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Did She Ask for It?: The Unwelcome Requirement in Sexual Harassment Cases

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NOTES

DID SHE ASK FOR IT?: THE "UNWELCOME" REQUIREMENT IN SEXUAL HARASSMENT CASES

Title VII's promise of equality has not lived up to its potential. Since Title VII's inception in 1964, courts have struggled to define and analyze sex-based discrimination. Sexual harassment, which 53.1% of working women experience,[1] was not legally recognized as discrimination until 1976.[2] Until 1981, courts upheld sexual harassment claims only when the plaintiff had suffered a tangible job detriment. Women working in environments filled with sexually degrading comments and behavior did not suffer legally cognizable employment injuries and had no legal remedies.[3] By 1981, courts had begun to recoguize sexual harassment as the basis of a claim of a "hostile or offensive work environment."[4] Finally, in 1986, the Supreme Court firmly established the claim of "hostile environment" in *Meritor Savings Bank v. Vinson*.[5]

To prove a hostile environment claim, plaintiffs must show that the alleged harassment was "unwelcome."[6] In determining whether conduct was "unwelcome," courts often admit evidence that is not relevant. This judicial treatment of the unwelcome requirement threatens to weaken the potentially powerful hostile environment

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1 Barbara A. Gutek, Sex and the Workplace 46 (1985). Gutek studied 827 women and, among other questions, asked them "Have you ever experienced sexual harassment?" *Id.* at 45. The questionnaire did not provide a definition of sexual harassment. Thus, the participants of the study defined harassment for themselves. In an often cited study of federal employees, 42% of women reported being subjected to some form of sexual harassment. U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Is It a Problem? 36 (1981). "Research indicates that the problem is quite pervasive. Estimates of the percentage of women who have encountered sexual harassment in the workplace range from 42% to 90%." David E. Terpstra & Douglas A. Baker, *A Hierarchy of Sexual Harassment*, 121 J. of Psychology 599 (1987).

2 Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *vacated on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

3 The feminine pronoun will be used throughout this Note because women are the primary victims of sexual harassment. Although men are sexually harassed in their employment, women are subjected to harassment much more frequently. U.S. Merit Systems Protection Board, *supra* note 1, at 3 (finding ten to fifteen percent of men complain of homosexual overtures or sexual intimidation by female superiors).

4 Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981).

5 477 U.S. 57 (1986) (Rehnquist, J.).

6 A plaintiff must prove she was subjected to unwelcome sexual harassment. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

claim by subjecting it to outdated sexual stereotypes. Many courts define discrimination based on gender roles from a male perspective.[7] This male perspective influences many facets of sexual harassment cases, including definitions of sexual harassment and expectations of how harassed women behave,[8] and thus engenders inequities in the legal system. These inequities must be reformed if women are to achieve equality in the workplace.

To restore Title VII's potential to promote true equality for women in the workplace, "unwelcomeness" must be carefully defined and the evidence admitted must be carefully regulated. The factors courts presently consider in determining whether behavior was "unwelcome" demonstrate a deeply rooted gender bias in the definition of discrimination. These factors place the plaintiff's behavior on trial[9] and frustrate the purposes of Title VII.

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[7] *See infra* parts III and V.

[8] The recent hearings surrounding the nomination of Associate Justice Clarence Thomas provide a clear example of the influence of the male perspective. Professor Anita Hill's testimony as to the alleged sexual harassment by Thomas engendered feelings of outrage from some of the Senators: outrage over *her* behavior. Senators demanded to know how she could have been subjected to such behavior and not have come forward. These questions vividly depicted the male perspective of how a woman should react to harassing behavior.

For example, Senator Specter queried, "I know you decided not to make a complaint but did you give that any consideration? And if so, how could you allow this kind of reprehensible conduct to go on right in the headquarters without doing something about it?" *The Thomas Nomination: Excerpts from Senate's Hearings on the Thomas Nomination*, N.Y. TIMES, Oct. 12, 1991, at A12. A befuddled Senator Orrin Hatch asked "How could she (Hill) tolerate it? . . . How could she stand such behavior and not file a complaint?" James Warren, *Coverage Offers Class on Sexual Harassment*, CHICAGO TRIBUNE, Oct. 12, 1991, at C1. Further, Senators used Hill's failure to file a complaint as proof of her lack of veracity. *See* Jane E. Larson & Jonathan A. Knee, *We Can Do Something About Sexual Harassment*, WASH. POST, Oct. 22, 1991, at A21.

Women seemed to understand and empathize with Anita Hill's reluctance to file a complaint or go to the news media. For example, the editors of Ms. magazine expanded the letters column in the January/February edition to provide room for expressions of support and outrage. *Letters*, Ms., Jan./Feb. 1992, at 8-11. The media cited the "fierce support that many Americans gave to Professor Hill . . ." and the "voices of women across the land who told men that they did believe Anita Hill. . . ." Larson & Knee, *supra*, at A21; Kathleen M. Sullivan, *Men Must See It With Women's Eyes*, NEWSDAY, Oct. 10, 1991, at 147.

[9] Hours of testimony in the Thomas hearings reflected the way in which Senators placed Professor Hill on trial. Judge Thomas's supporters produced witnesses to impugn Professor Hill's character, while Senators Specter and Hatch accused her of perjury. Derrick Z. Jackson, *After the Thomas Affair, Progress—Or Silence?*, BOSTON GLOBE, Oct. 20, 1991, at A37. Commentators suggested the absence of women on the Judiciary Committee as a cause of this reprehensible behavior: "There is no doubt, many activists say, that having more women in the Senate . . . almost certainly would have resulted in a different process." Marlene Cimons, *The Click! Heard 'Round the Nation*, L.A. TIMES, Oct. 18, 1991, at E1. "[T]he 14 Judiciary Committee members, all men, were insensitive to women's experience and feelings." Anthony Lewis, *Abroad at Home: Wages of Cynicism*, N.Y. TIMES, Oct. 11, 1991, at A31. In fact, the National Women's Political Caucus placed ads "depicting Judge Clarence Thomas testifying before an all-female Senate Ju-

This Note examines the historical treatment of sexual harassment under Title VII and the two Title VII claims currently available to sexual harassment victims. The Note then focuses on the current definitions of "unwelcome" and the sexism inherent in those definitions. Finally, the Note suggests evidentiary methods to reform this gender bias.

I
THE NEW STRUGGLE

Women in the 1990s face a radically different world than did women in the 1950s. The feminist movement of the 1970s, the increasing number of women in the workforce,[10] and the passage of Title VII of the 1964 Civil Rights Act[11] have combined to afford women greater opportunities to follow their chosen careers and attain economic independence. Professions that were previously bastions of male domination are now open to women.[12] In light of these successes, many women believe that they may claim victory and enjoy the fruits of the long struggle.[13] Indeed, people argue that further demands and continued struggle will bring about negative rather than positive results.[14] For some, the struggle is over; the war has been won.

But victory cannot be claimed. While the number of women in the workforce has increased, almost 61% of women are concen-

diciary Committee and asking 'What If?' " *Hearing Fallout*, USA TODAY, Oct. 25, 1991, at 4A.

10 In 1940, 27.9% of women were in the labor force. In 1984, 53.7% of women were in the labor force. FRANCINE D. BLAU & MARIANNE A. FERBER, THE ECONOMICS OF WOMEN, MEN AND WORK 69 (1986).

11 Title VII of the Civil Rights Act states that it shall be an unlawful employment practice to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2 (1991).

12 In 1970, 4.9% of lawyers, 9.7% of doctors, and 1.7% of engineers were women. In 1980, 13.8% of lawyers, 13.4% of physicians and 4.6% of engineers were women. BLAU & FERBER, *supra* note 10, at 160 (citing BUREAU OF THE CENSUS, DETAILED OCCUPATION OF THE EXPERIENCED CIVILIAN LABOR FORCE BY SEX FOR THE UNITED STATES AND REGIONS: 1980 AND 1970, SUPPLEMENTARY REPORT PC80-s1-15 (March 1984)).

13 "Lately when I talk about gender, I am often confronted with the message that women's equality has already been achieved. A colleague may provide this insight, or a complete stranger waiting in a grocery line." Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1184 (1989). "To be a woman in America at the close of the 20th century—what good fortune . . . the barricades have fallen, politicians assure us." SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN ix (1991).

14 "[T]he thought was most succinctly expressed by a student who grew impatient with my activism. 'I don't understand,' she declared. 'Women have gotten just about everything they wanted. Don't they see that the time for militancy is over?' " Abrams, *supra* note 13, at 1184. "The women's movement, as we are told time and again, has proved women's own worst enemy." FALUDI, *supra* note 13, at x.

trated in traditional occupations.[15] Women still earn only 64.8% of what men earn.[16] Women in the workforce must constantly fight against the inequities of the male dominated infrastructure.[17] Many women find that the infrastructure of the business community is based on male norms.[18] Several feminist theorists argue that hierarchies of authority, desiguated positions, and the vertical structure of authority—common elements of American working environments—are elements based on the male perspective.[19]

Power in the workplace is not equally distributed between men and women. Men hold the vast majority of managerial and supervisory positions.[20] This disproportionate distribution of power suggests that men define the norms of the workplace, including what constitutes acceptable behavior. On a deeper level, power and sex are closely intertwined.[21] In this way, the infrastructure of the workplace involves both the tangible and the intangible. Thus, although women cannot legally be excluded from the workplace on the basis of gender, they are subject to the male-defined infrastructure of the workplace, a condition that is often tantamount to exclusion. This infrastructure, with its hierarchies, is a breeding ground for sexual

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15 In 1984, 13.7% of all women in the labor force occupied sales positions, 28.9% occupied administrative support positions, including clerical, and 18.4% occupied service positions. Eleven percent of men are in sales, 5.6% are in administrative support, including clerical, and 9.3% are in service occupations. BLAU & FERBER, *supra* note 10, at 156 (citing DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS 27-28 (Dec. 1984) (Tables A-22, A-23).

16 BLAU & FERBER, *supra* note 10, at 171. This figure is based on the median weekly earnings of full-time women workers for 1984.

17 By infrastructure, I mean the accepted norms of behavior, interaction, accepted management styles and the usual hierarchy of authority.

18 *See generally* CATHARINE MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN (1979).

19 "[W]omen's culture offers the basis for a transformation of our society, a transformation based on the womanly values of responsibility, connection, selflessness, and caring, rather than on separation, autonomy and hierarchy . . . . [F]eminists characterize traditional Western epistemology as 'male.'" Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 798, 803 (1989).

