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Sexual Harrassment After Harris v. Forklift Systems, Inc. - Is it Really Easier to Prove?

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Sexual Harassment After *Harris v. Forklift Systems, Inc.*—Is it Really Easier to Prove?

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against an employee on the basis of sex.¹ The language of Title VII does not specifically address the issue of whether sexual harassment constitutes sexual discrimination under the Title. As a result, courts initially dismissed sexual harassment claims for failure to state a claim for relief under Title VII.²

In 1980, the lack of uniformity and confusion in construing Title VII prompted the Equal Employment Opportunity Commission (“EEOC”) to develop guidelines for analyzing sexual harassment claims.³ The guidelines

1. 42 U.S.C. § 2000e-2(a) (1988).

2. See *Garber v. Saxon Business Prod., Inc.*, 552 F.2d 1032 (4th Cir. 1977); *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Come v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated on procedural grounds*, 562 F.2d 55 (9th Cir. 1977).

3. See 29 C.F.R. § 1604.11 (1993).

affirmed the position that sexual harassment in the workplace is a violation of Title VII.⁴ According to the guidelines, hostile environment sexual harassment need not result in denial of employment opportunities.⁵ It is harassment that creates an “intimidating, hostile or offensive work environment.”⁶ Although the EEOC Guidelines articulated the concept of “hostile environment” sexual harassment, because the commission is only an administrative agency and its promulgations do not carry the weight of binding law, some courts were unwilling to recognize hostile environment claims.⁷ In 1986, the Supreme Court for the first time attempted to put an end to the confusion when it decided *Meritor Savings Bank v. Vinson*.⁸

One of the ways the Supreme Court helped ease the debate was by recognizing that claims of hostile environment sexual harassment were actionable as sex discrimination under Title VII.⁹ The Court further held that although the EEOC Guidelines are not binding on the courts, they are a body of experience and informed judgment that courts and litigants should look to.¹⁰ The Supreme Court set a standard for when hostile environment sexual harassment is actionable: the conduct must be sufficiently “severe or pervasive” so as to alter the conditions of employment and create an abusive work environment.¹¹

The Supreme Court thought it was ending the controversy in this area; however, the decision failed to address the disagreement between the circuit courts in defining hostile environment sexual harassment. The biggest problem the circuit courts have faced since *Meritor* has been in defining precisely what conduct would create a sexually hostile environment.¹² The Court did not define “severe” or “pervasive.” This left lower courts without a guideline which, in turn, has led to inconsistent results. Some courts have

4. See *id.* § 1604.11(a). There are two forms of sexual harassment under the guidelines: (1) quid pro quo, which is when sexual conduct is made a term or condition of employment; and (2) hostile environment, which is when the conduct unreasonably interferes with the work performance or the conduct creates an intimidating, hostile or offensive working environment. *Id.*

5. Denial of employment opportunities may result in “quid pro quo” sexual harassment. See *id.* at § 1604.11(a)(2).

6. *Id.* § 1604.11(a)(3).

7. See Jeffrey A. Gettle, Comment, *Sexual Harassment and the Reasonable Woman Standard: Is It a Viable Solution?*, 31 DUQ. L. REV. 841, 845 (1993).

8. 477 U.S. 57 (1986).

9. *Id.* at 65.

10. *Id.*

11. *Id.* at 67.

12. See Gettle, *supra* note 7, at 846.

decided that in light of *Meritor*, the plaintiff must show that the alleged conduct caused psychological harm.¹³ At the same time, other courts have held that psychological harm is not a necessary element of the claim.¹⁴

On November 9, 1993, the Supreme Court decided *Harris v. Forklift Systems, Inc.*, ("*Harris II*").¹⁵ By deciding this case, the Supreme Court was hoping to resolve the issues it left unresolved in 1986. The Court did not overrule *Meritor*; rather, it broadly interpreted its prior holding and decided that the conduct need not cause a tangible psychological injury to be considered sexual harassment.¹⁶ The Court took the middle ground between making a mere offensive utterance a valid cause of action and requiring that victims suffer a nervous breakdown as a requirement for a cause of action.¹⁷ The petitioner argued in her brief, and the Supreme Court agreed, that requiring psychological injury is inconsistent with the prophylactic objectives of Title VII.¹⁸ The Supreme Court stated that to question whether the conduct "seriously affected plaintiff's psychological well-being" or "led her to suffer injury" is a needless inquiry that focuses the factfinder's attention on concrete psychological harm, an element Title VII does not require.¹⁹ The Court was trying to set a standard for lower courts to follow, but it remains to be seen how this decision will be interpreted by the lower courts.

This comment will analyze the state of the law before the Supreme Court's decision and whether *Harris II* has changed the meaning of hostile environment sexual harassment. There is concern that the elimination of the psychological harm element makes it too easy for plaintiffs to prove their cases.²⁰ The goal of this comment is to determine whether *Harris II* in fact, does make hostile environment sexual harassment easier to prove. The *Harris II* decision by no means resolved all the questions dealing with sexual harassment. This comment will analyze the ambiguities left by

13. See *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1040 (1987); and *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

14. See *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *vacated on other grounds*, 900 F.2d 27 (4th Cir. 1990).

15. 114 S. Ct. 367 (1993).

16. *Id.* at 370.

17. *Id.*

18. Petitioner's Brief at 23, *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993) (No. 92-1168).

19. *Harris II*, 114 S. Ct. at 371.

20. See Linda Greenhouse, *Sex Harassment Easier to Prove*, N.Y. TIMES, Nov. 10, 1993, at A1.

Harris II and how one appellate court has dealt with the Supreme Court's holding.²¹ Many issues are unresolved in this area, one being the fairness or unfairness of the reasonable person standard in evaluating sexual harassment cases. Although this comment focuses on *Harris II*,²² the pros and cons of the reasonable person standard and the viability of the reasonable woman standard will also be discussed. This comment will also address the issue of whether the Federal government's restriction of speech in the workplace through Title VII is offensive to the First Amendment.²³ The Supreme Court should be visiting these two issues in the very near future.

II. STATE OF THE LAW BEFORE *HARRIS*

A. *Title VII of the Civil Rights Act of 1964*

Congress passed Title VII as part of the Civil Rights Act of 1964.²⁴ Its primary goal was to eliminate employment discrimination.²⁵ Title VII makes it an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's sex.²⁶ As part of Title VII, the Federal Equal Employment Opportunity Commission was created to help carry out the law.²⁷ By 1972, although the federal law was in place, Congress realized that the EEOC was not meeting desired expectations.

21. See *Saxton v. AT&T*, 10 F.3d 526 (7th Cir. 1993).

22. The Supreme Court framed the issue as whether a plaintiff needs to show she was psychologically injured in order to recover for hostile environment sexual harassment. The Court did not evaluate the reasonable person standard. It reversed the district court's decision and remanded the case to a factfinder who will apply the rule that it set forth. *Harris II*, 114 S. Ct. at 371.

23. The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

24. H.R. REP. No. 914, 88th Cong., 1st Sess. 113 (1963), reprinted in 1964 U.S.C.-C.A.N. 2391, 2401.

25. *Id.*

26. 42 U.S.C. § 2000e-2(a)(1) (1988).

