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Mock Problem Scenario
for the Opening Plenary Session on
Workplace Harassment Issues

This scenario has been created as a mock exercise in problem solving on
the topic of workplace sexual harassment. The scenario was originally
developed by Ms. Debra Crumbley, of the law firm of Thompson, Sizemore &
Gonzalez, and was modified by Ms. Crumbley and Professor Robert Bickel.
The scenario was adapted by Professor Bickel, Ms. Elsa Kircher Cole, and Mr.
Tom Hustoles for use at the National Conference. All names and events are
intended to be fictional, and any similarity to actual persons, institutions, or
other entities, is accidental and unintended.

Beyond “He Says-She Says” in the Workplace: When Do
Legitimate Job Requirements and Evaluations of Employee
Performance
Become Invalid Because of Alleged Harassment?

Mary Worker was employed by Alma Mater University in May,
1986, as a secretary in the University’s Human Resources Department.
After six months, she was removed from probationary status, and four
months later was promoted to the position of Employee Benefits Co-
ordinator. While working in this position, Ms. Worker attended night
classes at the University. In August, 1992, she completed her coursework,
and was awarded a Bachelor of Sciences Degree in Business Administration,
with a major in Human Resources Management. Upon completion of the
degree, Ms. Worker was promoted to the position of Assistant Director of
Human Resources Management at AMU.
From the date she was hired, and continuing until May, 1995, Ms. Worker's immediate supervisor was Mr. Jay Oldtime, the University's Director of Human Resources Management. During this period, Mr. Oldtime's evaluations of Ms. Worker described her as a commendable employee, pursuant to an evaluation scale of 1.0-5.0 [1.0 representing performance which fails to meet the requirements of the position and needs substantial improvement; 2.0 representing performance which meets some requirements, but needs improvement in certain areas; 3.0 representing performance which meets all requirements in a fully capable manner; 4.0 representing performance which meets all requirements and exceeds expectations in certain areas; and 5.0 representing performance which significantly exceeds requirements in all areas of responsibility]. Until 1993, Ms. Worker never received an evaluation, in any category, less than 3.0, and her average overall evaluation during this period was 3.75.

In late 1994, Mr. Oldtime evaluated Ms. Worker's overall performance at 2.75. At a meeting requested by Ms. Worker, she questioned the evaluation. Oldtime explained that he was concerned about her “apparent burn-out” and her unwillingness to seek additional responsibilities in management. Oldtime mentioned that he was “disappointed” that Worker had not been enthusiastic about his earlier suggestion that she pursue an MBA Degree, and he perceived a general “lack of interest” on her part in professional development. Worker responded that the completion of her undergraduate degree while working full time “took its toll”, and that she was simply not ready to accept the time constraints required for graduate work at this time. She indicated that the degree was a “long range goal”.

In May, 1995, Oldtime resigned his position, and was replaced by George Cleansweep. Mr. Cleansweep was perceived by the University's business and financial leadership team to be on a “fast track” within the University. In contrast to Oldtime, who was known as a collegial, “nurturing” manager (who tended to use positive employee evaluations to achieve positive employee motivation), Cleansweep was perceived as a “results-oriented, hands-off” manager, who demanded much of his subordinates, as well as himself. Most of his peers at the University agreed that it was difficult to work for Cleansweep, especially because of his use of “short-notice” project deadlines. As to Ms. Worker, the contrast
was noteworthy. It may be said that she and Mr. Oldtime enjoyed an extremely positive relationship, characterized as a virtual peer relationship. Thus, Ms. Worker had a difficult time adjusting to Mr. Cleansweep’s management style. More specifically, Ms. Worker was so intimidated by Mr. Cleansweep’s approach that she often experienced physical discomfort on the mornings of work days. Indeed, during the first few weeks of Cleansweep’s tenure as Worker’s supervisor, Worker actually used sick leave so that she would not have to report to work.

