governmental interest. *See* United States v. Lee, 455 U.S. 252, 257-58 (1982); Gillette v. United States, 401 U.S. 437, 462 (1971); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, app. (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1527 (1989). Recently, some courts have found that states' interests in barring marital status discrimination may not be sufficiently compelling to overcome the Free Exercise Clause rights of landlords who object on religious grounds to renting to unmarried couples. *See, e.g.*, Attorney General v. Desilets, 636 N.E.2d 233, 240 (Mass. Sup. Jud. Ct. 1994); Smith v. Fair Empl. & Housing Comm'n, 30 Cal.Rptr.2d 395, 412 (Cal. App. 3 Dist. 1994).

[174] *Meltebeke*, 63 Fair Empl. Prac. Cas. at 717 (Edmonds, J., concurring). In Michigan, by contrast, the appellate court found that religious and sexual harassment were equivalent. *See* Meek v. Michigan Bell Tel. Co., 483 N.W.2d 407, 409 (Mich. App. 1991) (finding that supervisors' acts over a nine-year period constituted a continuing violation, and that "[a]ll the discriminatory events alleged by plaintiff involved the same subject matter: gender and religion").

[175] *Meltebeke*, 63 Fair Empl. Prac. Cas. at 714 (Edmonds, J., concurring).

be free from discrimination based on an employee's religion. Because Meltebeke did not criticize any religion or use religious slurs, he did not harass the employee.[176] The concurring judge further found the employee unworthy of protection because he did not profess a well-defined and expressed religious belief.[177]

In this regard, Judge Edmonds overlooked the long line of cases upholding the rights of the nonreligious.[178] Judge Edmonds did not recognize that continuously telling an employee (and those close to the employee) that he was going to hell, that he was untrustworthy because he was not a church-going Christian, and that he could not be a good painter because he was not a good Christian could be harassing.[179]

Judge Riggs, in dissent, found that the majority opinions gave inadequate protection to employees. The dissenting judge specifically recognized the constitutional right of atheists, agnostics and the nonobservant, as well as the demonstrably religious, to be free from religious harassment.[180] Because employment creates a "special relationship of power and necessary subservience,"[181] curbs on *conduct* are appropriate.[182] Judge Riggs found that Meltebeke's ac-

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176 *Id.* at 714-15 (Edmonds, J., concurring). Judge Edmonds also required a showing that the employee's emotional and psychological stability was destroyed before sufficient harassment could be shown. *Id.* at 715 (Edmonds, J., concurring). This, of course, is inconsistent with *Harris*. *See supra* notes 119-25 and accompanying text (discussing *Harris* and post-*Harris* cases).

177 *Meltebeke*, 63 Fair Empl. Prac. Cas. at 714 (Edmonds, J., concurring). Judge Edmonds took great pains to find that the employee was not found to have a religious belief and, therefore, the concurring justice rejected most of Meltebeke's comments as merely being aimed at the employee's lifestyle, which was not entitled to protection because it was not religiously based. *Id.* BOLI, however, found that the employee had gone to Sunday school when he was very little, he went to kindergarten in a church, and sometimes went to church on Christmas Eve with his mother. *Id.*

178 *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1527 (1989).

179 *Meltebeke*, 63 Fair Empl. Prac. Cas. at 715 (Edmonds, J., concurring) ("[Meltebeke] was not even aware that his statements were offensive to the employee, because the employee did not express those sentiments to him. . . . The absence of any evidence that the statements were offensive because of the employee's religious beliefs or that the employee expressed to [Meltebeke] that he was offended by the statements, makes it impossible to determine if a hostile environment existed.").

180 *Id.* at 718 (Riggs, J., dissenting) ("For many, freedom *from* religion is as important as freedom to practice religion . . . [and] is entitled to the same level of constitutional, statutory and administrative protection in the workplace."); *see also* Young v. Southwestern Sav. and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975).