Elements of the male perspective include intangibles "such as the 'appropriate' professional demeanor: the tone of voice, air of command, and quickness to accommodate or anger that mark a 'successful' employee. [The male perspective] also dictate[s] the acceptable forms of professional camaraderie, and prescribe[s] the boundaries between the workplace and the rest of the world." Abrams, *supra* note 13, at 1189.

In her study of male and female problem-solving behavior, Professor Carol Gilligan elucidated some elements of these intangibles. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). In children as young as eight, boys tended to approach problem-solving through an independent, rule structured approach, while girls focused on the relational, contextual aspects of problems. *Id.* at 29.

20 BLAU & FERBER, *supra* note 10, at 161-65.

21 *See, e.g.*, MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME 1 (1978). In speaking of sexuality, Foucault stated that "[p]ower delineated it, aroused it, and employed it as the proliferating meaning that had always to be taken control of again lest it escape . . . ." *Id.* at 148.

harassment. "Sexual harassment has also emerged as a creature of hierarchy. It inhabits what I call hierarchies among men . . . ."[22]

Other subtle forms of discrimination keep many women from playing a full role in the workforce.[23] Catcalls, offensive and degrading language, unwelcome physical contact of a sexual nature, and unwanted invitations for dates or sexual conduct all serve to remind women that they are outsiders in the man's world of employment.[24]

II
HISTORICAL TREATMENT OF SEXUAL HARASSMENT UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 makes unlawful any discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[25] Originally, Title VII was not intended to remedy sexual harassment. In fact, "sex" was added to Title VII as a last minute amendment to the Civil Rights Act of 1964.[26] After Congress enacted Title VII,

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22 CATHARINE A. MACKINNON, *Sexual Harassment: Its First Decade in Court*, *in* FEMINISM UNMODIFIED 103, 107 (1987).

23 "Many employees and supervisors persisted in treating women in a demeaning or sexual way. Some women were required to wear sexually provocative uniforms on the job. Others heard themselves addressed by diminutives that undercut their credibility in responsible positions. They became the object of lewd comments and jokes, and sometimes were propositioned by colleagues or supervisors."

Abrams, *supra* note 13, at 1187. "Thirty-eight percent of women said the [harassment] affected their feelings about their jobs and twenty-eight percent said it affected how they relate to other people at work. . . . The two strongest reactions were disgust and anger." GUTEK, *supra* note 1, at 70-71.

24 *See generally* MACKINNON, *supra* note 18.

> Sexual harassment on the job undercuts a woman's autonomy outside the home by sexualizing her role in exactly the same way as within the family: sexual imposition combined with a definition of her work in terms of tasks which serve the man, sanctioned by her own practical inability to create the material conditions of her life on her own.

Id. at 216-17.

25 42 U.S.C. § 2000e-2 (1991).

26 "The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives . . . [and thus,] we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986). The amendment was proposed by Representative Howard Smith of Virginia, Chairman of the House Rules Committee. Some commentators believe the prohibition against discrimination based on sex was added as an attempt to defeat the entire bill. "[The inclusion of 'sex'] was offered as an addition to other proscriptions by opponents in a last-minute attempt to block the bill which became the Act . . . ." Barnes v. Costle, 561 F.2d 983, 987 (D.C. Cir. 1977). Representative Smith's plan failed. "One of the most powerful remedies for sex discrimination available today owes its origin to a misfired

courts struggled to determine how to apply Title VII to cases of sexual discrimination.[27] It was thirteen years before a court finally used Title VII to remedy sexual harassment.[28]

One of the key elements of a Title VII case is proof that the discriminatory action took place "because of" the employee's sex, race, religion, etc.[29] This standard has been described as the "but for" test—it is met when the action would not have taken place *but for* the employee's gender, race, religion, etc. In applying the "because of" or "but for" standard, courts examine the action taken by the employer and determine whether an employee of another gender would have been treated in the same way. If the action would not have occurred with an employee of the other gender, there is a presumption of discrimination.[30] In some early decisions, courts did not consider sexual harassment to be equivalent to discrimination, since it did not occur "because of" the employee's sex.[31] These courts found that the harassment was due to the interpersonal relationship between supervisor and employee.[32] In other words, the specific characteristics of the employee triggered the harassment: Jane Doe was harassed because she was Jane Doe, not because she was a woman.

In the late 1970s, however, courts began to include sexual harassment in the definition of discrimination.[33] In 1976, the U.S.

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political tactic on the part of opponents of the Act." J. RALPH LINDGREN & NADINE TAUB, THE LAW OF SEXUAL HARASSMENT 110-11 (1988).

27 *See, e.g.*, Corne v. Bausch and Lomb, Inc., 390 F. Supp 161 (D. Ariz. 1975) (holding that sexual advances are not discrimination because Title VII reaches only discrimination that arises out of company policy), *vacated*, 562 F.2d 55 (9th Cir. 1977) (without opinion).

28 *See* Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) (supervisor's demand for sexual relations violated Title VII).

29 Title VII states that "it shall be unlawful employment practice to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e (1991) (emphasis added); *see also* Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) ("[T]he plaintiff must show that but for the fact of her sex, she would not have been the object of harassment.").

30 "If an employee is discharged under circumstances in which an employee of another sex would not have been discharged, an inference of discrimination arises. . . ." EEOC v. Brown & Root, Inc., 688 F.2d 338, 340 (5th Cir. 1982).

31 *See* Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (finding that the conduct was "nothing more than a personal proclivity, peculiarity or mannerism" of the supervisor), *vacated on other grounds*, 562 F.2d 55 (9th Cir. 1977); Barnes v. Costle, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1975) (the conduct amounted to "the subtleties of an inharmonious personal relationship."), *rev'd*, 561 F.2d 983 (D.C. Cir. 1977).

32 *See supra* note 31 (discussing these cases).

33 *See* Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) (Title VII violated when supervisor conditions employee's job status on favorable response to his sexual advances); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978) (Title VII violated when supervisor conditions employee's job status on favorable re-

Court of Appeals for the D.C. Circuit found that a violation of Title VII had occurred when a supervisor dismissed an employee because she refused his requests for sexual relations.[34] The court held that this sexual harassment was a type of discrimination based on sex, and was therefore actionable under Title VII.[35] Similarly, in 1977, the Third Circuit upheld a claim for sexual harassment under Title VII in *Tomkins v. Public Service Electric & Gas Co.*[36] The court found that a supervisor's demand for sexual relations, ostensibly to foster a satisfactory working relationship, affected a "term or condition" of employment and therefore was a violation of Title VII.[37] Later, courts began to recognize unwelcome sexual attention as a claim under Title VII.[38] By the early 1980s, sexual harassment was fully accepted as a claim under Title VII.[39]

III
Current Claims of Sexual Harassment under Title VII

Under Title VII an employee may sue her employer[40] for unlawful employment practices, such as discrimination on the basis of gender.[41] The sexual discrimination or harassment need not be conduct on the part of the employer: Title VII applies both to su-

sponse to his sexual advances); *see also* Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977); Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976); Garber v. Saxon Business Prods., Inc., 552 F.2d 1032 (4th Cir. 1977) (compelling female employees to submit to the sexual advances of supervisors violates Title VII).

34 *Williams*, 413 F. Supp. at 654.

35 *Id.* at 658.

36 568 F.2d 1044 (3d Cir. 1977).

37 *Id.* at 1046-47.

38 *See infra* note 54.

39 Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (stating that sexual harassment can create a hostile environment and therefore a violation of Title VII, regardless of the absence of tangible job detriments); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (finding Title VII violated by insults and demeaning propositions that sexually stereotyped the plaintiff); Robson v. Eva's Super Mkt., Inc., 538 F. Supp. 857 (N.D. Ohio 1982) (bolding that an employee who received tasks more onerous than normal without receiving additional pay after rejecting her supervisor's advances could state a Title VII cause of action).

40 An employer includes "any person engaged in an industry affecting commerce who bas fifteen or more employees for each working day in each of twenty or more calendar weeks. . . ." 42 U.S.C. § 2000e(b) (1991).

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

42 U.S.C. § 2000e-2(a) (1991).

pervisors[42] and to the work environment created by fellow employees.[43] To bring a Title VII claim, the aggrieved employee must first file notice of the charge with the Equal Employment Opportunity Commission ("EEOC").[44] If the EEOC believes the charge has merit, it must then attempt to alleviate the situation through informal procedures.[45] If the informal mediation is unsuccessful, or at the request of aggrieved party, the EEOC will grant a "right to sue" letter.[46] The "right to sue" letter commences the suit in federal court. Until very recently, Title VII excluded awards of punitive or compensatory damages.[47] With the availability of such damages, either party in a Title VII suit may request a jury trial.[48]

Courts interpret Title VII to include two different claims based on sexual harassment: quid pro quo claims and hostile environment claims.[49] These will be addressed in turn.

A. Quid Pro Quo

Quid pro quo harassment involves a grant or denial of economic benefits following the employee's response to "unwelcome sexual advances, requests for sexual favors, [or] other verbal or

42 *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (finding Title VII violated when supervisor engaged in unwanted sexual conduct with an employee).

43 *See* Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987) (finding Title VII violated when co-employee subjected plaintiff to unwanted sexual comments and physical touching); *see infra* notes 188-95 and accompanying text (discussing the *Swentek* decision).

44 A complainant must file charges with the EEOC within 180 days after the alleged unlawful employment practice occurred. If, however, the aggrieved employee had initially instituted proceedings with a state or local agency, the employee must file charges with the EEOC within 300 days of the incident or within 30 days after receiving notice of the termination of the state proceedings, whichever is earlier. 42 U.S.C. § 2000e-5(e) (1991).

45 If the Commission determines that "there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (1991).

46 The Commission may bring a civil action under 42 U.S.C. § 2000e-5(f)(1) (1991) or, if the Commission takes no action, the aggrieved employee may institute a civil action no later than ninety days after receiving notice that the Commission is not bringing charges. 42 U.S.C. § 2000e-5(f)(1) (1991).

47 Relief under Title VII can include declaratory or injunctive relief, reinstatement, back pay, attorney's fees, and affirmative action plans. *See* 42 U.S.C. § 2000e-5(g) (1991). The Civil Rights Act of 1991 amended Title VII to allow successful plaintiffs to recover punitive damage awards from $50,000 to $300,000. 102 P.L. 166 § 102(b). *See also* Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (upholding the award of attorneys' fees under 42 U.S.C. § 2000a-3(b)).