Prior to his accepting the position of Director of Human Resources Management, Cleansweep had experienced three complaints of sexual harassment (by separate female subordinates) in his former position within the University. Oldtime [working with Mr. Gary Hunter, the University’s “EEO Co-ordinator/Employee Grievance Officer” (who reported to Oldtime)] had investigated these complaints, and Oldtime had decided that the complaints lacked merit. He had rejected all three without speaking to Cleansweep about them. In each case, the complaining party had accepted the finding and chose not to pursue any complaint to outside state or federal agencies. One of the complainant’s, Madeline Coworker, was a friend of Worker’s, and had been a secretary for Cleansweep prior to his promotion. She mentioned the prior complaints to Worker at lunch when Worker described her difficulties in working for Cleansweep. Knowing that Worker was recently divorced, Coworker also warned Worker to anticipate inappropriate conduct by Cleansweep, as he was “known to be interested in dating recently divorced women”.

Subsequently, Worker had occasion to be in Cleansweep’s office. She found him reading the “Swimsuit Issue” of Sports Illustrated Magazine. As she inquired what he was doing, he responded that he was “just getting his creative juices flowing”. As he responded, he held up the magazine so that Worker could see a photograph of a female model clad in a mesh swimsuit which depicted her partially nude. Worker was startled and embarrassed, and asked Cleansweep to close the magazine. Cleansweep laughed and asked Worker whether she would wear something similar to the beach, remarking that she “would look very inviting in it.”

Worker left Cleansweep’s office and reported the incident to Cleansweep’s immediate superior, Howard Bell, the University’s Vice-
President for Administration. Worker indicated to Mr. Bell that she was reporting the matter to him within the University’s grievance procedures. [Those procedures instructed an employee to first inform his/her immediate supervisor of any grievance respecting terms, or conditions of employment, and to request that the supervisor resolve the matter informally. Failing informal resolution, the procedure provided for the filing of a formal grievance which was then referred to a grievance panel comprised of persons designated by the Director of Human Resources Management]. Worker explained that she felt intimidated by Cleansweep, and could not bring herself to confront him again in this matter. Mr. Bell thanked Ms. Worker for bringing the matter to his attention. When Worker left his office, Bell immediately summoned Cleansweep, and confronted him with the incident. He admonished Cleansweep to be more sensitive to the presence of women in management at the University and suggested that he should enjoy his “Sports Illustrated” in the privacy of his own home. He instructed Cleansweep to apologize to Worker.

Following his meeting with Mr. Bell, Cleansweep asked Worker to come to his office, where he apologized to her for the incident, and for any discomfort he may have caused her. Cleansweep later mentioned the incident to his secretary, Rita Goffer, expressing his surprise that such a matter would be taken so seriously by Mr. Bell. Goffer took the occasion to inform Cleansweep that he was generally too explicit about sex, and that women in Cleansweep’s office too often had to endure his sexually explicit jokes. When Cleansweep responded that he only told such jokes to male coworkers in his office, Goffer reminded him that the door was usually open so that anyone in the outer offices could hear what was being said.

Some few days after these occurrences, Worker and Coworker again lunched, this time with two male coworkers, who were themselves recently divorced. In the course of the conversation, there was much talk of dysfunctional sexual relations as a factor in the break-up of marriages. Worker was an enthusiastic participant in the discussion, and explained that her sexual relationship with her “new boyfriend” was the reason she could describe their relationship as much more secure than her marriage had been. One of the two male coworkers had dinner that evening with Cleansweep, and mentioned that Worker was “bragging at lunch about her sex life.”
The following Friday afternoon, Cleansweep asked Worker to work late with him on a “rush project”. Worker indicated the need to catch a late afternoon bus home, as her “old car” was at the automotive shop for repair. She mentioned that, since her divorce, she had experienced financial difficulties and that “she could not even afford a decent car”. Cleansweep offered to drive her home if she worked late, and she accepted the idea, telling Cleansweep that she appreciated the opportunity to earn some overtime pay.

Later, as Cleansweep drove Worker home, Worker shared with Cleansweep that she felt intimidated working for him. She suggested that perhaps if she and Cleansweep could develop a more comfortable relationship, she might not feel so tense at work. Cleansweep requested the he and Worker “talk this matter through”; she agreed and invited him into her apartment for coffee. While having coffee in Worker’s apartment, the two talked about work, including Worker’s difficulty in dealing with what she described to Cleansweep as his “intimidating and sometimes insensitive style of management”. As they talked, the subjects of their discussion expanded to Worker’s divorce, and her difficult financial situation. The two also talked some about the personalities of coworkers, and how various employees had responded to Cleansweep’s new priorities and style. Cleansweep volunteered that “most women” found him intimidating” and suggested that if Worker knew him better, she would become quite comfortable with him at work. He then suggested that he and Worker begin to see each other socially on a regular basis, noting that he found her attractive, intelligent and generally stimulating.