181 *Id.*

182 *Id.*; *see generally* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (viewing harassment decisions as directed at conduct rather than speech); *see also Brown*, 10 Indiv. Empl. Rts. Cas. at 18 ("[A]n individual's freedom of belief is absolute, but an individual's freedom of conduct is not."), *reversed on other grounds*, 68 Fair Empl. Prac. Cas.

tions went well beyond the "mere providing of religious information" and constituted harassment.[183] Additionally, Judge Riggs rejected an intent requirement.[184]

The dissenting opinion is consistent with a Ninth Circuit case based on similar facts although not brought under a harassment theory. In *EEOC v. Townley Engineering & Manufacturing Co.*,[185] the employers had made a covenant with God when they established their business that it "'would be a Christian, faith-operated business.'" As part of that commitment, they held a devotional service once a week during working hours, and required all employees to attend, because the Bible and their covenant required them to share the Gospel with all of their employees.[186] Pelvas, who was hired in 1973 at a plant that did not have devotional services,[187] asked to be excused when the services were instituted in 1984 because he was an atheist. When he was not excused, Pelvas filed a claim with the EEOC for failure to accommodate his religious beliefs under Title VII.[188] The EEOC sought and obtained a permanent injunction from the district court prohibiting the employer from continuing mandatory devotional services.[189]

The Ninth Circuit took a traditional balancing approach in

(BNA) 648 (8th Cir. July 31, 1995) (en banc); *cf.* Madsen v. Women's Health Ctr, Inc., 114 S. Ct. 2516, 2524 (1994) (finding an injunction limiting speech and actions of abortion protestors a limit on conduct and, therefore, subject to standard less than strict scrutiny).

183 *Meltebeke*, 63 Fair Empl. Prac. Cas. at 718 (Riggs, J., dissenting). In a somewhat analogous 1991 case, the Michigan Court of Appeals had no problem finding that the plaintiff was harassed. *See* Meek v. Michigan Bell Tel. Co., 483 N.W.2d 407, 408 (Mich. App. 1991). Meek had been verbally harassed for a period of almost nine years by a succession of supervisors, some of whom harassed her because she was female and some because she was Jewish and female. *Id.* at 408, 409. As in *Meltebeke*, one supervisor harassed her because she did not fit his image of a proper religious person. *Id.* at 408. He told Meek that she should be at home, that Jewish women do not work and that she failed his expectations of a Jewish woman. *Id.* Apparently, the court did not think that finding these statements harassing created a problem with freedom of religious expression. *See id.* at 409.

184 *Meltebeke*, 63 Fair Empl. Prac. Cas. at 718 (Riggs, J., dissenting) ("I am not sure how intent could ever be shown in this context.").

185 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1527 (1989).

186 *Id.* at 620.

187 *Id.* at 612. In 1982, all Townley employees were given a handbook containing company rules and policies; one of those was a requirement that employees attend the devotional services. *Id.* Pelvas signed a statement agreeing to "abide by all the requirements and policies stated within it." *Id.*

188 *Id.* Pelvas was required to attend although he was told he could sleep, listen to the radio through earphones, or read the paper during services. *Id.*

189 *Id.* The *Townley* court found that the lower court's injunction against all mandatory services was too broad. *Id.* at 621. There was no need to protect those who did not object to attending; only Pelvas needed accommodation. *Id.*

determining whether restricting the Townleys' proselytizing in order to protect Pelvas unconstitutionally restricted the Townleys' religious rights. The court found that a major goal of the First Amendment was "ensuring religious freedom in a society with many different . . . religious groups."[190] Title VII was consistent with that goal in protecting against religious discrimination. The court further found that "[p]rotecting an employee's right to be free from forced observance of the religion of his employer is at the heart of Title VII's prohibition against religious discrimination."[191] Thus, a compelling state interest justified imposing some burden on the Townleys' religious practices.

The magnitude of the impact of that burden was not inappropriate. The accommodation requirement did not require the Townleys to abandon their religion; at most, the restriction presented some hardship regarding the ease with which the company spread its message. The mandated compromise between conflicting rights was consistent with the First Amendment's goals of protection in a society with religious diversity.[192] Further, the court found that when balancing the religious rights of employees and employers, "it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee's Title VII rights."[193] Failure to require an accommodation would impermissibly impede the objectives sought to be advanced by Title VII.

In *Turic v. Holland Hospitality House, Inc.*,[194] the district court likewise protected religious diversity when it safeguarded a worker against retaliation for offending her "very Christian" coworkers through her view on abortion. Turic, a worker in defendant's restaurant, informed her supervisor that she was pregnant, and told another supervisor, in response to a question, that she had not

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190 *Id.* at 621.