48 Civil Rights Act of 1991, Pub. L. 102-166 § 102(c) (1991).

49 *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Henson v. City of Dundee, 682 F.2d 897 (11tb Cir. 1982).

physical conduct of a sexual nature."[50] A clear example of the basis for such a claim is a fact pattern that amounts to "sleep with me or I'll fire you." In establishing a quid pro quo claim, the plaintiff must show that "tangible 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."[51] These job benefits may include transfers, promotions, favorable evaluations, pay raises, and continued employment.[52]

The quid pro quo claim arises only when the plaintiff shows a link between the job detriment and a refusal to submit to a supervisor's sexual advances.[53] For years, Title VII did not address the claims of women who experienced unwanted or unilateral sexual attention or advances without any tangible job detriment. In the early 1980s, however, courts begin to acknowledge the claim of a hostile working environment.[54]

B. Hostile or Abusive Working Environment

A hostile working environment claim arises in situations in which an employee must endure verbal or physical abuse as part of her employment but does not suffer a tangible job detriment. A hostile environment arising out of gender discrimination can be created by conduct that degrades or devalues women,[55] or simply by

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50 *See* 29 C.F.R. § 1604.11(a) (1985). Courts have granted the administrative guidelines issued by the enforcing agancy great deference. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

51 Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987).

52 Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1048-49 (3d Cir. 1977).

53 The link between the supervisor's sexual advances and the effect on the job benefit does not have to run between the supervisor and the plaintiff. In *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988), the court granted recovery in a claim based on a hostile environment created by supervisors bestowing preferential treatment on women who submitted to their sexual advances.

> [S]uch conduct created a hostile or offensive work environment which affected the motivation and work performance of those who found such conduct repuguant and offensive. . . . [P]laintiff and other women . . . found the sexual conduct and its accompanying manifestations which [the] managers engaged in over a protracted period of time to be offensive.

Id. at 1278. This hostile atmosphere forced women to be sexually responsive to their supervisors in order to gain job benefits, and therefore constituted sexual harassment. *Id.* at 1276-77.

54 Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981); Brown v. City of Guthrie, Okla., 22 Fair Empl. Prac. Cas. (BNA) 1627 (W.D. Okla. 1980).

55 Abrams, *supra* note 13, at 1209. Professor Abrams advocates a definition of hostile environment that focuses on the response of the plaintiff to the conduct: "The plaintiff's description of the defendant's sexually oriented behavior and of the feelings of coercion or devaluation it produced would establish the plaintiff's prima facie case." *Id.*

harmful conduct that would not occur but for the sex of the employee.[56] If a supervisor continually pinches and grabs an employee but never hinges a promotion or raise on reciprocity, a quid pro quo claim would not succeed. The employee would, however, have a hostile environment claim.

1. *The Origins of the Hostile Environment Claim*

The hostile environment claim originated in a case involving discrimination based on national origin. In *Rogers v. EEOC*,[57] a Hispanic employee sued her employer for creating a discriminatory environment through his discriminatory practices toward Hispanic clients. The Fifth Circuit held that Title VII covered psychological as well as economic harm,[58] and a discriminatory work environment could therefore constitute a violation of Title VII.[59]

Hostile environment cases based on race or national origin[60] do not prescribe a specific set of facts that the plaintiff must prove in order to recover.[61] Generally, however, courts require the existence of a pattern of racial or ethnic slurs, interference with job performance, and managerial inaction.[62]

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56 For example, such harmful conduct could include nonsexual verbal harassment and less favorable work assignments delegated only to female employees. *See* 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 an employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones."); *see also* Hall v. Gus Const. Co., 842 F.2d 1010 (8th Cir. 1988) (stating that repeated verbal comments of a sexual and nonsexual nature were found to have been properly considered); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) (holding that nonsexual verbal harassment of a black female security guard mandated consideration on the question of sexual harassment).

57 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

58 *Id.* at 238.

59 > " 'The terms, conditions, or privileges of employment' is an expansive concept which sweeps within its protective ambit the practice of creating a work environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.' "

Id. at 239.

60 *See* Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (holding that segregated dining facilities violate Title VII); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (holding that a racially hostile work environment adversely affects a term, condition or privilege of employment, *cert. denied*, 406 U.S. 957 (1972).

61 Most courts do not use the same test for sexual harassment as for racial harassment. The "unwelcome" requirement does not exist in racial harassment cases. It is assumed that a pattern of racial slurs is unwelcome and that "racial conduct does not serve any purpose in our society." *See* Lisa Rhodes, Note, *The Sixth Circuit's Double Standard in Hostile Work Environment Claims:* Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988), 58 U. CIN. L. REV. 779, 812 (1989); *see also infra* part III.B.2. (discussing hostile environment claims arising from sexual harassment).

62 *Id.*

2. *Hostile Environment Claims Arising From Sexual Harassment*

After the recognition of a hostile environment claim based on race, some courts began to extend the reasoning to sexual harassment claims. For instance, in *Bundy v. Jackson*,[63] the D.C. Circuit determined that the Title VII harassment analysis used in cases of discrimination based on race, religion or ethnicity also applies to claims of discrimination based on sex.[64] Throughout six years of employment, Bundy continually received sexual propositions from co-workers and, in the last two years of her employment, from two of her supervisors.[65] When she complained of the harassment to the harassers' supervisor, she was told " 'any man in his right mind would want to rape you.' "[66]

The D.C. Circuit held that a violation of Title VII could occur "where an employer created or condoned a substantially discriminatory work *environment*, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination."[67] The court reasoned that to hold otherwise would enable employers, by stopping short of taking any tangible action, to harass women "with impunity."[68] The court thus expanded the meaning of the phrase "conditions of employment" to include the "psychological and emotional work environment."[69]

In *Henson v. City of Dundee*,[70] the Eleventh Circuit further developed the hostile environment doctrine. Henson worked as a dispatcher for the Dundee Police Department. The Police Chief subjected Henson and another female employee to "numerous harangnes of demeaning sexual inquiries and vulgarities"[71] and repeated requests for sexual relations. The *Henson* court rejected the defendants' argument that a tangible job detriment must exist for an employee to state a legally cognizable Title VII sexual harassment claim. Citing cases involving racially discriminatory environments,[72] the court held that "under certain circumstances, the crea-

63 641 F.2d 934 (D.C. Cir. 1981).

64 The court cited extensively Judge Goldberg's opinion in *Rogers*. *See id.* at 944; *see also supra* notes 57-59 and accompanying text (discussing *Rogers*).

65 *Bundy*, 641 F.2d at 939.

66 *Id.* at 940 (quoting Findings of Fact No. 37, App. 14).

67 *Id.* at 943-44.

68 *Id.* at 945.

69 *Id.* at 944.

70 682 F.2d 897 (11th Cir. 1982).

71 *Id.* at 899.

72 *See* Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (holding that segregated dining facilities create a discriminatory work environment); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (holding that employee's work environment is protected under Title VII under the phrase "terms, conditions or privileges of employ-

tion of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers a tangible job detriment."[73] The court found that Title VII protects women, as well as men, from having to run "a gauntlet of sexual abuse in return for the privilege of being allowed to work."[74]

3. *The Five Necessary Elements of a Hostile Environment Claim Under* Henson

The *Henson* court listed five elements that a claimant must establish to succeed on a hostile environment claim:[75] (1) that the employee belongs to a protected group;[76] (2) that the employee was subject to unwelcome sexual harassment, including sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature; (3) that the harassment complained of was based on gender;[77] (4) that the harassment complained of affected a "term, condition or privilege" of employment; and (5) respondeat superior.[78]

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ment"); Lucero v. Beth Israel Hosp. and Geriatric Ctr., 479 F. Supp. 452, 454 (D. Colo. 1979) (finding that a pattern of racial slurs had created discriminatory work environment); Calcote v. Texas Educ. Found., Inc., 458 F. Supp. 231, 237 (W.D. Tex. 1976) (holding that racial harassment of white employee created discriminatory working conditions), *aff'd*, 578 F.2d 95 (5th Cir. 1978).

73 *Henson*, 682 F.2d at 901.

74 *Id.* at 902.

75 *Id.* at 903-05. Some courts have applied this sexual harassment analysis to cases involving racial or national origin harassment. *See* Taylor v. Jones, 653 F.2d 1193, 1199 (8th Cir. 1981) (recognizing a Title VII claim based on a racially hostile environment under the *Bundy* analysis); Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984) (holding that the *Henson* analysis provided a basis for a Title VII action permitted a pattern of anti-Semitic verbal abuse). For commentary on these cases, see CATHARINE A. MACKINNON, *Sexual Harassment*, *in* FEMINISM UNMODIFIED, *supra* note 22, at 256 n.46 (1986) (citing the above cases approvingly).

76 "As in other cases of sexual discrimination, this requires a simple stipulation that the employee is a man or a woman." *Henson*, 682 F.2d at 903.

77 *See supra* notes 30-32, accompanying text (discussing the nature of conduct in hostile environment cases).

78 *Henson*, 682 F.2d at 905. Many articles and commentaries have thoughtfully addressed the problem of proving employer liability. *See generally* Joseph G. Allegretti, *Sexual Harassment by Nonemployees: The Limits of Employer Liability*, 9 EMPLOYEE REL. L.J. 98 (1983); Cynthia F. Cohen & Joyce P. Vincelette, *Notice, Remedy, and Employer Liability for Sexual Harassment*, 35 LAB. L.J. 301 (1984); Katherine S. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment after* Vinson, 87 COLUM. L. REV. 1258 (1987); David J. Burge, Note, *Employment Discrimination—Defining an Employer's Liability under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C. L. REV. 795 (1984); Nancy F. Chudacoff, Comment, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment under Title VII*, 61 B.U. L. REV. 535 (1981); Sheryl A. Greene, Note, *Reevaluation of Title VII Abusive Environment Claims After* Meritor Savings Bank v. Vinson, 13 MARSHALL L. REV. 29 (1988); Lucy B. Longstreth, Note, *Hostile Environment Sexual Harassment: A Wrong Without a Remedy?*—Meritor Savings Bank v. Vinson, 21 SUFFOLK U. L. REV. 811 (1987); Christine O. Merriman & Cora G. Yang,

Under the *Henson* test, the plaintiff, after alleging that she is a woman or a member of a protected group, must allege that she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.[79] Although the term "harassment" implies unwelcomeness,[80] the plaintiff must nevertheless affirmatively prove that the conduct was "unwelcome."[81] The *Henson* court defined as "unwelcome" behavior that the plaintiff did not solicit or incite and that the plaintiff found "undesirable or offensive."[82] The plaintiff then must show that, but for the fact of her gender, the harassment would not have occurred.[83] A male supervisor's overtures to a female employee satisfy this criterion.[84] The gender-based harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."[85] A single instance of harassment, such as one comment or action, is not significant enough to create a hostile environment.[86]

Finally, the plaintiff must show respondeat superior.[87] Under *Henson*, the plaintiff must establish "that the employer knew or should have known of the harassment in question and failed to take prompt remedial action."[88] A complaint by the plaintiff to higher management indicates employer knowledge of the harassment. If

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Note, *Employer Liability For Co-worker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83 (1984-85); Michael D. Vhay, Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328 (1988).