27. H.R. REP. No. 914, 88th Cong., 1st Sess. 113 (1963), reprinted in 1964 U.S.C.-C.A.N. 2391.

Due to the ineffectiveness of the EEOC, Congress amended Title VII by passing the Equal Employment Opportunity Act.²⁸ Congress realized that the EEOC had been established in 1964 but that its power was limited to conciliation.²⁹ It became evident that the EEOC needed to have quasi-judicial power with the authority to obtain enforcement of its orders.³⁰ The legislative history of the amendment demonstrates Congress' growing concern with discrimination against women based on gender and its desire to put a stop to the problem.³¹ Congress became concerned that discrimination against women was being regarded by many as either morally or physiologically justifiable.³² Trying to change society's view of discrimination based on gender, Congress announced that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."³³

By 1980, the EEOC had set up guidelines to help courts determine not only what conduct constitutes sexual discrimination but, more importantly, what conduct constitutes sexual harassment.³⁴ The guidelines made harassment on the basis of sex a violation of Title VII.³⁵ They went on to recognize two forms of sexual harassment: "quid pro quo" and "hostile environment."³⁶ When evaluating a sexual harassment claim, the record is to be looked at as a whole and a decision is to be made based on the totality of the circumstances.³⁷

Despite the guidelines, some courts were unwilling to allow hostile environment claims because administrative agency guidelines do not carry

28. H.R. REP. No. 238, 92d Cong., 1st Sess. 4-5 (1972), *reprinted in* 1972 U.S.C.A.N. 2137.

29. *Id.* at 2138.

30. *See id.*

31. *See id.* at 2139. The persistence of discrimination and its detrimental effects require a reaffirmation of our national policy of equal opportunity in employment. *Id.*

32. *See* H.R. REP. No. 238 at 2141.

33. *Id.*

34. *See* 29 C.F.R. § 1604.11 (1993).

35. *Id.*

36. *Id.* Quid pro quo sexual harassment exists when submission to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature is made a term or condition of employment. *Id.* § 1604.11(a)(1). Hostile environment sexual harassment is defined by the guidelines as "conduct hav[ing] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* § 1604.11(a)(3). Hostile environment sexual harassment is the focus of this comment.

37. 29 C.F.R. § 1604.11(b) (1993).

the weight of binding law.³⁸ By 1981, courts were still refusing to recognize sexual harassment that did not affect tangible job benefits.³⁹ In *Bundy v. Jackson*,⁴⁰ the Court of Appeals for the District of Columbia recognized hostile environment sexual harassment as actionable under Title VII.⁴¹ This was a boost for women because they could file their claims without having to prove the harassment detrimentally affected tangible job benefits.⁴² But women still had a long road ahead of them because the court in *Bundy* stated that the psychological aspect of the work environment is a “condition of employment” under Title VII.⁴³

B. *The Supreme Court Steps In: Meritor Savings Bank v. Vinson*⁴⁴

Another five years passed before the Supreme Court decided to step in and lay the foundation in this new area of the law.⁴⁵ This was the first time the Supreme Court had taken a stand and held that hostile work environment is a form of sexual harassment that violates Title VII.⁴⁶ The Court reaffirmed the position that Title VII is not limited to “economic” or “tangible” discrimination.⁴⁷ This decision appeared to be the answer women were waiting for. However, it left many questions unanswered which, inevitably, have led to controversy.⁴⁸ According to the Supreme Court, for lower courts to find that plaintiffs have stated a claim for sexual harassment, the harassing conduct must be sufficiently severe or pervasive to alter the conditions of employment and must create an abusive working environment.⁴⁹

The Supreme Court affirmed the court of appeals’ remand to the

38. See Gettle, *supra* note 7, at 845.

39. See *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *vacated on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978).

40. 641 F.2d 934 (D.C. Cir. 1981).

41. See *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

42. See *id.* at 945.

43. *Id.* at 944.

44. 477 U.S. 57 (1986).

45. See *id.*

46. *Id.* at 64.

47. *Id.*

48. See Wendy Pollack, *Sexual Harassment: Women’s Experiences vs. Legal Definitions*, 13 HARV. WOMEN’S L.J. 35, 55 (1990).

49. See *Meritor*, 477 U.S. at 67.

district court to dispose of Vinson's hostile environment claim.⁵⁰ The district court, like many other courts, had previously decided that since there was no quid pro quo sexual harassment the claim should fail.⁵¹ The respondent, Mechelle Vinson, brought the action against Meritor Savings Bank, her employer, and Sidney Taylor, claiming that during the four years she was employed by the bank Taylor had constantly sexually harassed her.⁵² Vinson claimed that after her probationary period as a teller-trainee, Taylor invited her out to dinner, and during the meal suggested that they go to a motel to have sexual relations.⁵³ She refused at first, but because she feared losing her job she eventually agreed.⁵⁴ Taylor subsequently made repeated demands for sexual favors, both during and after business hours.⁵⁵ Over the next several years, they had intercourse forty or fifty times.⁵⁶ Taylor fondled Vinson in front of other employees, followed her into the women's restroom, exposed himself to her, and on several occasions forcibly raped her.⁵⁷ These activities ceased when she started going with a steady boyfriend.⁵⁸ On the stand, the testimony was the typical "he said/she said." Taylor contended that Vinson made the accusations because of a business-related dispute.⁵⁹ The district court held that since Vinson's and Taylor's sexual relationship was voluntary and unrelated to her continued employment at the bank, there was no actionable sexual harassment.⁶⁰

In reviewing these facts, the Supreme Court decided that the EEOC Guidelines support the view that harassment leading to noneconomic injury can violate Title VII.⁶¹ The guidelines undercut the district court's holding because under Title VII the fact that sex-related conduct was voluntary, is not a valid defense to sexual harassment.⁶² The gravamen of any sexual

50. *Id.* at 73.

51. *Id.* at 57.

52. *Id.* at 60.

53. *Id.*

54. *Meritor*, 477 U.S. at 60.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Meritor*, 477 U.S. at 61.

60. *Id.* at 57. This language indicates the court did not find "quid pro quo" sexual harassment. But for hostile environment sexual harassment, sexual favors need not be made a condition of continued employment. See 29 C.F.R. § 1604.11(a)(3) (1993).

61. *Meritor*, 477 U.S. at 65.

62. 29 C.F.R. § 1604.11(a) (1993).

harassment claim is that the alleged sexual advances were “unwelcome.”⁶³ The harassment need not be “quid pro quo;” it can be “hostile environment,” because Title VII “affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”⁶⁴ In arriving at its decision, the Supreme Court relied on *Rogers v. EEOC*.⁶⁵ *Rogers* recognized a cause of action for discriminatory work environment based on race under Title VII.⁶⁶ The court held that a mere utterance which engendered offensive feelings in an employee is not enough for a claim under Title VII.⁶⁷ On the other hand, a “working environment so heavily polluted with discrimination as to destroy completely the worker’s emotional and psychological stability” is actionable.⁶⁸ Although nowhere in *Meritor* does the Court say that plaintiffs must show they were psychologically damaged, quoting from *Rogers* created great confusion among the circuit courts and seemed to set a higher threshold for finding sexual harassment than under the EEOC Guidelines.⁶⁹ One scholar has suggested that *Meritor* leaves room for much legal sexual harassment, which is what the Court set out to end.⁷⁰ The Court failed to define how much conduct is lawful— from this stems the inconsistency that has pervaded this area.⁷¹

C. *Split in the Circuit Courts*

In 1986, the Sixth Circuit Court of Appeals decided *Rabidue v. Osceola Refining Co.*,⁷² (“*Rabidue II*”) based on the *Meritor* decision.⁷³ Although this court purports to follow the *Meritor* reasoning, it denied relief to a plaintiff who was subjected to an “extremely vulgar and crude” supervisor who “customarily made obscene comments about women generally, and on occasion, directed such obscenities to plaintiff.”⁷⁴ In the course of the supervisor’s (Douglas Henry) obscene comments about women, he used

63. *Meritor*, 477 U.S. at 68; 29 C.F.R. § 1604.11(a).