191 *Id.* at 620-21.

192 *See id.* The court recognized that allowing Pelvas not to attend services had a spiritual cost to the employers. *Id.* at 615. Even though excusing Pelvas would have a "chilling effect" on the company's purpose of "shar[ing] with all its employees the spiritual aspects of the company," *id.* at 616, the court found that the "chill" or cost was neither unconstitutional nor met the statutory requirement of showing "undue hardship *on the conduct of the employer's business.*" *Id.* at 615 (citing 42 U.S.C. § 2000e(j)).

193 *Id.* at 621.

194 842 F. Supp. 971, 975 (W.D. Mich. 1994); *see also* Young v. Southwestern Sav. and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975) ("Congress, through Title VII, has provided courts with a means to preserve religious diversity from forced religious conformity.").

ruled out abortion. As the news spread it led to "staff turmoil," and Turic was disciplined for causing the turmoil.[195] She was told that if she discussed terminating her pregnancy again, she would be fired; a week later, she was fired. Turic challenged the firing on the ground that the religion of the staff was impermissibly forced on her and that she suffered discrimination "because her views on the morality of abortion differed from those of the Christian staff."[196] Turic received protection despite the fact that she did not claim her views were religiously based.[197]

Turic, Townley, and other cases clearly stand for the proposition that employers and coworkers do not have the right to force their religious views on an employee.[198] While both employer and employee have rights to free expression of religious ideas, most courts have found that when those rights conflict, it is the relatively powerless employee who merits protection from the employer using his or her power over the job to force religion on the employee.

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195 *Id.* at 974-75; *see also* Cary v. Anheuser-Busch Inc., 53 Fair Empl. Prac. Cas. (BNA) 955 (E.D. Va. Dec. 16, 1988) (finding it appropriate for an employer to require an employee to get employee assistance after the employee threatened a fellow employee following a "religious experience").

196 *Id.* at 979. In addition to suing for harassment, the plaintiff also sued under the Pregnancy Discrimination Act of 1978 and for invasion of privacy, interference with contract, and discrimination on the basis of marital status. *Id.* at 974.

197 *See id.* at 979-80 (citing Blalock v. Metals Trades, Inc., 775 F.2d 703, 709 (6th Cir. 1985) (protecting an employee who had a falling out with the leader of a sect that the employer, an openly Christian company, also supported)). *But see* Wilson v. U.S. West Communications, 65 Fair Empl. Prac. Cas. (BNA) 200, 209 (D. Neb. June 5, 1994) (denying protection to an employee), *aff'd* 58 F.3d 1337 (8th Cir. 1995). The *Wilson* court found that an employer could not reasonably accommodate an employee wearing a button that had a color photo of an aborted fetus when she created an "acrimonious atmosphere" because the button "disturbed, distressed and offended" coworkers and they threatened to walk off their jobs, balked at attending meetings, and filed a labor grievance. *Id.* The employer's time and effort spent attempting to alleviate the situation as well as the loss of efficiency and productivity were more than *de minimis. Id.* Plaintiff wore the button because she made a religious vow that she would wear it until there was an end to abortion or until she could no longer "fight the fight." *Id.* at 202. She rejected the accommodation of wearing the button with the picture of the fetus covered; however, the accommodations she suggested were more than *de minimis. See id.*

198 *See, e.g.*, Brown v. Polk County, 10 Indiv. Empl. Rts. Cas. (BNA) 15 (8th Cir. Oct. 6, 1994), *reversed in part,* 68 Fair Empl. Prac. Cas. (BNA) 648 (8th Cir. July 31, 1995) (en banc); Young v. Southwestern Sav. and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975); EEOC Decision No. 72-0528, 4 Fair Empl. Prac. Cas. (BNA) 434 (Dec. 17, 1971); EEOC Decision No. 72-1114, 4 Fair Empl. Prac. Cas. (BNA) 842 (Feb. 18, 1972); *cf.* Mass v. McClenahan, 67 Fair Empl. Prac. Cas. (BNA) 1597 (S.D.N.Y. May 8, 1995) (holding that allowing an attorney, under 42 U.S.C. § 1981, to sue a corporation that fired him because he was a "New York Jew" did not unconstitutionally harm the corporation's First Amendment freedom of association or the right to hire the attorney of its choice).

