

# The Sweep of Sexual Harassment Cases

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# THE SWEEP OF SEXUAL HARASSMENT CASES

*Ann Julianot & Stewart J. Schwab††*

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*This study examines every reported federal district and appellate court opinion between 1986-1995 involving sexual harassment in the workplace—nearly 650 opinions in all. The methodology is to code over 100 variables for each case in an “objective” manner, meaning that persons with legal training should not differ in the coding, and then to statistically analyze correlations and trends among variables. This method self-consciously*

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†† Professor of Law, Cornell University. We have presented earlier versions of this Article at the 1996 annual meeting of the American Law and Economics Association, the 1997 annual meeting of the Law and Social Sciences Section of the American Association of Law Schools, and at law school workshops at New York University and the University of Michigan. We received many helpful comments at those presentations. In addition, we wish to thank Kathy Abrams, Theodore Eisenberg, Vicki Schultz, and Steve Willborn for comments, and our student research assistants: Charlotte Behrendt, Mitchell Edwards, Aaron Julien, Simon Kann, Ed Lilly, Julie Rosenbaum, and Robyn Steiner of Cornell and Wendy Tyson, Danielle White, Timothy Holly, and David Seidman of Villanova.

*differs from the traditional legal method of analyzing leading cases, and the Article describes the distinctive features, benefits, and problems of this method.*

*Among the findings are that a disproportionate number of plaintiffs are blue-collar or clerical workers, although most cases arise from mixed rather than sex-segregated workplaces. Most defendants are private employers, but a disproportionately large fraction are government employers. Most cases involve harassment by supervisors rather than coworkers alone. Successful cases are likely to involve sexualized conduct directed at individual victims. Sexual harassment claims involving differential but nonsexual conduct and conduct demeaning to women in general are far less successful. Critical factors for a successful case are that the victim complained within the organization and that the employer had established no formal process to deal with sexual harassment issues.*

### INTRODUCTION

How do sexual harassment claims fare in the federal courts? What facts and issues do the federal courts face. What circumstances make a successful claim? Have things changed over time? Are the horror stories true? Do courts find employers liable for a single joke or sexual story?<sup>1</sup> Although widespread sexual harassment has existed for decades, and litigation has proceeded for over twenty years, detailed knowledge about these issues is still lacking.

This Article presents the first systematic study of sexual harassment cases in the federal courts.<sup>2</sup> We have read and analyzed accord-

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<sup>1</sup> The case of *Mackenzie v. Miller Brewing*, 608 N.W.2d 331 (Wis. App. 2000), received much media attention. Known as the "Seinfeld" case, the plaintiff in Mackenzie was fired for recounting the plot line of a *Seinfeld* episode. *Id.* at 336. When a coworker complained of harassment based on this recounting, Mackenzie was fired. He sued for wrongful termination. The district court dismissed the claim, *id.*, and the appellate court affirmed, *id.* at 361.

<sup>2</sup> Studies or overviews which address the legal system tend to concentrate on one area such as a particular state, federal district, or within a particular year. *See, e.g.*, Nancy L. Abell, et al., *Recent Developments in Sexual Harassment Litigation*, C902 ALI-ABA 637 (1994) (reviewing facts and holdings of federal and California sexual harassment cases for 1993), available at WL C902 ALI-ABA 637; Frances S. Coles, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 SEX ROLES 81 (1986) (examining eighty-eight cases filed with California State Fair Employment and Housing Department between 1979 and 1983); John F. Dickinson & Richard N. Margulies, *Employment Discrimination*, 41 MERCER L. REV. 1303 (1990) (surveying significant sexual discrimination cases by the Eleventh Circuit for the 1989 judicial year); Vern E. Hauck & Thomas G. Pearce, *Sexual Harassment and Arbitration*, 43 LAB. L.J. 31 (1992) (reviewing 100 labor arbitration awards in sexual harassment cases); Lynn Brundage Jongleux, *Developments in Employment Discrimination Law*, 20 IND. L. REV. 243 (1987) (surveying recent developments in Seventh Circuit employment discrimination law); J. René Josey, *Labor and Employment*, 36 S.C. L. REV. 179 (1985) (surveying South Carolina labor and employment law); Barbara A. Lee, *Discrimination Against Students in Higher Education: A Review of the 1996 Judicial Decisions*, 24 J.C. & U.L. 619 (1998) (reviewing discrimination cases brought by college students in the 1996 judicial year); Elaine Massock, *Survey of Illinois Law: Employment Law*, 22 S. ILL. U. L.J. 841 (1998) (reviewing 1997 employ-

ing to quantifiable factors every reported federal district court and appellate court opinion on sexual harassment in the workplace from 1986 to 1996—a total of nearly 650 opinions.<sup>3</sup>

These 650 cases comprise only a fraction of sexual harassment litigation,<sup>4</sup> and an even smaller fraction of all workplace incidences of sexual harassment.<sup>5</sup> Complaints continue to pour into the Equal Em-

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ment decisions in Illinois); Patricia L. Ogden, *Survey of Labor and Employment Law Developments for Indiana Practitioners*, 31 IND. L. REV. 567 (1998) (reviewing labor and employment decisions in Indiana and the Seventh Circuit); Ramona L. Paetzold & Anne M. O'Leary-Kelly, *Continuing Violations and Hostile Environment Sexual Harassment: When is Enough, Enough?*, 31 AM. BUS. L.J. 365 (1993) (reviewing cases discussing the continuing violation exception to the statute of limitations).

In addition, academics have performed empirical studies on other aspects of Title VII. See, e.g., Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992) (reporting empirical study of the judicial response to the lack of interest defense in the context of job segregation cases); Richard C. Sorenson et al., *Solving the Chronic Problem of Sexual Harassment in the Workplace: An Empirical Study of Factors Affecting Employee Perceptions and Consequences of Sexual Harassment*, 34 CAL. W. L. REV. 457 (1998) (examining factors that influence how sexual behavior is perceived by "reasonable" people); Julie A. Springer et al., *Survey of Selected Evidentiary Issues in Employment Law Litigation*, 50 BAYLOR L. REV. 415 (1998) (surveying law on evidentiary issues in employment litigation); see also Maya Alexandri, Note, *The Student Summer Associate Experience with Harassing Behaviors: An Empirical Study and Proposal for Private Party Action*, 19 WOMEN'S RTS. L. REP. 43 (1997) (analyzing summer associates' experiences with sexual harassment); Donna Sheshtowsky, Note, *Where is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials*, 51 STAN. L. REV. 357 (1999) (examining the need for expert testimony in sexual harassment trials).

<sup>3</sup> See *infra* Part I for a description of the database.

<sup>4</sup> See David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594, 594 (1998) ("[S]exual harassment . . . [c]omplaints filed with the [EEOC] have skyrocketed during the past ten years."); Cathy Jones, *Set Policy on Sexual Harassment is Best Protection*, DALLAS BUS. J., Jan. 15, 1999, at 37 ("[S]exual harassment claims have increased . . . [and] . . . [t]his upward trend is expected to continue."); Amy Joyce, *An Alternative Sexual Harassment Policy: Insurance*, WASH. POST, May 17, 1998, at H4 ("Employee discriminatory claims have nearly quadrupled in the past four years . . ."); Albert R. Karr, *Work Week*, WALL ST. J., Dec. 29, 1998, at A1 ("[D]iscrimination complaints filed with the [EEOC] keep climbing . . . [to] . . . over 16,000 sexual-harassment cases [expected] in 1998, up from 6,883 in 1991."); Andre Mouchard, *Experts: Fewer Harass at Work*, ORANGE COUNTY REG., Feb. 10, 1996, at C1 ("Complaints about sexual harassment are on the rise."); N.H. *Sees Jump in Sex Complaints*, BOSTON GLOBE, May 20, 1996, at 23 ("[G]reater awareness is responsible for a 30 percent increase in the number of sexual harassment complaints filed in New Hampshire in the past year."); Elizabeth Shogren, *Sex Harassment Message Often Unheeded, Many Women Contend*, L.A. TIMES, Sept. 12, 1995, at D1 ("[U]nwelcome passes, groping and sexually offensive comments are still rampant in the workplace."). But see Don Lee, *Complaints of Sex Harassment Decline in State*, L.A. TIMES, Oct. 14, 1996, at A1 (reporting that the number of sexual harassment allegations filed with the state Department of Fair Employment and Housing dropped 3%, ending over a decade of consecutive increases).

<sup>5</sup> See BARBARA A. GUTER, *SEX AND THE WORKPLACE* 46 tbl.2 (1985) (reporting that 53.1% of the women in a study identified themselves as victims of sexual harassment); U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, TRENDS, PROGRESS, CONTINUING CHALLENGES* 13 (1995) (explaining that 42% of women in a study of federal employees in 1980 reported having experienced harassing behavior compared with 42% in 1987 and 44% in 1994); Claire Safran, *What Men Do to Women on the Job: A Shocking Look at*

ployment Opportunity Commission (EEOC),<sup>6</sup> and litigation in state and federal courts continues to increase.<sup>7</sup> Our set of cases is high up on the naming-blaming-claiming litigation pyramid.<sup>8</sup> We doubt that

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*Sexual Harassment*, REDBOOK, Nov. 1976, at 149, 217 (reporting that nearly 90% of the 9000 women that responded to readers' questionnaire entitled, "How Do You Handle Sex on the Job?" had personally experienced sexual harassment in the workplace ranging from "leering and ogling" to overt requests for sexual favors).

<sup>6</sup> In 1990, the Equal Employment Opportunity Commission received 6000 sexual harassment complaints. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, TRENDS IN HARASSMENT CHARGES FILED WITH THE EEOC DURING THE 1980s AND 1990s, available at <http://www.eeoc.gov/stats/harassment.html> (last modified July 11, 2000). Beginning in 1995 and continuing through 1998, the EEOC received over 15,000 sexual harassment complaints. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N SEXUAL HARASSMENT CHARGES, EEOC & FEPA'S COMBINED: FY 1992 - FY 1998, available at <http://www.eeoc.gov/stats/harass.html> (last modified Jan. 12, 2000) [hereinafter EEOC Report]; see also Elizabeth Grossman, *National Women Law Students Association Conference, March 1, 1996: Written Remarks on Violence Against Women*, 11 WIS. WOMEN'S L.J. 395, 399 (1997) ("The number of sexual harassment charges filed at EEOC has increased by 112% since 1989 . . . Sexual harassment charges now represent more than 12% of total charges, compared to 6% five years ago."). Victims who wish to sue in court must first file a charge with the Commission and receive either a "right to sue" notice or a decision by the Commission not to proceed on the charge. 42 U.S.C. § 2000e-5(f)(1) (1994).

<sup>7</sup> See Mary Chlopecki & Ellen Duffy McKay, *The Dollar Impact of the 1991 Civil Rights Act*, HR FOCUS, Sept. 1997, at 15 (stating that data maintained by the Administrative Office of the United States Courts shows that an excess of 23,000 employment-related lawsuits were filed in 1996, nearly triple from 1991, which was due in part to Civil Rights Act of 1991); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 987 (1991) (suggesting that employment discrimination cases increase at a rate of 344 cases per year); Mark Hansen, *Study Shows Job Bias Changing*, A.B.A. J., May 1991, at 34 (reporting that "[t]he number of employment-discrimination cases in the federal courts rose almost 2,200 percent in the past two decades, nearly 10 times the rate of all other civil litigation combined"); Richard C. Mariani, *Management Strategies to Deal with Today's Risks*, N.J. L.J., May 13, 1996, at 11 ("The number of employment discrimination cases in the federal courts has increased by more than 2,000 percent in the past 20 years. It is estimated that the number of discrimination cases filed in the federal courts will continue to grow at an annual rate of about 10 percent."); Gerald D. Skoning, *Federal Judiciary Reluctant Personnel Czar*, CHI. TRIB., July 3, 1997, at N23 ("Over the past five years, employment discrimination cases filed in federal court have increased at an annual rate as high as 33 percent."); see also Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC'Y REV. 371, 373-76 (1990) (stating that types of litigation increase or decrease at the same rate as the "underlying activity" that encourages that litigation); Carol Kleiman, *Winning Strategies for Avoiding Bias Suits*, CHI. TRIB., Aug. 10, 1994, at C5 (stating that since the passage of the Americans with Disabilities Act in 1990, there has been a 22% increase in employment discrimination claims).

<sup>8</sup> The process of resolving grievances has been described as a pyramid. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 86-87 (1983). In this pyramid, grievances ("blaming") form the bottom layer of the pyramid, followed by claims. *Id.* Claims for which redress is not granted become "disputes." *Id.* At the top layers of the pyramid are those disputes which result in court filings and finally, those filings that result in some sort of judicial intervention and opinion. *Id.*; see also William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635-36 (1981) (describing the stages by which an experience is transformed from naming ("saying to oneself that a particular experience has been injurious"), to blaming ("a person attributes an injury to the fault of another individual or social entity"), to claiming ("when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy").

the federal cases in our database accurately reflect the workplace.<sup>9</sup> Indeed, a major theme in our inquiry is the degree to which the published cases present a different picture from that seen by social science researchers surveying the workplace or from the public perception of sexual harassment litigation.

On the other hand, our 650 cases are substantially larger than the number of cases legal scholars, who tend to focus on the leading cases, typically examine. In other words, we do not focus exclusively on the tip of the litigation pyramid. Another theme we explore is the degree to which the leading cases are typical or distorted representations of the sweep of federal sexual harassment cases.

In *Robinson v. Jacksonville Shipyards, Inc.*,<sup>10</sup> for example, the court found that pornographic pinups contributed to the harassment of Lois Robinson.<sup>11</sup> *Jacksonville Shipyards* stimulated an ongoing scholarly debate over the intersection (or collision) between Title VII protections and the First Amendment. In another notorious case involving disturbing love letters, *Ellison v. Brady*,<sup>12</sup> the Ninth Circuit adopted a "reasonable woman" standard, judging the offensiveness of alleged harassment from the perspective of a "reasonable woman" rather than a "reasonable person."<sup>13</sup> This decision prompted an outpouring of critical commentary on the wisdom of adopting or rejecting the reasonable woman standard.<sup>14</sup>

In addition to these leading appellate court opinions, the Supreme Court cases inevitably become leading cases. In *Meritor Savings Bank, FSB v. Vinson*,<sup>15</sup> the Supreme Court first recognized sexual harassment as a violation of Title VII.<sup>16</sup> In *Harris v. Forklift Systems, Inc.*,<sup>17</sup> the Court held that the plaintiff could bring a sexual harassment

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<sup>9</sup> Very few instances of sexual harassment reach litigation. See Danielle Foulis & Marita P. McCabe, *Sexual Harassment: Factors Affecting Attitudes and Perceptions*, 37 SEX ROLES 773, 775 (1997) (noting that "only 1-7% of people who experience sexual harassment file formal complaints"); see also Jeanne Henry & Julian Meltzoff, *Perceptions of Sexual Harassment as a Function of Target's Response Type and Observer's Sex*, 39 SEX ROLES 253, 255-56 (1998) (explaining that many women choose to ignore harassing conduct rather than to confront or report it); Sharon Toffey Shepela & Laurie L. Levesque, *Poisoned Waters: Sexual Harassment and the College Climate*, 38 SEX ROLES 589, 590 (1998) (discussing the fact that sexual harassment is often not recognized or labeled as sexual harassment because offensive conduct occurs so frequently within academic environments).

<sup>10</sup> 760 F. Supp. 1486 (M.D. Fla. 1991).

<sup>11</sup> *Id.* at 1524-27. Although often overlooked in the debate over *Jacksonville Shipyards*, the plaintiff in that case testified not only to the presence of graffiti but also "about comments of a sexual nature she recalled hearing . . . from coworkers." *Id.* at 1498.

<sup>12</sup> 924 F.2d 872 (9th Cir. 1991).

<sup>13</sup> *Id.* at 879.

<sup>14</sup> See *infra* notes 140-41 and accompanying text.

<sup>15</sup> 477 U.S. 57 (1986).

<sup>16</sup> *Id.* at 73.

<sup>17</sup> 510 U.S. 17 (1993).

claim without necessarily showing serious psychological harm.<sup>18</sup> More recently, in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>19</sup> the Court upheld a male employee's complaint of sexual harassment by male supervisors and coworkers.<sup>20</sup> The Court reported that the conduct involved "sex-related, humiliating actions" including physical assault and threatened rape,<sup>21</sup> but in the "interest of both brevity and dignity" declined to describe the precise details.<sup>22</sup> Finally, the Court recently sought to clarify the standards for employer liability in a pair of sexual harassment cases. In *Faragher v. City of Boca Raton*,<sup>23</sup> a female lifeguard complained about physical touchings and offensive comments by her supervisors.<sup>24</sup> The Court held that an employer is subject to vicarious liability for a hostile environment created by a supervisor unless the employer can show "that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>25</sup> The companion case of *Burlington Industries, Inc. v. Ellerth*<sup>26</sup> involved "boorish and offensive remarks" about a worker's clothing and breasts, including never-carried-out threats to deny her a promotion and other tangible job benefits.<sup>27</sup> The Court held that, because hostile environment cases require a showing of severe or pervasive conduct the labels "quid pro quo" or "hostile environment" were relevant in determining whether discrimination exists but did not control the analysis of employer liability once a finding of discrimination is made.<sup>28</sup>

The present study goes beyond these leading cases and their fact patterns. In broadening the traditional analytical legal approach, we have foregone the ability to examine the nuances of particular cases and doctrinal debates among judges. However, we have gained perspective on the bulk of the issues and fact patterns with which federal judges wrestle. These fact patterns inform judges about sexual harassment, who in turn create sexual harassment laws (within, of course,

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<sup>18</sup> *Id.* at 22.

<sup>19</sup> 523 U.S. 75 (1998).

<sup>20</sup> *Id.* at 82.

<sup>21</sup> *Id.* at 77.

<sup>22</sup> *Id.* The lower courts were less circumspect. The Fifth Circuit noted that the actions in question included restraining the victim while another coworker put his penis on the victim's neck, and pushing a bar of soap into the victim's anus. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996).

<sup>23</sup> 524 U.S. 775 (1998).

<sup>24</sup> *Id.* at 780.

<sup>25</sup> *Id.* at 807.

<sup>26</sup> 524 U.S. 742 (1998).

<sup>27</sup> *Id.* at 747.

<sup>28</sup> *Id.* at 751.

the broad parameters laid out by Congress). This sweep of cases, then, presents a particularly important perspective.

After describing the study in Part I, we sketch a portrait of sexual harassment cases in the federal courts in Part II. We describe the plaintiffs (e.g., sex, occupation, employment status, the number of plaintiffs suing together), the defendants (e.g., private business or government, coworker or supervisor, the number of harassers), and alleged harassment (e.g., verbal or physical, directed at the plaintiff specifically or all women).

In Part III, we examine success rates for district court plaintiffs. Stated quite simply, the horror stories are not true. Our findings do not support the claims that plaintiffs succeed on cases alleging mere jokes or a single incident of allegedly harassing behavior. Here we conclude that successful claims involve allegations of physical harassment and verbal harassment of a sexual nature directed at the plaintiff. The existence, or lack thereof, of a grievance program greatly affects the employer's liability as does the employer's prior knowledge of the harassment.