64. *Meritor*, 477 U.S. at 65.

65. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

66. *Id.* at 236.

67. *Id.* at 238.

68. *Id.*

69. See Pollack, *supra* note 48, at 60.

70. See *id.* at 61.

71. See *id.*

72. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

73. *Id.*

74. *Id.* at 615.

words like “cunt,” “pussy,” and “tits.”⁷⁵ On at least one occasion, Mr. Henry called plaintiff a “fat ass.”⁷⁶ In addition to this, other male employees displayed, in their offices and work areas, pictures of nude or partially clad women, to which plaintiff and other female employees were exposed.⁷⁷ The court of appeals decided that based on the EEOC Guidelines and legal precedent, for plaintiff to prevail in a Title VII offensive work environment sexual harassment action, she had to prove that the work environment seriously affected her psychological well-being.⁷⁸ The court required psychological harm for a valid cause of action, although neither *Meritor* nor the EEOC Guidelines make psychological harm an element of the claim for relief.⁷⁹

The court, in *Rabidue II*, decided that based on the totality of the circumstances approach espoused by the guidelines, the lexicon of obscenity that pervaded the work environment before and after plaintiff’s introduction to it must be considered together with the plaintiff’s reasonable expectation when she voluntarily entered the environment.⁸⁰ This language makes it seem as though plaintiff assumed the risk of being harassed based on her sex when she accepted employment at Osceola Refining Co. By affirming the status quo in this way, the court legitimized sexual harassment. What is good for society is good for the workplace; or more aptly, what is good for the gander is good for the goose.⁸¹ Even more disturbing is the district court’s opinion, which was quoted by the appellate court in justification for its holding:

Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to - or can - change this. . . . Title VII was [not] designed to bring about a magical transformation in the social mores of American workers.⁸²

After reading this, it seems that Judge Newblatt totally misunderstood Title

75. *Rabidue v. Osceola Ref. Co.*, (“*Rabidue I*”) 584 F. Supp. 419, 423 (E.D. Mich. 1984), *aff’d*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

76. *Id.*

77. *Id.*

78. *Rabidue II*, 805 F.2d at 619.

79. *See Meritor*, 477 U.S. at 57; 29 C.F.R. § 1604.11 (1993).

80. *Rabidue II*, 805 F.2d at 620.

81. *See Pollack*, *supra* note 48, at 65.

82. *Rabidue I*, 584 F. Supp. at 430; *Rabidue II*, 805 F.2d at 620-21.

VII and its goal. Congress enacted Title VII and the Equal Employment Opportunity Act to change conduct that had become acceptable in a pervasively male dominated workplace.⁸³ Judge Keith, in his dissenting opinion, stated: "In my view, Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act."⁸⁴ He further stated that women should not be subjected to environments where their sexual dignity and reasonable sensibilities are visually, verbally, or physically assaulted as a matter of prevailing male prerogative.⁸⁵

The kind of attitude espoused by the *Rabidue II* majority reaffirms the common belief that it is fine to joke sexually with a woman even if it is offensive to her because it has become socially acceptable behavior. It must be remembered that the Supreme Court said in *Meritor* that the gravamen of sexual harassment is that the advances were "unwelcome" not whether the harasser set out to cause harm.⁸⁶ It is evident that the Sixth Circuit misinterpreted *Meritor* and makes it harder or virtually impossible for plaintiffs to make out a prima facie case for sexual harassment by requiring an element that is unnecessary.⁸⁷ It has been proposed that courts want to see severe psychological harm because they simply do not believe in hostile environment sexual harassment claims, although they have been recognized by the EEOC and the Supreme Court.⁸⁸

The Third and Eleventh Circuits also require plaintiffs to show that they were psychologically injured by the offensive conduct.⁸⁹ In *Andrews v. City of Philadelphia*, the plaintiffs were two female police officers who claimed they were harassed by their fellow workers and supervisors.⁹⁰ In their working division, women were regularly referred to in an offensive and obscene manner and plaintiffs were personally addressed in such manner. There was evidence of pornographic pictures of women in the locker room, which plaintiffs contend embarrassed, humiliated, and harassed them.⁹¹ The behavior by the male police officers included the showing of a

83. H.R. REP. No. 238, 92d Cong., 1st Sess. 4-5 (1972) reprinted in 1972 U.S.C.C.A.N. 2137.

84. *Rabidue II*, 805 F.2d at 626-27 (Keith, J., dissenting).

85. *Id.*

86. *See Meritor*, 477 U.S. at 68.

87. *See Rabidue II*, 805 F.2d at 619.

88. *See Pollack, supra* note 48, at 67-68.

89. *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3rd Cir. 1990); *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982).

90. *Andrews*, 895 F.2d at 1471.

91. *Id.* at 1472.

pornographic movie in a squad room which was also used by the plaintiffs.⁹² Although plaintiffs were emotionally affected, scared, and nervous, the court held that plaintiffs had to establish that the conduct was severe enough to affect their psychological stability.⁹³

Likewise, the Eleventh Circuit in *Henson v. City of Dundee*,⁹⁴ made psychological harm a question to be considered when deciding whether the harassment complained of affected a "term, condition, or privilege" of employment.⁹⁵ The court did not find a Title VII violation, although Henson's supervisor, Sellgren, subjected her and her female co-worker to crude and vulgar language, and almost daily inquired into their sexual habits and proclivities.⁹⁶

The court in *Henson* enunciated the elements a plaintiff must prove in order to successfully claim hostile environment sexual harassment: (1) plaintiff must belong to a protected group;⁹⁷ (2) plaintiff was subjected to unwelcome sexual harassment;⁹⁸ (3) the harassment was based upon sex;⁹⁹ (4) the harassment affected a "term, condition, or privilege" of employment; and (5) employer knew or should have known of the harassment and failed to take action.¹⁰⁰ The confusion comes into play when courts analyze the

92. *Id.* at 1475.

93. *Id.* at 1482.

94. 682 F.2d 897 (11th Cir. 1982).

95. *Id.* at 904.

96. *Id.* at 901-02. The appellate court reversed the district court's order as to the hostile work environment claim and remanded for a new trial on the issue. *Id.* at 901.

97. This requires a simple stipulation that plaintiff is a man or a woman. *Id.* at 903.

98. The conduct must be unwelcome in the sense that plaintiff did not solicit or incite it and the plaintiff regarded it as undesirable and offensive. *Henson*, 682 F.2d at 903.