Abuse of power, of course, lies at the heart of harassment theory.[199] Thus, this line of cases, while based on "pure" discrimination rather than harassment/discrimination theory, are directly apposite.

If this reasoning were correctly applied to *Meltebeke*, the employee would have prevailed. The employee had the right to be "free from forced observance of the religion" of his employer.[200] This right had to be balanced against the employer's right to express his religious beliefs through witnessing. Using a reasonable person standard as the balancing mechanism is "consistent with the First Amendment's goal of ensuring religious freedom in a society with many different . . . religious groups."[201] BOLI's rule regarding harassment, which is consistent with the EEOC's interpretation of Title VII, incorporates this balancing approach. The rule did not forbid all religious expression,[202] only that which creates an intimidating, hostile, or offensive working environment.[203] When the continuous witnessing reaches that point where it becomes sufficiently "intimidating, hostile or offensive" to change the working environment for the reasonable person, then it would be appropriate to "require the employer, who structures the workplace to a substantial degree," to cease.[204]

Additionally, there is an equity argument which can be made. If the employer has only a minimum duty to accommodate an employee's religious practices, there is little reason why the employee is not entitled to the same standard. An animus standard would require an employee to accommodate all his or her employer's expressions so long as they were motivated by the right intent. The rationale behind the *de minimis* standard should apply whether the employee's or employer's religious beliefs are being fostered.

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199 *See, e.g.*, Keith R. Fentonmiller, Note, *Verbal Sexual Harassment As Equality-Depriving Conduct*, 27 U. MICH. J.L. REF. 565, 574-81 (1994); Kristen R. Yount, *Ladies, Flirts, and Tomboys: Strategies for Managing Sexual Harassment in an Underground Coal Mine*, 19 J. CONTEMP. ETHNOGRAPHY 396, 397, 401 (1991); Daniel Coleman, *Sexual Harassment: About Power, Not Sex*, N.Y. TIMES, Oct. 22, 1991, at B5.

200 *Townley*, 859 F.2d at 620-21.

201 *Id.* at 621.

202 *See Meltebeke*, 63 Fair Empl. Prac. Cas. at 711.

203 *Id.* at 710; *cf.* Brown v. Polk County, 68 Fair Empl. Prac. Cas. (BNA) 648, 655 (8th Cir. July 31, 1995) (en banc) ("We concede that Polk County has a legal right to ensure that its workplace is free from religious activity that harasses or intimidates.").

204 *Townley*, 859 F.2d at 621; *cf.* Peloza v. Capistrano United School Dist., 37 F.3d 519 (9th Cir. 1994) (holding that a high school biology teacher, because of his special role vis-a-vis the students, could be required to teach evolution and prohibited from discussing religious matters with students), *cert. denied*, 115 S. Ct. 2640 (1995).

C. A Targeted Speech Standard

Another standard which has been suggested is that of "targeted" or directed speech. Eugene Volokh, in an article in the *UCLA Law Review*,[205] after rejecting other standards, argues that prohibiting only harassing speech targeted at an individual strikes the appropriate balance between freedom of expression and protection from harassment.[206] In protecting even "bigoted epithets" so long as they are undirected,[207] Volokh obviously errs on the side of freedom of expression.[208] However, this standard suffers from the same problem as an animus standard. It offers the employee no protection so long as the speaker says it in the "right" way. Under this standard, leaving an offensive picture on an employee's desk could be harassing, but posting it on the wall where it is "undirected" could not, despite the fact that the harassing impact would usually be greater if posted.[209] Likewise, because workplace devotional services would not be aimed at a particular individual, mandatory attendance would not be prohibited.