In Part IV, we compare our findings for the district courts with those for the appellate courts. Our study shows that Title VII plaintiffs are as successful as other plaintiffs in appellate courts.

In Part V, we look at trends over time. Interestingly, the claims and success rates did not dramatically change after the Civil Rights Act of 1991, nor after the 1993 Supreme Court decision in *Harris v. Forklift Systems, Inc.*<sup>29</sup>

Finally, in Part VI, we examine three important issues in sexual harassment cases that are reflected in the commentary: the presence of pornography in the workplace as a violation of Title VII; the reasonable woman standard; and the conceptualization of sexual harassment. First, many commentators analyzing the implications of sexual harassment have focused on pornography in the workplace. Our study shows that although pornography in the workplace implicates important First Amendment issues, few cases in our study involved pornography in the absence of other claims. Second, a relatively small number of courts mention the reasonable woman standard but when courts do mention the standard, plaintiffs have a higher success rate than in cases where courts mention the reasonable person standard.

Third, there is an ongoing debate among legal scholars over the conceptualization of sexual harassment.<sup>30</sup> As Professors Katherine M.

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<sup>29</sup> 510 U.S. 17, 23 (1993) (holding that sexual harassment claim does not require showing of psychological harm).

<sup>30</sup> See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L.



Franke and Kathryn Abrams describe the debate, this is the “why” question of sexual harassment—why is sexual harassment a violation of Title VII?<sup>31</sup> After describing the recent work of four scholars, we conclude that our findings support the critique that courts view sexual harassment too narrowly. Specifically, courts have failed to recognize the harms of harassment aimed at women as a group and have failed to acknowledge harassment premised upon nonsexual behavior. We base this conclusion on two of our most important findings: first, plaintiffs alleging individual conduct are more successful than plaintiffs alleging group conduct; and second, plaintiffs alleging sexual harassment based on comments or behavior of a sexual nature are more successful than plaintiffs basing their claims on nonsexual, although sexist, behavior.<sup>32</sup>

## I

## THE DATA AND METHODOLOGICAL ISSUES

This study includes a comprehensive analysis of every federal district and appellate court opinion on sexual harassment in the employment context<sup>33</sup> for the ten-year period following *Meritor Savings Bank, FSB v. Vinson*,<sup>34</sup> the first Supreme Court opinion to recognize sexual harassment as a violation of Title VII.<sup>35</sup> Importantly, our period spans

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REV. 445 (1997); Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

<sup>31</sup> Franke, *supra* note 30, at 691 (“What exactly is wrong with sexual harassment? Why is it sex discrimination?”).

<sup>32</sup> By “nonsexual, although sexist” behavior, we mean less favorable work assignments, lack of training opportunities, etc.

<sup>33</sup> Sexual harassment has been studied in many other nonworkplace contexts. *See, e.g.*, Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17 (1998) (discussing sexual harassment of women by men occurring in or around the home where threat to home exists, such as between a landlord and tenant); Cynthia Grant Bowman, *Street Harassment and the Informal Ghettos of Women*, 106 HARV. L. REV. 517 (1993) (addressing the harassment women face while they are traveling or in public places); Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305 (1998) (discussing the problem of sexual harassment and sexual assault in the military); Maureen O. Nash, *Student on Student Sexual Harassment: If Schools Are Liable, What About the Parents?*, 31 CREIGHTON L. REV. 1131 (1998) (reviewing current case law on peer sexual harassment, its implications for schools and the liability of the offenders' parents); Gail Sorenson, Commentary, *Peer Sexual Harassment: Remedies and Guidelines Under Federal Law*, 92 EDUC. L. REP. 1 (1994) (investigating peer harassment in public schools); David P. Thompson & A'Lann Truelock, Commentary, *Student-to-Student Sexual Harassment: Sifting Through the Wreckage*, 125 EDUC. L. REP. 1035 (1998) (discussing peer-inflicted sexual harassment, its treatment in federal courts, and the liability of schools under Title IX).

<sup>34</sup> 477 U.S. 57 (1986).

<sup>35</sup> *Id.* at 66.

the enactment of the Civil Rights Act of 1991,<sup>36</sup> which gave plaintiffs in sexual harassment suits the right to jury trials and compensatory and punitive damages.<sup>37</sup> Part of our charge, then, is to detect possible changes in litigation patterns after 1991.

Our strategy for finding cases was straightforward. We conducted searches on the federal courts database in Westlaw and Lexis using the command "sex! w/3 (haras! or harras!)". Although this broad search produced many cases that did not involve sexual harassment in employment, it gave us 502 useable district court opinions and 164 appellate court opinions.<sup>38</sup> Of these, only 263 district court cases and 126 appellate cases are officially "published" in the West reporter system.<sup>39</sup> Thus, our database is substantially larger than "published" opinions as judges use that term. Student research assistants read each case and filled out a coding sheet of some 106 questions.<sup>40</sup>

Our data have certain inherent limitations. First, we reiterate that we only study cases in which a judge has written an opinion. This necessarily excludes the vast majority of sexual harassment situations.<sup>41</sup> As commentators have noted, "most disputes are resolved without a filing [of a claim]."<sup>42</sup> Most filed cases are settled or dropped,<sup>43</sup> and these are not in our universe of cases. Additionally, we only include federal cases, even though Title VII claims may be

<sup>36</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C.).

<sup>37</sup> 42 U.S.C. § 1981a(b), (c) (1994); see also DAVID CATHCART ET AL., *THE CIVIL RIGHTS ACT OF 1991*, at 180-81 (1993) (noting that the Civil Rights Act of 1991 authorized compensatory and punitive damages originally not authorized under Title VII).

<sup>38</sup> The initial search identified cases in which the phrase "sexual harassment" was mentioned anywhere in the opinion, a list that was more than twice as long as the final database. Of this larger set, we first determined whether the opinion involved a claim under Title VII alleging sexual harassment and, if so, whether the opinion provided enough details to complete the coding sheet. The coding sheet does not allow for the same suit to be tracked throughout the system. In other words, we coded each opinion produced in the same suit as a separate case at both the district court and appellate court level.

<sup>39</sup> The proportion of published opinions in our appellate database (110/148, or 74%) is substantially higher than in our district-court database (261/503, or 52%). Because district court decisions address claims at every stage of the proceeding and many of their ruling have little precedential value, district court judges often choose not to officially report decisions.

<sup>40</sup> The coding sheet for appellate cases contains the same substantive questions as the coding sheet for district court cases. However, the procedural questions are different.

<sup>41</sup> See *supra* note 9.

<sup>42</sup> Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 7 (1986) (citing Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1981)); Miller & Sarat, *supra*, at 543 ("Few dlspu-tants (11.2 percent) report taking their dispute to court.").

<sup>43</sup> See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 26 (1983) ("Many cases are withdrawn or abandoned . . ."). Galanter also notes that "most civil cases in American courts are settled." *Id.* at 27.

pursued in state court and many states have enacted their own versions of Title VII.<sup>44</sup> Finally, we only study judicial opinions, which may not be a random sample of all judicial decisions.<sup>45</sup>

Second, we must recognize our own limitations in interpreting the cases and turning them into machine-readable, mostly binary variables. Although some coding error is inevitable when dealing with large data sets,<sup>46</sup> such error is not likely to be a serious source of misinterpretation because any error would be random. For example, we are as likely to miscode a man as a woman and vice versa, and such errors cancel one another out over enough cases.

The goal was to keep vagaries in interpreting cases to a minimum. Most legal scholarship—including the best scholarship examining sexual harassment cases—examines the dozen or so leading cases. Scholars interpret and translate the judges' words, trying to assess nuances of meaning, arguing that the judges implied something while saying

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<sup>44</sup> See, e.g., CONN. GEN. STAT. ANN. § 46a (West 1995 & Supp. 2000); KY. REV. STAT. ANN. §§ 344.010-990 (Banks-Baldwin 1999); MINN. STAT. ANN. §§ 363.01-03 (West 1991 & Supp. 2000); OHIO REV. CODE ANN. §§ 4112.01-99 (Anderson 1998 & Supp. 1999); TEX. LAB. CODE ANN. §§ 21.001-306 (Vernon 1996 & Supp. 2000). These human rights statutes have been identified by their respective state and circuit courts as analogous to their federal counterpart, Title VII. See *Wathen v. Gen. Elec. Co.*, 1997 FED App. 176P, 115 F.3d 400, 403-04 n.5 (6th Cir. 1997) ("[T]he general purpose of the Kentucky Act is to provide a means for implementing within the state the policies embodied in Title VII . . . [and] substantive legal analysis for the present claims brought under Title VII and the Kentucky Civil Rights Act is identical."); *Brittell v. Dep't of Corr.*, 717 A.2d 1254, 1264 (Conn. 1998) (noting that Title VII is the "federal statutory counterpart" to Connecticut's human rights statute); *Johns v. Harborage I, Ltd.*, 585 N.W.2d 853, 860 (Minn. App. 1998) ("Minnesota courts have recognized that principles developed in federal Title VII cases are instructive and may be applied when interpreting [Minnesota's Human Rights Act]."); *Ohio Civil Rights Comm'n v. David Richard Ingram, D.C. Inc.*, 630 N.E.2d 669, 672 (Ohio 1994) (analogizing Title VII to Ohio's human rights statute in sexual harassment claims); *Craves v. Komet*, 982 S.W.2d 551, 554 n.1 (Tex. App. 1998) ("Chapter 21 of the Texas Labor Code was enacted for the purpose, among others, of executing the policies of its federal counterpart, Title VII of the Civil Rights Act of 1964 . . .").

<sup>45</sup> See Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501 (1989) (examining different perspectives of the federal court system arising from published appellate opinions, filed appeals, and district court filings); Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782 (1992) (concluding that the process of reporting district court cases makes published cases a questionable sample for social science research because published district court cases are not representative of a court's entire caseload); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1144 (1990) (cautioning legal analysts that focusing on published opinions alone, which represent less than fifteen percent of employment discrimination complaints filed, will yield skewed results because published and unpublished opinions diverge in systematic and important ways).

<sup>46</sup> We established various controls to limit keypunch and related errors. All cases were keypunched twice with automatic notification if the repeated case had any different data. Thus, a keypunch slip would have to occur twice in the same way for the same variable in the same case for us not to catch it.

something else. In addition, the scholarship usually has a heavy normative approach, criticizing judges when they stray from the appropriate framework or results. By contrast, we try to shift the analysis for interpreting the individual case to interpreting the range of cases. The unit of observation is the individual case, but we try to analyze it in an "objective" manner.

We do this through an approach of "coding" rather than "interpreting" cases. The sweep of our variables can be seen from Appendix A. Typical questions include the following: Did the harassment occur at work? Is the employer private or government? Did the supervisor know of the conduct? Did the harassment include touching the victims? We designed our variables so that sophisticated legal readers of a case would agree on how it should be coded. One of the methodological innovations of the present study is to provide a measure of "objective questions." For now, we report our conclusion that we are confident that our variables are "objective" in the sense that well-trained legal professionals should reach the same answers in most cases.

An interesting limitation of our data derives from missing observations in some cases. Our information comes from what the judges decide to tell us about the cases, and it comes with all the blinders and biases of the bench job.<sup>47</sup> For example, we find that in all cases when we can identify race, nearly three times as many involve minority plaintiffs as white plaintiffs.<sup>48</sup> We do not interpret this statistic as suggesting that victims of color are more common than white plaintiffs in the reported decisions. Rather, we suspect that judges simply do not mention the race of the victim when she is white.<sup>49</sup> It is more salient

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<sup>47</sup> See Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141, 142 (1997) ("Judicial opinions select from among the many facts adduced at trial those 'relevant' to what is deemed to be the case's issue to construct a statement of the case; the resulting rendition of 'the facts' can thus be seen as a story crafted to support the court's holding."). Baron and Epstein further note that "[w]ere the issue framed differently, or were the court to reach a different result, different facts might be selected, and another story told." *Id.*; see also Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 *Vt. L. REV.* 681, 684 (1994) ("Increasingly scholars are realizing the inescapability of storytelling and the diverse ways in which narratives construct what we regard as truth and reality.").

Storytelling has merit not only within the context of the judicial opinion, but also as it relates to victims' perceptions of harassment and what constitutes harassment. See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *STAN. L. REV.* 807, 809-10 (1993) (discussing legal storytelling as it applies to critical race theory and feminist theory and noting that diverse experiences affect the storyteller's perception of the situation, including what constitutes sexual harassment).

<sup>48</sup> Of the identifiable district court plaintiffs, forty-five are black, twelve Hispanic, three Asian, one is Native American, and twenty-one are white. In the courts of appeals, ten plaintiffs are black, six are Hispanic, and eight are white.

<sup>49</sup> We considered the hypothesis that the courts mentioned the plaintiff's race only because the plaintiff had also brought a race discrimination or racial hostile environment

when the victim is black, and that makes the judge more likely to report it.<sup>50</sup>

The judicial opinion is the judge's story justifying the judgment. The cynical legal realist might say that the facts the judge chooses to relate are inherently selective and a biased subset of the actual facts of the case. This is an overstatement, but it is instructive. For example, an important issue for us is whether the employer had in place an antiharassment program, and the degree to which the existence of such a program affects liability. It is no surprise that when we know (because the judge reported it) that an employer did not have a program, plaintiffs are more successful (71% win rates versus the overall 51%). Correspondingly, in cases where we know (again, because the judge reported it) that the employer had either a general grievance program or a specific antiharassment program, plaintiffs are not successful (41% and 50% win rates, respectively).<sup>51</sup> But in 353 cases we do not know whether the employers had a formal program. Why didn't the judge give us this information? The cynic would say that in some cases the judge decides to rule for the employer, and then has to write an opinion justifying the decision. If the employer had an antiharassment program in place, this is a fact worth mentioning. If the employer did not have such a program in place, the judge keeps silent. In cases in which the judge decides to rule for the employee, the same factors cut in the opposite way in determining whether the judge mentions the presence or absence of the antiharassment program. It remains a tricky question whether the presence or absence of an antiharassment program affects the judicial decision or simply is part of the judicial reporting of the decision in certain cases.

In short, we must be sophisticated and somewhat tentative in the conclusions we reach. Nevertheless, we are enthusiastic about the data set and the potential insights it can bring into litigated sexual harassment cases. With our methodology and its reliance on "objective" coding, we do not reject issues of interpretation. Rather, we wel-

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claim, but we concluded that this is only a partial explanation at best. In the eighty-two cases that mention the plaintiff's race, only thirty include some type of race or national-origin discrimination claim.

<sup>50</sup> Professor Eskridge, writing about Lon Fuller's famous "judicial" opinions in the "Speluncean Explorers" case, noted that Fuller never referred to the race of any of the participants: "[t]here is no explicit clue of any sort as to the race of any participant. That is, itself, an implicit clue. In the 1940s, it went without saying that you were white if your race was not noted." William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 *GEO. WASH. L. REV.* 1731, 1750 n.111 (1993); see also David L. Shapiro, *Foreword: A Cave Drawing for the Ages*, 112 *HARV. L. REV.* 1834, 1835 n.7 (1999) (noting the failure of the hypothetical justices to mention the race of any of the participants (citing Eskridge, *supra*)). We suspect that the implication of such silence remains true in the sexual harassment opinions of the 1980s and 1990s.

<sup>51</sup> Hereinafter, data reported are reflected in Appendix A unless otherwise noted.

come them. Certainly other commentators may interpret our results in different ways. Our main objective has been to push issues of interpretation from the usual arena (what does this case mean?) to a broader one (what does the sweep of cases reveal?).

## II

### DISTRICT COURT RESULTS

#### A. The Plaintiff

We were not surprised to find that the vast majority of the plaintiffs are women. Only 5.4% of the plaintiffs (a total of twenty-seven) are men, a lower percentage than reported in the Merit Systems Protection Board study.<sup>52</sup> Another nine cases had at least one male plaintiff as well as female plaintiffs. Usually these cases involved a husband joining a state tort claim with his wife's harassment claim. Most of the victims had left the workplace by the time the lawsuit started.<sup>53</sup> However, 11% of the victims were still employed by the employer at the time the lawsuit began.

The plaintiffs' marital status also raises issues of selective factual reporting in judicial opinions. Among the cases where we could ascertain the plaintiff's marital status, we found that 53% of our plaintiffs were married, 14% were divorced, and 34% were single.<sup>54</sup> This finding is consistent with the general workforce statistics<sup>55</sup> which indicates that 58% of the 1997 working labor force was married. The U.S. Merit Systems Protection Board found, however, that unmarried employees are more likely to be victims of sexual harassment than are those who are married.<sup>56</sup> One might expect, then, that the proportion of married sexual harassment plaintiffs should be less than in the general

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<sup>52</sup> U.S. MERIT SYS. PROT. BD., *supra* note 5, at 14 (stating that 37% of women and 14% of men reported experiencing harassing behavior); see also EEOC REPORT, *supra* note 6 (reporting that between 1992 and 1998, men filed between 9.1% and 12.9% of sexual harassment charges).

<sup>53</sup> This finding is generally in line with a 1979 survey which found that 24% of sexual harassment victims were fired for complaining about the conduct at issue; another 42% left jobs when they felt harassed. *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women*, RES. SERIES REP. NO. 3 (Working Women's Inst.) (1979).

<sup>54</sup> These percentages were calculated without including the following categories: "single living with boyfriend," "widowed" and "missing/can't tell." Of the 123 participants, sixty-six were married, eighteen were divorced, and thirty-nine were single.

<sup>55</sup> See *Current Labor Statistics*, MONTHLY LAB. REV., Fall 1999, at 87 (indicating that the U.S. Dept. of Labor Statistics report that 58% of the working labor force was "married with spouse present" in 1997).

<sup>56</sup> See U.S. MERIT SYS. PROT. BD., *supra* note 5, at 17; see also Becky L. Glass, *Workplace Harassment and the Victimization of Women*, 11 WOMEN'S STUD. INT'L F. 55, 59 (1988) (noting that harassing behavior is more likely to be targeted at women who are younger, never married, or divorced).

workforce.<sup>57</sup> A possible explanation lies within the 75% of cases in which marital status was unascertainable. We suspect that the "actual" percentage of married victims in our cases is lower than the percentage reported because a judge may find marriage particularly relevant in discussing a sex harassment case and be more inclined to mention it than when the person is single.

Somewhat surprisingly, the bulk of the plaintiffs are clerical or blue collar, rather than workers in higher-status occupations. One might hypothesize that high-status victims have more resources to bring a federal lawsuit, and thus professional women should comprise a higher fraction of all plaintiffs in comparison to their representation in the workforce. We found, however, that the range of occupations in our cases tracked the overall workforce quite closely. Where occupation status of the plaintiff could be identified, 12% of the plaintiffs were professional<sup>58</sup> (as compared to 16% of the workforce), over a quarter (29%) of the victims were clerical workers (as compared to 29% of the workforce), and 38% of the plaintiffs we could classify were blue collar (40% of the workforce).<sup>59</sup> Management and white-collar workers represent 21% of the plaintiffs in the study but entail 15% of the workforce. The occupation of the plaintiff was reported in 90% of the cases, so differential reporting patterns is unlikely to be an explanation.