79 *See Henson*, 682 F.2d at 903 (citing 29 C.F.R. § 1604.11(a) (1981)).

80 Black's Law Dictionary defines harassment as "words, gestures and actions which tend to annoy, alarm and abuse (verbally) another person." BLACK'S LAW DICTIONARY 645 (5th ed. 1979). Harassment has also been defined as "to annoy persistently." WEBSTER'S NEW COLLEGIATE DICTIONARY 522 (Henry B. Woolf, ed., 8th ed., 1973).

81 *Henson*, 682 F.2d at 903. *See infra* part IV (criticizing the unwelcomeness test).

82 *Henson*, 682 F.2d at 903. *See infra* part VI (discussing incitement as a test of unwelcomeness).

83 *Henson*, 682 F.2d at 903-04. *See supra* part II (discussing the "because of" requirement).

84 "In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion." *Henson*, 682 F.2d at 904. Despite the *Henson* court's claim that overtures by a male supervisor to a female employee "obviously" satisfied the test, the courts reasoning actually creates a "bisexual" defense when the supervisor has made overtures to men *and* women, thereby negating a showing of "but for" cause.

85 *Id.*

86 "The mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee does not affect the terms, conditions, or privileges of employment to a sufficiently significant degree." *Id.* (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

87 *Id.* at 905; *see supra* note 76.

88 *Henson*, 682 F.2d at 905.

the conduct is extremely pervasive, a court may attribute constructive knowledge to the employer.[89]

With little variation, the *Henson* five-part test remains the primary test for establishing sexual harassment under Title VII.[90] Among the circuit courts, only the Third and Ninth Circuits have adopted other standards. The Third Circuit, in *Drinkwater v. Union Carbide Corp*,[91] set forth a different five-part analysis for hostile environment claims. Under *Drinkwater*, the plaintiff must show: (1) intentional discrimination because of gender; (2) that the discrimination was pervasive and regular; (3) that the discrimination detrimentally affected the plaintiff; (4) that the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) respondeat superior.[92] The Third Circuit did not require unwelcomeness, focusing instead on the objective and subjective effect the discrimination has on the plaintiff.

The Ninth Circuit adopted a method of analysis different from either of these five-part tests.[93] In *Ellison v. Brady*,[94] the plaintiff turned down several requests for dates from a co-worker. She then received several letters from him indicating his belief in the existence of a relationship between them.[95] The Ninth Circuit essentially allowed the plaintiff to define the harassment:[96] "We . . .

89 *Id.* The employee can "demonstrate that the employer knew of the harassment by showing . . . the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Id.*

90 The most recent Tenth Circuit decisions in sexual harassment cases do not explicitly require a showing of "unwelcomeness." *See* Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572 (10th Cir. 1990); Ramsey v. City and County of Denver, 907 F.2d 1004 (10th Cir. 1990). However, both cases quote *Henson* and Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), for definitions of sexual harassment. Both *Meritor* and *Henson* require a finding that the conduct was unwelcome. *See infra* part VI.

The other circuits (discussing *Meritor*) follow *Henson*'s five-part test. *See* Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990); Dabish v. Chrysler Motors Corp., 902 F.2d 32 (6th Cir. 1990) (unpublished decision) (requiring a showing of "unwelcome" conduct but not explicitly citing *Henson*); Spencer v. General Elec. Co., 894 F.2d 651 (4th Cir. 1990); Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989); Wyerick v. Bayou Steel Corp., 887 F.2d 1271 (5th Cir. 1989); Staton v. Maries County, 868 F.2d 996 (8th Cir. 1989); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988); Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

91 904 F.2d 853 (3d Cir. 1990).

92 *Id.* at 860 (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)).

93 924 F.2d 872 (9th Cir. 1991).

94 *Id.*

95 The letters included statements such as "I cried over you last night and I'm totally drained today," and "I have enjoyed you so much over these past few months. Watching you." *Id.* at 874.

96 *Id.* at 878 ("[W]e believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim."). *Id.*

prefer to analyze harassment from the victim's perspective."[97] 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."[98] This method of analysis does not require proof of unwelcomeness and allows recovery even if the alleged harasser did not intend to discriminate based on the plaintiff's gender.[99]

4. *The Supreme Court's Acceptance of the Hostile Environment Claim in* Meritor Savings Bank v. Vinson

The Supreme Court recognized hostile environment as a Title VII claim in *Meritor Savings Bank v. Vinson*.[100] Out of fear of losing her job, Vinson engaged in sexual relations with her supervisor and was subjected to various other sexual encounters.[101] Some time after sexual relations between the two ended, she was fired for excessive use of sick time. Citing EEOC gnidelines, the Court held that "Title VII is not limited to 'economic' or 'tangible' discrimination,"[102] and that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[103] The Court also stated that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment."[104]

Vinson's employer, Meritor Savings Bank, argued that existed no harassment because Vinson "voluntarily" engaged in sexual intercourse with her supervisor.[105] The district court accepted the Bank's argument and held that because the relationship was voluntary no cause of action existed under Title VII.[106] The Supreme Court rejected the district court's assessment of the voluntariness issue.[107] Instead, the Court asserted that "[t]he gravamen of any

97 *Id.* at 878.
98 *Id.* at 879.
99 "Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action . . . because Title VII is not a fault-based tort scheme." *Id.* at 880.
100 477 U.S. 57 (1986).
101 Vinson alleged that her supervisor made repeated demands for sexual favors, fondled her in front of other employees, followed her into the women's restroom, exposed himself, and forcibly raped her. *Id.* at 60.
102 *Id.* at 64.
103 *Id.* at 65.
104 *Id.* at 66.
105 *Id.* at 68.
106 Vinson v. Taylor, 22 Empl. Prac. Dec. (CCH) ¶ 30,708, at 14,692 (1985).
107 "[T]he fact that sex-related conduct was 'voluntary' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit . . . ." *Meritor*, 477 U.S. at 68.

sexual harassment claim is that the alleged sexual advances were 'unwelcome.' "[108] By focusing on the "unwelcome" issue, an employee can claim sexual harassment for conduct she neither invited nor appreciated.

The Court, however, reversed the court of appeals' finding that evidence of Vinson's "dress and personal fantasies"[109] were not admissible. "[I]t does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome."[110] The Supreme Court declined to rule on the potential prejudicial effect of this evidence, instead leaving that decision to the district court.[111]

Furthermore, the Court held that not all harassing conduct falls within Title VII. The harassment complained of must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment."[112] The Court did not elaborate on this requirement but stated that Vinson's "allegations . . . are plainly sufficient to state a claim for 'hostile environment' sexual harassment."[113]

Meritor potentially represents a significant step forward for women in securing workplaces free of sexual harassment.[114] However, the decision also undermines that progress because, although the Court requires a showing that the conduct was unwelcome, it also allows evidence of the plaintiff's speech and dress[115] in determining "welcomeness." This latter requirement allows judges and juries to

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108 *Id.* at 68.

109 753 F.2d 141, 146 n.36 (D.C. Cir. 1985).

110 477 U.S. at 69.

111 *Id.*

112 *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (alteration in original).

113 *Id.*

114 Despite this great potential, some commentators criticized the *Meritor* decision for creating more confusion than clarity. *See* MACKINNON, *supra* note 22, at 105 ("[I]t may be too soon to know whether the law against sexual harassment will be taken away from us or turn into nothing or turn ugly in our hands."); Theodore F. Claypoole, Note, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 OHIO ST. L.J. 1151, 1151 (1987) ("Instead of clarifying the developing sexual harassment law, the *Meritor* decision raised as many questions as it answered.").

115 While the Court's decision specifically mentioned "speech and dress," this Note will focus on the dress and personality of the victim without addressing the specific content of the speech. To address adequately the standards surrounding speech would involve a lengthy discussion of First Amendment doctrine, especially the recent "hate speech" developments. For a discussion of such issues, see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

For articles specifically addressing the conflict between Title VII and free speech, see March Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990); Symposium, *Free Speech and Religious, Racial and Sexual Harassment*, 32 WM. & MARY L. REV. 207 (1991); Ellen E. Lange, Note, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. CAL. L. REV. 105 (1990).

consider outmoded stereotypes and beliefs in their analysis of hostile environment claims.[116] The requirement of unwelcomeness, along with consideration of the plaintiff's speech and dress, will continue to exclude women from the workplace and will hinder efforts to achieve equality. The remainder of this Note focuses on the Court's requirement that the conduct be "unwelcome," and shows how this requirement undermines all that this *Meritor* might have accomplished.

IV
THE "UNWELCOME" REQUIREMENT

In *Meritor*, the Supreme Court declared that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' "[117] While attempting to remove any requirement of involuntariness,[118] the Court added an additional hurdle over which plaintiffs must leap. In addition to showing that the alleged conduct actually did occur, plaintiffs must show that they did not welcome the conduct.[119]

One author suggests that the "unwelcome" requirement in the plaintiff's prima facie case is a departure from the ordinary requirements of Title VII law.[120] Usually, a Title VII plaintiff must demonstrate that she is a member of a protected group and that some discriminatory action was taken against her.[121] The employer may rebut the prima facie case by showing a nondiscriminatory reason for the action.[122] The employee must then prove that the nondiscriminatory reason is pretextual.[123] "[M]ost areas of the law do not require a victim to anticipate her antagonist's defenses in her prima facie case, and Title VII is no exception."[124] The concept of "wel-

116 *See infra* part VI (discussing the tests for unwelcomeness).

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

118 *See supra* notes 106-09 and accompanying text.

119 "Defining sexual harassment as unwanted sexual overtures has the same problem inherent in defining rape as unwanted sexual relations. In practice, the woman has to prove that the sexual relations or the sexual overtures were unwanted." GUTEK, *supra* note 1, at 17.