Part of the justification for this position is Volokh's rejection of the idea that an employee is part of a captive audience.[210] The idea of employee as captive audience is implicit in the rationale of *Townley* and similar decisions as well as in the power theory of har-

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205 Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

206 *Id.* at 1871-72. Some courts have considered whether the offensive language was targeted at the complaining individual to be one element in determining whether the complained-of behavior was sufficiently severe to be harassing. *See, e.g.*, Carr v. Allison Gas Turbine, 65 Fair Empl. Prac. Cas. (BNA) 688, 690-91 (7th Cir. July 26, 1994) (sexual harassment) ("For one thing, the words and acts of which she complains were . . . targeted on her, and it is a lot more uncomfortable to be the target of offensive words and conduct than to be merely an observer of them."); *see also* Lenoir v. Roll Coater, Inc., 63 Fair Empl. Prac. Cas. (BNA) 1346 (N.D. Ind. Apr. 13, 1992) (racial harassment).

207 Volokh, *supra* note 205, at 1855.

208 *Id.* at 1854, 1868 & n.276 (citing City of Houston v. Hill, 482 U.S. 451, 462 n.11 (1987) ("When government is regulating speech, it must generally err on the side of underregulation, not overregulation. . . . [S]uppressing speech . . . that is likely to find a willing audience cannot be justified even by the very important state interest in workplace equality."); *cf.* Baliko v. Stecker, 65 Fair Empl. Prac. Cas. (BNA) 899, 903 (N.J. Super. Ct., App. Div., July 20, 1994) (remanding case for determination of whether New Jersey's Law Against Discrimination could be interpreted to constitutionally punish speech which is sexually, racially, or religiously offensive where it is not accompanied by illegal, nonverbal conduct).

209 Volokh, *supra* note 205, at 1868.

210 *Id.* at 1833. Volokh divides the argument, based on Supreme Court cases, into home (where the captive audience doctrine applies) and non-home (where it does not), and attempts to argue away all cases that do not fit this analysis. *Id.* at 1833-38 (footnotes and citations omitted).

assment,[211] and explicit in *Robinson v. Jacksonville Shipyards, Inc.*.[212] *Townley's* recognition that the employer "structures the workplace to a substantial degree,"[213] and that most employees are not free to move at will within it is certainly the more realistic view.[214]

Additionally, the notion that an employee is free to leave a job whenever he or she is made uncomfortable by the employer's proselytizing denies today's economic realities and the lack of real bargaining power most employees possess.[215] This was recognized by the Supreme Court in *Meritor* when discussing "welcome" v. "voluntary" acceptance of the harassing behavior.[216] Because employees have little realistic ability to protect themselves, it is appropriate

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211 *Id.* at 1868-69. Volokh rejects the employee-as-captive theory and distinguishes his position from that of Professor Strauss, who argues that if a worker can readily avoid a discussion among coworkers that he or she might find offensive, the speech is protected; otherwise, it is not. *Id.* (rejecting Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 49 (1990)); *see generally* Linda E. Fisher, *A Communitarian Compromise on Speech Codes: Restraining the Hostile Environment Concept*, 44 CATH. U. L. REV. 97 (1994).

212 *Robinson*, 760 F. Supp. at 1535 (quoting J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 423) ("Few audiences are more captive than the average worker.").

The Supreme Court has upheld restrictions on speech to protect captive audiences. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

213 *Townley*, 859 F.2d. at 621.

214 *See* Volokh, *supra* note 205, at 1833-38. Volokh does not analyze whether employees are in fact captive, but merely discusses whether they are more or less captive than other types of audiences. *See id.* at 1834-35 (citing Rosenfeld v. New Jersey, 408 U.S. 901, 904 (1972) (Powell, J., dissenting) (attendees at a public school board meeting) and Cohen v. California, 403 U.S. 15, 21 (1971) (citizens on the street)). What Volokh's analysis fails to acknowledge is that these were public forums where open dialogue has traditionally been more protected, and that people were freer to leave with much less detrimental consequences if the message were offensive. A workplace environment only becomes harassing if there is a pattern of behavior, not a one-time statement as in *Rosenfeld* or *Cohen*. Additionally, the Supreme Court has recognized the economically-based lack of freedom to object in the "voluntariness" portion of its *Meritor* opinion. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986); *see also* Fentonmiller, *supra* note 199, at 583 (discussing the role of the employee in the hierarchy of the workplace).