99. Plaintiff must show that but for her sex, she would not have been subjected to sexual harassment. *Id.* at 904.

100. *Id.* at 903-05. The issue of imputed liability is not dealt with in this comment because in *Harris*, the alleged perpetrator was the president of the company. Nevertheless, the EEOC Guidelines hold an employer responsible for the acts of its agents and supervisory personnel with regard to sexual harassment, regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known. 29 C.F.R. § 1604.11(c) (1993). The Commission will examine the employment relationship to determine whether the employee was acting in either a supervisory or agency capacity. *Id.*

The Supreme Court in *Meritor* decided not to issue a definitive rule on employer liability, but agreed with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. 477 U.S. at 72 (1986). Although the Court did not announce a rule, it did try to give some guidance to lower courts. For example, it stated that employers are not always automatically liable for sexual harassment by their supervisors; absence of notice to an employer does not necessarily insulate the employer from liability; and the mere

fourth element—the harassment affected a “term, condition, or privilege” of employment. The Eleventh Circuit, like others, claims that for the harassment to be sufficiently severe or pervasive so as to affect a term, condition, or privilege of employment, it must affect plaintiff psychologically.¹⁰¹ Some courts have departed from this line of reasoning and only require that plaintiffs show either the harassment interfered with their ability to perform or significantly affected their psychological well-being or, even bolder, that the conduct need not affect plaintiffs psychologically.¹⁰²

The standard of not requiring proof of tangible psychological harm is fair because someone’s job performance may be impaired without their suffering a nervous breakdown. This shows the confusion that has led to many inconsistent results. What plaintiffs must plead and prove depends on what circuit they are in and not on any set standard. This creates uncertainty and may even deter plaintiffs from filing their claims, which is a great departure from what Title VII set out to accomplish.¹⁰³ It was evident that somewhere along the line the Supreme Court would have to step in again and try to set a standard for lower courts to follow in hostile environment sexual harassment claims.

III. HARRIS V. FORKLIFT SYSTEMS, INC.

A. Lower Court Decision

The District Court for the Middle District of Tennessee was following circuit precedent in 1991 when it decided that Teresa Harris had to show she had been psychologically damaged in order to show she had been sexually

existence of a grievance procedure and a policy against discrimination, coupled with employee’s failure to invoke the procedure, will not always insulate the employer from liability. *Id.* Courts since *Meritor* are split on whether notice is required. *Compare* *Vance v. Southern Bel. Tel. & Tel. Co.*, 863 F.2d 1503, 1515 (11th Cir. 1989) (holding employer liable for supervisor’s conduct even without notice) *with* *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 902 (1st Cir. 1988) (holding employer liable if he or she had actual or constructive notice and failed to take appropriate action).

101. *Henson*, 682 F.2d at 904.

102. *See* *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). The harasser’s conduct is what must be pervasive or severe, not the alteration in the condition of employment. *Id.* at 876. *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *vacated on other grounds*, 900 F.2d 27 (4th Cir. 1990).

103. *See* 42 U.S.C. § 2000e-2(a) (1988); 29 C.F.R. § 1604.11 (1993).

harassed.¹⁰⁴ The test is whether the harassment is conduct which would interfere with a hypothetical reasonable individual's work performance and seriously affect the psychological well-being of that reasonable person under like circumstances.¹⁰⁵ The court cited *Rabidue II* to justify its holding.¹⁰⁶ By requiring that plaintiffs be psychologically harmed, the courts are denying relief when work performance has been affected but plaintiffs have not suffered a nervous breakdown. This is contrary to Title VII. The EEOC Guidelines were designed to punish people whose conduct unreasonably interferes with another's work performance.¹⁰⁷ The district court found that Forklift's president often insulted Ms. Harris because of her gender and made her the target of unwanted sexual innuendos and that his inappropriate sexual comments offended her as they would a reasonable woman.¹⁰⁸ Nevertheless, the court concluded that the behavior was not so severe as to be expected to seriously affect her psychological well-being.¹⁰⁹ In like manner, the Sixth Circuit Court of Appeals affirmed.¹¹⁰

B. Facts

Plaintiff, Teresa Harris, was employed by Forklift Systems as a rental manager from April 22, 1985 until October 1, 1987.¹¹¹ Charles Hardy was at all material times president of Forklift.¹¹² Mr. Hardy made plaintiff the object of a continuing pattern of sex-based derogatory conduct. In the presence of other employees he would make comments like "you're a woman, what do you know," "you're a dumb ass woman," "we need a man as the rental manager," and once in front of employees and a Nissan representative he said, "lets go to the Holiday Inn to negotiate your raise."¹¹³ Mr. Hardy would ask plaintiff and other female employees, but not male employees, to retrieve coins from his front pants pocket.¹¹⁴ He

104. *Harris v. Forklift Sys., Inc.*, ("Harris I") No. 3-89-0557, 1991 WL 487444 (M.D. Tenn. Feb. 4, 1991) (following *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986)), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *rev'd*, 114 S. Ct. 367 (1993).

105. *Harris I*, 1991 WL 487444 at *6.

106. *Id.*

107. *See* 29 C.F.R. § 1604.11(a)(3) (1988).

108. *Harris I*, 1991 WL 487444 at *6.

109. *Id.*

110. *Harris v. Forklift Sys., Inc.*, 976 F.2d 733 (6th Cir. 1992).

111. *Harris I*, 1991 WL 487444 at *1.

112. *Id.*

113. *Id.* at *2-3.

114. *Id.*

would throw objects on the ground in front of plaintiff and other female employees and ask them to pick them up, and then make comments about the female employees' attire.¹¹⁵ As a result of Mr. Hardy's behavior, plaintiff experienced anxiety and emotional upset. She did not want to go to work, cried frequently, began drinking heavily, and her relationship with her children became strained.¹¹⁶ On August 18, 1987, plaintiff met with Mr. Hardy to complain about his treatment towards her.¹¹⁷ He admitted making the comments but said they were jokes.¹¹⁸ He apologized, and on his promise that the behavior would cease, plaintiff continued working for Forklift.¹¹⁹ Shortly thereafter, Mr. Hardy continued to humiliate her by suggesting that plaintiff secured an account for the company by promising to do sexual favors for a customer.¹²⁰ He said to her in front of other employees, "what did you do, promise the guy . . . some 'bugger' Saturday night?"¹²¹

On Thursday, October 1, 1987, plaintiff collected her paycheck and left Forklift Systems.¹²² Considering all the facts and the way plaintiff felt, the court still refused to recognize she made a prima facie case for hostile environment sexual harassment. Although the court called this a close case and found that Mr. Hardy was a vulgar man who demeaned female employees at his workplace, the court chose to characterize his conduct as merely annoying and insensitive and dismissed plaintiff's case.¹²³

C. Supreme Court Holding

The Supreme Court granted certiorari to resolve the conflict among the circuits on whether conduct, to be actionable as "abusive work environment" sexual harassment, must seriously affect an employee's psychological well-being or lead the plaintiff to suffer injury.¹²⁴ The Supreme Court reaffirmed its holding in *Meritor* and attempted to expand upon it by setting a standard.¹²⁵ The Court, borrowing from *Meritor*, said that Title VII is

115. *Id.* at *3.

116. *Harris I*, 1991 WL 487444 at *3.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Harris I*, 1991 WL 487444 at *3.

122. *Id.*

123. *Id.* at *5-6.

124. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993).

