NOTES

BEYOND THE COURT'S STANDARD RESPONSE: CREATING AN EFFECTIVE TEST FOR DETERMINING HOSTILE WORK ENVIRONMENT HARASSMENT UNDER TITLE VII

Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993).

Dawn M. Buff*

Teresa Harris worked for Forklift Systems, Inc., as a manager for two and one-half years.[1] During that time, Charles Hardy, Forklift's president, made suggestive and derogatory remarks to Harris while other employees were present.[2] For example, Hardy called Harris a "dumb ass woman" and stated, "[W]e need a man as the rental manager."[3] Furthermore, Hardy offered to join Harris at a local hotel to negotiate her raise.[4] On several occasions, Hardy tossed articles onto the floor in front of Harris and other female employees and asked them to retrieve the objects.[5] In yet another incident, Hardy requested that Harris, as well as other women at Forklift, retrieve coins from the front pocket of his pants.[6]

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* B.A., Florida State University, 1992; J.D., Stetson University College of Law, 1995.

1. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 369 (1993).
2. *Id.*
3. *Id.* (citation omitted).
4. *Id.*
5. *Id*.
6. *Harris*, 114 S. Ct. at 369. While risking illustration of the obvious, the Author

Approximately one and one-half months prior to her eventual resignation, Harris complained to Hardy about his harassing behavior and notified him that she intended to submit her resignation.[7] Harris agreed not to resign after Hardy indicated that he was only "joking" and that he was unaware that his behavior was offensive.[8] In fact, Hardy told Harris that his harassing conduct only indicated an attempt to treat her "like one of the boys."[9] After Hardy apologized and promised to cease his offensive behavior, Harris chose to remain on the job.[10] Several weeks later, Hardy returned to his harassing conduct when he asked Harris in front of other employees whether she completed a deal because she promised the customer sex.[11] Two weeks later, Harris resigned.[12]

Harris sued Forklift under Title VII of the Civil Rights Act of 1964,[13] alleging that, based on her gender, Hardy created a hostile work environment.[14] A federal magistrate conducted a hearing and

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wishes to emphasize that Hardy neither made any of the above comments to nor requests of the male employees at Forklift. *See* Petitioner's Brief at 4–5, Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) (No. 92-1168), *available in* 1993 WL 302216.

7. Petitioner's Brief at 7, *Harris* (No. 92-1168).

8. *Harris*, 114 S. Ct. at 369 (citation omitted).

9. Petitioner's Brief at 8, *Harris* (No. 92-1168). Harris "participated in regular, voluntary after-work gatherings in the office . . . [where] she drank beer, joked and used coarse language in the presence of Mr. Hardy and other co-workers." Respondent's Brief at 1, Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (No. 92-1168) (citation omitted), *available in* 1993 WL 302223. No other women participated in these gatherings. *Id.*

10. *Harris*, 114 S. Ct. at 369.

11. *Id.*

12. *Id.* During the time Harris worked at Forklift, she and her husband had a social relationship with Hardy and his wife. Respondent's Brief at 2, *Harris* (No. 92-1168). Furthermore, Harris' husband had a business relationship with Hardy. *Id.* When Harris' husband's company lost the Forklift account, the business relationship between Harris' husband and Hardy deteriorated. *Id.* at 3. This occurred about the same time that Harris resigned from Forklift. *Id.*

13. 42 U.S.C. § 2000e (1988). The Federal Government may prohibit private businesses with 15 or more employees from engaging in sexual harassment under the Commerce Clause because such businesses affect the free flow of interstate commerce. *See* 42 U.S.C. § 2000e(b); Heart of Atlanta Motels, Inc. v. United States, 379 U.S. 241 (1964) (holding that a motel which racially discriminated against potential guests impeded interstate travel and therefore affected interstate commerce); H.R. REP. NO. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2402. "The Supreme Court has interpreted the term `industry affecting commerce' as indicating Congress' intent to exercise its regulatory power to the `fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.'" EEOC v. Ratliff, 906 F.2d 1314, 1316 (9th Cir. 1990).