120 Vhay, *supra* note 78, at 344.

121 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *McDonnell Douglas* involved a claim of a racially motivated discharge. The Court held that the complainant could establish a prima facie case by showing: (1) that he is a member of a racial minority; (2) that he applied and was qualified for the open job position; (3) that he was rejected despite his qualifications; and (4) that the position remained open after his rejection and that the employer continued to seek applicants from people with the same qualifications. *Id.* at 802.

122 *Id.*

123 *Id.* at 804.

124 Vhay, *supra* note 78, at 344. *But see* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986) (rejecting the applicability of the *McDonnell Douglas* procedures to a hostile environment case, stating that "the order of proof and procedures enunciated [in

comeness" is almost identical to an employer's defense of consent.[125]

The justifications offered for "unwelcome" requirement demonstrate a reliance on outdated stereotypes. Concerned about the potential for abuse, the EEOC, in its *Meritor* amicus brief, argued for a "welcomeness" standard. The EEOC stated that welcomeness is needed to "ensure that sexual harassment charges do not become a tool by which one party to a consensual sexual relationship may punish the other."[126] The concern that women will abuse the legal system to punish others is a familiar concept in legal history.[127] Such an unjustifiable belief should not be allowed to skew discrimination law towards defendants.

Another problem with the unwelcomeness requirement is the practical difficulty of ascertaining whether the conduct was truly welcomed.[128] A victim may silently accept such harassment because she fears retaliation, yet courts may erroneously consider a victim's silence as consent. "The legal requirement of notice can conflict with the dynamics of power present in the workplace."[129] Therefore, definitions of welcomeness should look to see whether there was true consent or acquiescence.

In sum, the "unwelcomeness" requirement reformulates the structure of proof normally found in Title VII cases and does not adequately account for the power dynamics of the workplace. Despite these inadequacies, courts continue to use this standard and have fashioned a variety of tests to determine unwelcomeness.[130]

McDonnell Douglas is] not readily adaptable to developing the proofs and defenses in this type of Title VII action."), *cert. denied*, 481 U.S. 1041 (1987).

125 *See* Vhay, *supra* note 78, at 344 ("Welcomeness in this context is most analogous to a justification for the defendant's act . . . .").

126 Brief for EEOC, *Meritor* (No. 84-1979).

127 Lord Chief Justice Matthew Hale's now infamous statement concerning rape charges provides a succinct statement of this view: "[Rape is a charge] easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent." SUSAN ESTRICH, REAL RAPE 6 (1987) (quoting Sir Matthew Hale, The History of the Pleas of the Crown, I (1971)). For a summary of the historical distrust of women victims, see ESTRICH, *supra*, at 27-79.

Consider also the characterizations of Professor Hill during the Thomas hearings as a "scorned woman." " 'My impression was that Anita wished to have a greater relationship with the chairman than just a professional one . . . . [She] was hurt because he treated her just like he treated everybody else . . . .' " Adam Clymer, *The Thomas Nomination*, N.Y. TIMES, Oct. 14, 1991, at A1.

128 Mary Jo Shaney, Note, *Perceptions of Harms: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109 (1986). The author advocates a standard that determines whether the victim of the harassment overtly indicated consent and examines the context of the consent to see if it was freely given.

129 *Id.* at 1119. *See supra* notes 10-24 and accompanying text (explaining the structure of the workplace which allows men to hold such power of retaliation over women).

130 *See infra* part VI (describing the tests used by the Circuit Courts).

V
The Analogy to Rape Shield Laws

In deciding if conduct is "unwelcome," courts and juries essentially determine whether the victim "asked for it." The factors considered bear a striking resemblance to factors formerly considered in rape cases. In the past, a victim of rape had to explain her dress (miniskirts, tight pants, etc.), her behavior (walking alone late at night), and her past sexual conduct. Indeed, cross-examinations of victims were frequently so intrusive that complainants often felt victimized again.[131]

Although the Federal Rules of Evidence contain procedures to exclude irrelevant, prejudicial evidence in rape and sexual harassment cases,[132] courts did not apply the rules to protect rape victims adequately. To remedy this, Congress enacted Federal Rule of Evidence 412 to "spare victims of rape the degrading and unwarranted intrusions into intimate details of their private lives that had formerly been common practice in the federal courts."[133]

Rule 412[134] is based on the belief that sexual history evidence is logically irrelevant: it does not make more or less probable the existence of any material fact.[135] Although such evidence might pass the low threshold of "any tendency," stereotypes and sexist assumptions create a large risk that the jury will misuse such evidence. In-

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131 Catherine O'Neill, Note, *Sexual Harassment Cases and the Law of Evidence: A Proposed Rule*, 1989 U. Chi. Legal F. 219, 230 (citing 124 Cong. Rec. H 34,913 (1978)).

132 Federal Rule of Evidence 403 allows for the exclusion of any evidence where the potential prejudice outweighs the probative value of such evidence. *See infra* part VII (discussing Rule 403).

133 O'Neill, *supra* note 131, at 230.

134 The relevant part of Rule 412 is as follows:

> (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.
>
> (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of a victims past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—
>
> (1) . . . is constitutionally required to be admitted; or
>
> (2) admitted in accordance with subdivision (c) and is evidence of—
>
> (A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
>
> (B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.

135 *Id.* at 224.

formation is often withheld from the jury on the belief they might misuse it.[136] Congress, in enacting Rule 412, sought to reinforce "the evidentiary rules so as to avoid the juror's consideration of information which has the great potential to influence the outcome in impermissible ways."[137] Thus, Rule 412 provides a practical example of the fashioning of specific evidentiary rules to exclude evidence when the courts seem unwilling to do so.

Rule 412 provides a basis to argue against the introduction of prior sexual history evidence in sexual harassment cases.[138] Although Rule 412 explicitly applies to criminal cases, the leap to civil cases is not a large one. In a rape case, discovery and introduction of evidence is limited to protect victims, although "the defendant can potentially lose his liberty."[139] Sexual harassment cases involve equally important considerations: "the civil rights of the victims are involved."[140] Further, in sexual harassment cases, the defendant is not subject to prison, only money damages. Hence, it would be possible to create an analogue to Rule 412 for sexual harassment cases. However, a mere analogue to Rule 412 would not reach far enough.[141] Rule 412 does not end the "did she ask for it" inquiry. A victim's speech and dress are still relevant in rape cases under the current Rules.[142] Similarly, an imputation of Rule 412 to sexual harassment cases is not a solution—the "unwelcomeness" requirement would still remain.

VI
THE TESTS FOR UNWELCOMENESS

In many sexual harassment cases, the courts merely state that the plaintiff was subjected to unwelcome sexual harassment without explaining how they reached this finding.[143] In some cases, the

136 *Id.* at 229 (citing FED. R. EVID. 403 advisory committee's notes).

137 *Id.* at 230.

138 *See id.* (proposing a rule similar to Rule 412 in sexual harassment cases); *see also* Susan R. Klein, Comment, *A Survey of Evidence and Discovery Rules in Civil Sexual Harassment Suits with Special Emphasis on California Law*, 11 INDUS. REL. L.J. 540 (1989).

139 Klein, *supra* note 138, at 574.

140 *Id.*

141 It should be noted that Rule 412 applies only to federal cases. There is no federal crime of rape. "[R]ape prosecutions in federal court are few and far between." ABRAHAM ORDOVER & FAUST ROSSI, CASES AND MATERIALS ON EVIDENCE 87 (1991). One notable exception is crimes, including rape, committed on American Indian reservations in which all crimes are heard in federal court.

142 Rule 412 does not mention speech or dress. *See supra* note 134.

143 *See* Wheeler v. Southland Corp., 875 F.2d 1246, 1249 (6th Cir. 1989) ("It is uncontested that [the plaintiff] was the victim of sexual harassment."); Pease v. Alford Photo Indus., Inc., 667 F. Supp. 1188, 1191 (W.D. Tenn. 1987) ("The preponderance of the evidence is that this sexually harassing conduct by [the supervisor] was unwelcomed, unwanted, unconsented to and humiliating. . . ."); Coley v. Consolidated Rail Corp., 561

statement of a clear and unequivocal "no" or physical resistance by the plaintiff, may have obviated the need for a discussion of the evidence of "unwelcomeness."[144] In many other cases, however, the criterion of welcomeness remains an important issue. Courts have relied on a number of different tests.[145]

A. The "Totality of the Circumstances" Test

1. *Origin and Judicial Interpretations of the Test*

In 1985, the Equal Employment Opportunity Commission released guidelines on sexual harassment, suggesting that the trier of fact should determine whether sexual harassment occurred in light of the "record as a whole" and the "totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."[146]

The Supreme Court, in *Meritor v. Vinson*,[147] cited with approval the EEOC Guidelines for determining what evidence was relevant to the issue of welcomeness: "The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of the circumstances. . . .' "[148] Following *Meritor*, many courts adopted the

F. Supp. 645, 647 (E.D. Mich. 1982) ("I find that the plaintiff was subject to unwelcome sexual harassment. . . .").

144 *See* Llewellyn v. Celanese Corp., 693 F. Supp. 369, 371 (W.D.N.C. 1988) ("Plaintiff resisted this advance and broke away from [the defendant's] grip."); Carrero v. New York City Hous. Auth., 668 F. Supp. 196, 198 (S.D.N.Y. 1987) (The plaintiff told the defendant that "she wanted him to stop his conduct and showed [him] a notice of a conference which related to her then pending charge of barassment [against another supervisor.]").

145 In Perkins v. General Motors Corp., 709 F. Supp. 1487 (W.D. Mo. 1989), the court listed a number of facts that other courts have looked to to analyze the element of unwelcomeness:

> a) Whether plaintiff by her own conduct indicated that the alleged sexual advances were unwelcome.
> b) Whether the plaintiff substantially contributed to the alleged distasteful atmosphere by her own "profane and sexually suggestive conduct."
> c) Whether the plaintiff in response to evidence that at various times she had willingly participated in the conduct now complained of can "identify with some precision a point at which she made known to her co-workers or supervisors tbat such conduct would hencefore [sic] be considered offensive."
> d) Whether and, if so, when, plaintiff reported or complained about any of the incidents at issue.
> e) Whether plaintiff's account of the "unwelcome" sexual conduct is sufficiently detailed and internally consistent so as to be plausible.
> f) The nature of the work environment itself.

Id. at 1499 (citations omitted).

146 29 C.F.R. § 1604.11(b) (1991).

147 477 U.S. 57 (1986).