125. *Id.* at 370.

violated “[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”¹²⁶ The standard takes a middle path between making merely offensive conduct actionable and requiring the conduct to cause tangible psychological harm.¹²⁷ The conduct is measured both objectively and subjectively. The conduct must objectively create a hostile or offensive environment that a reasonable person would find hostile and the victim must subjectively perceive the conditions as such.¹²⁸ The petitioner argued in her brief, and the Court seemed by its holding to have agreed, that neither the language of Title VII nor its legislative history requires proof of serious psychological injury.¹²⁹ The decision undercut the Sixth Circuit and others that require tangible psychological harm because the Court announced that “Title VII comes into play before the harassing conduct leads to a nervous breakdown.”¹³⁰ Justice O’Connor, who rendered the unanimous opinion, reasoned that psychological harm should not be an element of the claim for relief because a discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.¹³¹ Such behavior is offensive to the goals of Title VII.¹³²

The Court further tried to ease the confusion by stating that the fact that *Meritor* made reference to environments so heavily polluted with discrimination as to completely destroy the emotional and psychological stability of employees, merely showed an especially egregious example of harassment.¹³³ This language was not meant to mark the boundary for what is actionable.¹³⁴ This seems to be the language circuits were relying upon to require tangible psychological damage as part of the claim for relief. As correctly stated by petitioner in her brief, the Sixth Circuit test is based on a misinterpretation of *Meritor*.¹³⁵ Lower courts must now follow the

126. *Id.*

127. *Id.*

128. *Id.* The appropriateness of the reasonable person standard was not an issue before this Court.

129. Petitioner’s Brief, *supra* note 18, at 15.

130. *Harris II*, 114 S. Ct. at 370.

131. *Id.* at 371.

132. *Id.*

133. *Id.*

134. *Id.*

135. Petitioner’s Brief, *supra* note 18, at 20.

rule that as long as the environment would reasonably be perceived and is perceived as hostile or abusive, there is no need for it also to be psychologically injurious.¹³⁶ This decision seems to be a major coup for women who were kept from showing they were sexually harassed because they had not endured a nervous breakdown. Nevertheless, the Court cautioned that this is a difficult area of the law and that there cannot be a mathematically precise test to determine when there has been a hostile environment sexual harassment violation under Title VII.¹³⁷ This language shows that hostile environment sexual harassment is far from being a defined area of the law. The decisions will still vary because juries must look at the totality of the circumstances and make decisions on a case-by-case basis.¹³⁸ Lower courts should look at the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether the conduct unreasonably interferes with an employee's work performance. Whether or not the plaintiff suffered psychological harm may be relevant when determining if in fact plaintiff found the environment to be abusive, but no single factor is determinative.¹³⁹ In light of its holding, the Supreme Court reversed the judgment and remanded the case because the district court's application of the incorrect standard may have influenced its ultimate conclusion.¹⁴⁰ The Court was further inclined to render this decision because the district judge himself found this to be a close case.¹⁴¹ This does not mean that Ms. Harris won, but at least her case should now be evaluated under the correct legal standard, giving her a fair chance to prove she was sexually harassed.

IV. IMPACT

The impact the Supreme Court decision will have on Teresa Harris depends on how the district court weighs all the evidence. This could very well mean that the district court again finds she was not sexually harassed. What the court cannot do is ask that she show psychological harm as a result of Mr. Hardy's abusive behavior. The Supreme Court was not sure if, or to what extent, the district court relied on the psychological harm

136. See *Harris II*, 114 S. Ct. at 371.

137. *Id.*

138. See *id.*

139. *Id.*

140. *Id.*

141. *Harris II*, 114 S. Ct. at 371.

element when it decided that Ms. Harris did not state a claim for hostile environment sexual harassment.¹⁴² Therefore, the decision the district court will make will depend on whether or not it gave too much weight to this element.

It seems from reading the district court opinion that the court accorded great weight to the fact she could not show a tangible injury.¹⁴³ The court did find that Hardy was vulgar and treated female employees in a demeaning fashion.¹⁴⁴ Further, the court even said that she was offended as would any reasonable woman.¹⁴⁵ This shows the court did not find Ms. Harris to be an especially fragile or sensitive person who was merely overreacting. In light of all the evidence and the fact that the court cannot exclusively rely on psychological harm, there is a good chance the court will change its prior judgment dismissing plaintiff's claim.

Of course, there exists the possibility, as respondent argued to the Supreme Court in his brief, that the district court did not give any particular emphasis to the psychological harm element.¹⁴⁶ If this is so, then Teresa Harris stands to lose again. The Supreme Court was not attempting to cure all the evils that pervade sexual harassment when it decided *Harris II*, but it was a move in the right direction.

The Supreme Court's decision is strong legal precedent for new plaintiffs who can now successfully argue that they need not show they were psychologically injured to state a claim for hostile environment sexual harassment. On December 3, 1993, less than a month after the Supreme Court had decided the sexual harassment issue, the Court of Appeals for the Seventh Circuit decided a case based on *Harris II*.¹⁴⁷ The U.S. District Court for the Northern District of Illinois granted summary judgment in favor of AT&T because it found insufficient evidence to establish hostile environment sexual harassment.¹⁴⁸ The Seventh Circuit Court of Appeals affirmed.¹⁴⁹

Although the plaintiff in that case did not make out a claim for hostile environment sexual harassment, it is important to note that the court

142. *Id.*

143. *See Harris I*, 1991 WL 487444.

144. *Harris I*, 1991 WL 487444 at *5.

145. *Id.* at *7.

146. Respondent's Brief at 12, *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993) (No. 92-1168).

147. *See Saxton v. AT&T*, 10 F.3d 526 (7th Cir. 1993).

148. *Id.* at 531.

149. *Id.* at 537.

followed the Supreme Court's decision and stated that psychological injury is not a necessary element.¹⁵⁰ The court further stated that, even without regard to the tangible effects, the very fact that there was discriminatory conduct, which was so severe or pervasive that it created a work environment abusive to employees because of gender, offends Title VII's broad rule of workplace equality.¹⁵¹ The effect *Harris II* had on this case was that the court had to take notice and realize that it could no longer require plaintiffs to show they suffered anxiety and debilitation as it had in the past.¹⁵² Furthermore, this decision shows that *Meritor* is still alive and well in this field, as the court relies on it for the basic elements that must be proven to show hostile environment sexual harassment.¹⁵³

As was evident with *Meritor*, lower courts do not always interpret cases correctly and sometimes the Supreme Court does not convey the message clearly. It still remains to be seen if lower courts are going to interpret *Harris II* properly or are going to read something into it that is not there. The *Saxton* decision is only one, and may not be the best, example to measure how other lower courts will apply the hostile environment sexual harassment test enunciated by *Harris II* because the facts are not the ones commonly found in these types of cases.

The conduct by the supervisor in *Saxton* was inappropriate but not severe or pervasive enough as to create a hostile work environment because the behavior was limited to two instances and he stopped after she made her lack of interest clear.¹⁵⁴ Saxton and her supervisor, Richardson, met for drinks after work at Richardson's suggestion.¹⁵⁵ She had been trying to meet with him in order to discuss her dissatisfaction with her lab assignment.¹⁵⁶ After spending two hours at a nightclub, they drove to a jazz club, again at Richardson's request.¹⁵⁷ While they were at the jazz club, Richardson placed his hand on Saxton's leg above the knee several times and once he rubbed his hand along her upper thigh.¹⁵⁸ Saxton removed his hand each time and told him to stop.¹⁵⁹ When they left the jazz club, Richardson pulled Saxton into a doorway and kissed her for two or three

150. *Id.* at 533.

151. *Id.*

152. *See Saxton*, 10 F.3d at 533.

153. *See id.*

154. *Id.* at 534-35.

155. *Id.* at 528.

156. *Id.*

157. *Saxton*, 10 F.3d at 528.