Worker felt threatened by this suggestion in the context of what she had thought was her attempt to discuss her job with her supervisor, and she told Cleansweep that she didn’t believe dating would be appropriate since she was his subordinate. She also observed that she did not want to be put in an awkward position relative to the other women at work (As she spoke, her thoughts turned to Coworker’s warning of Cleansweep’s interest in divorced women). Cleansweep responded that she should “think it over”, and that he would call her over the weekend. As Worker escorted Cleansweep to the door, he suddenly embraced her and kissed her, exclaiming “you did a great job on the project tonight, and you’re a great girl!”
Immediately after Cleansweep left, Worker telephoned Coworker, and tearfully told her of the incident which had just occurred. She told coworker that she was now afraid to work alone with Cleansweep, but needed to maintain a sound working relationship with him because she was dependent upon her job for her survival. The next day, Cleansweep telephoned Worker, and asked if she would like to have dinner and “take in a movie”. She repeated her concerns about dating him, and asked for time to think about things. During the following week at work, he repeated to Worker on three occasions (at her desk) his interest in dating her, insisting that his intentions were merely that the two enjoy “a better casual relationship outside the office to relieve bad impressions.” Worker did not respond to these overtures, except to smile and return to her work.

Over the next few weeks, Worker’s job became increasingly more demanding, especially in the context of newly enacted federal and state laws regarding family leave, employee medical benefits, disability discrimination, and workers’ compensation. Worker was asked by Cleansweep to attend several seminars on legal issues for employee relations managers, and to develop policy documents and employee education materials on each of these subjects. Worker found these added responsibilities demanded that she consistently work overtime, and she gradually began to resent that her job dominated her life. Assuming that her negative attitude might also be related to her recent divorce, Worker began to see a psychotherapist once a week. Although Worker experienced some satisfaction from therapy, her normally positive attitude with coworkers continued to suffer. In response to the recommendation of her therapist, Worker took a two week vacation in August, 1995.

When Worker returned to work the Tuesday after Labor Day, 1995, Cleansweep summoned her to his office and announced that he felt it necessary to complete a special evaluation of Worker’s recent performance. He told Worker that her progress in matters of policy analysis and development was unsatisfactory, and that her new responsibilities respecting the University’s compliance with federal and state laws appeared to require education, training and skills which Worker did not possess or demonstrate. Cleansweep placed Worker on 30 days probation, and informed her that unless she brought her projects up to date, and improved her attitude, he would be constrained to recommend that she be
demoted or terminated. In this regard, Cleansweep reminded Worker that she was an “at will” employee.

Upset, Worker phoned Coworker and the two discussed Worker’s plight over dinner. On Coworker’s advice, Worker made an appointment the next morning with Mr. Bell, and expressed to him her belief that Cleansweep’s personnel action was retaliatory for her refusals to date him, and her prior complaint against him. Mr. Bell agreed to again speak with Cleansweep, and did so, making a general inquiry whether Cleansweep had harassed Worker. Cleansweep firmly declared that he had taken Bell’s prior warning to heart, and that he had since refrained from any wrongful behavior toward Worker. He insisted that he held Worker in the highest regard, and expressed to Bell his opinion that Worker was simply not able to respond to the pressures of an increasingly complex job. Further, he declared, Worker’s lack of progress in her work could subject the University to liability for noncompliance with new federal employment laws. Mr. Bell felt that Cleansweep’s criticism of Worker’s performance had merit, but repeated his instruction that Cleansweep should be “ultimately professional” in dealing with Worker during this “critical period” in her employment.