14. *Harris*, 114 S. Ct. at 369.

found that Hardy's conduct was *objectively* offensive, but that such conduct did not "seriously affect [Harris'] psychological well-being."[15] Furthermore, the magistrate determined that Harris was not *subjectively* offended by Hardy's conduct.[16] The United States District Court for the Middle District of Tennessee adopted the magistrate's findings and opinion.[17] The United States Court of Appeals for the Sixth Circuit affirmed the district court's opinion in light of the magistrate's reasoning.[18]

The United States Supreme Court granted certiorari review to determine whether the magistrate correctly required Harris to prove that she suffered psychological injury.[19] HELD: Sexually harassing conduct that creates a hostile or abusive work environment is actionable under Title VII of the 1964 Civil Rights Act if: (1) a reasonable person would find the environment hostile or abusive; (2) the victim "subjectively perceives the environment to be abusive;" and (3) the "conditions of the victim's employment" have been altered.[20]

The *Harris* decision is significant because the Court specifically denied that a plaintiff must prove that she suffered psychological injury.[21] The rejection of the psychological injury requirement serves to solve the conflict that arose among the circuits in the wake of

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15. *Id*. at 370 (citation omitted).

16. *Id.*

17. *Id.* See Harris v. Forklift Sys., Inc., No. 3-89-0557, 1991 WL 487444 (M.D. Tenn. Nov. 27, 1990), for the magistrate's opinion as adopted by the Middle District of Tennessee.

18. Harris v. Forklift Sys., Inc., 976 F.2d 733 (6th Cir. 1992) (affirming the district court's decision without issuing an opinion). The unpublished opinion is a rather succinct affirmation without further commentary. *See* Harris v. Forklift Sys., Inc., Nos. 91-5301, 91-5871, 91-5822, 1992 WL 229300 (6th Cir. 1992). "[T]he issuance of a written opinion by this court would be duplicative and serve no useful purpose." *Id*.

19. Harris v. Forklift Sys., Inc., 113 S. Ct. 1382 (1993).

20. *Harris*, 114 S. Ct. at 370–71.

21. *Id.* at 371. "Such an inquiry may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is *not limited* to such conduct." *Id.* (emphasis added).

Although sexual harassment is not limited to women as victims, *see* DISCLOSURE (Warner Bros. 1994) (Hollywood's portrayal of a woman who sexually harasses a male employee, noting that sexual harassment is about power rather than sex), this Note will use female pronouns to designate the victim and male pronouns to indicate the harassing party because this is the context in which harassing conduct frequently occurs. *See* Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 38 (1993); Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 343 (1992).

Meritor Savings Bank v. Vinson.[22] Such a requirement creates an incredibly difficult hurdle for the plaintiff[23] and narrows the scope of Title VII.[24] Thus, the *Harris* Court adopted a less stringent hostile work environment standard, allowing greater protection for victims of sexual harassment under Title VII.[25]

The *Harris* decision is also significant because the Court failed to set forth a more workable standard for employers to use to keep the workplace free from conduct which violates Title VII.[26] Rather,

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22. 477 U.S. 57 (1986). Following the *Meritor* decision, some courts held that an employee must suffer psychological harm to state a claim under Title VII for sexual harassment. *See* Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Brooms v. Regal Tire Tube Co., 881 F.2d 412 (7th Cir. 1989); Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), *aff'd in part, rev'd in part*, 900 F.2d 27 (4th Cir. 1990); Sparks v. Pilot Freight Carrier, Inc., 830 F.2d 1554 (11th Cir. 1987); Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). *But see* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (rejecting the psychological injury requirement).

Many post-*Meritor* cases refer to *Meritor* as *Vinson*. However, the Author has chosen to use *Meritor* as the Court so used in *Harris*. *See Harris*, 114 S. Ct. at 370.

The *Meritor* Court held that sexually harassing conduct which psychologically affects an employee, as well as quid pro quo harassment which affects the employee economically, is actionable. *Meritor*, 477 U.S. at 65. For a definition of quid pro quo harassment, see *infra* text accompanying note 66.