158. *Id.*

159. *Id.*

seconds until she pushed him away.¹⁶⁰ Saxton repeated her admonition at work the following morning, and he apologized and assured her that it would not happen again.¹⁶¹

About three weeks later, Richardson invited Saxton to lunch to discuss work related matters.¹⁶² As Richardson was driving her back to her car after lunch, he took a detour, stopped the car and got out for a walk.¹⁶³ Saxton decided to do the same and walked off on her own, when he suddenly lurched at her from behind some bushes, as if to grab her.¹⁶⁴ She dashed several feet away to avoid him and again told him his behavior was inappropriate.¹⁶⁵ This was the last time he made any advances toward Saxton.¹⁶⁶ These facts make the case easier to decide than *Meritor* or *Harris II*, in which the conduct was obviously persistent and abusive. The ultimate result of *Harris II* is that plaintiffs who find themselves in courts that follow the Sixth Circuit test can now cite *Harris II* to overrule the need for psychological harm and remove the burden of proving any unnecessary elements.

As an interesting alternative, professor Kathryn Abrams has proposed two ways to prevent sexual harassment without the need to resort to litigation.¹⁶⁷ The first is for the EEOC to enforce the guidelines which provide an avenue for reform that is less adversarial than a full-blown private action.¹⁶⁸ The second is for employers to voluntarily implement programs to train employees on sexual harassment.¹⁶⁹ This alternative is more desirable because neither the decree nor the litigation will help employers or employees understand what conduct caused the injury, nor do they learn more acceptable forms of conduct.¹⁷⁰ When courts decide

160. *Id.*

161. *Id.*

162. *Saxton*, 10 F.3d at 528.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 529.

167. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1216-19 (1989).

168. *Id.* at 1216-17.

169. *Id.* at 1217. Under this model, the employers would create guidelines indicating what conduct is proper and which is not proper for the workplace. *Id.* at 1218. Upon imposing the guidelines, the employer must impress upon the employees that sexual harassment in the workplace will not be tolerated and corrective measures will be taken. See *id.*

170. Abrams, *supra* note 167, at 1219.

sexual harassment they confine themselves to rendering the decision, not to advising the employer or employees on how they should reform their conduct. It seems that even if plaintiffs make it to court, the judicial decrees will do little in improving that particular workplace and preventing the event from recurring, unless employers get actively involved.

V. FUTURE CONCERNS

A. *Psychological Harm Element*

The Supreme Court in *Harris II* was attempting to set a standard that would erase the confusion that was troubling lower courts. The Court said that plaintiffs need not show they were psychologically injured in order to state a claim for hostile environment sexual harassment.¹⁷¹ This was the standard enunciated by the Court, but there is no set definition. There still exists no precise test to determine when someone has been the victim of hostile environment sexual harassment. *Harris II* leaves us with no set number of times the harasser must act; all that is evident is that it must be more than once. Even after the Supreme Court attempted to clear the air, there is no definition for how “severe” or “pervasive” the behavior must be.¹⁷² These are important items because they are vital to a correct judicial decision. It is likely that lower courts are still going to encounter problems when trying to apply *Harris II*. This will be especially true in cases where the conduct was borderline. When the conduct is clear-cut one way or the other, the court’s decision is simplified. Unfortunately, in most cases, the decision is not so simple because the conduct was neither extremely blatant nor was it a mere one time occurrence. It then becomes important what definition is applied and how much weight the elements are given. It seems that these types of questions are always going to pervade this area because of the Court’s reluctance to set a test and its desire to leave it up to lower courts to handle on a case-by-case basis.¹⁷³

In his concurring opinion, Justice Scalia points out that the *Harris II* holding leaves lower courts unguided because there is no mention of how much of each factor is necessary nor is a single factor identified as determinative.¹⁷⁴ This does not help ease the uncertainty that already

171. *Harris II*, 114 S. Ct. at 371.

172. *Id.*

173. *See id.*

174. *Id.* at 372 (Scalia, J., concurring).

riddles this area of the law. Justice Scalia concurred because he did not foresee at the time an alternative course other than the one taken by the Court.¹⁷⁵ It seems the Court took the better approach, not the best possible solution. He said that in an attempt to set a definite test, the Court could rely on the factor of unreasonable interference with the employee's work performance as the absolute test.¹⁷⁶ This would lend some guidance to lower courts, but by the same token he pointed out that Title VII's language does not give any indication that such limitation is appropriate.¹⁷⁷ Therefore, it seems the answer to what constitutes hostile environment sexual harassment is far from being fully answered.

A major concern after *Harris II* is that removing the psychological harm element will make hostile environment sexual harassment claims easier to prove. In other words, it will make it too easy for plaintiffs to show they were harassed.¹⁷⁸ However, the author submits that *Harris II* does not make sexual harassment easier to prove. The Court simply removed an unnecessary obstacle. Lower courts were requiring this element based on a misinterpretation of precedent and aggrieved plaintiffs were the ones paying the price. Under the new standard, the insurmountable obstacles have been removed which makes it more fair to plaintiffs.¹⁷⁹ Under the old standard, women who showed appalling behavior by co-workers and superiors had their cases dismissed nonetheless, for failure to show tangible psychological harm.¹⁸⁰ Plaintiffs can now prove the essential elements of the claim without the need for unnecessary obstacles. Plaintiffs must show that the conduct was severe or pervasive enough that it created a hostile work environment in which an objective reasonable person would be offended.¹⁸¹ This is already a difficult task in and of itself without adding to it unnecessary elements.

The elements of the claim will eliminate any frivolous claims. Plaintiffs still have to make out a prima facie case. This diminishes the chance that removing the requirement of showing psychological harm will open the floodgates of litigation in this area. The judicial system cannot

175. *Id.*

176. *Harris II*, 114 S. Ct. at 372.

177. *Id.* Justice Ginsburg took a position similar to Justice Scalia's by stating that "the adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance." *Id.* (Ginsburg, J., concurring).

178. See *Greenhouse*, *supra* note 20, at A1.

179. See *Harris II*, 114 S. Ct. at 371.

180. See, e.g., *Rabidue II*, 805 F.2d at 611.

181. *Harris II*, 114 S. Ct. at 370.

create unreasonable obstacles for legitimate claims in an effort to keep out illegitimate ones. The positive aspect is that now plaintiffs with legitimate claims will not be discouraged from filing their cases; this is exactly what must occur if Title VII is to have any effect on preventing hostile environment sexual harassment.

B. *The Reasonable Person Standard*

The objective reasonable person standard is the standard that has been used by most courts, and was the one applied by the district court to determine if in fact Teresa Harris was offended by the conduct of Mr. Hardy.¹⁸² The conduct must be severe or pervasive enough to create an objective hostile or abusive work environment—one in which a reasonable person would be offended.¹⁸³ This is the so-called “sex blind” reasonable person standard. The standard does not take into account the gender of the person who was offended. This standard is the one most widely used by judges and juries to determine if parties to a case acted reasonably.¹⁸⁴

The problem in this area of the law is that consistently women are the plaintiffs and their perspective is not taken into account.¹⁸⁵ Men have reported experiences with sexual harassment from women, but historically it has been more common for women to face this behavior in the workplace.¹⁸⁶ “[M]uch of the behavior that women find offensive is behavior that is accepted as normal heterosexual behavior by men.”¹⁸⁷ If courts are not willing to take into account that a plaintiff was offended because she is a woman, then sexually harassing environments will remain unchanged because men in male-dominated workplaces find such behavior normal and acceptable.¹⁸⁸ It has been proposed that “the reasonable person standard may even work against Title VII’s goal of placing women on an equal footing with men in the workplace.”¹⁸⁹ Some courts have been willing to reexamine the reasonable person standard and consequently have decided

182. *Id.* at 369-70.