## B. Representation

We looked to see if public interest groups such as the American Civil Liberties Union or the National Women's Law Center are involved in these cases. Despite the high media profile of such groups,<sup>60</sup> less than 2% of the cases had any public interest group involvement. Public interest groups were a party in two district court cases, represented plaintiffs as counsel in five cases, and participated as *amicus* in one other case. In addition, the EEOC was the plaintiff in

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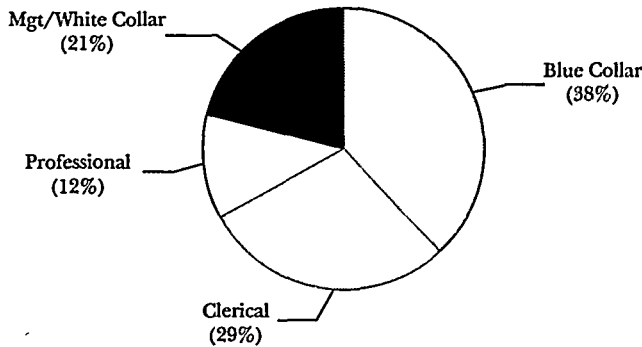
<sup>57</sup> Fifty-eight percent of the married population won while only 39% of both divorced and single groups won.

<sup>58</sup> These percentages do not include the fifty-two cases where data were missing or readers could not tell.

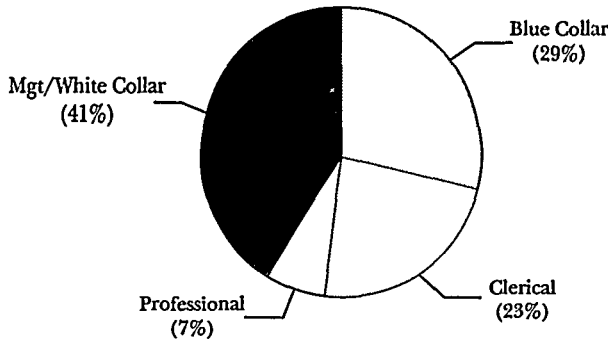
<sup>59</sup> For the workforce statistics, see Bureau of Labor Household Data Annual Averages (May 22, 2000) (reporting 1999 data), available at <ftp://ftp.bls.gov/pub/special.requests/H/AAT9.TXT>.

<sup>60</sup> See Kirk Mitchell, *Woman Claims Private Guards Assaulted Her*, DENVER POST, Mar. 2, 1999, at 1B (noting the ACLU's recent lawsuit against the "nation's largest private prisoner-transport company"); Brenda Rios, *NOW Joins in Bias Battle*, DETROIT FREE PRESS, Mar. 5, 1999, at E1 (discussing the National Organization for Women's contention that Detroit Edison fostered a sexually and racially hostile work environment); Jonathon Saltzman, *ACLU Hits New Policy on Sex Harassment*, PROVIDENCE J.-BULL., Oct. 21, 1997, at C1 (discussing the American Civil Liberties Union's opposition to a broad sexual harassment policy prohibiting all city employees from having any sexually suggestive literature at work).

FIGURE 1  
OCCUPATIONS  
Cases



Workforce



only ten cases.<sup>61</sup> Further, in contrast to well-publicized accounts of class action lawsuits in the media,<sup>62</sup> only three of the approximately

<sup>61</sup> The EEOC records its participation in lawsuits by statute. Therefore, numbers are available for the EEOC's participation for all actions brought pursuant to Title VII, a broader category than sexual harassment suits. In the fiscal year 1992, the EEOC was involved in 242 suits. The EEOC was involved in 260 suits in 1993, 235 in 1994, 193 in 1995, and 106 in 1996. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LITIGATION STATISTICS, FY 1992 THROUGH FY 1998, available at <http://www.eeoc.gov/stats/litigation.html> (last modified Mar. 1, 2000).

<sup>62</sup> See, e.g., *EEOC: Women Sexually Harassed at Ford Plants*, BOSTON GLOBE, Jan. 8, 1999, at C4 (discussing a lawsuit against Ford and explaining that the "women were called sexually degrading names, groped, and subjected to explicit graffiti"); David Greising & Stephen Franklin, *Complaints Persist at Mitsubishi Plant*, PANEL, CHI. TRIB., Jan. 23, 1999, § 2, at 1 (referring to a \$34 million class action settlement won by workers at Mitsubishi plant and noting that, in spite of the plaintiffs' victory, harassment problems still exist); Bob Kievra, *Hearing Scheduled on Astra Settlement*, WORCESTER TELEGRAM & GAZETTE, Jan. 20, 1999, at E1 (discussing \$9.8 million settlement of a class action sexual harassment case against Astra USA); Deborah Peterson & John M. McGuire, *Hooters vs. Harassment Charges*, ST. LOUIS POST-DISPATCH, July 30, 1993, at 1F (discussing a class action suit brought by seven former Hooters waitresses who alleged a sexually hostile work environment); *Stroh Settles Women's Suit Citing Ads*, NEW ORLEANS TIMES-PICAYUNE, Dec. 2, 1993, at C8 (discussing a sexual har-



five hundred cases involved a class action.<sup>63</sup> In fact, our data show that approximately 90% of cases are brought by an individual female plaintiff who is not represented by the EEOC or a public interest group.

### C. The Workplace

Where does the harassment occur? Given the very name of the claim (a hostile "work" environment), it is noteworthy that 114 cases, or 23% of our total, include allegations of harassment that did not occur on the employer's premises. Indeed, in sixty-nine cases (14% of the total), all of the alleged harassment took place outside of the workplace. Considering the one hundred cases that include a nonworksites complaint, about half contain an employment related event, such as a company party. Thirty cases involve a nonwork social event, such as private drinks after work.<sup>64</sup> However, in thirty-five cases, the harassment included nonconsensual, off-premises conduct, such as phone calls, letters, or visits to the victim's home.

One study found that "[v]ictims are more likely than non-victims to work exclusively or mostly with individuals of the opposite sex."<sup>65</sup> Our study finds no support for this statement. The courts mentioned the sex segregation of the workplace in less than half of the cases (47%). Of those cases, approximately one-third of the workplaces were mostly male and approximately two-thirds were mixed male and female workplaces. Only four district court decisions described the workplace as mostly female.

### D. The Defendants

The majority of cases involved employers in the private sector.<sup>66</sup> Only 4% of the cases involved the federal government as defendant,

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assment suit filed by eight women against Stroh Brewing Company alleging that the Brewery's ads, and in particular those featuring the "Swedish Bikini Team," fostered a sexually hostile environment); Jon Tevlin, *The Eveleth Mines Cases: What Price Pain?*, MINNEAPOLIS-ST. PAUL STAR TRIB., Nov. 29, 1998, at 1A (discussing "the first [case] in the nation to be certified as a class-action 'hostile work environment' sexual harassment suit").

<sup>63</sup> *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993); *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991); *Sims v. Montgomery County Comm'n*, 766 F. Supp. 1052 (M.D. Ala. 1990).

<sup>64</sup> For an interesting discussion of the regulation of such "associational" rights, see Terry Morehead Dworkin, *It's My Life—Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47 (1997).

<sup>65</sup> U.S. MERIT SYS. PROT. BD., *supra* note 5, at 17. We note that much of the workplace remains sex-segregated. See Randy P. Albelda, *Occupational Segregation by Race and Gender, 1958-1981*, 39 INDUS. & LAB. REL. REV. 404, 405-06 (1986) (finding that the "occupational distributions of all men and women have changed very little when race is held constant").

<sup>66</sup> This study does not examine questions concerning the appropriate definition of "employer" under Title VII. Rather, we limited our description of "employer" to include only private, federal government, or state or local government employers. For a discussion

and 23% involved a state or local government. If anything, state and local governments are overrepresented in the cases. Federal employees comprise only 2% of the workforce, while state and local employees comprise 13.6%.<sup>67</sup>

At least one commentator has suggested that coworkers are most often the perpetrators of sexual harassment.<sup>68</sup> In the judicial opinions, however, most harassers are supervisors.<sup>69</sup> Plaintiffs named supervisors or superiors alone as the harassers in 59% of the cases, and both supervisors and coworkers were named in 20% of the cases. When the plaintiff named only one harasser, the vast majority (85%) were supervisors. The selection effect may explain these numbers. That is, plaintiffs are aware of the lower probability of success when coworkers are the harassers, and therefore victims of harassment file suit less frequently when coworkers rather than supervisors are involved. Thus, in the reported and filed cases, most harassers are supervisors. In almost 8% of the cases, we could not determine the number of harassers involved although 72% of the cases involved harassment by one person only. Another 18% involved two to five harassers and one case involved fourteen different harassers.

#### E. The Claims

Two different sexual harassment claims exist: *quid pro quo* and hostile work environment. The Supreme Court recently reaffirmed the distinction between these claims, explaining that “[t]o the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant.”<sup>70</sup> The labels do not, however, control the analysis of employer liability once a finding of discrimination has been made.<sup>71</sup>

*Quid pro quo* harassment involves a grant or denial of economic benefits following the employee’s response to “[u]nwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct of a sexual nature.”<sup>72</sup> The quintessential example of a *quid pro quo* claim is a supervisor’s demand of ‘sleep with me or I’ll fire you.’ To establish a *quid pro quo* claim, the plaintiff must show that “tangi-

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of current issues surrounding the definition of “employer,” see Donald F. Kiesling, Jr., *Title VII and the Temporary Employment Relationship*, 32 VAL. U. L. REV. 1, 5-9 (1997).

<sup>67</sup> BUREAU OF LABOR STATISTICS, REPORT ON THE AMERICAN WORKFORCE 149 tbl.13 (1999) (reporting 1998 data), available at <http://www.bls.gov/opub/rtaw/stattab2.htm>.

<sup>68</sup> Note, *Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment*, 3 HARV. WOMEN’S L.J. 173, 177 (1980) (noting that most harassers are coworkers of the plaintiff).

<sup>69</sup> See *supra* notes 9, 41-45 and accompanying text for a discussion of “published” opinions. In our study, 461 cases described the type of harasser.

<sup>70</sup> *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 753 (1998).

<sup>71</sup> *Id.* at 752; accord *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>72</sup> 29 C.F.R. § 1604.11(a) (2000).

ble job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from the employee's refusal to submit to the conduct."<sup>73</sup> Tangible job benefits may include transfers, promotions, favorable evaluations, pay raises, or continued employment.<sup>74</sup>

A hostile working environment claim arises in situations in which an employee must endure verbal or physical abuse as part of her employment. In such a claim, an employee may or may not suffer a loss of job benefits. Conduct that degrades or devalues women or conduct that would not occur but for the sex of the employee can create a hostile environment arising out of sex discrimination.<sup>75</sup> If a supervisor continually pinches or grabs an employee but never hinges a promotion or raise on reciprocity, a quid pro quo claim would not succeed.<sup>76</sup> The employee would, however, have a hostile environment claim.<sup>77</sup>

The bulk of sex harassment cases involve hostile environment claims. Almost 70% of the cases only include a hostile environment claim, while another 22.5% combine a hostile environment claim with a quid pro quo claim.

Professor Marion Crain has suggested that women in traditionally female jobs are relatively likely to bring quid pro quo claims, while women entering male-dominated workplaces are more likely to complain of hostile environment.<sup>78</sup> The fact that courts described the workplace as predominantly female in only four cases complicated our verification of this part of Professor Crain's theory. However, we can compare the rate of quid pro cases in male-dominated workplaces and mixed workplaces. In the eighty-eight mostly-male-workplace cases, only 17% include a quid pro quo claim and 83% rely solely on

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<sup>73</sup> *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987).

<sup>74</sup> *See, e.g., Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977) (concluding that Title VII is violated when a supervisor makes sexual advances or demands toward a subordinate employee and conditions aspects of the employee's career development on a favorable response to those advances or demands).

<sup>75</sup> *See Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (holding that repeated verbal comments of a sexual and nonsexual nature were properly considered by the district court); *Hicks*, 833 F.2d at 1416-17 (holding that nonsexual verbal harassment of a black female security guard should be considered in a sexual harassment claim); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) ("We have never held that sexual harassment . . . of an employee or group of employees that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones."); *Broderick v. Ruder*, 685 F. Supp. 1269, 1278-81 (D.D.C. 1988) (granting recovery for a hostile environment created by supervisors bestowing preferential treatment on women who submitted to their sexual advances).

<sup>76</sup> *See Hicks*, 833 F.2d at 1413-14.

<sup>77</sup> *See id.* at 1417.

<sup>78</sup> Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 16-17 (1995).

hostile environment claims. In the 145 mixed-workplace cases, by contrast, 34% include quid pro quo claims and only 66% rely solely on hostile environment claims. Thus, it appears that mostly-male workplaces tend to generate hostile environment claims, consistent with Professor Crain's analysis.

Conforming to stereotypes, physical harassment was significantly more likely in the blue-collar and pink-collar cases than in higher-status occupation cases. Nearly half of the blue-collar and clerical cases (48% and 50%, respectively) contained a complaint of physical harassment, compared to only 32% of the management and 38% of the professional cases. In addition, most sex harassment cases, whether quid pro quo or hostile environment, include other claims as well. In fact, only 13% of the cases did not include at least one other claim. Almost 20% brought at least four other claims. Six plaintiffs brought nine other claims.

Of prime interest is the type of conduct at issue in the cases. We looked for the presence of sixteen categories of sexual harassment conduct (plus a catch-all "other" category). These categories include the following: oral and written comments about women in general or particular victims; written comments or graffiti; pornography; posters or pinups; objectionable letters or materials sent to the plaintiff; physical contact of a sexual nature or a nonsexual nature (such as hitting); requests for dates; and requests for sexual favors. Table 1 shows the frequency of these types of conduct. For example, the plaintiff alleged that the harassers made sexual comments about her physical appearance in 48% of the cases and alleged physical sexual contact in 42% of the cases.

By referring to Table 1, we can make the following observations. The type of harassing conduct differs somewhat by occupational category but not in clearly predictable ways. Physical harassment is most common in white-collar cases, although, due to coding issues, we have only nineteen white-collar cases involving physical harassment. Requests for dates formed part of harassment complaints somewhat more often in clerical or management settings than in blue-collar settings. The larger conclusion is that the type of conduct does not differ dramatically by occupation.

The type of conduct also differs in the segregated workplaces, but again the differences are modest.

Complaints about requests for dates and requests for sexual favors were somewhat less frequent in mostly male workplaces than in mixed workplaces. By contrast, segregation of the workplace did not affect the proportion of physical harassment complaints.

Some of the more notorious cases involve poster pinups, general graffiti, or other harassment against women in general, without any

TABLE 1  
SEXUAL HARASSMENT IN DISTRICT COURT CASES

|   | Number | % of district court cases | Win Rate |
|---|--------|---------------------------|----------|
| Plaintiff Specific Conduct  | 426    | 84.7                      | 52.8*    |
| Oral comments about Plaintiff   |        |                           |          |
| Belittling names (e.g., babe, honey)  | 98     | 19.5                      | 59.2*    |
| Physical appearance, sexual comments  | 244    | 48.6                      | 57.4***  |
| Objectionable letters sent to plaintiff   | 25     | 5.0                       | 52.0     |
| Sexual materials left in plaintiff's private space                              | 25     | 5.0                       | 68.0*    |
| Less favorable treatment in work assignments, conditions                        | 145    | 28.9                      | 55.9     |
| Favorable treatment to employees in sexual relations with supervisors/employers | 17     | 3.4                       | 88.2***  |
| Requests for dates  | 100    | 19.9                      | 53.0     |
| Requests for sexual favors  | 149    | 29.7                      | 59.1**   |
| Physical harassment   | 224    | 44.6                      | 59.4***  |
| Sexual nature (e.g., squeezing, pinching, grabbing)                             | 210    | 41.8                      | 59.5***  |
| Nonsexual nature (e.g., hitting)  | 43     | 8.6                       | 62.8     |
| Conduct Aimed at Women in General   |        |                           |          |
| Oral comments about Women in general  |        |                           |          |
| Belittling names  | 60     | 12.0                      | 58.3     |
| Physical appearance, sexual comments  | 89     | 17.7                      | 61.8**   |
| Pornographic descriptions   | 42     | 8.4                       | 64.3*    |
| Offensive gestures  | 27     | 5.4                       | 51.9     |
| Written comments, like graffiti   | 34     | 6.8                       | 70.6**   |
| Posters/pinups in public areas  | 35     | 7.0                       | 60.0     |

\*(\*\*)(\*\*\*) Significant at the 10% (5%)(1%) level

conduct specifically directed against particular employees. These cases turn out to be quite unusual. Nearly 85% of the cases in our sample involve allegations of plaintiff-specific conduct. In fact, allegations of posters or pinups occurred in only 7% of the cases. Comments about women in general but not specifically about the plaintiff were almost never alleged in isolation of other conduct. In fact, we found only three cases in which the plaintiff premised her entire complaint on sexual comments about women in general.<sup>79</sup> They all lost.

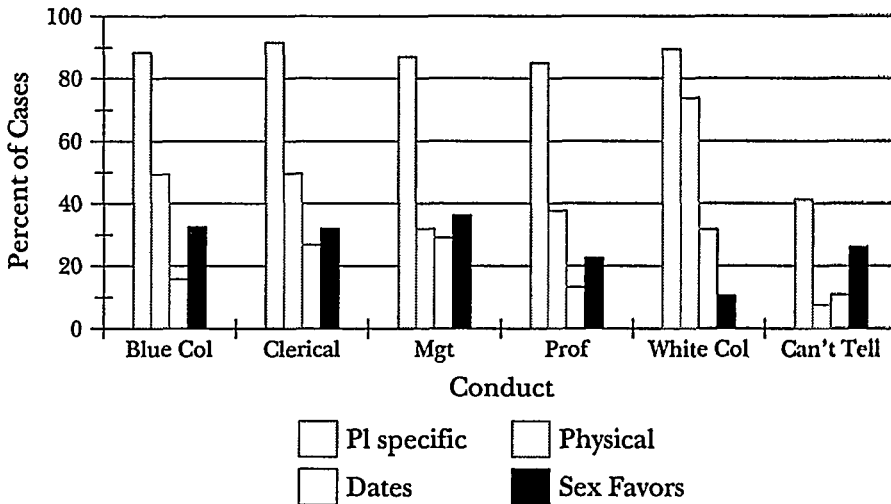
Paula Jones's sexual harassment suit against President Clinton<sup>80</sup> raised the issue of whether a single incident could constitute sex harassment.<sup>81</sup> Our data show that single-incident cases are highly unusual. Only 4% of our 502 cases involved a single incident of harassment. (*Jones* itself occurred after our time period and is not in

<sup>79</sup> *Thompson v. Campbell*, 845 F. Supp. 665 (D. Minn. 1994); *Fair v. Guiding Eyes for the Blind, Inc.*, 742 F. Supp. 151 (S.D.N.Y. 1990); *Krijn v. Pogue Simone Real Estate Co.*, No. 89-Civ-0829, 1989 U.S. Dist. LEXIS 9108 (S.D.N.Y. Aug. 4, 1989), *rev'd*, 896 F.2d 687 (2d Cir. 1990).