Although *Rabidue* was argued before *Meritor*, the United States Court of Appeals for Sixth Circuit reached its decision in *Rabidue* after the Supreme Court decided *Meritor*. *Compare Meritor*, 477 U.S. at 57 (argued Mar. 25, 1986, and decided June 19, 1986) *with Rabidue*, 805 F.2d at 611 (argued Sept. 25, 1985, and decided Nov. 13, 1986). Furthermore, *Rabidue* cites *Meritor* favorably for the proposition that hostile work environments are actionable, yet concludes that the psychological well-being of the victim must be seriously affected. *Rabidue*, 805 F.2d at 619–20 (citing *Meritor*, 477 U.S. at 63–69). Thus, although the Sixth Circuit misinterpreted the *Meritor* decision to require psychological injury only five months after *Meritor* was decided, the Supreme Court chose to deny certiorari for *Rabidue* and to allow the psychological injury progeny to continue to breed for seven years before clarifying itself in *Harris*, 114 S. Ct. at 367; *see* Rabidue v. Osceola Ref. Co., 481 U.S. 1041 (1987) (denying certiorari).

The Court apparently waited seven years to decide whether psychological injury was a proper requirement because in the seven years following *Meritor*, conflict arose among the circuits as to what proof a hostile/abusive work environment claim required. *See Harris*, 114 S. Ct. at 370. The Court evidently felt compelled to decide the conflict among the circuits, but chose not to review *Rabidue* where its decision ostensibly expanded *Meritor* beyond what the Court has now directed as its intended scope. The Author does not rule out the possibility that the recent increased awareness of sexual harassment and changes in the membership of the Supreme Court may have also prompted review.

23. *See* Barbara J. Fick, *Does Sexual Harassment Require Proof of Psychological Injury?*, PREVIEW U.S. SUP. CT. CASES, Sept. 30, 1993, at 28–29.

24. *Harris*, 114 S. Ct. at 370.

25. *Id.* at 370–71.

26. Jorge Aguino, *Sex Harassment Ruling Takes a Middle Path*, N.J. L.J., Nov. 15,

the Court's holding merely reaffirmed that a hostile work environment is an actionable sexual harassment claim under Title VII.[27] In clarifying the *Meritor* standard, the majority opinion enunciated several factors to aid in determining the existence of a hostile work environment.[28] Nonetheless, the Court neither commented upon the weight to be accorded to each factor nor indicated whether one consideration was to be determinative.[29] Consequently, the Court's factors added scant clarification to the already nebulous hostile/abusive standard.[30] As a result, the circuits are now left with nearly as much unguided discretion as existed following the *Meritor* decision. Without further guidance, the circuits are likely to continue to search for more tangible and concrete methods to determine hostile work environments, as they did when the psychological injury requirement was formulated.[31]

This Note first covers the history of sexual discrimination claims under Title VII. Next, the Note explores whether the Court correctly interpreted Title VII to cover hostile work environment claims. In addition, this Note analyzes whether the Court properly held that a plaintiff need not prove that she suffered psychological injury to recover under a hostile work environment theory. The discussion centers on criticism of the Court's test because the test is vague, provides scant guidance to employers, and invites misapplication.[32] Specifically, this Note evaluates the different components of the *Harris* test and other suggested methods for determining

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1993, at 9; Emanuel Margolis, *Human Rights Commentator*, 67 CONN. B.J. 429, 438 (1993).

27. The Court first held that a hostile work environment was actionable under Title VII in Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).

28. *Harris*, 114 S. Ct. at 371. For an enumeration of the factors the Court listed, see *infra* text accompanying note 156.

29. *Harris*, 114 S. Ct. at 371–72 (Scalia, J., concurring).

30. *Id.* at 372.

31. *See* Gayle S. Sanders & Susan C. Stanley, *Court Contemplates Harassment Claims After* Harris *Decision*, NAT'L L.J. S10 (Feb. 28, 1994) (stating that after *Harris*, courts will have to struggle with many "significant questions").

32. *See* Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 152 (1994) (proposing an idealistic, individualized standard which gives "voice and validity" to "women's experiences of gender abuse and subordination"); Mary C. Gomez, Note, *Sexual Harassment After* Harris v. Forklift Systems, Inc. — *Is It Really Easier to Prove?*, 18 NOVA L. REV. 1889 (1994) (recognizing that the *Harris* test could be improved, but not proposing a preferable standard).

whether a hostile work environment claim is actionable. This Note then concludes with a proposed test which provides a more concrete and workable standard that affords better notice to employers and employees of the type of conduct proscribed by Title VII.