183. *Id.* at 370.

184. See Elizabeth A. Glidden, Note, *The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment*, 77 IOWA L. REV. 1825, 1827-28 (1992).

185. See generally Pollack, *supra* note 48.

186. LILLIAN GLASS, PH.D., HE SAYS, SHE SAYS 208 (1992).

187. See Pollack, *supra* note 48, at 52.

188. See Glidden, *supra* note 184, at 1849.

189. See *id.* at 1839.

that it was time for a change.¹⁹⁰

In *Ellison v. Brady*,¹⁹¹ the Ninth Circuit decided it would evaluate the severity and pervasiveness of sexual harassment from the perspective of the victim.¹⁹² The court chose to take this innovative route because “[h]arassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.”¹⁹³ Men, who are rarely victims of sexual assault, tend to view sexual conduct without understanding the social setting or underlying threat of violence perceived by women.¹⁹⁴ The court stated that taking into account the reasonable woman’s view does not establish a higher level of protection for women than men.¹⁹⁵ A gender-conscious examination enables women to be equal to men in the workplace by acknowledging the effects of sexual harassment on a reasonable woman.¹⁹⁶ This standard will protect employers from the hypersensitive female employee because it considers only the view of a reasonable woman.¹⁹⁷

The district and appellate courts judged Teresa Harris based on the perspective of a reasonable sexless person.¹⁹⁸ This was the same standard used by the Sixth Circuit in *Rabidue II*, which was the precedent the *Harris I* court used.¹⁹⁹ Interestingly, in *Rabidue II*, Judge Keith espoused in his dissent the reasonable woman standard²⁰⁰ five years before *Ellison* was decided.²⁰¹ He dissented from the majority because he felt that unless a woman’s view was taken, sexual harassment would continue.²⁰² Hopefully

190. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482-83 (3rd Cir. 1990). The discrimination must “detrimentally affect a reasonable person of the same sex” in the position of the plaintiff. *Id.* at 1482. *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Rabidue II*, 805 F.2d at 626 (Keith, J., dissenting) (indicating that women and men are different and the standard should account for this), *cert. denied*, 481 U.S. 1041 (1987).

191. 924 F.2d 872 (9th Cir. 1991).

192. *Id.* at 878.

193. *Id.*

194. *Id.* at 879.

195. *Id.*

196. *Ellison*, 924 F.2d at 879.

197. *Id.*

198. *Harris I*, 1991 WL 487444.

199. *Rabidue II*, 805 F.2d at 611.

200. *Id.* at 626 (Keith, J., dissenting). “[U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.” *Id.*

201. *Id.*

202. *Id.*

someday soon, the voice of the minority will become that of the majority. At the moment, the reasonable woman/reasonable victim standard remains a minority view. As this area of the law has evolved, it has become evident that men's and women's perspectives must be considered separately.²⁰³

The First Circuit, also taking the minority position, made the common illustration that a male supervisor may believe it is perfectly correct for him to tell a female subordinate that she has a great figure or nice legs.²⁰⁴ The female may find the comments are not a compliment but offensive behavior.²⁰⁵ The problem is that most men are not aware of how seemingly innocent words, "labels," and terms of endearment may be perceived as sexist; they simply deem them as a way of interacting.²⁰⁶ That is why if the woman's perspective is not taken into consideration, the comments will be dismissed as nothing more than a man complimenting a pretty woman.²⁰⁷ This is so regardless of the fact that the female was truly offended and these types of sexual comments made her feel inferior and uncomfortable. More and more women have grown to resent this sort of behavior as disrespectful and sexist.²⁰⁸ This is the sort of behavior Title VII²⁰⁹ was designed to prevent and it will continue to surface under the current reasonable person standard.²¹⁰

The Supreme Court in *Harris II* did not consider whether or not it should change the standard to account for the victim's views.²¹¹ The Court only dealt with the issue at hand.²¹² Perhaps if Teresa Harris would have had the benefit of being judged based on a reasonable woman's

203. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988).

204. *Id.*

205. *Id.*; see also GLASS, *supra* note 186, at 210. Many may fail to see the reason women get upset by being called "honey" or "sweetheart" in the workplace. This stems from the socially acceptable view that the man is just being friendly. Dr. Glass suggests that terms of endearment have no place in the workplace because they can easily be misinterpreted as a sexist comment. *Id.*

206. GLASS, *supra* note 186, at 211.

207. *Id.*

208. In a 1984 study conducted by *Newsweek*, women were asked if it bothered them when men referred to them as "girls." Only 34% of the women surveyed reported that they were annoyed, while 51% said it did not bother them at all. This changed six years later when in 1990, another survey conducted for Virginia Slims American Women's Poll revealed that 53% of the women were annoyed (a 19% increase), while 44% were not. *Id.*

209. 42 U.S.C. § 2000e-2 (1988).

210. *Id.*

211. *Harris II*, 114 S. Ct. at 368.

212. *Id.* at 371.

perspective, she would have prevailed.²¹³ Even the district judge had to admit that a reasonable woman would have been offended by the behavior to which Ms. Harris was exposed.²¹⁴

The viability of the reasonable woman standard has become a burning issue, one the Supreme Court will not be able to ignore much longer. As illustrated above, some lower courts have applied *Harris II* and have shown the importance of the change. Realistically, it does not matter how severe or pervasive the conduct was or whether plaintiffs must show tangible psychological injury if their viewpoint and feelings are not going to be accorded the weight they deserve by the court.

C. *The First Amendment*

Another major concern which the Supreme Court has not addressed is whether the federal government is unconstitutionally restricting speech in the workplace through Title VII. The question that begs to be answered is whether the Court's recent interpretation of Title VII and the expansion of hostile environment sexual harassment claims is consistent with the First Amendment.²¹⁵ Professor Kingsley Browne suggests that the definition given to "hostile work environment" is too broad and for it to be consistent with the First Amendment it needs to be narrowed.²¹⁶ Some speech may be regulated on the basis of content if it falls within a recognized exception to the First Amendment such as defamation, obscenity, or fighting words.²¹⁷ Traditionally, if the category of speech does not fall under one of the recognized exceptions, it is protected.

The First Amendment has been invoked successfully to protect expression even if it is offensive, harmful, or disagreeable to society.²¹⁸

213. *Harris I*, 1991 WL 487444 at *7.

214. *Id.*

215. See Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

216. *Id.*

217. See *id.* at 484. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *cert. denied*, 459 U.S. 1226 (1983). There is no constitutional value in false statements. *Id.* at 340. Obscene materials have no First Amendment protection. *Miller v. California*, 413 U.S. 15, 23 (1973). Fighting words—those which inflict injury or incite breach of peace—are not protected by the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

218. *Texas v. Johnson*, 491 U.S. 397 (1989). The expression of ideas may not be prohibited simply because society finds it offensive or disagreeable. An exception to this principle has not been recognized even when our flag is involved. *Id.* at 414. "[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify

The Supreme Court stated in *Pickering v. Board of Education*,²¹⁹ that the “core value” of the First Amendment is “having free and unhindered debate on matters of public importance.”²²⁰ This principle seems to be in direct collision with the cases that have made hostile environment sexual harassment actionable under Title VII because the person is held liable for what he says.²²¹ This conflict is also evident in racial discrimination claims under Title VII.²²² The Sixth Circuit said:

[T]he law does require that an employer take prompt action to prevent . . . bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well.²²³

This shows that courts are willing to restrict what people say in the workplace.