When Worker learned of Bell’s support for Cleansweep’s conclusions about her declining performance, she found it impossible to work for Cleansweep without being constantly distracted by her fear of being terminated. It was difficult for her to sleep, and on several occasions she used sick leave to sleep at home during the day. As a result, she fell even farther behind in her work, and finally, at the end of her probationary period, informed Cleansweep that she could no longer work under his supervision. Cleansweep responded that, since no opening was available in another department for a person with Worker’s skills, he was forced to recommend that her employment be terminated. When Worker expressed concern to Cleansweep that his action was retaliatory, he responded (vehemently) that his decision was motivated solely by his concerns for the University’s potential liability, as a result of Worker’s failure to bring University policy into line with emerging federal laws.

Cleansweep notifies Worker, in writing, of his decision to terminate her employment (Under University policy, Cleansweep has authority to
terminate an employee without Mr. Bell’s prior approval). Somewhat anxious that Worker might allege employment discrimination, Cleansweep consults Ms. Elsa Cole, the University’s General Counsel about his action and her proposed defense of any subsequent claim by Worker that she was a victim of illegal discrimination. Cleansweep indicates that he stands by his evaluation of Worker, but inquires of Cole whether he would be required to testify in a lawsuit. When asked why he is concerned, Cleansweep replies that he had “accelerated” his negative evaluations of Worker because his college roommate, Joe Gudolboye (a white male) had recently completed his DBA degree, and Cleansweep desired to hire Joe into the position held by Worker. Cleansweep argued that it would not be in the University’s best interest to disclose this desire, because Joe has made it clear that any possibility of being drawn into a lawsuit would discourage his interest in the position. Cleansweep informs Cole that the University desperately needs a man of Gudolboye’s caliber, and that Gudolboye’s personal relationship with Cleansweep makes the position attractive to Gudolboye at a lower salary package than he could command in an open market.

Cole consults with Thomas Hustoles, who serves as Special Counsel to the University in employment law matters. Worker, concerned that she has no alternative but to fight for her job, consults Adrienne Fechter, an attorney who specializes in representing workers who are victims of employment discrimination. Worker informs Fechter that she and several other women at the University have been the victims of sex discrimination or harassment by Cleansweep.
A Digest of the Opinions
of the Court in

Meritor Savings Bank, FSB v. Vinson &
Harris v. Forklift Systems, Inc.

Robert D. Bickel
Professor of Law
Stetson University College of Law

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399
(1986). Vinson was hired by Sidney Taylor, a Vice-President of the bank. She was first employed as a teller, and thereafter as head teller, and assistant branch manager, over a four year period, under Taylor's authority and supervision. Following her discharge (allegedly for excessive use of sick leave), Vinson sued the bank in federal court, alleging that she had "constantly been subjected to sexual harassment" by Taylor in violation of Title VII of the Civil Rights Act of 1964, as amended.

Vinson's factual allegations included that Taylor had at first treated her "in a fatherly way" without any sexual advances. However, she alleged his sexual conduct began when he invited her to dinner and suggested that "they go to a motel to have sexual relations". At trial, Vinson stated that at first she refused, but because of fear of losing her job, she eventually
agreed to the suggestion. Thereafter, Vinson testified, Taylor made repeated demands for sexual favors, usually at the bank during business and nonbusiness hours. She approximated the frequency of sexual intercourse between herself and Taylor at 40 or 50 times over a four year period.

Vinson also testified that Taylor fondled her in front of other employees, followed her into the women’s restroom, exposed himself to her, and on several occasions forcibly raped her. Vinson alleged that Taylor had also fondled other women employees, although she encountered some difficulty in offering the testimony of alleged victims of such conduct. Finally, Vinson testified that she did not report this harassment to Taylor’s superiors, or bank grievance officers because she feared Taylor. Taylor denied the allegations in their entirety, and the bank denied any knowledge of sexual misconduct by Taylor.