148 *Id.* at 69 (citing 29 C.F.R. § 1604.11(b) (1985)).

EEOC's "totality of the circumstances" test.[149] Perhaps the strongest acceptance of the test is seen in *Rabidue v. Osceola Refining*.[150] In *Rabidue*, the plaintiff alleged that exposure to degrading speech and pornographic pictures subjected her to a hostile environment.[151] Ultimately rejecting the plaintiff's claim,[152] the court listed several factors relevant to determining whether such conduct was welcome:

> the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers and supervisors, *the totality of the environment of the plaintiff's work area*, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.[153]

While the court stated that "the plaintiff must . . . prove . . . she had been subjected to unwelcomed verbal conduct and poster displays of a sexual nature,"[154] it did not explicitly discuss whether such conduct was welcome. Instead, the court determined that the alleged harassment was not "so startling" as to have affected the psyche of the plaintiff.[155] In reaching this conclusion, the court pointed to societal norms. According to the court, the pornography must be "considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica. . . ."[156] Thus, under *Rabidue*, the totality of the

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149 *See supra* note 46. Although the EEOC Guidelines are entitled to deference, they are not binding. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986); General Elec. Co. v. Gilbert, 429 U.S. 125, 140-45 (1976); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

150 805 F.2d 611 (6th Cir. 1986).

151 A co-worker continually referred to women as "whores," "cunt," "pussy," and "tits," and to the plaintiff as a "bitch" and a "fat ass." *Id.* at 624 (Keith, J., dissenting) Male employees "from time to time displayed pictures of nude or scantily clad women." *Rabidue*, 805 F.2d at 618. The court held that the sexually oriented posters could not have a significant impact on the plaintiff's work environment due to the pervasiveness of pornography in society. *Id.* at 622. In addition, even though the plaintiff was the only female in management, she was excluded from important business lunches because "it would be improper for a woman to take male customers to lunch." Rabidue, 805 F.2d at 624 (Keith, J. dissenting).

152 A few courts, however, have found a hostile work environment based on the prevalence of pornography in the workplace. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (holding that the pervasiveness of "pictures of women in various stages of undress and in sexually suggestive or submissive poses" created a hostile environment."); Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 573 (W.D.N.Y. 1987) (holding that the "proliferation of [pornography] may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal co-workers.").

153 *Rabidue*, 805 F.2d at 620 (emphasis added).

154 *Id.* at 622.

155 *Id.*

156 *Id.*

circumstances includes the level of discrimination and the acceptance of pornography in the world outside the workplace.[157]

In *Downes v. FAA*,[158] the Federal Circuit also adopted the totality of the circumstances approach. Downes alleged sexual harassment based on remarks relating to her body, physical touching of her hair, and sexual remarks by supervisors directed at nonemployees.[159] Several of the alleged harassing remarks were made to Downes by her supervisor during a phone conversation outside work hours.[160] The court found there was not a specific pattern of conduct. The court considered the time of day and the location of the comments, and concluded that no hostile environment existed:[161] "The important point is that the offensiveness of conduct cannot be judged simply by proving that an incident involving sexual remarks occurred without considering the context."[162] In considering the context, the court implied that conduct that takes place outside of the workplace is not harassment for Title VII purposes.[163]

2. *Criticism of the Test*

Consideration of the entire context in which an event takes place is often considered to be a major tenet of feminism. Professor Carol Gilligan's work provides a starting point for this theory of contextuality.[164] She argues that women focus on responsibility and contextuality and men focus on separateness and rules.[165] Thus, women have a "different voice" than the dominant discourse.[166] Many feminists call for a broadening of legal analyses to include this voice.[167]

Professor Catharine MacKinnon rejects this concept. According to MacKinnon, the "different voice" that women possess is one

157 *But see* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (wherein Judge Easterbrook asserts that there is a causal relationship between pornography and the lower pay and subordination of women), *aff'd* Hudnut v. American Booksellers Ass'n, 475 U.S. 1001 (1986).

158 775 F.2d 288 (Fed. Cir. 1985).

159 *Id.* at 289.

160 *Id.*

161 *Id.* at 295.

162 *Id.*

163 *Id.*

164 GILLIGAN, *supra* note 19, at 29.

165 *Id.*

166 *Id.*

167 Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Naomi Cahn, *The Looseness of Legal Language: The Reasonable Woman in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1434-38 (1992) (advocating a "new contextual" standard in place of the "reasonable woman standard").

that men allow them to possess.[168] The "different voice" concept gives a positive valuation to women's attitudes "by making it seem as though . . . [they] really are somehow ours, rather than what male supremacy has attributed to us for its own use."[169] Thus, the "different" voice is a voice strangled out of a woman with a foot on her neck.[170] Under the "different voice" analysis, a broadening of factors considered in sexual harassment claims could include factors that do not truly reflect women's experience. Such an expansion carries the danger of sexist bias.

The factors listed by the *Rabidue* court demonstrate this danger.[171] "The background and experience of the plaintiff"[172] should not be relevant to determine whether an advance or sexual bantering was welcome. Even assuming the perspective of the harasser as the *Rabidue* court did, there are several reasons to ignore such evidence. First, background and experience may be unknown to the harasser or to coworkers. Second, background and experience (in *Rabidue*, an "irascible" personality) do not suggest a desire for pornographic displays or sexually degrading comments. Such considerations invite courts and juries to use pejorative notions of "loose women" when considering a meritorious claim.

In addition, using society as a yardstick in order to measure the offensiveness of conduct within the workplace stagnates Title VII.[173] Simply because society may create a "hostile living environment," it does not follow that the conduct is any less offensive or discriminatory.[174] Title VII was enacted not to require the workplace to keep

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168 CATHARINE A. MACKINNON, *Difference and Dominance*, *in* FEMINISM UNMODIFIED, *supra* note 22, at 32, 38-39.

169 *Id.* at 39.

170 "Take your foot off our necks, then we will hear in what tongue women speak." *Id.* at 45.

171 For example, the court considered as a factor "the reasonable expectation of the plaintiff upon voluntarily entering that environment." *Rabidue*, 805 F.2d 611, 620 (6th Cir. 1986). Under this theory, if a woman entering into a male dominated workplace realized she might encounter sexist behavior, a "reasonable expectation," the court could deny a sexual harassment claim. The pre-existence of sexism of the workplace is used in this way to deny redress for that very same sexism. *See* Rhodes, *supra* note 61 for a discussion of the double standard between sexual harassment cases and racial harassment cases. Courts do not use the existence of racism to deny redress for racist behavior.

172 *Rabidue*, 805 F.2d at 620.

173 Although the presence of discrimination has dramatically decreased, today's culture is not bias free. The widespread instances of rape, harassment and other discriminatory acts blatantly prove the continued presence of gender discrimination. The widepsread existence of discriminatory attitudes should not be allowed to limit the recovery of harassment victims.

174 The use of society as a measure is not sanctioned in other hostile environment cases, such as race, where racial slurs are assumed to serve no purpose. *See* Rhodes, *supra* note 61.

pace with society, but rather to prohibit "employment discrimination on the basis of gender, and . . . to remove arbitrary barriers to sexual equality at the workplace. . . ."[175] The fact that discrimination exists in society does not make its existence in the workplace acceptable.

Considering potentially biased factors has led courts to deemphasize other relevant factors. The *Downes* court found phone conversations to be less harassing than face-to-face conversations.[176] The court also found that the remarks did not constitute harassment because the conversation took place after hours.[177] However, the remarks were still made within the unequal relationship of supervisor and employee.[178] Conduct on the part of a supervisor is no less harassing when it occurs outside the workplace than within the workplace.[179] With the inclusion of societal discrimination and the minimization of relevant interactions outside the workplace, *Downes* demonstrates the inability of the "totality of the circumstances" test to assess "unwelcomeness."

B. Did the Employee Incite or Solicit the Conduct Through Her Dress, Actions, or Personality?

1. *Origin and Judicial Interpretations of the Test*

In *Meritor Savings Bank v. Vinson*, the Supreme Court stated that "[a] complainant's sexually provocative speech or dress is [not] irrelevant in determining whether he or she found particular sexual advances unwelcome."[180] The *Henson* court stated that conduct would be considered unwelcome if the employee did not solicit or incite the alleged behavior "in the sense that the employee regarded the conduct as undesirable or offensive."[181] In light of these hold-

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175 Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982).

176 775 F.2d 288, 295 (Fed. Cir. 1985).

177 *Id.*

178 *See supra* notes 17-24 and accompanying text (discussing the power relationships of the workplace).

179 *See* Haehn v. City of Hoisington, 702 F. Supp. 1526 (D. Kan. 1988). The court held that a court may properly consider allegations of sexual conduct occurring after work hours when deciding a summary judgment motion since "this conduct has an evidentiary nexus to the work environment." *Id.* at 1529.

Recognizing this fact does not require Title VII to police every aspect of the employer-employee relationship. However, when an employee's work environment is made more difficult by the employer's behavior, the primary arena of the behavior should not function as a method of excluding such evidence.

180 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986). The Supreme Court found evidence of the plaintiff's speech and dress "obviously relevant" to the issue of welcomeness. *Meritor*, 477 U.S. at 69. The Court left any questions of balancing the prejudicial effect of such evidence against its relevance to the District Court, *id.*, and simply added that "there is no per se rule against its admissibility." *Id.*

181 Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

ings, courts now examine the plaintiff's dress and personality when adjudicating sexual harassment cases.

In *Rabidue v. Osceola Refining Co.*,[182] the court found no hostile environment even though the plaintiff was subjected to degrading language and sexually explicit posters.[183] The court began its opinion with a list of adjectives, mostly negative, describing the plaintiff's personality: "capable, independent, ambitious, aggressive, intractable, . . . opinionated[,] . . . abrasive, rude, antagonistic, extremely willful, uncooperative and irascible. . . ."[184] The court then dismissed the claim, finding that the conduct at issue did not constitute behavior so shocking as to interfere with a reasonable person's work situation.[185] The court explicitly connected the plaintiff's personality with the likelihood of her taking offense at the crude language: "Thus, the presence of actionable sexual harassment would be different depending on the personality of the plaintiff . . . ."[186] Implicit in the court's opinion is the belief that a reasonable woman should not behave in such a way. The court thus implied that the plaintiff's personality justified the behavior of the harasser.[187]

The relationship between the plaintiff's behavior and the "welcomeness" issue was recognized in *Swentek v. USAir, Inc.*[188] Swentek, a flight attendant, was subjected to numerous sexual advances and comments by an airline pilot.[189] The employer defended the claim by asserting that the plaintiff was a "foul-mouthed individual who often talked about sex,"[190] and that her past actions indicated that the alleged sexual harassment was welcomed.[191] The trial court found that "Swentek's own past conduct and use of foul language meant that [the harasser's] comments were 'not unwelcome' even though she told [the pilot] to leave her alone."[192] Therefore, Swentek's sexually explicit behavior with some individuals led the

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182 805 F.2d 611 (6th Cir. 1986).