It can be inferred from the case law that the workplace is sufficiently different from the street or a social setting to merit a greater degree of regulation, but courts have never explained the reason for this.²²⁴ *Harris*

curtailing all speech capable of giving offense.” *Cohen v. California*, 403 U.S. 15, 21 (1971). Free speech in our system of government best serves its purpose “when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Public expression of ideas will not be prohibited merely because ideas are offensive to some listeners when they can simply “avert” their ears. *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

219. 391 U.S. 563 (1968).

220. *Id.* at 573.

221. *E.g.*, *Harris II*, 114 S. Ct. at 367.

222. *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).

223. *Id.* at 350.

224. *See e.g.*, *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987). “[M]ost complaints of sexual harassment are based on actions which, although they may be permissible in some settings, are inappropriate in the workplace.” *Id.* at 1561 n.13. *See Doe v. University of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (striking the university’s policy prohibiting harassment of students on First Amendment grounds, but suggesting that “speech which creates a hostile or abusive working environment on the basis of race or sex” is unprotected); *Snell v. Suffolk County*, 611 F. Supp. 521 (E.D. N.Y. 1985), *aff’d*, 782 F.2d 1094 (2d Cir. 1986). Courts do not interfere with what people say or do in their homes or at social gatherings, but the workplace is different. *Id.* at 528. *See also* Robert Post, *Free Speech and Religious, Racial and Sexual Harassment: Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991). Speech in the workplace does not

II did not answer this question. The Court placed the case outside the parameters of the First Amendment by stating: "This standard . . . takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."²²⁵ This is the manner in which the First Amendment issue was disposed of by the Supreme Court. Since the Court refused to allow claims for sexual harassment based on a mere offensive utterance, the holding is not inconsistent with the First Amendment.²²⁶ This suggests that the conduct displayed by Mr. Hardy against Ms. Harris and other female employees was more than just an offensive utterance within the meaning of the First Amendment. It was behavior that created an abusive and hostile working environment, undeserving of First Amendment protection.²²⁷

Professor Browne notes that the First Amendment is seldom invoked in these cases, although the defendant is held liable for expressing social and political ideas.²²⁸ Professor Browne suggests that if the First Amendment is going to be respected, hostile environment claims cannot be based even partly on protected speech.²²⁹ This would mean that a person who brings a claim based on employer's (or its agent's) inappropriate touching coupled with posting of pornographic pin-ups on the walls should not be permitted to introduce the latter into evidence.²³⁰ The problem with this proposition is that to force plaintiffs to base their claims solely on the physical act would go against the many judicial decisions on sexual harassment that do not require touching for a successful claim.²³¹ The bulk of hostile environment sexual harassment claims are based on verbal abuse. This demonstrates the tension between hostile environment claims and the First

generally constitute public discourse because that sort of dialogue would be patently out of place. *Id.* at 289.

225. *Harris II*, 114 S. Ct. at 370; *see also Meritor*, 477 U.S. at 57 (supporting the position that a mere utterance of an epithet which engenders offensive feelings in an employee is not sufficient to implicate Title VII).

226. *See id.*

227. *See Harris II*, 114 S. Ct. at 367.

228. *See generally* Browne, *supra* note 215.

229. *Id.* at 544.

230. *Id.*

231. *E.g.*, *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). Plaintiffs must show they were subjected to verbal or physical conduct of a sexual nature. *Id.* at 875. *See also Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1490 (M.D. Fla. 1991) (plaintiff was subjected in the workplace to "pictures of women in various stages of undress and in sexually suggestive or submissive poses, as well as remarks by male employees and supervisors which demean women").

Amendment.

Due to the great public importance of the First Amendment issue, it is likely that the Supreme Court will be confronted with this issue in the near future. The Court will have to balance all the interests involved. Employees have the right to work in an environment free from discriminatory intimidation, ridicule, and insult²³² and employers likewise have the right to have their workplaces free from this counterproductive behavior. On the other hand, citizens have the protection of the First Amendment to give their opinion on matters of public concern. Because the First Amendment is highly valued, this is not going to be an easy decision for the Court, but Congress has made clear its desire to stop discrimination in the workplace.²³³ The author submits that a solution would be for the Court to make expressions in the workplace which are targeted at a specific person and are perceived by that person as offensive an exception to First Amendment protection. If the Court does not resolve this conflict in favor of sexual harassment, then the legislative and judicial efforts to stop sexual harassment have been in vain. The harassment will continue and with more frequency because the harassers will be clothed by the First Amendment.

VI. CONCLUSION

Harris II seems to be the panacea victims of harassment were waiting for. Unfortunately, the questions have not been fully answered; if anything, more questions have been raised. Justice O'Connor said that the Court need not answer in its opinion all the questions raised by the hostile environment sexual harassment test.²³⁴ This shows that the decision is not going to solve all present inconsistencies and that sometime soon the Court will be revisiting the issue. Although the potential remains for a myriad of questions, the Court did take a positive stand in the struggle to give some definition to hostile environment sexual harassment claims. Now, plaintiffs like Teresa Harris will not have to endure a nervous breakdown before they can prove they were sexually harassed. The Court was not trying to make sexual harassment easier to prove. It was trying to determine the pertinent elements of the claim for relief. To do this it reaffirmed *Meritor* and said

232. *Harris II*, 114 S. Ct. at 370 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986)).

233. See *supra* note 31 and accompanying text.

234. *Harris II*, 114 S. Ct. at 371.

psychological harm was never meant to be an element.²³⁵ The Court is merely giving sexual harassment victims what was theirs in the first place: the chance to show that abusive behavior created a hostile working environment.

Litigation is not the best means of preventing sexual harassment. The EEOC Guidelines seek prevention of sexual harassment as a means of elimination.²³⁶ When litigation ensues it is an after-the-fact event geared towards redress of the victim. The sexual harassment has already occurred and plaintiff is obligated to relive what happened by recounting the story in court. Professor Kathryn Abrams' suggestions on preventing sexual harassment without litigation are a viable solution to the current problem and merit consideration.²³⁷ The battle for preventing sexual harassment is not only in the hands of Congress and the judicial system, but more appropriately, at the root of the problem, the workplace.

These suggestions only illustrate ways sexual harassment can be prevented without resorting to the courts. When preventive measures are not in place or they do not function, plaintiffs must turn to the judicial system for redress. They can expect to find inconsistencies in the courts, because this is a highly uncertain area. There is no set test, even considering the Court's efforts in *Harris II*. The propositions set forth in Justices Scalia and Ginsburg's concurring opinions do not lend any help at the moment.²³⁸ Perhaps when the Court revisits the issue it will look to the concurring opinions as an aid to reaching a defined test for hostile environment sexual harassment claims. Until the Supreme Court takes up the issue again, let us hope lower courts have enough sense to evaluate all the factors fairly based on the totality of the circumstances, without adding any unnecessary burdens, from the perspective of the reasonable victim and not a sexless reasonable person.

Mary C. Gomez

235. *Id.* at 370-71.

236. 29 C.F.R. § 1604.11(f) (1993).

237. Abrams, *supra* note 167-70 and accompanying text.

238. *Harris II*, 114 S. Ct. at 371-72 (Scalia, J., and Ginsburg, J., concurring).