215 *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) ("[W]hat is basically at stake is the establishment of a nonpermanent, limited relationship between the employer [and] his economically dependent employee."); Lisa B. Bingham, *Employer Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 390-91 (1994) ("A century of First Amendment jurisprudence stands for the proposition that . . . it is healthier for our democracy to tolerate disparate viewpoints than to suppress them. Similarly, it is healthier for employers to tolerate diverse views than to attempt to suppress them with threats to an employee's job security. . . . [A]n individual employee's disagreement with the company party line should not form the basis for dismissal.").

216 *Meritor*, 477 U.S. at 68.

for the court to protect the employee's religious rights through rejection of a targeted or animus standard.

V. CONCLUSION

There is growing clamor to limit or carve out exceptions to hostile environment claims. Many argue that different standards should be applied to the university classroom to allow a more honest and open exchange of ideas and thereby foster a better learning environment.[217] As previously discussed, an exception for religious expression is also being debated.

Clearly, whether one prefers equality or religious rights is a matter of personal choice.[218] A balancing approach prevents it from being an either/or choice. As we have argued, an animus or targeted speech approach does not adequately protect the "captive" employee because much of the behavior which has been found to be harassing would not cross the line under these standards. Benign motives (such as proselytizing) or general application would require the dissenting employee to tolerate all such acts or to leave. This does not mean, however, that there is not room for a separate standard for religious harassment. The use of a true reasonable person standard rather than the more sensitive reasonable victim or woman standard would strike an appropriate balance. This less-sensitive standard would, to some extent, err on the

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217 *See, e.g.*, Michael S. Greve, *Yes: Call It What It Is—Censorship*, A.B.A. J., Feb. 1994, at 40. Amy Gutmann, the Laurance S. Rockefeller University Professor at Princeton University, argues for increased debate, but only so long as it entails "mutual respect." Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, 101 ETHICS 64, 78 (1990). Almost by definition, harassing speech is not a respectful debate on the issues. Harassing speech, therefore, is appropriate for government regulation. Some courts have not been reluctant to allow universities to sanction employees for racist speech. *See, e.g.*, Dambrot v. Central Michigan Univ., 55 F.3d 1177 (6th Cir. 1995); Jeffries v. Harleston, 10 Indiv. Empl. Rts. Cas. (BNA) 806 (2d Cir. April 4, 1995).

218 Fentonmiller, *supra* note 199, at 595 ("The few cases in which the Supreme Court has simultaneously addressed First Amendment interests and equality interests suggests that the two are constitutionally equivalent."); *see also Harassment Protections Do Not Restrict Free Speech Rights*, 10 Indiv. Empl. Rts. Summary (BNA) 2, 3 (April 25, 1995) (quoting Gilbert Casellas, Chairman, EEOC). For further reading on the First Amendment in the harassing speech context, see generally Douglas Lawrence, *The Force of Words: Fish, Matsuda, MacKinnon, and the Theory of Discursive Violence*, 29 L. & SOC. REV. 169 (1995); Fisher, *supra* note 211; Symposium, *Race, Gender & Free Speech*, 3 TEMP. POL. & CIV. RTS. L. REV. 1 (1993/1994); James H. Fowles, III, Note, *Hostile Environments and the First Amendment: What Now After Harris and St. Paul?*, 46 S.C. L. REV. 471 (1995); Jeffrey A. Steele, Note, *Fighting the Devil With a Double-Edged Sword: Is the Speech-Invoked Hostile Work Environment Hostile to O'Brien?*, 72 U. DET. MERCY L. REV. 83 (1994).

side of freedom of expression, and probably allow more witnessing or expression of religious beliefs before the behavior becomes violative of Title VII.

This less sensitive standard would also be consistent with the spirit of the Religious Freedom Restoration Act of 1993 (RFRA).[219] This act, designed to counteract the Supreme Court's decision in *Employment Division v. Smith*[220] and return the law to prior interpretations,[221] requires that the government show a compelling state interest before substantially burdening a person's exercise of religion, and that the burdensome requirement be the least restrictive means of furthering that interest. Since Title VII's purpose of eliminating discrimination is a compelling state interest, and a reasonable person standard is less restrictive than a reasonable victim or woman standard, it is the appropriate standard to use when mediating between the conflicting religious and equality rights of the employer and the employee. While an animus or targeted standard would be less restrictive, it would not be consistent with carrying out the compelling interest of Title VII.