<sup>80</sup> *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998).

<sup>81</sup> *Id.* at 675 (failing to find alleged incident constitutes abusive working environment when viewed under totality of the circumstances).

FIGURE 2  
CONDUCT BY OCCUPATION



the database). The plaintiffs were successful in only seven of these twenty cases, a significantly lower win rate than in cases complaining of longer periods of harassment.

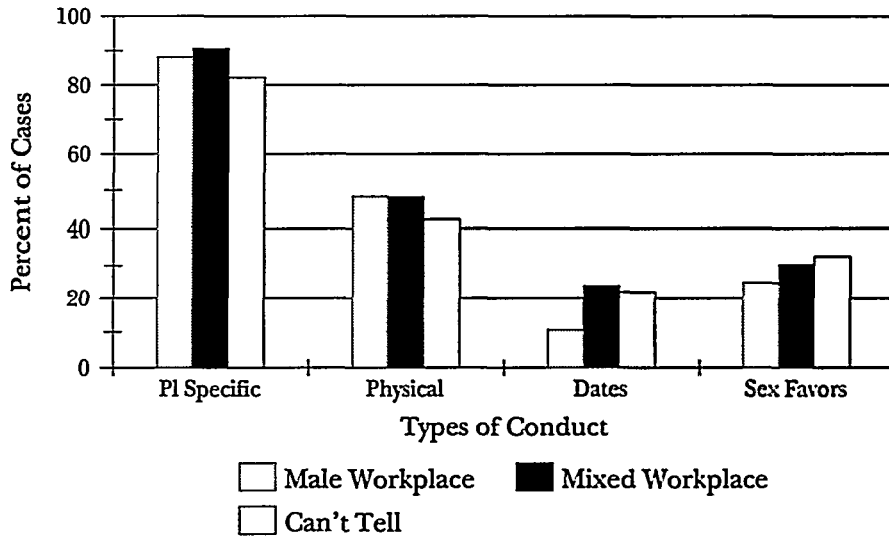
#### F. The Posture of the Case

The district court opinions we examined included many pretrial opinions, such as summary judgment motions and motions to dismiss. Twenty-five percent involved memorandum decisions after trial and the remainder dealt with pretrial motions. Most trials were before a judge rather than a jury. Recent years have seen a significantly higher fraction of cases occurring at the dismissal or summary judgment stage. In the 1986-1989 period, only half of the opinions are in pretrial cases, while three-quarters of the opinions in the 1990s are at the pre-trial stage. These results are consistent with the supposition that judges are increasingly playing a gatekeeper role in sexual harassment cases by deciding issues on legal rather than factual grounds.<sup>82</sup> While this comports with Justice Holmes's vision that law will become more rule-oriented as experience in an area increases,<sup>83</sup> it is inconsistent

<sup>82</sup> See, e.g., M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311 (1999) (arguing that courts' tendencies to decide hostile environment sexual harassment cases prevents juries from participating in the enforcement of gender antidiscrimination norms).

<sup>83</sup> See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-2 (1881).

FIGURE 3  
CONDUCT BY WORKPLACE SEGREGATION



with the general trend in modern tort law that allows triers of fact to decide most legal disputes. Despite the provisions in the Civil Rights Act of 1991 allowing for jury trials, a jury was involved in only twenty-nine cases. Of those cases, the jury reviewed the sexual harassment allegations in only half.

### III

#### THE SUCCESSFUL PLAINTIFFS IN DISTRICT COURT

Determining whether a plaintiff has won or lost is not always easy,<sup>84</sup> particularly in pretrial cases. We count the case as a "win" for the plaintiff if the court upheld the plaintiff's sexual harassment claim in whole or in part. Many opinions arise from pretrial motions to dismiss the plaintiff's claim, after which a "winning" plaintiff could face other motions to dismiss as well as a trial on the merits, post-trial motions, and an appeal. Winning at an early stage does not necessarily indicate an ultimate victory for the plaintiff, but losing an early motion typically indicates an ultimate defeat.

In some of our analyses of factors influencing wins, we limit ourselves to opinions attached to trials. Table 2a summarizes the proce-

<sup>84</sup> For an extended discussion of the problems in determining whether a civil rights plaintiff is successful, see Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987) (reporting empirical data on relative success, burden, and financial drain on constitutional tort plaintiffs).

dural posture of the district court cases and shows the success rate at each stage. Table 2b shows that trials occurred in only a third of the cases. As would be expected, given the standards for pretrial motions, plaintiffs had a much higher success rate surviving pretrial motions than obtaining a favorable final judgment. When a claim did reach the trial stage, plaintiffs did significantly better before a jury than a judge.

TABLE 2A  
PROCEDURAL POSTURE OF SEX HARASSMENT CASES IN  
DISTRICT COURT CASES

|   | Number | % of cases | Win Rate |
|---|--------|------------|----------|
| Pretrial motion on substance of claim       | 326    | 64.9       | 52.5     |
| Pretrial motion on procedure, evidence      | 19     | 3.8        | 79.0     |
| Memorandum order after bench trial          | 124    | 24.7       | 39.5     |
| Motion for judgment notwithstanding verdict | 4      | 0.8        | 75.0     |
| Posttrial motions                           | 29     | 5.8        | 65.5     |

TABLE 2B  
TYPE OF TRIALS IN DISTRICT COURT CASES

|                                       | Number | % of cases | Win Rate |
|---------------------------------------|--------|------------|----------|
| No trial; decided on pretrial motions | 346    | 68.9       | 54.1     |
| Bench trial                           | 127    | 25.3       | 45.7     |
| Jury trial                            | 11     | 2.2        | 54.6     |
| Both bench and jury trial             | 18     | 3.6        | 33.3     |

Appendix A shows the win rates for every category of case. Not controlling for other factors and not separating motion opinions from trial opinions, the successful plaintiff is a woman who alleged conduct directed specifically at her by both supervisors and coworkers and complained within the organization in some manner about the conduct. As expected, female plaintiffs fared better than male plaintiffs; however, when both a male and female plaintiff sued, the success rate was a surprising 89%. Blue-collar and clerical workers were more successful than management, white-collar, or professional employees. Contrary to some suggestions, plaintiffs in sex-segregated workplaces fared better than those in integrated workplaces.<sup>85</sup>

Understandably, plaintiffs were most successful where both supervisors and coworkers were the alleged harassers. Moreover, the success rates seem to increase as the number of the harassers increase. However, the number of cases with multiple harassers is fairly small so that this increase in the success rates is not statistically significant.

<sup>85</sup> See Lee, *supra* note 4, at A1 (suggesting that hostile environment claims will be more difficult to win against defendants in industries historically perceived as tolerating a higher degree of vulgarity and abuse).



When a plaintiff alleged that the defendants commented about her physical appearance or made comments of a sexual nature specifically to her, she won in 57% of the cases. Further, plaintiffs were equally successful (59%) in cases wherein they complained of belittling or derogatory comments about them. Physical contact also seems important: when plaintiffs did not allege physical contact of any kind, they were successful in only 45% of the cases.

When the plaintiff had not complained within the organization in some fashion, she lost almost 70% of the time.<sup>86</sup> However, when the employer had no formal sexual harassment programs or generalized grievance process which covered sexual harassment, the plaintiff won 71% of the time. This comports with our finding that an absence of employer liability is one of three main reasons that courts reject plaintiffs' claims.

The preceding analysis is superficial in that it ignores the correlation between elements that influence success. For example, the type of conduct and the type of workplace may jointly affect success. We therefore turn to multivariate analysis to determine more precisely the factors affecting wins.

Table 3 reports the results of two logistic regressions explaining wins. The first regression includes all 502 cases in the district court database, while the second regression limits itself to 130 usable cases involving trials.<sup>87</sup>

The factors strongly helping a plaintiff's case include the following: (1) the supervisor knew of the harassment before the victim complained externally; (2) the plaintiff alleged physical harassment; (3) the case is covered by the Civil Rights Act of 1991; (4) the complaint comes from a mostly male rather than a mixed workplace; (5) harassment involved supervisors rather than coworkers alone; (6) the plaintiff objected to the harassment; and (7) the employer had no general or sex-harassment-specific grievance procedures in place.

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<sup>86</sup> One researcher has postulated that women are generally more likely to employ passive coping strategies that reduce internal stress, such as talking with others and venting emotions, rather than confronting the harasser or filing a formal report. See Margaret S. Stockdale, *The Direct and Moderating Influences of Sexual-Harassment Pervasiveness, Coping Strategies, and Gender on Work-Related Outcomes*, 22 *PSYCHOL. WOMEN Q.* 521, 523 (1998) (noting that women tend to reserve more confrontational approaches, such as reporting the harassment or telling the harasser to stop, for more severe incidents).

<sup>87</sup> The odds ratio demonstrates how a particular variable affects the odds. Odds ratios greater than one increase the odds, meaning that after controlling for the other variables in the regression, such variables increase the chances of the plaintiff winning the case; conversely, odds ratios less than one indicate that the variable harms the plaintiff's chances.

TABLE 3  
LOGISTIC REGRESSION SHOWING FACTORS INFLUENCING WINS IN  
SEXUAL HARASSMENT CASES

|   | All District Court Cases |          | Trials Only |          |
|---|--------------------------|----------|-------------|----------|
|   | Odds Ratio               | P> z     | Odds Ratio  | P> z     |
| <u>Independent Variables</u>                        | 3.053                    |          |             |          |
| 1991 Civil Rights Act applies                       | 3.210                    | 0.005*** |             |          |
| Segregation of Workplace                            |                          |          |             |          |
| Omitted reference variable=mostly male              |                          |          |             |          |
| Workplace mostly female                             | 0.789                    | 0.884    |             |          |
| Workplace mixed                                     | 0.576                    | 0.086*   | 0.471       | 0.199    |
| Workplace can't tell segregation                    | 1.334                    | 0.851    | 0.671       | 0.517    |
| Sex of Plaintiff                                    |                          |          |             |          |
| Omitted reference variable=male                     |                          |          |             |          |
| Plaintiff female                                    | 1.080                    | 0.856    | 1.325       | 0.838    |
| Plaintiff both                                      | 5.605                    | 0.141    | 5.648       | 0.398    |
| Status of Harassers                                 |                          |          |             |          |
| Omitted reference variable=supervisors only         |                          |          |             |          |
| Supervisors & coworkers                             | 1.235                    | 0.433    | 1.765       | 0.288    |
| Coworkers only                                      | 0.455                    | 0.012**  | 0.268       | 0.142    |
| Can't Tell status of harassers                      | 2.068                    | 0.070*   | 30.789      | 0.006*** |
| Employer's Antiharassment procedure                 |                          |          |             |          |
| Omitted reference variable=no procedure             |                          |          |             |          |
| Employer has antiharassment procedure               | 0.402                    | 0.055*   | 0.128       | 0.033**  |
| Can't tell if procedure exists                      | 0.595                    | 0.251    | 0.107       | 0.018**  |
| Plaintiff told coworkers of harassment              | 2.038                    | 0.049**  | 4.385       | 0.023**  |
| Plaintiff-specific harassment                       | 1.532                    | 0.182    | 1.234       | 0.780    |
| Physical harassment                                 | 1.632                    | 0.025**  | 1.491       | 0.426    |
| Type of Consent                                     |                          |          |             |          |
| Omitted reference variable=pl expressed disapproval |                          |          |             |          |
| Plaintiff gave no signals                           | 0.207                    | 0.063*   |             |          |
| Plaintiff sometimes reacted in kind                 | 0.782                    | 0.555    | 1.110       | 0.872    |
| Can't tell  | 0.995                    | 0.985    | 1.576       | 0.481    |
| Knowledge of Supervisors                            |                          |          |             |          |
| Omitted reference variable=no supervisor knowledge  |                          |          |             |          |
| Supervisor Knew of Harassment                       | 4.093                    | 0.002*** | 1.230       | 0.751    |
| Can't tell whether supervisor knew                  | 2.823                    | 0.022**  | 0.782       | 0.777    |
| Single incident of harassment                       | 0.536                    | 0.221    |             |          |
| Number of observations                              | 502                      |          | 130         |          |
| Chi <sup>2</sup>                                    | 82.91                    |          | 36.72       |          |
| Probability > chi <sup>2</sup>                      | 0.000                    |          | 0.002       |          |
| Pseudo R <sup>2</sup>                               | 0.119                    |          | 0.209       |          |

## IV

## APPELLATE COURTS RESULTS

## A. Case Characteristics

Most appellants were plaintiffs below. The plaintiff appealed in 74% of the cases, the employer in 18%, and both parties in the re-

maintaining 8%. Given that plaintiffs and defendants win about equally in the district courts, it follows<sup>88</sup> that unsuccessful plaintiffs are more likely to appeal than unsuccessful defendants. Even taking into account the somewhat lower success rate for plaintiffs in decisions issued after a trial (40%), plaintiffs are still appealing at a higher rate than defendants.

As Appendix A shows, the appellate courts confront plaintiffs, defendants, and allegations similar to those before the district courts. For example, the occupational categories break down along the same lines as the district court: one-third blue collar, one-third clerical, and the remainder management or professional. As discussed above, the similarities of the cases in the trial courts and appellate courts cast doubt on the belief that blue-collar workers may not have the resources to pursue a lawsuit, much less pursue one through the appeals stage. The fraction of appellate cases involving harassment only by coworkers, 15.8%, is strikingly similar to the proportion of coworker-only cases in the district courts (13%). Slightly more appellate cases than district cases include a claim of physical harassment (53.1% to 44.6%), but the difference is not statistically significant. In sum, the appeal filter does not alter the mix of cases very much.

Indeed, the greatest difference between the appellate and district courts is that the appellate court data are more detailed. As seen in Appendix A, with a few exceptions the "Missing/Can't tell" percentage is higher for district court variables than appellate court variables. In general, this is because appellate opinions tend to be longer and richer, and are less likely to discuss procedural issues with little factual background. Thus, our coders found more data in the appellate cases.

In most cases, the differences between the appellate and district court are minor, but the differences in missing data involving employer antiharassment programs is astounding. When coding whether or not the employer had an antiharassment program, general grievance procedures, or specific sex-harassment procedures, we could not tell in 70.3% of the district court cases. For the vast bulk of district cases, the presence or absence of an employer program was not worthy of judicial reporting in the opinion. By contrast, in the appellate cases, we were unable to answer the question in only 36% of the cases. In other words, the appellate judge usually gave this information in the opinion, while the district judge did not. Assuming that appellate

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<sup>88</sup> Our appellate-court and district-court databases are not linked; thus, we cannot track the same case through the system. Therefore, we do not estimate what factors lead to an appeal at the individual-case level. However, we can determine at the gross level which district-court characteristics show up disproportionately on appeal. From this perspective, it is evident that plaintiffs who lose in district court show up disproportionately on appeal.

and district cases have the same mix of employers with and without programs, it appears that when employers do not have such a program, district judges fail to mention whether the antiharassment program exists. In the appellate data, 28.7% of the employers are known not to have a program, which is dramatically higher than the 7% of employers known not to have a program in the district-court database. On the other side, 35.4% of the employers in the appellate database are known to have some type of program, which is not substantially more than the 22.8% of the employers in the district court database known to have a program.

## B. The Success Rates

Both plaintiffs and defendants had difficulty convincing the appellate courts to reverse the lower courts. When the plaintiff appealed, she succeeded in only 27% of the cases, while the defendant also won in 27% of cases. These numbers are similar to other studies of federal courts of appeals.<sup>89</sup>

As Table 4 shows, the success rate of plaintiffs varies dramatically by circuit. In the Fourth, Sixth, Seventh, and Tenth Circuits, plaintiffs won fewer than a third of the appellate cases (twenty-four of eighty-one), while in the Second, Eighth, Ninth, and Eleventh Circuits collectively, plaintiffs won nearly three-quarters of their cases on appeal (twenty-five of thirty-four). Similar but more muted differences obtain when the analysis is restricted to officially published opinions. The Fourth and Sixth Circuits officially publish fewer than half the opinions they issue, a far lower rate than the other circuits, and seem to publish a disproportionate number of opinions where plaintiffs win. Still, these circuits, especially the Fourth, have lower plaintiff success rates than other circuits.

The varying success rates at the appellate level do not easily translate into corresponding success rates among district courts in the circuits. Although the plaintiffs' below average success rate in the district courts of the Fourth Circuit and the above average success rate in the district courts of the Ninth and Eleventh Circuits correspond to low and high success rates, respectively, at their appellate levels, there is no correspondence between district and appellate success rates within the Second, Sixth, or Seventh Circuits. The most startling statistic among the district courts may be the huge number of district court opinions, particularly at the pretrial stage, within the Seventh Circuit. It turns out that the Northern District of Illinois wrote 102 opinions in sexual harassment cases, over twice as many as the forty-six

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<sup>89</sup> See Eisenberg & Schwab, *supra* note 45, at 517 (reporting that plaintiffs successfully appealed 35% of a control group of published, non-civil-rights cases whereas defendants successfully challenged 33% of these cases).

TABLE 4  
SUCCESS RATES OF SEX HARASSMENT PLAINTIFFS BY CIRCUIT

| Circuit | DISTRICT COURT |                |                 |               | APPELLATE COURT |                |                    |               |
|---------|----------------|----------------|-----------------|---------------|-----------------|----------------|--------------------|---------------|
|         | All Cases      |                | Cases w/Trials  |               | All Cases       |                | Published Opinions |               |
|         | % Pl Wins      | # of Cases     | % Pl Wins       | # of Cases    | % Pl Wins       | # of Cases     | % Pl Wins          | # of Cases    |
| 1st     | 50.0           | 20             | 57.1            | 7             | 42.9            | 7              | 50.0               | 6             |
| 2d      | 50.0           | 62             | 38.1            | 21            | 80.0            | 5              | 80.0               | 5             |
| 3d      | 43.4           | 53             | 16.7            | 18            | 37.5            | 8              | 37.5               | 8             |
| 4th     | 38.5           | 39             | 33.3            | 12            | 21.1            | 19             | 30.0               | 10            |
| 5th     | 47.4           | 19             | 33.3            | 6             | 38.5            | 13             | 38.5               | 13            |
| 6th     | 58.3           | 24             | 55.6            | 9             | 28.0            | 25             | 44.4               | 9             |
| 7th     | 53.5           | 116            | 60.0            | 20            | 27.3            | 33             | 32.1               | 28            |
| 8th     | 50.0           | 30             | 50.0            | 18            | 72.7            | 11             | 72.7               | 11            |
| 9th     | 64.5           | 31             | 85.7            | 7             | 63.6            | 11             | 70.0               | 10            |
| 10th    | 50.0           | 64             | 47.1            | 17            | 33.3            | 24             | 31.6               | 19            |
| 11th    | 62.1           | 29             | 53.3            | 15            | 85.7            | 7              | 83.3               | 6             |
| D.C.    | 53.3           | 15             | 28.6            | 7             | 0.0             | 1              | 0.0                | 1             |
| TOTAL   | 51.1           | 502            | 45.2            | 157           | 39.0            | 164            | 45.2               | 126           |
|         | chi2 =<br>8.36 | Pr. =<br>0.681 | chi2 =<br>15.94 | Pr =<br>0.143 | chi2 =<br>24.78 | Pr. =<br>0.010 | chi2 =<br>17.41    | Pr =<br>0.096 |

cases from the District of Kansas or the thirty-seven opinions in the Southern District of New York, the districts with the next most opinions.