I. HISTORICAL OVERVIEW

A. The Unlikely Beginning

Title VII, the employment section of the Civil Rights Act of 1964,[33] did not initially extend its protection to women. Representative Howard W. Smith from Virginia[34] proposed the addition of the word "sex" to Title VII on February 8, 1964.[35] However, several other male Representatives believed Smith offered the amendment in jest,[36] in an effort to make the bill's employment section look irrational.[37] Some Representatives hoped that this would then split the liberal votes and ultimately prevent the bill's passage.[38] Smith pref-

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33. 42 U.S.C. § 2000e (1988). Although the idea of legislating equal rights for African-Americans was radical for 1964, "Title VII was the most controversial part of the bill." CAROLINE BIRD, BORN FEMALE: THE HIGH COST OF KEEPING WOMEN DOWN 1 (1970). Many legislators who generally supported the Civil Rights Bill opposed Title VII because of skepticism regarding whether employment discrimination should be legislated. *Id*. Across state and party lines, many representatives believed that such legislation would unduly interfere with the right to conduct business as one chooses. *Id.* at 1–2.

34. "Smith was no feminist." BIRD, *supra* note 33, at 1. The 81-year-old Representative from Virginia was a Southern gentleman who had been supporting the Southern way of life for over 30 years. *Id.* He certainly recognized that President Johnson had rallied enough support to pass the Civil Rights Act which would provide equal opportunity for blacks in various aspects of life, including employment. *Id.*

35. 110 CONG. REC. 2577 (1964).

36. Even as the clerk read the proposed amendment aloud, it sounded like a joke. BIRD, *supra* note 33, at 1. Representative Smith stated, "I have certainly tried to do everything that I could to hinder, delay, and delapidate this Bill." *A Century of Women, pt. I* (TBS television broadcast, June 7, 1994).

37. JO FREEMAN, THE POLITICS OF WOMEN'S LIBERATION 53 (1975). Many of the most "ardent supporters" of the amendment, including Smith, were the same people who strongly opposed the Equal Pay Act in 1962. 110 CONG. REC. at 2584 (statement of Rep. Green); *see* BIRD, *supra* note 33, at 3–4; JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 233 (1990).

38. FREEMAN, *supra* note 37, at 53. But see Caruthers Gholson Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. U. L. REV. 326, 330–38 (1971), which indicates that the Equal Pay Act hearings and the National Women's Party (NWP) influenced the "sex" amendment. Freeman, however, points out that Berger was a member of NWP and that NWP did not have much congressional influence. FREEMAN, *supra* note 37, at 53 n.24; *see Sexual Harassment: A Primer*, TIME, June 6, 1994, at 12 (stating that Title VII "contain[ed] a provocatively

aced his remarks by stating that he offered the amendment to protect an important minority group, women, "in the absence of which the majority group would not be here today."[39] Smith responded to the apparent humor with which this amendment was taken,[40] stating, "Now I am very serious about this amendment . . . I do not think it can do any harm to this legislation; maybe it can do some good. I think it can do some good for the minority sex."[41]

To illustrate the problem of sex discrimination, Smith then read a letter from a woman complaining about the "imbalance of women" which shut off the "right of every female to have a husband of her own."[42] The letter then asked the government to take actions to correct this problem.[43] Smith characterized this problem as "serious."[44] However, Smith failed to point out how Title VII, a provision relating to employment discrimination, would aid the letter's author and other "spinsters" in obtaining their desired husbands.[45]

Many of the liberal Representatives opposed the sex amendment because they feared it would jeopardize the protection they were trying to afford to African-Americans.[46] The majority of the female Representatives, however, took the amendment quite seriously.[47] In fact, Representative Martha Griffiths stated that she had intended to suggest the amendment herself, but when she discovered that Representative Smith intended to do so, she determined that he would be in a better position to obtain the support needed to pass the entire bill.[48]

Although Smith and his liberal opponents often disagreed, they "played the provision for all it was worth and the ensuing uproar

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novel amendment banning job discrimination on the basis of sex which foes of the law hoped would derail [the Act]").

39. 110 CONG. REC. 2577 (1964).