183 *See supra* note 151 (discussing the alleged harassment).

184 *Rabidue*, 805 F.2d at 615.

185 In dismissing the claim, the court was apparently applying an objective test, which is demonstrated by the use of the "reasonable person."

186 *Id.* at 620.

187 While this connection between personality and likelihood of offense is not per se unreasonable, it is a broad generalization. Such generalizations have no place in an adjudication of a victim's civil rights.

188 830 F.2d 552 (4th Cir. 1987).

189 Swentek alleged that the pilot exposed himself by dropping his trousers, reached under her skirt and grabbed her genitals, dropped to his knees and sniffed her, and made numerous obscene comments. *Id.* at 555.

190 *Id.* at 556.

191 There was testimony that the plaintiff "placed a 'dildo' in her supervisor's mailbox to get her to 'loosen up,' urinated in a cup and passed it as a drink to another employee, and once grabbed the genitals of pilot Don Matthews with a frank invitation to a sexual encounter." *Id.*

192 *Id.* at 557.

court to infer that she desired this type of interaction with everyone.[193]

On appeal, the Fourth Circuit reversed, finding the trial court's reliance on the plaintiff's personality traits erroneous.[194] The circuit court held that where the alleged harasser was not exposed to the plaintiff's past conduct, such conduct could not form a basis for waiving legal protection against unwelcome harassment.[195] Hence, the Fourth Circuit focused on the action from the harasser's perspective and implied that if the alleged harasser had been exposed to the plaintiff's past conduct, such conduct would have been relevant to the issue of "welcomeness."

Similarly, in *Mitchell v. Hutchings*,[196] the defendant employer sought to depose individuals who would testify that the plaintiffs were "sexually promiscuous" and therefore "would not be as distressed by unwanted sexual advances as would plaintiffs who are less sexually active."[197] The *Mitchell* court, essentially utilizing the *Swentek* rationale, held that "evidence relating to the work environment . . . is obviously relevant, if such conduct was known to [the] defendant. . . ."[198] The court did not allow the use of evidence regarding sexual activity unknown to the defendant[199] or that was "remote in time or place to the plaintiffs' working environment."[200] Thus, the defendant's knowledge of the plaintiff's prior conduct with other individuals, as well as evidence of the work environment, may be relevant in sexual harassment cases.

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193 This inference is similar to one drawn in rape cases. Until recently, evidence of a rape victim's prior sexual conduct was admissible to show consent. "[N]o impartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one spotless and pure." ESTRICH, *supra* note 127, at 47 (quoting Lee v. State, 179 S.W. 145 (Tenn. 1915)).

194 The *Swentek* court excluded evidence of the plaintiff's speech. The court distinguished *Meritor* on the basis of frequency of contact between the plaintiff and her supervisor. *Swentek*, 830 F.2d at 557. In *Meritor*, "[the plaintiff] worked with her supervisor daily, and her dress and conversation were relevant in determining whether she welcomed sexual advances from him." *Id.* The speech at issue in the *Swentek* case was not conversations between the alleged harasser and the plaintiff. Rather, the conversations involved the plaintiff and third parties to the case. The *Swentek* court found that "there was no evidence . . . that [the employee] knew of [the plaintiff's] past conduct or that he believed his conduct was welcomed by her." *Id.* Thus, the harasser must be exposed to the plaintiff's speech in order for such evidence to be relevant.

195 *Swentek*, 830 F.2d at 557 (quoting Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983)).

196 116 F.R.D. 481 (D. Utah 1987).

197 *Id.* at 483. Evidence of the sexual atmosphere of the workplace was also sought to show that the defendant's conduct was welcome. *Id.*

198 *Id.* at 484.

199 *Id.*

200 *Id.*

2. *Criticism of the Test*

Like *Meritor*, the *Swentek* decision offers great promise of equality and freedom from sexual harassment. *Swentek* endorses the *Meritor* rationale for considering dress and speech, but *Swentek* does not allow general evidence of past conduct to vitiate a plaintiff's sexual harassment claim. While the court did not completely exclude evidence of past conduct from the determination of welcomeness, it did enunciate some limitations on the production and use of such evidence.

Despite *Swentek*'s partial limitation on evidence of the plaintiff's past conduct, courts hearing sexual harassment claims continue to impart male-biased perspectives to their analysis of "welcomeness." For instance, courts have admitted evidence of dress and speech as relevant to the issue of welcomeness.[201] Under the *Meritor* test, evidence of a woman's dress may be admitted to show the harasser was "incited" to the conduct.[202] The belief that such evidence is probative of a woman's intent displays the sexism inherent in such a concept.

> The belief that women signal our general availability by choice of clothing or that our sexual sharing with some signifies sexual availability to all is the purest male mythology, an insistence that the male viewpoint is the only valid viewpoint.[203]

The notion that women dress nicely to please men or to invite sexual conduct permeates the test of unwelcomeness. Further, these standards are riddled with sexist assumptions of what exactly an invitation for sexual behavior entails.

The concept of women dressing to please men is obsolete and incorrect. First, definitions of "sexually enticing" clothing are subjective. What a man views as "enticing" may not be considered so by the wearer of the garment. Sexual attraction and desire do not rule everyone's daily decisions. Second, a woman may dress nicely to bolster her own self-esteem, rather than to attract the attention of others.[204] Society does not, nor should it, require women to dress like nuns in order to avoid sending unknown and unintended messages. Finally, a woman *may* dress in order to look attractive to

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201 Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Swentek v. US Air, Inc., 830 F.2d 552 (4th Cir. 1987); Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986).

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

203 Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 770 (1989) (citations omitted) (reviewing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1986)).

204 It is obvious that at times men and women *do* dress and behave in a manner calculated to attract the attention of others. "Pick-up" joints are a clear example of an arena for such behavior. However, to impute behavior that is acceptable in a social setting to behavior in the workplace is unfounded.

someone. Because a woman is attempting to attract one individual, however, does not mean that she welcomes sexual attention from *all* men. These and other explanations for a woman's particular style of dress require courts to reject the automatic admittance of such evidence.[205]

Dress is not the only element courts consider when deciding "welcomeness." A victim's personality must be pristine enough to demonstrate that she did not invite the harassment. When courts engage in this inquiry, the plaintiff's personality is put on trial.[206] The *Swentek* decision clearly limits the admissibility of the plaintiff's personality or past conduct. This standard correctly protects the rights of the plaintiff by limiting inquiries into her personality. Sexual harassment law should not protect only those women whose personalities and characteristics the court holds above reproach.[207] A woman's "use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.' "[208]

Unless her actions or dress clearly indicate a desire for sexual conduct with the alleged harasser, there is no basis for believing that a woman's desire to engage in sexual conduct *with a specific person* is indicated by her dress or general speech.[209] By focusing on a woman's dress and personality, current Title VII analysis puts the plaintiff on trial. Sexual harassment plaintiffs must endure irrelevant inquiries into their personal lifestyle choices. Such inquiries are a disincentive to bring sexual harassment suits.[210] In order to

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205 Cases could exist where such evidence would be admitted. If a woman specifically focused her behavior towards the alleged harasser, such evidence should be admitted. This determination should be made out of the hearing of the jury. *See infra* part VIII (discussing solutions).

206 "Through emphasizing the plaintiff's 'abrasiveness' and minimizing the harmfulness of the barasser's conduct, the [*Rabidue*] court subtly suggested that something was wrong with Rabidue for having been offended by [the alleged harasser's] behavior." Ruth Colker, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1199 (1990).

207 By examining the plaintiff's personality, a court may hold the plaintiff to a stereotyped notion of the appropriate characteristics for a women. In 1989, the Supreme Court found that the use of stereotypes by supervisors to evaluate female employees for promotions violates Title VII. Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989). It naturally follows that the courts may not use gender stereotypes to evaluate Title VII plaintiffs.

208 *Swentek*, 830 F.2d at 557 (quoting Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983)).

209 *See infra* part VI.B. While speech such as double entendres create a more difficult situation, it should not be admitted as relevant. What one person views as a double entendre, and therefore an invitation to engage in sexual conduct, may not be intended as such by the speaker. Thus, to be admissible, speech should be clear as to its meaning and audience.

210 "Most victims of sexual harassment . . . never file complaints." MACKINNON, *supra* note 22, at 114. "[R]esearch has shown that very few individuals report their ex-

achieve its potential for equality, Title VII analysis must focus on the defendant's actions, not the plaintiff's.

VII
SOLUTIONS

Each of the judicial tests for "unwelcomeness" incorporates sexist stereotypes and beliefs. Under each test,[211] the court examines a woman's behavior to determine whether she "welcomed" the sexual conduct in question. The danger lies in the factors courts use to make this determination. Currently, courts examine the victim's speech, dress, personality, and prior behavior to determine whether the alleged harassment was welcome. These factors put the plaintiff's behavior on trial, invoke outdated stereotypes, and stagnate Title VII.

A. The Problem Redefined

Professor Catharine MacKinnon[212] states that women work categorically "as women."[213] They are perceived in the workplace in relation to their gender roles within society as a whole: hence, men perceive women not as workers, but as sexual beings in the workplace.[214] When denied desired sexual relations, men sexually harass women through degrading comments and behavior.[215] According to this view, men in positions of power combine their authority as supervisors with their perception of women as sexual beings. This perception creates an environment that often leads to sexual harassment.[216]

Most of society agrees that a racially hostile environment will never be welcomed by a victim, and that racial prejudice is never consensual. Yet, in the area of sexual harassment, the line is blurred[217] because it is possible that coworkers will want to engage

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periences or lodge an official complaint." Linda Brooks & Annette R. Perot, *Reporting Sexual Harassment: Exploring a Predictive Model*, 15 PSYCH. WOMEN Q. 31, 32 (1991).

211 *See supra* part VI (discussing the two tests).

212 Professor MacKinnon is the most influential scholar on the causes, effects and legal aspects of the sexual harassment of women. Two of the seminal cases on hostile environment analysis cited Professor MacKinnon to explain the difference between hostile environment and quid pro quo harassment. *See* Henson v. City of Dundee, 682 F.2d 897, 908 n.18 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 945-46 (D.C. Cir. 1981).