## V

### TRENDS OVER TIME

#### A. The Civil Rights Act of 1991

The database spans almost ten years of decisions, allowing us to examine trends over time. The enactment of the Civil Rights Act of 1991 falls in the middle of this ten-year span.<sup>90</sup> After much debate and a presidential veto of an earlier bill, Congress amended Title VII when it passed the Civil Rights Act of 1991. These amendments did not alter the substantive law of sexual harassment but for the first time provided for the recovery of punitive and compensatory damages as well as the right to a jury trial.<sup>91</sup> In *Landgraf v. USI Film Products*, the

<sup>90</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C.).

<sup>91</sup> 42 U.S.C. § 1981a (1994 & Supp. III 1997) (providing for compensatory and punitive damages in Title VII and ADA cases involving intentional discrimination and making a jury trial available when such damages are sought).

Supreme Court held that these provisions did not apply to cases pending prior to the enactment of the Act.<sup>92</sup>

Unfortunately, we must remain tentative about the effects of the 1991 Act. Even though we read cases through 1995, the 1991 Civil Rights Act (CRA) covered only thirty-three cases in our sample. This reflects the fact that it takes the federal courts a long time to process cases. Because jury trials occurred in only three of those cases, we can detect no stampede to juries from the Act.

One-third of the cases under the Act did request punitive damages, significantly more than the 11% of pre-CRA cases that requested punitive damages. Three post-CRA plaintiffs received punitive damages, compared to only 1% of the pre-CRA cases. Thus, the Act's creation of punitive damages does seem to have an effect.

The CRA may increase the likelihood of monetary damages as well. Ten post-CRA plaintiffs (30% of our sample) received monetary damages, compared to only 11% prior to the CRA.

### B. Win Rates over Time

Table 5 shows the complex trend in win rates for sexual harassment cases.

TABLE 5  
SEX HARASSMENT PLAINTIFFS' DISTRICT COURT WIN RATES OVER TIME

| Year  | # of Cases | % Won |
|-------|------------|-------|
| 1986  | 15         | 40.0  |
| 1987  | 36         | 38.9  |
| 1988  | 20         | 40.0  |
| 1989  | 41         | 43.9  |
| 1990  | 62         | 51.6  |
| 1991  | 81         | 59.3  |
| 1992  | 66         | 54.6  |
| 1993  | 57         | 57.9  |
| 1994  | 95         | 48.4  |
| 1995  | 29         | 55.2  |
| Total | 502 cases  | 51.2  |

The win rate in 1994 is lower than the immediately preceding years, consistent with the supposition that *Harris* signaled a cutback in sexual harassment claims.<sup>93</sup> But the win rate in 1995 is not lower. Overall, win rates are not lower in the mid-1990s than they were a decade ear-

<sup>92</sup> 511 U.S. 244, 286 (1994).

<sup>93</sup> Bradley Golden, Note, *Harris v. Forklift: The Supreme Court Takes One Step Forward and Two Steps Back on the Issue of Hostile Environment Sexual Harassment*, 1994 DET. C.L. REV. 1151; Mary C. Gomez, Note, *Sexual Harassment after Harris v. Forklift Systems, Inc.—Is it Really Easier to Prove?*, 18 NOVA L. REV. 1889 (1994).

lier. Statistically, we cannot reject the hypothesis of no linear time trend in win rates.

The lack of a time trend should not be surprising, however, because it is consistent with most selection-effect models of litigation.<sup>94</sup> Suppose, for example, that courts became more receptive to sexual harassment claims (perhaps reflecting legislative enactments). One would expect that more plaintiffs would bring claims in response and that these additional claims would tend to be weaker. The result could be no change in overall win rates. While the courts might treat a claim of a given strength more favorably than in earlier years, this could be counteracted by the increased incentive to bring weaker claims.

## VI

### RECENT ISSUES IN SEXUAL HARASSMENT LAW

#### A. The Conceptualization of Sexual Harassment

Sexual harassment in the workplace is actionable only if it meets Title VII's prohibition on discrimination "because of" sex.<sup>95</sup> Although it is now beyond question that Title VII provides such a cause of action, scholars have begun to refocus on the question of why sexual harassment falls within Title VII.<sup>96</sup> That is, these scholars seek to determine why sexual harassment is sex discrimination in order to understand both how to remedy the wrong and what behavior should be included within the category.<sup>97</sup> Below, we briefly discuss the recent work of four scholars on the "why" of sexual harassment and conclude that our findings substantiate their conclusions that the courts narrowly construe what constitutes sexual harassment.

Professor Anita Bernstein "examines sexual harassment with an eye toward remediation, prevention, and other pragmatics."<sup>98</sup> She describes the divisions in the judicial and academic communities over sexual harassment as "miscommunication" and sexual harassment as coercion as well as a division as to the role of fault in sexual harassment claims.<sup>99</sup> If harassment is a wrong inflicted by one person upon

<sup>94</sup> See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (presenting empirical data on the selection effect model and its implications).

<sup>95</sup> 42 U.S.C. § 2000e(k), 2000e-2 (1994 & Supp. III 1997); see *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998) (holding that Title VII's prohibition of discrimination "because of sex" protects men as well as women).

<sup>96</sup> See *supra* notes 30-32 and accompanying text.

<sup>97</sup> See Franke, *supra* note 30, at 691-95.

<sup>98</sup> Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 CORNELL L. REV. 1231, 1232 (1998) [hereinafter Bernstein, *An Old Jurisprudence*]; see Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997) [hereinafter Bernstein, *Treating*].

<sup>99</sup> See Bernstein, *Treating*, *supra* note 98, at 447-48.

another then tort remedies should govern.<sup>100</sup> However, Title VII focuses on the “atmosphere or working conditions rather than fault.”<sup>101</sup> Bernstein reconciles these competing perspectives by describing sexual harassment as a type of incivility or disrespect.<sup>102</sup> She further argues that sexual harassment denies each individual the respect she is due simply by her status as a person: “Respect in the sense of recognition [of a person’s inherent worth] is owed to all persons, and thus workplace sexual harassment betrays the ideal of recognition respect . . . .”<sup>103</sup> Thus, Bernstein recommends use of a “respectful person standard” in hostile environment cases as “giving content to the ideal of equality behind Title VII as well as the ideal of individual autonomy behind dignitary-tort law.”<sup>104</sup> In using a respectful person standard, Bernstein seeks to do more than simply replace one word with another. She argues that “[b]y moving the inquiry away from a complainant’s reaction and turning it on the conduct of employers, the switch from ‘reasonable’ to ‘respectful’ avoids the victim-blaming that has marginalized and devalued women workers.”<sup>105</sup>

Professor Katherine Franke begins by analyzing the flaws in the current understanding of sexual harassment through the use of same-sex harassment cases. She explains that “by looking to the margins of a doctrine, much can be understood about tensions in the doctrine at the center.”<sup>106</sup> She describes the three historic “principal justifications” for the inclusion of sexual harassment within Title VII’s prohibition against discrimination “because of” a person’s sex.<sup>107</sup> Franke argues that these justifications fail to account for why sexual harassment is a form of sexual discrimination. Franke asserts that “sexual harassment is a sexually discriminatory wrong because of the gender norms it reflects and perpetuates.”<sup>108</sup> She describes sexual harassment as a “technology of sexism”—a tool by which sexist goals are accomplished.<sup>109</sup> Franke maintains that sexual harassment “perpetuates, enforces, and polices a set of gender norms that seek to feminize

<sup>100</sup> See *id.* at 448.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 450.

<sup>103</sup> *Id.* at 452.

<sup>104</sup> *Id.* at 450.

<sup>105</sup> Bernstein, *An Old Jurisprudence*, *supra* note 98, at 1234.

<sup>106</sup> Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245, 1250 (1998). Interestingly, our study seeks to learn about sexual harassment from the opposite point of view of Professor Franke—by examining the run of cases (rather than the margin).

<sup>107</sup> Franke, *supra* note 30, at 698-729. The three rationales under which sexual harassment is considered sex discrimination are: (1) because it violates formal equality principles, *id.* at 705-14; (2) because it is sexual, *id.* at 714-25; and (3) because it is sexually subordinating, *id.* at 725-29.

<sup>108</sup> *Id.* at 693.

<sup>109</sup> *Id.*



women and masculinize men."<sup>110</sup> By reconceiving sexual harassment as an exercise of gendered power, Franke seeks to provide the legal system with a principled method by which to judge all sexual harassment claims—both “different sex” and same-sex claims.<sup>111</sup>

In her most recent work, Professor Kathryn Abrams also seeks to encompass same-sex harassment cases within a conceptualization of sexual harassment.<sup>112</sup> For Abrams, however, women’s subordination and the dynamics of the workplace must remain at the center of sexual harassment analysis.<sup>113</sup> In essence, she conceives of sexual harassment as the institutionalization of women’s subordination through the preservation of male control of the workplace and the reinforcement of masculine norms in the workplace.<sup>114</sup> Ultimately for Abrams, the wrong of sexual harassment is the “interference with human agency, and particularly the agency of women.”<sup>115</sup>

Abrams suggests that there are many forms of sexual harassment:

There is harassment that secures the work place as a site of male control versus harassment that secures it as a zone of either male comfort or in masculine normative entrenchment. There is harassment that is directed at women as a group, harassment that is directed at individual women as representatives of a group, and harassment that is directed at men and women as individuals.<sup>116</sup>

Abrams argues that by focusing on the subordination of women, each of the above forms of sexual harassment may be recognized as actionable. She asserts that “[t]his pluralism [of sexual harassment] is crucial in propounding an accurate description of a phenomenon that occurs at the intersection of a variety of oppressive dynamics.”<sup>117</sup>

Professor Vicki Schultz also argues that courts and scholars should increase recognition of nonsexualized behavior as sexual harassment.<sup>118</sup> She asserts that sexual harassment is a tool used (primarily) by men as a method of undermining women’s competence in the workplace and thereby blocking women from certain jobs.<sup>119</sup> She ar-

<sup>110</sup> *Id.* at 696.

<sup>111</sup> By conceiving of sexual harassment as a means of feminizing women and masculinizing men, Franke’s account reaches beyond the workplace to encompass all other fora. See Franke, *supra* note 106, at 1248-49 (noting school-based sexual harassment as an example).

<sup>112</sup> Abrams, *supra* note 30.

<sup>113</sup> *Id.* at 1172. In this article, Abrams discusses Bernstein’s and Franke’s theories and concludes that Bernstein and Franke have shifted away from a subordination account of sexual harassment. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1215.

<sup>117</sup> *Id.* at 1217.

<sup>118</sup> See Schultz, *supra* note 30, at 1689.

<sup>119</sup> See *id.* at 1686-87.

gues that courts have placed too much emphasis on the “sexual” aspect of sexual harassment claims.<sup>120</sup> That is, according to Professor Schultz, courts currently employ a “sexual desire-dominance paradigm” when judging sexual harassment claims.<sup>121</sup> If the defendant’s conduct is sexual in nature, the courts more readily find a hostile environment.<sup>122</sup> However, courts often ignore nonsexual conduct such as inadequate training, name calling, physical contact and abuse, and less favorable work assignments.<sup>123</sup> Professor Schultz notes that by ignoring this type of behavior, courts may be overlooking treatment that is clearly geared toward discriminating against women because of sex.<sup>124</sup> Schultz accepts and incorporates Franke’s theory of gender conformity and includes non-gender-conforming men among those whose competence is questioned.<sup>125</sup> Therefore, Schultz argues for a competence-centered paradigm in which courts focus on whether the defendant used sexual and/or nonsexual conduct to undermine the plaintiff’s competence, creating a hostile environment because of the plaintiff’s gender.<sup>126</sup>

Franke and Abrams address the harms of sexual harassment on a macro level. Although each victim feels the harm as an individual, the harm arises as a result of that individual’s status within a group. In this way, the subordination of women through the enforcement of male norms or the exercise of power to enforce those norms is a harm that affects entire groups. In contrast, Schultz and Bernstein view the harm of sexual harassment on a micro level—sexual harassment depriving the individual of respect or sexual harassment as undermining an individual’s competence. In other words, the harm is experienced by the individual herself.

Regardless of the perspective from which each scholar views the harm, each faults the courts for operating under too narrow a view of sexual harassment. As a positive or descriptive matter, they claim that courts tend to ignore behavior that “merely” subordinates, disrespects, enforces gender norms, or attacks the competence of women (and men). Our findings support this claim. Plaintiffs alleging “harassment as sexualized behavior”<sup>127</sup> have significantly higher win rates than other sexual harassment plaintiffs. Plaintiffs who alleged harassment based on comments of a sexual or physical nature were more successful than plaintiffs who alleged comments that devalued women as wo-

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120 *See id.* at 1689.

121 *Id.*

122 *See id.*

123 *See id.* at 1689-90.

124 *See id.* at 1690-91.

125 *See id.* at 1691-92.

126 *See id.* at 1692.

127 *See supra* Part III.

men (such as “honey” or “babe”).<sup>128</sup> Further, harassment claims premised upon physical contact of a sexual nature met greater success than physical conduct of a nonsexual nature.<sup>129</sup>

These “less successful” claims are encompassed within the theories described above. For Bernstein, physical conduct (such as hitting) or belittling, devaluing language surely meets a test of denying an employee the respect she is due. For Schultz, this behavior is calculated to undermine the competence of women in the workplace. For Franke, the belittling names aimed at women reminds women of the feminine roles they are required to play, while those aimed at men criticizes them for not attaining masculine goals. In addition, the physical conduct, even if not of a sexual nature, does the same. In cross-sex cases, by hitting women, men reinforce the gendered norms of the male aggressor and the passive female victim. In same-sex cases, nonsexual physical conduct (such as the “rough housing present in *Oncale*”<sup>130</sup>) serves to keep men in the physical aggressor mode while punishing those men who do not play along. Finally, for Abrams, language devaluing women reminds women of the primacy of male norms in the workplace while the physical conduct secures the workplace as a site of male control.

Our findings also support the arguments of Schultz and Abrams that courts are not including nonphysical, nonsexual harassment within the scope of sexual harassment. In cases in which plaintiffs alleged less favorable work assignments, for example, plaintiffs were significantly less successful than plaintiffs alleging requests for sexual favors.

Finally, in considering the difference in win rates between allegations involving comments about women in general versus comments directed at the plaintiff specifically, we see that courts give greater attention to plaintiff-specific conduct.<sup>131</sup> When plaintiffs alleged harassment based upon comments of a physical nature made about women in general, the success rate was a mere 11%. However, when the comments concerned the particular plaintiff and were of a physical nature, the win rate rises to 28%. Although Schultz and Bernstein would most likely find comments directed at women as a group to constitute sexual harassment, Franke and Abrams’s “macro” perspectives are more on point. Under Franke’s theory, comments about women in general, not about the particular plaintiff, reinforce the feminization

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<sup>128</sup> See *supra* notes 85-86 and accompanying text (reporting a 60% success rate for suits based on allegations of comments of sexual or physical nature).

<sup>129</sup> See *supra* Part III.

<sup>130</sup> For example, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), involved “roughhousing.” *Id.* at 82.

<sup>131</sup> See *supra* Part III.

of women (and in the alleged harasser, reinforce the role of men as sexual aggressor). For Abrams, these comments contribute directly to subordination of women by reducing women to sexualized beings rather than employees of equal status.

In sum, our findings support the claim that courts do not recognize all discriminatory behavior that reinforces gender roles and sexualizes women in the workplace. The sweep of court opinions reveals that courts take most seriously claims of sexual harassment that are plaintiff-specific and sexually based.

## B. The Reasonable Woman Standard

In order to state an actionable claim, the aggrieved party must allege harassment sufficiently "severe or pervasive" to be considered both subjectively and objectively hostile or abusive.<sup>132</sup> Any such test immediately begs the question of whose perspective courts should use to evaluate the allegations most accurately and objectively. Until 1991, the courts used the reasonable person test.

In 1991, the Ninth Circuit articulated a "reasonable woman" standard to analyze the plaintiff's claim. In *Ellison v. Brady*,<sup>133</sup> the court declared, "We . . . prefer to analyze harassment from the victim's perspective."<sup>134</sup> Under this methodology, the plaintiff can prove a prima facie case of hostile environment by showing "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."<sup>135</sup>

Two years after *Ellison*, the Supreme Court in *Harris v. Forklift Systems, Inc.* held that in order for sexual harassment to be actionable it must be perceived objectively by a "reasonable person" to be hostile or abusive.<sup>136</sup> Despite the Court's use of the "reasonable person" standard, it did not explicitly reject the "reasonable woman" test.<sup>137</sup> Following *Harris*, the lower courts split on the question of the appropriate objective standard.<sup>138</sup> The Ninth Circuit responded by

<sup>132</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

<sup>133</sup> 924 F.2d 872 (9th Cir. 1991).

<sup>134</sup> *Id.* at 878.

<sup>135</sup> *Id.* at 879.

<sup>136</sup> *Harris*, 510 U.S. at 21.

<sup>137</sup> See Mary Anne Weiss, Note, *Ninth Circuit Broadens Reasonableness Standard for Hostile Work Environment Sexual Harassment: Fuller v. City of Oakland*, 31 U.S.F. L. REV. 665, 676 (1997) ("The Court mentioned the reasonable person, but it did not hold that such a standard was required . . . Thus, the Court avoided the opportunity to resolve the conflict between the circuits on the appropriate reasonableness standard.")

<sup>138</sup> Compare *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir. 1995) ("The test is an objective one, not a standard of offense to a 'reasonable woman.'"), with *West v. Phila. Elec. Co.*, 45 F.3d 744, 753 (3d Cir. 1995) (noting that the relevant question is whether "the discrimination would have detrimentally affected a reasonable

adopting the standard of a "reasonable person with the same fundamental characteristics."<sup>139</sup>

Since *Ellison*, the reasonable woman standard has received much attention in the academic literature. Many commentators argue that the use of a "reasonable man" standard is contrary to the intent of Title VII and that courts should follow the lead of the Ninth Circuit and adopt the reasonable woman (or reasonable person with the same fundamental characteristics or reasonable victim) standard.<sup>140</sup> Others have suggested that such a standard is contrary to the principle of equality or that it is unfair to hold men to an unclear standard of behavior.<sup>141</sup>

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person of the same protected class in that position") and *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1456 (7th Cir. 1994) (employing a "reasonable woman" standard).

<sup>139</sup> *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). The Ninth Circuit's standard was intended to represent a compromise between the *Ellison* reasonable woman standard and the Supreme Court's reasonable person standard. See *Crowe v. Witel Communications Sys.*, 103 F.3d 897, 900 (9th Cir. 1996).