40. Smith halted his reading on several occasions to ask the House to be quiet. BIRD, *supra* note 33, at 5.

41. 110 CONG. REC. at 2577.

42. BIRD, *supra* note 33, at 4.

43. *Id.* at 4–5.

44. *Id.* at 5.

45. *Id.*

46. *Id.* Furthermore, they were apprehensive of the effect that such an amendment would have on protective legislation such as laws opposed to requiring women to serve in combat. *Id.* at 5–6. In addition, many women's organizations opposed the sex amendment for similar reasons. *Id.* at 5.

47. FREEMAN, *supra* note 37, at 53.

48. *Id.*

went down in congressional history as `Ladies Day in the House.'"[49] The amendment passed by a narrow margin of 168 to 133.[50] Yet, many of the Representatives who supported the amendment did so because they reasoned that the exclusion of the "sex" provision would give employment preference to black women over white women.[51]

In addition to the resistance the "sex" amendment received prior to the passage of the Civil Rights Act of 1964, enforcement of the "sex" provision met with further resistance. The Civil Rights Act created the Equal Opportunity Employment Commission (EEOC) to protect the employment interests of women, as well as the employment interests of other classes of persons protected under Title VII, such as members of racial minority groups.[52] However, the EEOC refused to treat gender discrimination claims on the same footing as racial discrimination claims.[53] Moreover, Herman Edelsberg, the first executive director for the EEOC, claimed that the "sex" provision was a "fluke" that was "conceived out of wedlock."[54] Furthermore, the small EEOC staff did not even handle the sex discrimination claims.[55] Rather, the Commission turned these claims over to the wife of a temporary EEOC member.[56]

Since the legislative history supports the contention that the

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49. *Id*. at 53–54. As an example of the tenor with which the amendment was received, Representative Martha Griffiths, a Democrat from Michigan stated, "I presume that if there had been any necessity to have pointed out that women were a second class sex, the laughter would have proved it." 110 CONG. REC. at 2578. As floor manager and leader of the bipartisan coalition which President Johnson anticipated would pass the bill, Emmanuel Celler had to "oppose the sex amendment before it sank . . . under gales of laughter." BIRD, *supra* note 33, at 5.

50. 110 CONG. REC. at 2584. Less than 50% of House members actually voted for Smith's "sex" amendment to the Act. HOFF, *supra* note 37, at 233. After strong lobbying, the Civil Rights Act of 1964 passed, including the "sex" provision in Title VII. FREEMAN, *supra* note 37, at 54. However, 40% of House members did not vote on the Act at all. HOFF, *supra* note 37, at 233.

51. *See generally* 110 CONG. REC. at 2575–84.

52. 42 U.S.C. § 2000e-4 (Supp. III 1988).

53. BIRD, *supra* note 33, at 14–15. The EEOC's failure to take sex discrimination seriously led to the desire to develop an "NAACP for Women" which resulted in the formation of National Organization of Women (NOW). FREEMAN, *supra* note 37, at 54.

54. BIRD, *supra* note 33, at 15.

55. *Id.* at 14.

56. *Id.* In response to the ineffectiveness of the EEOC, Congress passed the Equal Employment Opportunity Act in 1972 as an amendment to Title VII. H.R. REP. NO. 238, 92d Cong., 2d Sess. 4–5 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137. This Act provided the EEOC with the quasi-judicial power that it needed to enforce its orders. *See id*.

"sex" amendment was not added for the sole purpose of providing equal employment opportunities for women, Title VII only marginally included a desire to extend employment protection to women. Certainly, that "intent" did not include the desire to shield women from sexual harassment.[57] Rather, the debate regarding the amendment focused mainly on hiring, not on terms and conditions of employment.[58] Furthermore, the language of Title VII speaks in terms of discrimination; the word harassment is not specifically used in the statute.[59] Consequently, sexual harassment under Title VII is primarily the creature of interpretation rather than original legislative intent.[60]

B. Pre-*Meritor Savings Bank v. Vinson*: The Genesis of Sexual Harassment Claims[61]

Professor Catharine MacKinnon has described sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[62] Sexual harassment also involves disparate power obtained in a social context which is then used in the employment context to gain benefits for oneself or to deny benefits to another.[63] Although the language of Title VII is couched in terms of *discrimination* rather than *harassment*, courts have interpreted sexual harassment as a form of discrimination which is prohibited under Title VII.[64]

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57. *See* 110 CONG. REC. at 2575–84 (focusing on women's ability to get a job, rather than how they would be treated once on the job).