213 MACKINNON, *supra* note 18, at 9.

214 *Id.*

215 *Id.*

216 *Id.*

217 This appeal requires us to examine the often-blurred line which exists between human interaction in the workplace which is purely a private matter and human interaction in the workplace which gives rise to sexual

in sexual relations or discuss topics that are sexual.[218] Two co-workers who voluntarily engage in flirting do not violate Title VII. However, if one co-worker or supervisor flirts with an employee who does not want to engage in such conduct, a case of sexual harassment arises. The problem is one of proof, and courts must determine whether the employee bringing a case truly welcomed such behavior or was merely protecting her job.[219]

The current definitions of "unwelcomeness"—the totality of the circumstances and incitement/solicitation—demonstrate the prominence of sexism and its inability to provide a workplace free of sexual harassment. Under both tests, men's beliefs about women's behavior provide the framework for Title VII cases. These definitions must change in order to revitalize Title VII and enable its promise of equality.

It is difficult to transform legal analysis in the way that feminist scholars believe is necessary to protect the rights of women.[220] Like the workplace, the legal system was structured by and for men.[221] But until all courts reject the present system of analysis, the judiciary should begin reform by recognizing and removing sexist assumptions from existing evidentiary rules.

B. The Irrelevance of the Victim's Speech and Dress

The Federal Rules of Evidence grant wide discretion to trial judges in determining the admissibility of evidence,[222] and the extent of this discretion is unlikely to change in the near future. How-

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> harassment claim actionable under either Title VII or the equal protection clause of the fourteenth amendment.

Trautvetter v. Quick, 916 F.2d 1140, 1146 (7th Cir. 1990).

218 Sexual harassment is a violation only if the conduct is nonconsensual. The difficulties in defining sexually harassive behavior parallel those in rape cases, i.e., intercourse is only a crime if there is an absence of consent. *See supra* note 119.

219 *See* Shaney, *supra* note 128 (advocating a standard to examine if consent is freely given).

220 Many of the previously cited articles advocate various new standards that would incorporate women's views. *See, e.g.*, Abrams, *supra* note 13 (suggesting a standard that uses the devaluation of women to judge Title VII violations).

221 "Men have constructed an adversary system, with its competitive, sparring style, for the resolution of legal problems . . . . Because our legal system has developed from an unstated male norm, it has never focused adequately on harms to women." Bender, *supra* note 167, at 3, 7-8. This theme runs through many feminist articles. *See* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980); Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

222 Under the Federal Rules of Evidence, "all relevant evidence is admissible." FED. R. EVID. 402. Evidence is considered relevant if it "has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." FED. R. EVID. 401. The "any tendency" test is not a difficult

ever, an understanding of outdated stereotypes will decrease the admission of prejudicial evidence.

Certain evidence should never be relevant in sexual harassment cases. Evidence of the plaintiff's speech, dress, personality, and actions has little probative value, while the resulting prejudice may be great. Although there will be some cases in which behavior is relevant,[223] in most cases Rule 401 should bar such evidence does not have "any tendency to make the existence of any fact . . . more or less probable."[224] Even in those cases where the court feels that such evidence passes the Rule 401 threshold, the evidence may be excluded under Rule 403.[225] In sexual harassment cases, evidence about the plaintiff's prior sexual conduct, speech, and dress may confuse the jury. Such evidence may shift the jury's focus from the defendant's behavior to that of the plaintiff. This shift in focus is prejudicial, frequently outweighing any probative value the evidence may have. Further, examining past conduct may invite juries to punish women for past expressions of sexuality or to incorrectly infer that sexual expression with one person invites sexual expression with all. Thus, under Rule 403, evidence of the plaintiff's be-

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standard to meet. Thus, Rule 401 is generally considered an inclusionary rule under which most evidence is admitted.

Rule 401, however, is only the beginning of the inquiry. Relevant evidence may be excluded under Rule 403 if it is too prejudicial: "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." *Id.* The advisory committee notes to Rule 403 define unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 402 advisory committee's notes.

Under the structure of the Rules, the trial judge must first decide if the evidence is relevant under Rule 401. Then, if the judge determines the offered evidence is relevant, the judge must decide if there is potential for undue prejudice. If there is such potential, the trial judge must balance the probative value of the evidence against its possible prejudical effect. Much leeway is given to trial judges in balancing the two effects. A failure to balance these issues is reversible error.

As with any balancing test, a fair degree of subjectivity is involved. In addition to determining the probative and prejudicial value of the offered evidence, the trial judge must also consider the *purpose* for which the evidence is offered: "The probative value of evidence cannot, of course, be assessed in a vacuum; the value must always be measured in terms of the purpose for which the evidence was introduced." U.S. v. Robinson, 560 F.2d 507, 519 (2d Cir. 1997) (Oakes, J., dissenting). The structure of the Federal Rules of Evidence provides the means for excluding prejudicial evidence at several points in the decisionmaking process—the judge may determine that the evidence is not relevant, the evidence is too prejudicial, or that the evidence is too prejudicial for the purpose for which it is offered. In the final section of this Note, these rules are applied to the specific context of sexual harassment cases.

223 For example, if a woman walked into her employer's office wearing a negligee and threw herself on the desk, one would probably consider such evidence relevant to show a welcoming attitude.

224 FED. R. EVID. 401.

225 The wording of Rule 403 is discretionary and cannot be said to "require" anything. "[E]vidence *may* be excluded. . . ." FED. R. EVID. 403.

havior should usually be excluded as prejudicial and misleading to the jury. By so doing, the jury will remain focused on whether the defendant harassed the plaintiff.[226]

While any evidence not pertinent to the specific claim may seem facially irrelevant, the Advisory Committee Notes to Rule 401 state that "background" evidence can be admitted as an aid to understanding.[227] Thus, the "fact to which the evidence is directed need not be in dispute."[228] In other words, prior behavior, speech, and dress of the plaintiff might be considered helpful background facts. This concept alone suggests that prior sexual conduct, whether specific sexual acts, speech or dress, might be admissible. Yet, while such facts may aid in understanding the defendant's actions, in most cases the prejudicial nature of these facts outweighs any benefit because the jury's attention will be shifted from the defendant to a prejudicial and unwarranted examination of the plaintiff.

C. Only Evidence of Specific Interaction Between the Employee and the Harasser Should be Admitted

The optimal solution to this infusion of sexist stereotypes is the adoption of the victim's perspective as carried out by the *Ellision v. Brady* decision. Such a perspective removes the impact of societal views and rids hostile environment cases of the "unwelcome" requirement. However, the adoption of this standard would require a large shift for many courts. Generally, progress in this area has been made in incremental steps. This Note proposes that federal courts should adopt this standard in order to remove sexist bias in hostile environment cases.

The *Ellison* standard serves two purposes. First, it provides a method to reduce the scope of admissible evidence while operating within the current requirement of "welcomeness." Second, it provides a screening device for sexist stereotypes by limiting admissible evidence to interactions between the alleged harasser and the plaintiff.

Only evidence of behavior on the part of the plaintiff that is specifically directed to the alleged harasser should be admitted to show the welcomeness of the conduct. The burden should be on the defendant to show a "specific" relationship between himself and the plaintiff in order to substantiate his claim that his conduct was welcome. General behavior should not be admitted. For example, evidence that a woman dresses in a sexually provocative manner

226 As previously stated, any provocative act on the part of the plaintiff could be admitted, if shown to be specifically directed at the alleged harasser.

227 FED. R. EVID. 401 advisory committee's notes.

228 *Id.*

should not be admitted unless the harasser could show the plaintiff specifically wore such clothes to let him know of her desire for a sexual relationship. Similarly, the plaintiff's past conduct would be inadmissible unless specifically directed at the harasser.

Furthermore, the workplace need not be a completely sterile environment in which relations between men and women are non-existent. A relationship between two workers, with sexual overtones, should not be evidence that a woman welcomes sexual conduct from all workers. Simply because a woman wishes to express her sexuality with one person does not tend to show she wishes such a relationship with all people. Hence, if the plaintiff makes comments of a sexual nature in the workplace, they should not be admitted unless they were directed at the defendant with a clear purpose of inviting sexual relations or banter.[229]

At first glance, narrowing the realm of admissible evidence in this manner may seem to contradict the general concept of inclusion embodied in the Federal Rules of Evidence.[230] However, Title VII is not a "fault-based tort scheme."[231] Evidence that provides a background of the defendant's intent is irrelevant under the statute. Only evidence relating to the cause and effect of the conduct is probative to the issue. The defendant's belief that his conduct was welcome also should be irrelevant under Title VII. However, the "unwelcome" requirement makes such intentions relevant. The prejudice created by the pervasiveness of sexist norms and the limited relevance of the defendant's intentions provide a sound basis to exclude such background evidence.

Under this approach, which excludes evidence of "general" behavior, the various factors listed by the *Rabidue* court (plaintiff's experience, the lexicon of obscenity that pervaded the workplace, etc.) would be inadmissible as general evidence. The focus would remain on the specific relationship between the parties to the case, and past experiences external to this relationship would not be considered. A woman's reputation as "easy" is not a basis for finding that she welcomed conduct from a specific person. Men do not and should not assume that they are interchangeable with other men. Thus, courts should not impute a woman's behavior with one man to all

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229 "[There is] a tendency among men to perceive women's friendly behavior as a sign of sexual interest or availability." Catherine B. Johnson et al., *Persistence of Men's Misperceptions of Friendly Cues Across A Variety of Interpersonal Encounters*, 15 PSYCH. WOMEN Q. 463, 464 (1991).

230 *See* FED. R. EVID. 401; FED. R. EVID. 402.

231 Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) (citing Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)); *see also* Greene, *supra* note 78, at 31 ("Title VII was aimed at the consequences of employment practices rather than the motivation behind them.").

other men. To do so would rid women of personal choice, identity, and freedom. In sum, current tests of welcomeness admit too much general evidence about the plaintiff, and hence limit Title VII.

Conclusion

For women to achieve equality in the workplace, new conceptions of discrimination must be adopted. Presently, to succeed on a sexual harassment claim, a woman is required to prove that the conduct that was harassing and unwelcome. Courts must limit admission of evidence to the specific relationship between the defendant and the plaintiff. Through this judicial limitation of admissible evidence, women will be better able to define the offense committed against them and secure legal redress. Further, employers will be forced to view women as individual workers and not as a group whose identity as workers and as women are inseparable.

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