<sup>140</sup> See Sarah A. DeCosse, *Simply Unbelievable: Reasonable Women and Hostile Environment Sexual Harassment*, 10 LAW & INEQ. 285, 286, 309 (1992) (arguing that the reasonable woman standard challenges stereotyped roles and permits a broader scope of actionable claims); Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1157 (1995) (advocating the use of a "rational woman" standard); Kim L. Kirn, *The "Reasonable Woman" Standard in Sexual Harassment Cases*, 81 ILL. B.J. 404, 408 (1993) (encouraging Illinois courts to adopt the reasonable woman test); Robert J. Shoop, *The Reasonable Woman in a Hostile Work Environment*, 72 EDUC. L. REP. 703, 703 (1992) (arguing that the reasonable woman standard makes the legal system more responsive to women). Commentators have also examined the reasonable woman standard and the *Ellison* decision. See Angela Baker, Comment, *The "Reasonable Woman" Standard Under Ellison v. Brady: Implications for Assessing the Severity of Sexual Harassment and the Adequacy of Employer Response*, 17 J. CORP. L. 691, 692 (1992) (noting that the *Ellison* reasonable woman standard allows courts to examine the difference in social power between women and men); Deborah S. Brenneeman, Comment, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281, 1305 (1992) (advocating the reasonable woman standard as a means of neutralizing the divergent perceptions of men and women regarding appropriate behavior); Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 857 (1993) (advocating a reasonable victim standard); Cheryl L. Dragel, Note & Comment, *Hostile Environment Sexual Harassment: Should the Ninth Circuit's "Reasonable Woman" Standard Be Adopted?*, 11 J.L. & COM. 237, 238 (1992) (noting that "'the reasonable woman standard' appears to ease the burden on female plaintiffs seeking to establish hostile environment sexual harassment"); Jeffrey A. Gettle, Comment, *Sexual Harassment and the Reasonable Woman Standard: Is It a Viable Solution?*, 31 DUQ. L. REV. 841, 857 (1993) (arguing for the adoption of the reasonable woman test); Deborah B. Goldberg, Note, *The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases*, 2 CARDOZO WOMEN'S L.J. 195, 212 (1995) (advocating adoption of the reasonable woman standard and arguing that the reasonable person standard hurts women).

<sup>141</sup> See Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 825-27 (1993) (arguing that it is unfair to hold men to a standard that they may be unable to fully appreciate or understand because they are men); Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 621 (1993) ("[C]ourts that have embraced the new standard have done so primarily as a declaration of political faith, not because the standard was of any real value."); Kathleen A. Kenealy, *Sex-*

In light of such vigorous debate, we read each case to see whether the courts discussed the reasonableness standard and, if so, whether the standard was that of the reasonable person, reasonable woman, or reasonable victim. Interestingly, we found more articles discussing the reasonable woman standard than courts adopting the standard. Of all the cases we studied, only twenty-five opinions adopted the reasonable woman standard.

TABLE 6  
REASONABLENESS STANDARDS AND WIN RATES OF SEX HARASSMENT  
PLAINTIFFS IN DISTRICT COURT

| Reasonableness Standard Used                            | Plaintiff<br>Loses | Plaintiff<br>Wins  | Total               |
|---|--------------------|--------------------|---------------------|
| Reasonable Person                                       | 45<br>56%<br>18%   | 36<br>44%<br>14%   | 81<br>100%<br>16%   |
| Reasonable Woman  | 12<br>48%<br>5%    | 13<br>52%<br>5%    | 25<br>100%<br>5%    |
| Reasonable Victim                                       | 2<br>50%<br>1%     | 2<br>50%<br>1%     | 4<br>100%<br>1%     |
| Reasonable Victim with Plaintiff's demographic features | 1<br>100%<br>0%    | 0<br>0%<br>0%      | 1<br>100%<br>0%     |
| None  | 185<br>47%<br>76%  | 206<br>53%<br>80%  | 391<br>100%<br>78%  |
|   | 245<br>49%<br>100% | 257<br>51%<br>100% | 502<br>100%<br>100% |

First number in box: number of cases  
Second number in box: row percentage  
Third number in box: column percentage

Pearson  $\chi^2 = 2.8827$   
Prob = 0.578

Fewer than one quarter of the district court cases mentioned any "reasonable standard" at all, and of those cases, approximately three-quarters employed the reasonable person standard. The plaintiff's success rate was slightly higher in cases in which the courts adopted

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*ual Harassment and the Reasonable Woman Standard*, 8 LAB. LAW. 203, 203, 210 (1992) (proposing that the reasonable woman standard is a legal setback for women because it sends the message that women are inherently unreasonable); Walter Christopher Arbery, Note, *A Step Backward for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims*, 27 GA. L. REV. 503, 552-53 (1993) (rejecting the reasonable woman standard because it does not reflect the idea of shared values between men and women); Saba Ashraf, Note, *The Reasonableness of the "Reasonable Woman" Standard: An Evaluation of Its Use in Hostile Environment Claims Under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483, 484 (1992) (arguing that the reasonable woman standard subverts Title VII because it is "difficult for employers to announce and enforce policies concerning sexual harassment that conform to a subjective, rather than an objective standard").

the reasonable woman standard than those in which the courts used the reasonable person standard.<sup>142</sup> Given how few cases mentioned the reasonable standard at all, the specific "reasonable" standard used is not statistically significant in predicting win rates.

Some commentators have suggested that courts are increasingly adopting the reasonable woman standard in sexual harassment cases.<sup>143</sup> We see no dramatic upward trend, with only a handful of courts each year using the reasonable woman standard. Our data show that courts used the standard in 5% of the cases in 1994 and 7% in 1995, compared to 6% in 1991, 8% in 1992, and 11% in 1993.

Perhaps most interesting is the interplay between the "reasonable" standard used in those cases in which plaintiffs lost. When courts determined that the conduct complained of was not severe or pervasive enough to create a hostile environment, they most often did not mention any reasonableness standard. However, when they did, they cited the reasonable person test over 75% of the time. Further, of the twenty-seven cases in which courts rejected claims on the grounds that the plaintiff should not reasonably be affected by the conduct, courts discussed the reasonable person test in eighteen cases and the reasonable woman standard in a mere three cases. Although the numbers tell an interesting story, we must once again point out that the volume of cases using "reasonable" standards is too small to yield any statistical significance.<sup>144</sup>

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<sup>142</sup> See e.g., Bernstein, *supra* note 30, at 471 (noting that "female plaintiffs have arguably had [greater] success using the reasonable woman standard"); Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?*, 26 IND. L. REV. 227, 229 (1993) (surmising that female plaintiffs are more likely to prevail under the reasonable woman standard than the reasonable person standard).

<sup>143</sup> See Liesa L. Bernardin, Note, *Does the Reasonable Woman Exist and Does She Have Any Place in Hostile Environment Sexual Harassment Claims Under Title VII After Harris*, 46 FLA. L. REV. 291, 322 (1994) (noting that recent decisions suggest that courts may be beginning to follow the reasonable woman standard); cf. Elizabeth A. Glidden, Note, *The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment*, 77 IOWA L. REV. 1825, 1828 (1992) (pointing to the "innovative approach" some courts are using by employing the reasonable woman standard).

<sup>144</sup> In addition to the "reasonable" standard, we also examined the so-called "social context standard" set out in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986). In this case, the Sixth Circuit affirmed the district court's dismissal of the plaintiff's hostile environment claim in part because the Sixth Circuit found that the plaintiff's "irascible" personality was a sufficiently nondiscriminatory reason for her discharge. See *id.* at 615, 618. However, the court acknowledged that "the presence of actionable sexual harassment would be different depending upon the personality of the plaintiff and the prevailing work environment." *Id.* at 620. The "social context" standard takes into account both subjective and objective factors and it considers the totality of the work environment coupled with the plaintiff's reasonable expectations. *Id.* at 620. In discussing the "prevailing work environment," the Sixth Circuit quoted the district court's opinion with approval:

Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—

### C. Same-Sex Harassment

In 1998, the Supreme Court held that same-sex harassment is actionable under Title VII,<sup>145</sup> thereby resolving an issue which had divided the lower courts.<sup>146</sup> In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women.<sup>147</sup> Justice Scalia noted that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex."<sup>148</sup> Justice Scalia further reiterated that Title VII only covers discrimination "because of sex."<sup>149</sup> That is, "Title VII does not prohibit all verbal or physical harassment in the workplace."<sup>150</sup> Rather, the behavior alleged to be sexual harassment must be shown to have occurred because of the plaintiff's sex.

While same-sex harassment is actionable, the phrase "same-sex harassment" covers a range of behaviors. Professor Franke suggests three categories of same-sex harassment.<sup>151</sup> The first category involves a gay supervisor who seeks sexual favors from or creates a sexually hostile environment for his male subordinates.<sup>152</sup> The second cate-

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or can—change this. . . . But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

*Id.* at 620-21.

A year later, the Sixth Circuit in *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987), held that the plaintiff failed to demonstrate that she had suffered any "adverse employment action" because she continued to receive the same salary and benefits that she had received before she filed her sexual harassment charge. *Id.* at 638. In reaching this conclusion, the Sixth Circuit applied and espoused a reasonable woman standard for female victims, *id.* at 637, thereby limiting the *Rabidue* "social context standard." Interestingly, despite this subsequent limitation, the "social context" standard was mentioned in ten cases (or 2% of the cases in our study).

<sup>145</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

<sup>146</sup> See Erwin Chemerinsky, *Defining Sexual Harassment*, TRIAL, May 1998, at 86 (discussing the *Oncale* decision); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 678 (1998) (discussing what constitutes same-sex harassment in federal courts); Deborah Zalesne, *When Men Harass Men: Is It Sexual Harassment?*, 7 TEMP. POL. & CIV. RTS. L. REV. 395 (1998) (discussing the interpretation of "sex" under Title VII and whether courts have been willing to read Title VII to protect workers from same-gender sexual harassment); Linda K. Davis, Note & Comment, *When Is Same-Gender Sexual Harassment Actionable Under Title VII?* Fredette v. BVP Management Associates, 22 NOVA L. REV. 559, 559 (1998) (noting the controversy in federal circuit courts over whether same-sex harassment is actionable); Corey Taylor, Comment, *Same-Sex Sexual Harassment in the Workplace Under Title VII: The Legal Dilemma and the Tenth Circuit Solution*, 46 U. KAN. L. REV. 305, 305 (1998) (observing a split in the federal courts that have evaluated same-sex harassment claims).

<sup>147</sup> *Oncale*, 523 U.S. at 78.

<sup>148</sup> *Id.* at 79.

<sup>149</sup> *Id.* at 79-80.

<sup>150</sup> *Id.* at 80.

<sup>151</sup> Franke, *supra* note 30, at 696-98.

<sup>152</sup> *Id.* at 696-97.



gory includes a heterosexual defendant who exhibits sexual behavior in the workplace in a manner which another male employee regards as offensive.<sup>153</sup> In this second set of cases, "the harasser engages in sexual behavior that is designed to or has the effect of making the plaintiff annoyed, uncomfortable . . . or otherwise victimized by the defendant's conduct."<sup>154</sup> *Oncale* falls within this second category.<sup>155</sup> The third category encompasses "nongay hostile environment cases where a man in the workplace is targeted for harassment of a sexual nature because he fails to conform to hetero-masculine norms" and is undertaken because of the plaintiff's gender identity.<sup>156</sup>

We analyzed those cases with a male plaintiff to determine the breakdown between cases in which a male supervisor engaged in sexually based behavior, a female supervisor engaged in sexually based behavior, and those in which *Oncale* "non-conforming" behavior was present. Of the twenty-three cases in which we could categorize the behavior, eleven involved a male supervisor engaging in sexually-based behavior (the first category described by Franke). The remaining twelve were split evenly between a female harasser engaging in sexually-based activity and one or more male harassers engaging in "category two," *Oncale* behavior.

TABLE 7  
DISTRICT COURT CASES WITH MALE VICTIMS BY TYPE OF  
SEXUALLY-HARASSING BEHAVIOR

| Type of Harassing Behavior        | Male Plaintiff Loses | Male Plaintiff Wins | Total |
|-----------------------------------|----------------------|---------------------|-------|
| Male Supervisor, sexually based   | 6                    | 5                   | 11    |
| Female Supervisor, sexually based | 3                    | 3                   | 6     |
| Male "nonconforming" behavior     | 6                    | 0                   | 6     |
| Total                             | 15                   | 8                   | 23    |

Pearson  $\chi^2$  (2) = 9.8795 Pr = 0.043

As Table 7 shows, complaints brought by male victims against heterosexual harassers have been uniformly unsuccessful. By contrast, male victims complaining of sexual harassment by either female harassers or male homosexual harassers have been just as successful as female

<sup>153</sup> *Id.* at 697-98.

<sup>154</sup> *Id.*

<sup>155</sup> The plaintiff, *Oncale*, alleged that while employed on an offshore oil drilling rig, male employees subjected him to sexual abuse. *Oncale* alleged that the harassing actions included the following: two employees restrained him while a third employee placed his penis on *Oncale*'s neck on one occasion and on *Oncale*'s arm on another occasion; employees threatened him with homosexual rape; and, employees used force to push a bar of soap into *Oncale*'s anus. See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118 (5th Cir. 1996).

<sup>156</sup> Franke, *supra* note 30, at 766.

victims. Despite the small numbers, the differences are significant at the 5% level of significance. Given the gruesome physical attack in *Oncale*, the leading same-sex harassment case, it is perhaps surprising that overall male-victim cases are no more likely to involve physical harassment. Only eleven of the twenty-seven male-victim cases (41%) involved such harassment, compared to 44% of the cases with female plaintiffs.

#### D. Title VII and the First Amendment

Another subset of the recent literature concerning sexual harassment focuses on the interplay between Title VII and the First Amendment.<sup>157</sup> Two court decisions have spawned much of this debate. In

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<sup>157</sup> See, e.g., Stacy J. Cooper, *Sexual Harassment and the Swedish Bikini Team: A Reevaluation of the "Hostile Environment" Doctrine*, 26 COLUM. J.L. & SOC. PROBS. 387, 420-34 (1993) (arguing that court's invocation of the First Amendment to protect offensive speech overlooks women's compelling interest in the workplace and in society); Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649, 649-51 (1997) (arguing that anti-discrimination law withstands First Amendment scrutiny); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 688 (1997) (questioning whether Title VII unconstitutionally restricts employees' freedom of speech); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 1 (describing the Supreme Court's failure to discuss the First Amendment in *Harris* as "somewhat surprising" in light of the increased publicity about collisions between speech and equality interests); Linda E. Fisher, *A Communitarian Compromise on Speech Codes: Restraining the Hostile Environment Concept*, 44 CATH. U. L. REV. 97, 98 (1994) (arguing that "hostile environment" is a vague term in speech codes); Gary Goodpaster, *Equality and Free Speech: The Case Against Substantive Equality*, 82 IOWA L. REV. 645, 646-47 (1997) (discussing whether efforts at creating substantive equality by restricting racially or sexually discriminatory speech violates the First Amendment); David Benjamin Oppenheimer, *Workplace Harassment and the First Amendment: A Reply to Professor Volokh*, 17 BERKELEY J. EMP. & LAB. L. 321, 321-22 (1996) (defending sexual harassment law as not conflicting with free speech rights); Ellen R. Peirce, *Reconciling Sexual Harassment Sanctions and Free Speech Rights in the Workplace*, 4 VA. J. SOC. POL'Y & L. 127, 128-29 (1997) (examining the conflict between First Amendment rights and sexual harassment law); Wayne L. Robbins, *When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789 (1995) (advocating that Title VII should not restrict political speech); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 465 (1995) (arguing that First Amendment analysis can properly address Title VII hostile environment issues); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757, 757-58 (1992) (arguing that broader regulation undermines women's equality); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (suggesting that Title VII is a valid time, place, and manner restriction); Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305 (1996) (asserting that hostile work environment law is too broad and restricts constitutionally protected speech); see also Peggy E. Bruggman, Note, *Beyond Pinups: Workplace Restrictions on the Private Consumption of Pornography*, 23 HASTINGS CONST. L.Q. 271, 273 (1995) (arguing that "the government as an employer may restrict even private consumption of pornography for the purpose of ridding the workplace of discrimination"); Michael E. Collins, Comment, *Pin-ups in the Workplace—Balancing Title VII Mandates with the Right of Free Speech*, 23 CUMB. L. REV. 629, 629-30 (1992-1993) (proposing an obscenity test instead

*Robinson v. Jacksonville Shipyards, Inc.*,<sup>158</sup> the court held that pinups and pornography displayed in the workplace violated Title VII: "pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment."<sup>159</sup>

In 1992, the Supreme Court handed down a significant decision, striking down a St. Paul, Minnesota ordinance prohibiting bias-motivated disorderly conduct as facially invalid under the First Amendment.<sup>160</sup> The majority opinion distinguished the prohibitions of Title VII as resting within the bounds of the First Amendment because Title VII covers only "sexually derogatory 'fighting words.'"<sup>161</sup> However, in his concurrence, Justice White applied the majority opinion's analysis to Title VII and concluded that "[u]nder the general rule the Court applies in this case, Title VII hostile work environment claims would suddenly be unconstitutional."<sup>162</sup>

The litany of articles and comments these decisions generated address two categories of expression: nonverbal expression, such as posters, pinups, or graffiti; and verbal (oral) expression. As discussed above, our data demonstrate that allegations falling into the first category are rare. Plaintiffs alleged written comments or graffiti in only 6.8% of the cases and posters or pinups in 7%. In fact, only one case in our database involves allegations of pornography and graffiti in the absence of any other conduct, and the plaintiff lost. Often lost in the debate surrounding *Jacksonville Shipyards* is the fact that the plaintiff was the target of personal comments as well as denigrating comments about women in general. When plaintiffs allege pornography or graffiti in addition to other conduct, they are successful a remarkable 80% of the time.

### E. Employer Liability

Employer liability has long held an important place in sexual harassment cases. In fact, it is one of the three most commonly cited reasons by courts for finding that a plaintiff has not proven her

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of Title VII to address the issue of pinups in the workplace); Aviva O. Wertheimer, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 *FORDHAM L. REV.* 793, 848 (1994) (discussing Title VII and "fighting words").

<sup>158</sup> 760 F. Supp. 1486 (M.D. Fla. 1991).

<sup>159</sup> *Id.* at 1535; see also Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 *OHIO ST. L.J.* 481, 495 (1991) (citing *Jacksonville Shipyards* as the first decision to impose liability solely on the basis of arguably protected expression).

<sup>160</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

<sup>161</sup> *Id.* at 389.

<sup>162</sup> *Id.* at 409 (White, J., concurring).

case.<sup>163</sup> Until recently, and primarily as a result of the Supreme Court's ruling in *Meritor*,<sup>164</sup> employer liability for sexual harassment has remained the subject of much scholarly discussion<sup>165</sup> and judicial variance.<sup>166</sup> Following *Meritor*, the lower courts unanimously agreed that an employer was vicariously liable when a plaintiff demonstrated a cognizable quid pro quo claim.<sup>167</sup> However, courts have less success-

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<sup>163</sup> The other two are that the conduct was not severe or pervasive and that the court either did not credit the plaintiff's allegations or there was insufficient support for the plaintiff's allegations.

<sup>164</sup> *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 67 (1985) (holding that severe and pervasive sexual harassment that alters employee's conditions of employment is actionable under Title VII).