58. *See id.*

59. *See* 42 U.S.C. § 2000e-2.

60. Although Title VII does not employ the word "harassment" to describe the type of discrimination that it prohibits, courts have determined that Title VII's proscription against sex discrimination prohibits sexual harassment. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (holding that sexually discriminatory hostile work environments constitute sex discrimination under Title VII); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (holding quid pro quo harassment actionable as sex discrimination under Title VII); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32 (1979) (coining phrase "quid pro quo harassment" to describe harassment where employer fires, demotes, or otherwise discriminates against employee because she refuses to grant him sexual favors).

61. 477 U.S. 57 (1986).

62. MACKINNON, *supra* note 60, at 1.

63. *Id.*

64. *See, e.g.,* Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub. nom.*, Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978) (holding that quid

The first form of sexual harassment that courts recognized as discrimination under Title VII was quid pro quo harassment.[65] Under this type of discrimination, an employee is fired, demoted, or otherwise denied employment benefits for refusing sexual advances.[66] The Supreme Court chose to analyze quid pro quo cases under a disparate treatment[67] framework which it outlined in *McDonnell Douglas Corp. v. Green*.[68] This framework requires three levels of proof. First, the plaintiff must prove that her employer denied her some benefit at work because she rebuffed his sexual advances.[69] Then the employer must attempt to prove that the plaintiff employee was denied employment benefits for nondiscriminatory reasons.[70] If the plaintiff can prove that these reasons are mere pretexts, she may prevail.[71]

Although courts recognized quid pro quo claims as early as 1976,[72] hostile or abusive work environment claims were not recognized until 1982.[73] A hostile work environment was first acknowledged as discrimination under Title VII in a racial context.[74] By

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pro quo harassment is sexual discrimination); *see also* Equal Employment Opportunity Commission Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1993) (defining sexual harassment as sexual discrimination under Title VII). For other cases which have interpreted sexual harassment as sexual discrimination under Title VII, see *supra* note 60.

65. *See, e.g.,* Barnes v. Costle, 561 F.2d 983, 984 (D.C. Cir. 1977) (employee terminated because she refused supervisor's sexual advances); Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977) (employee fired because she refused to stay in same motel room with supervisor on a business trip and to have sexual relations with him); *Williams*, 413 F. Supp. 654 (employee fired for refusing supervisor's sexual advances). Although courts held that quid pro quo harassment was actionable as early as 1976, the phrase "quid pro quo harassment" was not coined until 1979. *See supra* note 60.

66. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1454 (1984).

67. "`Disparate treatment' employment discrimination occurs when an employer treats some people less favorably than others because of their membership in a particular social group. Proof of discriminatory intent is usually critical to a disparate treatment claim." *Id.* at 1450 n.4.

68. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

69. *Id.* at 804.

70. *Id.*

71. *Id.*

72. *See supra* note 64.

73. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

74. *See* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). "[T]he phrase `terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a

recognizing such a cause of action, the United States Court of Appeals for the Fifth Circuit interpreted Title VII to protect psychological as well as economic aspects of employment.[75] Courts decided, however, that the *McDonnell Douglas* framework for analyzing quid pro quo claims was not well-suited for analyzing hostile work environment claims[76] because the order of proof requires that the employer provide a nondiscriminatory reason for the conduct.[77] An employer will rarely be able to articulate a nondiscriminatory reason for sexually harassing conduct.[78]

In *Henson v. City of Dundee*, the United States Court of Appeals for the Eleventh Circuit chose for the first time to extend Title VII protection to persons subjected to sexually charged work environments.[79] The *Henson* court held that the plaintiff had a cause of action where an employer repeatedly subjected her to inquiries regarding her "sexual habits and proclivities."[80] Furthermore, the employer often aimed vulgar and crude comments at the plaintiff and requested sexual favors from her.[81]

The court employed the favored quid pro quo terms for analysis in stating, "A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts *disparate treatment* upon a member of one sex with respect to terms, conditions, or privileges of employment."[82] Although the *Henson* court required proof of disparate treatment, it denied that the

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working environment heavily charged with ethnic or racial discrimination." *Id*. Hostile work environments may actually reinforce the stereotypes that Congress intended to eliminate with Title VII. Note, *supra* note 66, at 1455.