Without resolving the conflicting factual positions of Vinson and Taylor, the trial court held that any sexual relations between Vinson and Taylor were voluntary, having nothing to do with her continued employment, or advancement. The court of appeals reversed, holding that sexual harassment consists of either the conditioning of concrete employment benefits on sexual favors, or harassment that, while not affecting economic benefits, creates a “hostile or offensive working environment.” 753 F.2d 141 (D.C.Cir. 1985), citing EEOC Guidelines at 29 CFR §1604.11(a)[emphasis added]. The court of appeals also held that if Taylor made toleration of sexual harassment a condition of employment, Vinson’s voluntary agreement to tolerate his conduct could not be raised as a defense to liability.
On writ of certiorari, the United States Supreme Court affirmed, holding that when a supervisor sexually harasses a subordinate because of the subordinate's sex [sic (gender?)], the conduct constitutes sex discrimination in violation of Title VII. More important to Title VII jurisprudence, the court held that a Title VII plaintiff (who is a victim of sexual harassment in the workplace) need not prove a loss of economic benefits of employment in order to have standing to sue. The court noted that Title VII’s prohibition of discrimination as to “terms, conditions or privileges of employment” shows a congressional intent “to strike at the entire spectrum of disparate treatment of men and women” in the workplace [citing prior cases]. In support of its opinion, the court relied upon EEOC guidelines which define sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” 29 CFR § 1604.11(a). The EEOC’s definition subsumes conduct which has the purpose or effect of unreasonably interfering with an individual’s work performance, or which creates an intimidating, hostile, or offensive working environment, whether or not it is directly linked to the granting or denial of an economic benefit [quid pro quo discrimination].

Extensive precedent was cited by the court, including several opinions of the federal courts in racial harassment cases. In sum, these cases were cited in support of the court’s holding that psychological or mental injury, without economic injury, entitles a victim of harassment to recovery under Title VII. Recovery is, however, limited to cases in which the alleged harassment is “sufficiently severe or pervasive” so as to “alter the conditions of the victim’s employment and create an abusive working
environment”, citing Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982). Thus a mere utterance of an ethnic or racial epithet which subjectively offends an employee would not affect that employee’s working conditions sufficiently to violate Title VII.

Remanding the case for rehearing pursuant to its conclusions of law, the court stated that, if true, Vinson’s allegations define conduct by Taylor which clearly violated Title VII, as interpreted, supra. Moreover, the court held, the fact that the sexual conduct at issue was “voluntary in the sense that the complainant was not forced to participate against her will” is not a defense to liability for sexual harassment if the sexual advances were unwelcome. On this issue, the court held that evidence offered by a defendant as to the victim’s “sexually provocative speech, or dress” cannot per se be excluded, if it is shown to be relevant to the question whether the allegedly offensive conduct was in fact welcomed by the victim.

Although the court’s decision as to the legal impropriety of Taylor’s conduct was without dispute, the justices were divided as to the basis for the bank’s liability. The majority held that liability of the employer for hostile environment sex discrimination [unlike quid pro quo harassment] is conditioned upon a finding that the employer knew or should have known of the offending conduct. Furthermore, where the employer has a distinct, express policy against sexual harassment and a legitimate procedure specifically addressing the resolution of sexual harassment claims, it may be shielded from liability if the victim of alleged harassment does not take advantage of the policy and internal grievance procedure. The crux of the employer’s argument in avoidance of liability is the legitimacy of its procedure. Thus, in the instant case, it is unfavorable to
the bank that its grievance procedures do not specifically address sexual harassment, and that they require a complainant to complain first to her supervisor.

Justices Marshall, Brennan, Blackmun and Stevens concurred in the court's judgement, but argued for a rule of strict (vicarious) liability of the employer, whether or not it knew, or from facts available to it should have known, of a supervisor's sexual harassment of a subordinate. The concurring justices cited EEOC Guidelines which support the majority's position in cases of peer harassment, but which impose vicarious liability in cases of harassment of subordinates by supervisors. 29 CFR §§ 1604.11(c)(d).