<sup>165</sup> See Joseph G. Allegritti, *Sexual Harassment by Nonemployees: The Limits of Employer Liability*, 9 EMPLOYEE REL. L.J. 98 (1983) (discussing employer liability); Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 41-42 (1992-1993) (arguing for vicarious liability for supervisors); Cynthia Fryer Cohen & Joyce P. Vincelette, *Notice, Remedy, and Employer Liability for Sexual Harassment*, 35 LAB. L.J. 301, 301 (1984) (discussing employer liability for sexual harassment under EEOC guidelines); Sheryl A. Greene, *Reevaluation of Title VII Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 13 T. MARSHALL L. REV. 29, 29-31 (1988) (discussing the standard for employer liability after the Court's decision in *Meritor*); Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375 (1998) (advocating curtailment of employer liability for sexual overtures by coworkers); Kiesling, *supra* note 66, at 1, 1-2 (discussing the liability of "on-site" employers for claims of a temporary employee under Title VII); David J. Burge, Note, *Employment Discrimination—Defining Employer's Liability Under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C. L. REV. 795, 795-97 (1984) (discussing the standards for determining employer liability); Nancy Fisher Chudacoff, Significant Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U. L. REV. 535 (1981) (explaining employer liability guidelines under EEOC); Matthew J. Cleveland, Comment, *Title VII and Negative Job References: Employees Find Safe Harbor in Robinson v. Shell Oil Co.*, 31 J. MARSHALL L. REV. 521 (1998) (discussing employer liability for negative job references); Lucy B. Longstreth, Note, *Hostile Environment Sexual Harassment: A Wrong Without a Remedy?—Meritor Savings Bank v. Vinson*, 21 SUFFOLK U. L. REV. 811, 811 (1987) (same); Christine O. Merriman & Cora G. Yang, Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 83-86 (1984-1985) (discussing coworker sexual harassment and advocating for change so that victims are able to obtain judicial remedies); Michael D. Vhay, Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 328-33 (1988) (discussing the history of sexual harassment as it has been recognized and defined by the courts).

<sup>166</sup> See *Faragher v. City of Boca Raton*, 524 U.S. 775, 785-86 (1998) (noting the confusion caused by *Meritor*); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751-54 (1998) (same). See generally Graham Penn, Comment, "Because I'm the Boss:" *Employer Liability for Supervisors' Hostile Environment Sexual Harassment*, 51 FLA. L. REV. 373 (1998) (praising the Supreme Court's decision in *Faragher* for eliminating the confusion caused by *Meritor* by providing a clear rule for determining employer liability for all Title VII sexual harassment claims).

<sup>167</sup> *Faragher*, 524 U.S. at 790-91.

fully agreed upon a rule for determining employer liability for an otherwise actionable hostile environment claim.<sup>168</sup>

This confusion in the lower courts may account for the high number of cases that turn on the question of employer liability. Our study shows that when an employer has a program that allows victims to report sexual harassment, plaintiffs are successful barely one-third of the time, far less than in other cases. Further, where a plaintiff has not reported the harassment to a supervisor, either formally or informally, plaintiffs lose 76% of the time. Thus, prior to the Court's decisions in *Faragher* and *Ellerth*, the plaintiff's steps to report alleged harassment and the existence of an employer program were paramount.

In 1998, the Supreme Court issued two important decisions on the same day. These decisions identified the circumstances under which an employer may be held liable for the acts of a supervisor whose sexual harassment of subordinates had created a hostile work environment.<sup>169</sup> In both cases, petitioners alleged that a pattern of sexual harassment by supervisors created a sexually hostile working environment. The Court based its determination of employer liability on agency law;<sup>170</sup> holding that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor."<sup>171</sup>

The Court simultaneously created an affirmative defense for hostile environment cases:

The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee

In view of our finding of the importance of an employer program and a plaintiff's reporting of the alleged harassment, the *Ellerth* and *Faragher* decisions will not significantly vary plaintiff success rates. In fact, the two elements of the new *Faragher* affirmative defense were already critical to the success or failure of a sexual harassment claim.

#### CONCLUSION

Our method tried to objectively code all cases in a single area of law—in this case, federal employment sexual harassment law. We then examined the overall characteristics of the cases, using what we have called the “sweep” of cases. This method differs from the standard legal methodology used in teaching and scholarship, which intensively examines the judicial reasoning in the leading appellate cases, many of which are admittedly atypical. The disadvantage of the traditional approach is that it disproportionately focuses on marginal cases at the expense of the run-of-the-mill cases. This may assist lawyers in handling cases at the margin, but does not help them with the typical case. Our method extensively examines the bulk of cases.

This method can jar traditional sensibilities, and lawyers are almost instinctively suspicious of its findings (unless they accord with prior beliefs, in which case the method is boring). In some respects, our sweeping empirical approach is like some of the newer multidisciplinary approaches to the law, such as law and economics, psychology, and sociology. These approaches are controversial in part because they also tend to examine more cases less thoroughly and, hence, also run up against the law's normal methodologies. In our teaching and scholarship, we engage in a fair amount of what we are calling “traditional” scholarship. Certainly we do not want to discredit that enterprise. But we believe that examination of the sweep of cases will provide useful antidotes to the tendency to generalize too far from a handful of cases.

What does our study show? Like all empirical studies, many of the findings confirm common sense or folk wisdom in the area. Others are more surprising. Still others, we suspect, will elicit both reactions. After reviewing our study, readers who have had no previous exposure to a particular finding might be able to explain and incorporate such findings into their own conceptions of reality.

Our study examines the sweep of sexual harassment opinions in the federal courts. It is not a study of sexual harassment in the workplace, nor is it a study of leading cases. Rather, it explores the body of sexual harassment claims with which judges wrestle, from which they form their world views, and upon which they develop the doctrine of sexual harassment law.

We find that a disproportionate number of plaintiffs are blue-collar or clerical. Most work harassment occurs at work, but 20% of the cases include claims of off-work harassment. Many more cases involve mixed workplaces than mostly-male workplaces (and only a tiny handful of cases involve mostly-female workplaces). Most defendants are private employers, but a disproportionately high percentage of cases involve government employers. Almost 80% of the cases involved harassment by supervisors in whole or in part, while only 13% limited their complaint to co-worker harassment.

Most cases (70%) involve solely a hostile environment claim, and a substantial number (22.5%) combine hostile environment and quid pro quo claims. Mostly-male workplaces tend to generate a disproportionate number of hostile environment claims while mixed workplaces have relatively more quid pro quo claims. Blue-collar cases have a higher proportion of physical harassment claims than do cases from other settings. In cases where we could identify the duration of the harassment, 44% involved harassment occurring for longer than a year. Only 4% of the cases involved a single incident.

Successful cases are likely to involve sexualized conduct directed at individual victims. Sexual harassment claims involving differential but nonsexual conduct and conduct demeaning to women in general are far less successful. Male victims comprise less than 6% of the cases, and their cases are significantly less successful than cases brought by female victims. Furthermore, complaints from mostly-male workplaces tend to be more successful than those from mixed workplaces. Two critical factors for a successful case are: (1) that the victim complained within the organization in some fashion, and (2) that the employer had established no formal process to deal with sexual harassment issues. Thus, the prior case law had anticipated the 1998 Supreme Court case that articulated these factors as critical components in a sexual harassment defense.<sup>173</sup>

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<sup>173</sup> Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

APPENDIX A  
BASIC DATA ON SEX HARASSMENT OPINIONS

\*, \*\*, \*\*\* = significant at the 10%, 5%, 1% confidence level

Pl = Plaintiff

| Variable                               | District Court Opinions |      |             | Appellate Opinions |      |             |
|--|-------------------------|------|-------------|--------------------|------|-------------|
|  | Number                  | %    | Pl Win Rate | N                  | %    | Pl Win Rate |
| All Cases                              | 502                     | 100% | 51.2%<br>** | 164                | 100% | 39.0<br>**  |
| Publication                            |                         |      |             |                    |      |             |
| Published in official reporters        | 263                     | 52.4 | 56.7        | 126                | 76.8 | 45.2        |
| Order not published; on line           | 36                      | 7.2  | 50.0        | 32                 | 19.5 | 18.8        |
| Not published; on line                 | 163                     | 32.5 | 42.3        | 6                  | 3.7  | 16.7        |
| Missing/Can't tell                     | 40                      | 8.0  | 52.5        |                    |      |             |
| Public Interest Group Involved in Case | 8                       | 1.6  | 75.0        | 2                  | 1.2  | 0           |
| Type of Case                           |                         |      |             |                    |      |             |
| Quid Pro Quo only                      | 22                      | 4.4  | 72.7        | 7                  | 4.3  | 71.4        |
| Hostile Environment only               | 347                     | 69.1 | 51.3        | 129                | 78.7 | 36.4        |
| Both                                   | 113                     | 22.5 | 46.0        | 27                 | 16.5 | 44.4        |
| Other/Missing/Can't tell               | 20                      | 4.0  | 55.0        | 1                  | 0.6  | 0           |
| Site of Harassment                     |                         |      |             |                    |      |             |
| On work Premises                       | 433                     | 86.3 | 50.1        | 151                | 92.1 | 41.1*       |
| Off premises, work-related event       | 49                      | 9.8  | 49.0        | 20                 | 12.2 | 50.0        |
| Off premises, consensual social event  | 30                      | 6.0  | 40.0        | 13                 | 7.9  | 23.1        |
| Off premises, nonconsensual            | 35                      | 7.0  | 51.4        | 15                 | 9.2  | 60.0*       |
| Pl's Tenure at Employer                |                         |      |             |                    |      |             |
| Less than 6 months                     | 44                      | 8.8  | 56.8        | 9                  | 5.5  | 44.4        |
| 6-12 months                            | 44                      | 8.8  | 45.5        | 18                 | 11.0 | 44.4        |
| 1-3 years                              | 101                     | 20.1 | 47.5        | 37                 | 22.6 | 51.4        |
| More than 3 years                      | 190                     | 37.9 | 49.0        | 65                 | 39.6 | 38.5        |
| Missing/Can't tell                     | 123                     | 24.5 | 57.7        | 35                 | 21.3 | 22.9        |
| Employment Status of Pl                |                         |      |             |                    |      |             |
| Not employed when EEOC charges filed   | 314                     | 62.6 | 48.4        | 70                 | 42.7 | 44.3        |
| Employed for EEOC charges, not lawsuit | 47                      | 9.4  | 51.1        | 16                 | 9.8  | 25.0        |
| Employed when lawsuit began            | 53                      | 10.6 | 56.6        | 22                 | 13.4 | 36.4        |
| Missing/Can't tell                     | 88                      | 17.5 | 58.0        | 56                 | 34.2 | 37.5        |
| Occupation of Pl                       |                         |      |             |                    |      |             |
| Blue Collar                            | 171                     | 34.1 | 56.7        | 54                 | 32.9 | 44.4        |
| Clerical                               | 131                     | 26.1 | 48.9        | 54                 | 32.9 | 40.7        |
| Management                             | 71                      | 14.1 | 42.3        | 24                 | 14.6 | 41.7        |
| Professional                           | 56                      | 11.2 | 48.2        | 19                 | 11.6 | 31.6        |
| White Collar                           | 21                      | 4.2  | 47.6        | 4                  | 2.4  | 50.0        |
| Missing/Can't tell                     | 52                      | 10.4 | 55.8        | 9                  | 5.5  | 0           |
| Segregation of Workplace               |                         |      |             |                    |      |             |
| Mostly male                            | 88                      | 17.5 | 59.1        | 24                 | 14.6 | 50.0        |
| Mostly female                          | 4                       | 0.8  | 50.0        | 1                  | 0.6  | 0           |
| Mixed                                  | 145                     | 28.9 | 43.5        | 79                 | 48.2 | 40.5        |
| Missing/Can't tell                     | 265                     | 52.8 | 52.8        | 60                 | 36.6 | 33.3        |
| Race of Pl                             |                         |      |             |                    |      |             |
| White                                  | 21                      | 4.2  | 28.6        | 8                  | 4.9  | 25.0        |
| Black                                  | 45                      | 9.0  | 51.1        | 10                 | 6.1  | 20.0        |
| Hispanic                               | 12                      | 2.4  | 58.3        | 6                  | 3.7  | 50.0        |
| Asian                                  | 3                       | 0.6  | 66.7        |                    |      |             |
| Native American                        | 1                       | 0.2  | 0.0         |                    |      |             |
| Multiple plaintiffs/races              | 5                       | 1.0  | 60.0        | 1                  | 1    | 100         |
| Missing/Can't tell                     | 415                     | 82.7 | 52.1        | 139                | 84.8 | 40.3        |



| Variable                                     | District Court<br>Opinions |      |                | Appellate<br>Opinions |      |                |
|--|----------------------------|------|----------------|-----------------------|------|----------------|
|  | Number                     | %    | Pl Win<br>Rate | N                     | %    | Pl Win<br>Rate |
| <b>Sex of Plaintiff</b>                      |                            |      |                |                       |      |                |
| Male   | 27                         | 5.4  | 44.4           | 7                     | 4.3  | 14.3           |
| Female                                       | 464                        | 92.4 | 50.9           | 152                   | 92.7 | 39.5           |
| Both (at least 1 Male & 1 Female)            | 9                          | 1.8  | 88.9           | 5                     | 3.1  | 60.0           |
| Missing/Can't Tell                           | 2                          | 0.4  | 50.0           |                       |      |                |
| <b>Sexual Orientation of Pl</b>              |                            |      |                |                       |      |                |
| Gay  | 6                          | 1.2  | 16.7           | 1                     | 0.6  | 0              |
| Straight                                     | 124                        | 24.7 | 51.6           | 51                    | 31.1 | 47.1           |
| Missing/Can't tell                           | 372                        | 74.1 | 51.6           | 112                   | 68.3 | 35.7           |
| <b>Marital Status of Pl</b>                  |                            |      |                |                       |      |                |
| Married                                      | 66                         | 13.2 | 57.6           | 23                    | 14.0 | 47.8           |
| Divorced                                     | 17                         | 3.4  | 41.2           | 4                     | 2.4  | 50.0           |
| Single                                       | 40                         | 8.0  | 37.5           | 10                    | 6.1  | 50.0           |
| Single living w/ boyfriend                   | 1                          | 0.2  | 100.0          | 2                     | 1.2  | 0              |
| Widowed                                      | 1                          | 0.2  | 100.0          | 0                     |      |                |
| Missing/Can't Tell                           | 377                        | 75.1 | 51.7           | 125                   | 76.2 | 36.8           |
| <b>Relationship of Pl to someone at work</b> |                            |      |                |                       |      |                |
| No relationship                              | 152                        | 30.3 | 54.0           | 73                    | 44.5 | 48.0           |
| Yes, w/harasser                              | 27                         | 5.4  | 48.2           | 10                    | 6.1  | 30.0           |
| Yes, w/someone else                          | 15                         | 3.0  | 33.3           | 7                     | 4.3  | 42.9           |
| Missing/Can't tell                           | 308                        | 61.4 | 51.0           | 74                    | 45.1 | 31.1           |
| <b>Type of Employer</b>                      |                            |      |                |                       |      |                |
| Private                                      | 367                        | 73.1 | 50.7           | 106                   | 64.6 | 41.5           |
| Federal Government                           | 20                         | 4.0  | 45.0           | 11                    | 6.7  | 27.3           |
| State or Local Government                    | 115                        | 22.9 | 53.9           | 47                    | 28.7 | 36.2           |
| <b>Consent of Pl</b>                         |                            |      |                |                       |      |                |
| Pl never went along/expressed dis-approval   | 331                        | 65.9 | 54.4           | 115                   | 70.1 | 49.6           |
| Pl gave no signals one way or other          | 14                         | 2.8  | 14.3           | 3                     | 1.8  | 33.3           |
| Pl sometimes reacted in kind                 | 31                         | 6.2  | 45.2           | 10                    | 6.1  | 10.0           |
| Missing/Can't tell                           | 126                        | 25.1 | 48.4           | 36                    | 22.0 | 13.9           |
| <b>Type of Harasser</b>                      |                            |      |                |                       |      |                |
| Supervisors or superiors only                | 294                        | 58.6 | 50.7           | 98                    | 59.8 | 39.8           |
| Supervisors and coworkers                    | 99                         | 19.7 | 57.6           | 30                    | 18.3 | 50.0           |
| Coworkers only                               | 67                         | 13.4 | 35.8           | 29                    | 17.7 | 27.6           |
| Missing/Can't tell                           | 42                         | 8.4  | 64.3           | 7                     | 4.3  | 28.6           |
| <b>Length of Harassment</b>                  |                            |      |                |                       |      |                |
| Single Incident (One day)                    | 20                         | 4.0  | 35.0           | 5                     | 3.1  | 0              |
| Less than 6 months                           | 111                        | 22.1 | 49.6           | 38                    | 23.2 | 31.6           |
| 6-12 months                                  | 75                         | 14.9 | 50.7           | 43                    | 26.2 | 39.5           |
| More than 1 year                             | 161                        | 32.1 | 54.7           | 53                    | 32.3 | 58.5           |
| Missing/Can't tell                           | 135                        | 26.9 | 51.1           | 25                    | 15.2 | 16.0           |
| <b>Victim Complained Internally</b>          |                            |      |                |                       |      |                |
| No internal complaint                        | 57                         | 11.4 | 29.8           | 30                    | 18.3 | 23.3           |
| Yes, victim complained internally            | 316                        | 63.0 | 54.1           | 100                   | 61.0 | 45.0           |
| Missing/Can't tell                           | 129                        | 25.7 | 53.5           | 34                    | 20.7 | 35.3           |
| <b>Employer Antiharassment Programs</b>      |                            |      |                |                       |      |                |
| No program                                   | 35                         | 7.0  | 71.4           | 47                    | 28.7 | 48.9           |
| General grievance procedures                 | 54                         | 10.8 | 40.7           | 38                    | 23.2 | 29.0           |
| Specific sex-harassment procedures           | 60                         | 12.0 | 50.0           | 20                    | 12.2 | 40.0           |
| Missing/Can't tell                           | 353                        | 70.3 | 51.0           | 59                    | 36.0 | 37.3           |
| <b>Supervisor Knowledge of Harassment</b>    |                            |      |                |                       |      |                |
| None before victim files extrnl chg          | 41                         | 8.2  | 19.5           | 20                    | 12.2 | 15.0           |
| Yes, supervisor knew of harassment           | 291                        | 58.0 | 56.7           | 109                   | 66.5 | 45.9           |
| Missing/Can't tell                           | 170                        | 33.9 | 49.4           | 35                    | 21.3 | 31.4           |
| <b>Steps Pl took in Reporting Claim:</b>     |                            |      |                |                       |      |                |
| Told coworkers about harassment              | 49                         | 9.8  | 65.3**         | 29                    | 17.7 | 65.5***        |
| Told outside friends                         | 18                         | 3.6  | 66.7           | 7                     | 4.3  | 42.9           |
| Told supervisor informally                   | 210                        | 41.8 | 57.1**         | 82                    | 50.0 | 48.8*          |