The use of the reasonable person standard in religious cases is less likely to inhibit expression than its use in sexual harassment cases. Religious expressions, such as the wearing of a cross, having a picture of Jesus on a private desk, or expressing the tenets of one's religion, are different from the types of behavior found violative of Title VII in *Robinson*.[222] "Girlie pictures" are demeaning to the reasonable woman because they focus on women as sexual objects rather than on their competence as workers.[223] The display of

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219 42 U.S.C. § 2000bb-1(c) (Supp. V 1994).

220 494 U.S. 872 (1990).

221 42 U.S.C. § 2000bb-2(b)(1) (citing Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972)). For a discussion of the Act in the context of *Smith* and the language of the Free Exercise Clause, see generally Allan Ides, *The Text of the Free Exercise Clause as A Measure of* Employment Division v. Smith *and the Religious Restoration Act*, 51 WASH. & LEE L. REV. 135 (1994); *see also* Douglas Laycock & Olivy S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 37 TEX. L. REV. 209 (1994); David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines*, 56 MONT. L. REV. 119 (1995).

222 *Robinson*, 760 F. Supp. at 1490 (involving harassing acts and words in addition to pictures, noting that pictures alone would have been harder to prohibit). *See* Johnson v. County of L.A. Fire Dep't, 66 Fair Empl. Prac. Cas. (BNA) 205, 214 (D.C. Cal. Oct. 28, 1994) (holding that county could not ban private reading of *Playboy* in workplace that operates as his *de facto* home for consecutive days because there was no evidence that reading it contributed to a sexually-harassing environment, he did not seek to make lewd gestures or comments, and he was not seeking to expose the magazine's contents to unwitting viewers).

223 *See Robinson*, 760 F. Supp. at 1502-05; Yount, *supra* note 199, at 401; Fentonmiller, *supra* note 199, at 571-72. For cases involving religion and sexually explicit mate-

religious objects, however, is not generally seen by the reasonable person as demeaning. Rather, the reasonable person sees them as nothing more than an expression of the individual's faith.[224] Likewise, there is a difference between a personal statement of faith by a co-employee, and repeated conversion attempts by the employer directed at employees who cannot leave. The reasonable person is likely to find the former less intimidating than the latter.[225] The reasonable person standard is flexible enough to acknowledge these distinctions without unduly hampering expression of religious ideas.

When the EEOC revisits the issue of harassment guidelines for all protected classes, precedent, politics, and First Amendment considerations argue for a different standard for religion. If the EEOC keeps the reasonable victim standard for other protected classes, it should adopt a reasonable person standard for religion.

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rial in the workplace, see Lambert v. Condor Mfg., Inc., 768 F. Supp. 600 (E.D. Mich. 1991) (allowing an employee to challenge the reasonableness of an accomodation where the employee was fired for his refusal, based on religious beliefs, to work in an area where other employees displayed nude pictures of women); Finnermore v. Bangor Hydro-Elec. Co., 65 Fair Empl. Prac. Cas. (BNA) 1226 (Me. Aug. 3, 1994) (granting summary judgment for a fundamentalist Christian employee taunted by sexually explicit remarks).

224 *See* Gregory, *supra* note 221, at 136. *But see* Wilson v. U.S. West Communications, 65 Fair Empl. Prac. Cas. (BNA) 200, 209 (D. Ne. June 5, 1994) (finding that employee's display of graphic anti-abortion pin offended colleagues although case was not filed on harassment grounds), *aff'd* 58 F.3d 1337 (8th Cir. 1995). A picture of an aborted fetus is not usually seen as a religious symbol; however, the *Wilson* court found that it fell within Title VII's definition of religion. *Id.* Additionally, the employer's attempts at reasonable accommodation were made much more difficult because plaintiff was working in a hostile environment unrelated to religion before she started wearing the pin. *Id.* Plaintiff had been transferred into the worksite in a way which caused other employees to fear losing their jobs, and her coworkers were under pressure to increase efficiency and reduce "time-robbing." *Id.* at 202.

225 *See* Brown v. Polk County, 68 Fair Empl. Prac. Cas. (BNA) 648 (8th Cir. July 31, 1995).