Note: The Meritor Bank case was the Supreme Court's first definitive statement that the creation of an abusive work environment (race or gender-based) constituted unlawful discrimination. The critical question left open by the court's opinion in Meritor was therefore whether alleged harassing conduct is sufficiently severe or pervasive so as to create an "intimidating, hostile, or offensive working environment". See Friedman & Strickler, The Law of Employment Discrimination, 3d. Ed., Note 1, p. 420. Friedman and Strickler suggest, as do some courts, that to be unlawful, challenged conduct must be both severe and pervasive. However, while using "and" rather than "or" to join these descriptive terms, they cite cases which permit a finding of harassment based upon serious, though not continuous conduct. See Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503 (11th Cir. 1989)[Holding that the determination of whether the defendant's conduct was sufficiently severe and pervasive does not turn solely on the number of incidents]; cf. King v. Board of Regents of
The second question left to the court seems to have been whether the benchmark or standard for comparing the defendant's conduct was to be a reasonable person standard, or a reasonable woman standard. Following the decision in *Meritor*, several federal circuits held that it was sufficient for a sex or race harassment plaintiff to prove conduct by the defendant that would be severely offensive or hostile to a reasonable woman, or reasonable black person. The Supreme Court considered both questions in 1993 in the *Harris* case.

**Harris v. Forklift Systems, Inc.,** 114 S.Ct. 367 (1993). Harris was employed as a manager at Forklift, an equipment rental company, for approximately two and one half years. During that time, Forklift's president, Charles Hardy, allegedly harassed Harris based on her gender. According to Harris, Hardy told Harris in the presence of other employees that "You're a woman, what do you know(?)" and "We need a man as rental manager". At least once, Hardy allegedly called Harris a "dumb ass woman", and, in front of others he suggested that Harris accompany him to a Holiday Inn to discuss her raise. Finally, Harris alleged that Hardy asked her to get coins from his pants pocket, and made sexual innuendos about Harris' and other women's clothing.

Harris complained to Hardy about his conduct, and he responded that he was surprised that Harris was offended. He stated that his comments
were merely jokes, apologized, and promised he would stop. However, his conduct continued, and Harris resigned her employment. She sued Forklift in federal court, alleging sexual harassment. The court found that Hardy’s remarks offended Harris, and would offend a reasonable woman, but were not severe enough to cause psychological injury or interfere with a reasonable woman’s work performance. The court of appeals affirmed, without published opinion.

The Supreme Court reversed. The court reaffirmed that all sexually offensive conduct is not *per se* unlawful. And, the court avoided the opportunity to affirm a reasonable woman standard in defining unlawful conduct. Instead, the court held that, to be unlawful, conduct must violate both a subjective and an objective standard. That is, conduct that is not severe or pervasive enough to create an *objectively* hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—does not violate Title VII. Moreover, if the victim herself does not subjectively perceive the environment to be abusive, then the conduct will not be found to have actually altered the conditions of her employment. However, if the conduct complained of is both objectively and subjectively hostile and abusive, a Title VII plaintiff need not prove psychological or mental injury. The fact that conduct was so severe or pervasive that it created an environment abusive to employees because of their race, gender, religion, or national origin violates Title VII’s mandate for workplace equality.

The court admitted that its decision offered no bright line in defining sexual harassment. It did offer a guide to factual inquiry in sexual harassment cases, suggesting that courts ask about the frequency of the
offending conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with the employee’s performance of her/his job.

Note: Justices Scalia and Ginsburg concurred in the judgement and opinion of the court. Justice Scalia did so reluctantly, finding the court’s standard a poor guide to judges or juries as fact finders. Contrasting negligence law (although not the law of infliction of emotional distress), he emphasized the absence of physical or mental injury in sexual harassment cases in suggesting that the court’s ruling in Harris would promote difficult litigation. Justice Ginsburg expressed firm resolve about the correctness of the court’s ruling. She defined the issue as whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the opposite sex are not exposed. As to parameters, she opined that conduct which unreasonably interferes with the worker’s performance of her job is unlawful, even if her tangible productivity has not declined. In other words, a victim of sexual harassment who is able to overcome the harassing conduct and sustain her productivity does not lose her cause of action to redress the harassment she has endured.

Justice Ginsburg’s interpretation of Title VII appears to make common sense. A contrary interpretation would penalize a woman worker for sustaining her productivity in spite of sexual harassment.

At least one post-Harris case has held that, to be unlawful, conduct must be “extremely insensitive”, resulting in a deterioration of the work environment. See DeAngelis v. El Paso Municipal Police Officers’ Association, 51 F.3d 591 (5th Cir. 1995), cited in Friedman & Strickler, supra., 1995 Supplement, p. 100.