| Variable  | District Court Opinions |      |             | Appellate Opinions |      |             |
|---|-------------------------|------|-------------|--------------------|------|-------------|
|   | Number                  | %    | Pl Win Rate | N                  | %    | Pl Win Rate |
| Complained formally   | 233                     | 46.4 | 56.2**      | 80                 | 48.8 | 47.5**      |
| Someone else complained on Pl's behalf  | 9                       | 1.8  | 22.2*       | 12                 | 7.3  | 50.0**      |
| Jury involved in case   |                         |      |             |                    |      |             |
| No jury involvement   | 457                     | 91.0 | 52.1        | 121                | 73.8 | 35.5        |
| Jury involvement  | 32                      | 6.4  | 43.8        | 33                 | 20.1 | 57.6        |
| Missing/Can't tell  | 13                      | 2.6  | 38.5        | 10                 | 6.1  | 20.0        |
| Jury involved in Sex Harassment Claim   |                         |      |             |                    | *    |             |
| No jury involvement   | 470                     | 93.6 | 51.5        | 130                | 79.3 | 39.2        |
| Jury involvement  | 16                      | 3.2  | 56.3        | 15                 | 9.2  | 60.0        |
| Missing/Can't tell  | 16                      | 3.2  | 37.5        | 19                 | 11.6 | 21.1        |
| Request for Punitive Damages  |                         |      | ***         |                    |      |             |
| No request made   | 157                     | 31.3 | 47.1        | 95                 | 57.9 | 39.0        |
| Pl. Requests punitives  | 63                      | 12.6 | 82.5        | 11                 | 6.7  | 63.6        |
| Missing/Can't tell  | 282                     | 56.2 | 46.5        | 58                 | 35.4 | 34.5        |
| Reasonable Standard Used by Court   |                         |      |             |                    |      | *           |
| Reasonable Person   | 81                      | 16.1 | 44.4        | 28                 | 17.1 | 50.0        |
| Reasonable Woman  | 25                      | 5.0  | 52.0        | 3                  | 1.8  | 100.0       |
| Reasonable Victim   | 4                       | 0.8  | 50.0        | 1                  | 0.6  | 0           |
| Reasonable Victim w/Pl's Features   | 1                       | 0.2  | 0.0         | 1                  | 0.6  | 100.0       |
| Missing/Can't tell  | 391                     | 77.9 | 52.7        | 131                | 79.9 | 35.1        |
| Social Context Standard Used by Court   |                         |      |             |                    |      |             |
| Yes, Standard Used  | 11                      | 2.2  | 54.6        | 2                  | 1.2  | 50.0        |
| No, Standard Rejected   | 10                      | 2.0  | 50.0        | 7                  | 4.3  | 57.1        |
| None Mentioned  | 472                     | 94.1 | 50.9        |                    |      |             |
| Missing/Can't Tell  | 9                       | 1.8  | 66.7        | 155                | 94.5 | 36.0        |
| Types of Sexual Harassment:   |                         |      |             |                    |      |             |
| Oral comments about Pl: belittling names (e.g., babe, honey)                    | 98                      | 19.5 | 59.2*       | 45                 | 27.4 | 62.2***     |
| Oral comments about women in general: belittling names                          | 60                      | 12.0 | 58.3        | 33                 | 20.0 | 57.6**      |
| Oral comments about Pl: physical appearance, sexual comments                    | 244                     | 48.6 | 57.4***     | 74                 | 45.1 | 46.0*       |
| Oral comments about women in general; phys appearance, sex comments             | 89                      | 17.7 | 61.8**      | 37                 | 22.6 | 46.0        |
| Pornographic descriptions   | 42                      | 8.4  | 64.3*       | 8                  | 4.9  | 87.5***     |
| Offensive gestures  | 27                      | 5.4  | 51.9        |                    |      |             |
| Written comments, like graffiti   | 34                      | 6.8  | 70.6**      | 9                  | 5.5  | 66.7*       |
| Objectionable letters sent to Pl  | 25                      | 5.0  | 52.0        | 8                  | 4.9  | 50.0        |
| Posters/pinups in public areas  | 35                      | 7.0  | 60.0        | 12                 | 7.3  | 66.7**      |
| Sexual materials left in Pl's private space; e.g., desk, locker                 | 25                      | 5.0  | 68.0*       | 9                  | 5.5  | 66.7**      |
| Physical contact of sexual nature; e.g., squeezing, pinching, grabbing          | 210                     | 41.8 | 59.5***     | 78                 | 47.6 | 46.2*       |
| Physical contact of nonsexual nature; e.g., hitting                             | 43                      | 8.6  | 62.8        | 17                 | 10.4 | 70.6***     |
| Less favorable treatment in work assignments, conditions                        | 145                     | 28.9 | 55.9        | 35                 | 21.3 | 60.0***     |
| Favorable treatment to employees in sexual relations with supervisors/employers | 17                      | 3.4  | 88.2***     | 7                  | 4.3  | 42.0        |
| Requests for dates  | 100                     | 19.9 | 53.0        | 53                 | 32.3 | 56.6***     |
| Requests for sexual favors  | 149                     | 29.7 | 59.1**      | 54                 | 32.9 | 57.9**      |
| Grouped types of sexual harassment:   |                         |      |             |                    |      |             |
| Plaintiff specific allegations  | 426                     | 84.7 | 52.8*       | 140                | 85.4 | 44.3***     |
| Physical harassment   | 224                     | 44.6 | 59.4***     | 87                 | 53.1 | 49.4        |

| Variable                                    | District Court Opinions |      |             | Appellate Opinions |      |             |
|---|-------------------------|------|-------------|--------------------|------|-------------|
|   | Number                  | %    | Pl Win Rate | N                  | %    | Pl Win Rate |
| Case covered by 1991 Civil Rights Act       | 33                      | 6.6  | 84.8***     |                    |      |             |
| Procedural Posture of Case                  |                         | ***  |             |                    |      |             |
| Pretrial motion on substance of claim       | 326                     | 64.9 | 52.5        |                    |      |             |
| Pretrial motion on procedure, evidence      | 19                      | 3.8  | 79.0        |                    |      |             |
| Memorandum order after bench trial          | 124                     | 24.7 | 39.5        |                    |      |             |
| Motion for judgment notwithstanding verdict | 4                       | 0.8  | 75.0        |                    |      |             |
| Posttrial motions                           | 29                      | 5.8  | 65.5        |                    |      |             |
| Trial in Case                               |                         |      |             |                    |      |             |
| No trial; decided on pretrial motions       | 346                     | 68.9 | 54.1        |                    |      |             |
| Bench trial                                 | 127                     | 25.3 | 45.7        |                    |      |             |
| Jury trial                                  | 11                      | 2.2  | 54.6        |                    |      |             |
| Both bench and jury trial                   | 18                      | 3.6  | 33.3        |                    |      |             |
| Number of Individual Defendants             |                         |      | ***         |                    |      |             |
| 0   | 179                     | 35.7 | 36.3        |                    |      |             |
| 1   | 166                     | 33.1 | 59.6        |                    |      |             |
| 2   | 56                      | 11.2 | 58.9        |                    |      |             |
| 3 or more                                   | 87                      | 17.3 | 59.8        |                    |      |             |
| Missing/Can't tell                          | 14                      | 2.8  | 57.1        |                    |      |             |
| Remedies Awarded to Successful Pls:         |                         |      |             |                    |      |             |
| Backpay                                     | 34 cases                |      |             |                    |      |             |
| Attorneys fees                              | 45                      |      |             |                    |      |             |
| Injunction                                  | 18                      |      |             |                    |      |             |
| Reinstatement                               | 8                       |      |             |                    |      |             |
| Front Pay                                   | 5                       |      |             |                    |      |             |
| Nominal damages                             | 17                      |      |             |                    |      |             |
| Punitive damages                            | 9                       |      |             |                    |      |             |
| Costs to Pl                                 | 32                      |      |             |                    |      |             |
| Money judgment                              | 63                      |      |             |                    |      |             |
| Mean judgment when awarded                  | \$70,883.72             |      |             |                    |      |             |
| Who Appeals                                 |                         |      |             |                    |      | ***         |
| Plaintiff                                   |                         |      |             | 121                | 73.8 | 27.3        |
| Defendant                                   |                         |      |             | 30                 | 18.3 | 73.3        |
| Both  |                         |      |             | 13                 | 7.9  | 69.2        |

\* (\*\*) (\*\*\*) = variable significant at the .1 (.05) (.001) level of significance

## APPENDIX B

## MEASURING OBJECTIVITY OF QUESTIONS THROUGH KAPPA ANALYSIS OF INTER-RATER AGREEMENT

We tested the objectivity of our variables by having two readers independently code a random subset comprising about 6% of the cases, and examining how closely they agreed. Under this "objective" test, the best reader of a case is not the person with the most clever or original or thoughtful analysis, but the reader who most often agrees with others. In turn, the most objective variables are those where the inter-rater agreement is highest.

As revealed in Table B-1, the coders agreed unanimously on four variables, and agreed in over 90% of the cases on another sixteen variables. Indeed, in about two-thirds of our variables, the coders agreed in over 80% of the cases.

Medical statisticians have long wrestled with similar issues of inter-rater reliability. They have developed a kappa statistic as a more sophisticated measure than simply eye-balling the percentage of agreement. In its original application, a kappa statistic evaluates the degree to which medical professionals reach the same diagnosis when, for example, rating mammograms as normal, benign disease, suspicious, or cancerous. If the raters guess randomly based only on population distributions, the likelihood of agreement can be calculated and the kappa statistic equals zero. If the raters always agree, the kappa statistic equals one. For intermediate levels of agreement, the kappa statistic indicates the proportion between random and full agreement. For example, suppose two raters agree on the results of a six-sided dice 50% of the time. If they had randomly guessed based only on the fact that each choice is 16.7% of the population, they should agree 16.7% of the time. The kappa statistic for their 50% agreement is 0.400, showing that .50 is 40% of the distance between random (.167) agreement and full (1.00) agreement.<sup>174</sup>

The larger the kappa statistic, then, the greater the degree of agreement. It has been suggested<sup>175</sup> that the kappa statistic can be interpreted on the following scale:

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<sup>174</sup> See generally 2 STATA REFERENCE MANUAL RELEASE 6, at 132-43 (1999) (instructing on the use of kappa statistics).

<sup>175</sup> J. Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159, 165 (1977).

| <i>Kappa score</i> | <i>Degree of Inter-rater Agreement</i> |
|--------------------|--|
| < 0.0              | Poor                                   |
| 0.00-0.20          | Slight                                 |
| 0.21-0.40          | Fair                                   |
| 0.41-0.69          | Moderate                               |
| 0.61-0.80          | Substantial                            |
| 0.81-1.00          | Almost perfect                         |

Table B-1 groups our variables into these kappa categories. Again, most of our variables hold up well. About half of the variables we could test had kappa statistics greater than .5, meaning that the coders were more than halfway between random agreement and perfect agreement. This is regarded as substantial agreement. Importantly, most of our key variables show high inter-rater reliability. These include the procedural posture of the case, the type of employer and occupation of the victim, and many of the conduct categories.

When our variables are less objective, the problems arise mainly from missing data. Our coders seemed to differ in how aggressively they would mine the case for data. The variable "segregation of the workplace" typifies the problem. The coding sheet asked coders to choose between (1) mostly male, (2) mostly female, (3) mixed, or (8) can't tell. Table B-2 shows their responses. The coders agreed in only seventeen of the thirty-two cases, and the kappa statistic is a "slight" 0.1489. However, we take considerably more comfort in this table than the summary statistics would suggest. The main problem is that Coder 1 was more aggressive in determining the segregation of the workforce, doing so in half the cases, while Coder 2 gave a substantive answer in only one-fourth of the cases. Substantively, however, the coders expressed near unanimous agreement. They both agreed that no cases had mostly female, and they only substantively disagreed on one case, which Coder 1 described as mostly male while Coder 2 called it mixed. In general, the substantive disagreement between coders for almost all variables was minimal.

Based on these results, we have considerable faith that our variables are "objective" in the sense that well-trained legal professionals should reach the same answers in most cases.

APPENDIX TABLE B-1  
INTER-RATER AGREEMENT ON VARIABLES

| Variable  | % of cases<br>agreed on | Kappa<br>Statistic | Probability<br>of random<br>rating |
|---|-------------------------|--------------------|------------------------------------|
| <b>Almost Perfect Agreement (Kappa=0.81-1.00)</b>     |                         |                    |                                    |
| Employer type (private/federal/state)                 | 100.00                  | 1.0000             | 0.0000                             |
| Physical contact of nonsexual nature                  | 100.00                  | 1.0000             | 0.0000                             |
| Favorable treatment to employees in sexual relations  | 100.00                  | 1.0000             | 0.0000                             |
| Race of victim  | 93.75                   | 0.8293             | 0.0000                             |
| Procedural posture of case                            | 93.75                   | 0.8140             | 0.0000                             |
| Was there a trial                                     | 93.75                   | 0.8140             | 0.0000                             |
| Ruling on Hostile Environment claim                   | 87.50                   | 0.8112             | 0.0000                             |
| <b>Substantial Agreement (Kappa=0.60-0.80)</b>        |                         |                    |                                    |
| Sexual material left in victim's private area         | 96.88                   | 0.7881             | 0.0000                             |
| Sex of victims (female, male, both)                   | 96.88                   | 0.7867             | 0.0000                             |
| Tenure of victim at firm                              | 84.38                   | 0.7841             | 0.0000                             |
| Number of individual defendants                       | 83.87                   | 0.7630             | 0.0000                             |
| Marital status of victim                              | 90.62                   | 0.7618             | 0.0000                             |
| Did supervisor know of harassment                     | 84.38                   | 0.7407             | 0.0000                             |
| Offensive gestures                                    | 90.62                   | 0.7280             | 0.0000                             |
| Oral comments about plaintiff: belittling names       | 87.50                   | 0.7211             | 0.0000                             |
| Harassment off premises, consensual interaction       | 93.75                   | 0.7168             | 0.0001                             |
| Physical contact of sexual nature                     | 84.38                   | 0.6899             | 0.0000                             |
| Case published (officially published/online only)     | 81.48                   | 0.5833             | 0.0002                             |
| Victim complained internally                          | 78.12                   | 0.6216             | 0.0000                             |
| Length of harassment                                  | 71.88                   | 0.6139             | 0.0000                             |
| <b>Moderate Agreement (Kappa=0.40-0.60)</b>           |                         |                    |                                    |
| Type of claim (qqq/hostile environment)               | 83.87                   | 0.5856             | 0.0000                             |
| Who were harassers (supervisors/coworkers/both)       | 71.88                   | 0.5765             | 0.0000                             |
| District court ruling on Quid Pro Quo claim           | 78.12                   | 0.5564             | 0.0000                             |
| Occupation of pl (e.g., blue collar, white collar)    | 62.50                   | 0.5288             | 0.0000                             |
| Plaintiff told coworkers about harassment             | 90.62                   | 0.5200             | 0.0014                             |
| Posters/pinups in public areas                        | 93.75                   | 0.4797             | 0.0001                             |
| Employer's harassment program (general/specific/none) | 75.00                   | 0.4733             | 0.0000                             |
| Plaintiff told supervisor informally                  | 75.00                   | 0.4667             | 0.0020                             |
| Requests for sexual favors                            | 71.88                   | 0.4617             | 0.0002                             |
| Plaintiff's Sexual orientation (gay/straight)         | 84.38                   | 0.4521             | 0.0050                             |
| Oral comments about plaintiff: physical appearance    | 62.50                   | 0.4402             | 0.0001                             |
| Number of harassers                                   | 62.50                   | 0.4370             | 0.0000                             |
| Less favorable treatment in work assignments          | 71.88                   | 0.4364             | 0.0003                             |
| Reasonable standard used by court (person/woman/etc)  | 78.12                   | 0.4043             | 0.0011                             |
| <b>Fair Agreement (Kappa=0.20-0.40)</b>               |                         |                    |                                    |
| Did Plaintiff request punitive damages                | 71.88                   | 0.3950             | 0.0011                             |
| Consent of Plaintiff (e.g., sometimes went along)     | 62.50                   | 0.3836             | 0.0006                             |
| Requests for dates                                    | 84.38                   | 0.3822             | 0.0023                             |
| Was jury involved in case                             | 90.62                   | 0.3806             | 0.0000                             |
| Was jury involved in sex harassment part of case      | 90.62                   | 0.3806             | 0.0000                             |
| Pornography in workplace                              | 81.25                   | 0.3469             | 0.0009                             |
| Pl's Employment status (employed at EEOC filing/etc)  | 71.88                   | 0.3455             | 0.0034                             |
| Did victim have relationship at work                  | 75.00                   | 0.2809             | 0.0172                             |
| Harassment off premises, nonconsensual interaction    | 81.25                   | 0.2066             | 0.0274                             |
| <b>Slight Agreement (Kappa=0.00-0.20)</b>             |                         |                    |                                    |
| Plaintiff complained formally                         | 59.38                   | 0.1875             | 0.1321                             |
| Segregation of workforce (mixed, mostly male/female)  | 53.12                   | 0.1489             | 0.1122                             |
| Oral comments re women in general: phys appearance    | 68.75                   | 0.0303             | 0.4103                             |

| Variable   | % of cases<br>agreed on | Kappa<br>Statistic | Probability<br>of random<br>rating |
|--|-------------------------|--------------------|------------------------------------|
| <b>Poor Agreement (Kappa Below 0.0)</b>                                  |                         |                    |                                    |
| Oral comments re women in general: belittling names                      | 87.50                   | -0.0492            | 0.6393                             |
| Written comments, i.e., graffiti   | 87.50                   | -0.0492            | 0.6333                             |
| Objectionable letters sent to plaintiff                                  | 84.38                   | -0.0596            | 0.6708                             |
| Harassment occurred at work  | 84.38                   | -0.0811            | 0.6807                             |
| <b>Insufficient variation to accurately analyze interrater agreement</b> |                         |                    |                                    |
| Plaintiff told outside friends of harassment                             | 100.00                  | .                  | .                                  |
| Did court use social context standard                                    | 96.88                   | 0.0000             | .                                  |
| Plaintiff had someone else complain on her behalf                        | 96.88                   | 0.0000             | .                                  |
| Public Interest Group Involvement  | 93.75                   | 0.0000             | .                                  |
| Harassment occurred off work, at work-related event                      | 90.62                   | 0.0000             | .                                  |

## APPENDIX TABLE B-2

## LEVEL OF INTER-RATER AGREEMENT SEGREGATED WORKPLACE VARIABLE

|         |               | Coder 2     |               |       |            |       |
|---------|---------------|-------------|---------------|-------|------------|-------|
|         |               | Mostly Male | Mostly Female | Mixed | Can't Tell | Total |
| Coder 1 | Mostly Male   | 1           | 0             | 1     | 3          | 5     |
|         | Mostly Female | 0           | 0             | 0     | 0          | 0     |
|         | Mixed         | 0           | 0             | 3     | 8          | 11    |
|         | Can't Tell    | 1           | 0             | 2     | 13         | 16    |
|         | Total         | 2           | 0             | 6     | 24         | 32    |

Percentage Agreement (diagonal cells/total) =  $17/32 = 53.12\%$

Expected agreement (based on overall probability distribution) = 44.9%

Kappa Statistic =  $[\.5312 - .4492] / [1 - .4492] = .1489$

Probability - .1122