75. *Rogers*, 454 F.2d at 238. Economic aspects are actionable under quid pro quo claims.

76. *See, e.g.,* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986).

77. *McDonnell Douglas*, 411 U.S. at 802.

78. B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 18 (1993). For example, one can hardly fathom a "legitimate, nondiscriminatory reason" for calling someone a "dumb ass woman" as Hardy called Harris. *See Harris*, 114 S. Ct. at 369.

79. Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982). "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest racial epithets." *Id.* (footnote omitted).

80. *Id*. at 900–01.

81. *Id.* at 899–900. If the employee's continued employment is conditioned upon acceding to sexual demands, the employee has an actionable quid pro quo claim. *See* Note, *supra* note 66, at 1454.

82. *Henson*, 682 F.2d at 902 (emphasis added).

plaintiff needed to prove that she suffered a "tangible job detriment" which a quid pro quo claim would necessitate.[83] Consequently, under the *Henson* analysis, a plaintiff could assert a claim if her harasser's conduct was motivated by the victim's gender, regardless of whether her employer fired, demoted, or otherwise denied her some discernible employment benefit.[84]

The *Henson* court listed five elements needed to prove a prima facie case of sexual discrimination under the hostile work environment theory: (1) the plaintiff employee is a member of a protected class; (2) the employee did not invite the harassment; (3) the employee was harassed because of her sex; (4) the conduct affected a "term, condition, or privilege" of the victim's occupation; and (5) a respondeat superior relationship exists between employer and employee.[85]

The *Henson* court looked to the EEOC's Guidelines on Sexual Harassment to find examples of conduct that constituted sexual harassment.[86] For example, "verbal or physical conduct of a sexual nature constitutes sexual harassment" under certain conditions.[87] Also, the employee must consider the conduct unwelcome as well as "undesirable or offensive."[88]

Furthermore, the *Henson* court elaborated on what the plaintiff must demonstrate to prove that an employer who engaged in sexual harassment under parts (2) and (3) of the test affected a "term, condition, or privilege" of employment.[89] "For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working

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83. *Id.* Thus, the *Henson* court employed parts of the *McDonnell Douglas* test, but did not formally adhere to its framework.

84. *Id*.

85. *Id.* at 903–05. The elements that are most likely to be disputed are whether the employee was subject to unwelcome sexual harassment and whether that harassment affected a "term, condition, or privilege" of employment. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522–27 (M.D. Fla. 1991).

86. *Henson*, 682 F.2d at 897; *see* 29 C.F.R. § 1604.11(a) (1993) (EEOC's Guidelines on Sexual Harassment). Courts may look to the EEOC's Guidelines for assistance in interpreting Title VII. General Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976).

87. 29 C.F.R. § 1604.11(a).

88. *Henson*, 682 F.2d at 903.

89. 42 U.S.C. 2000e-2(a)(1); *Henson*, 682 F.2d at 904.

environment."[90] The *Henson* court also looked to *Rogers v. EEOC* for the proposition that an employee's psychological well-being is a term, condition, or privilege of employment.[91] The court concluded that since an employee's psychological well-being is a term, condition, or privilege of employment, the harassing conduct must be "sufficiently severe and persistent to *seriously affect the psychological well being* of [the] employee" in order to affect the terms, conditions, or privileges of employment.[92] Whether it so affects the employee must be determined after considering all the circumstances.[93]

Although early hostile work environment claims continued to focus on the same behavior complained about in quid pro quo claims, women have since expanded their claims to include "more subtle forms of harassment."[94] For example, women have filed actions in response to lewd comments and sexually harassing jokes.[95] Even flagrantly displaying pornographic materials in the employment context has been held to be actionable under Title VII.[96] Thus, female employees no longer must legally tolerate conduct which courts often considered inherent and acceptable in some workplace environments.[97]

C. *Meritor Savings Bank v. Vinson*[98]: The Court Broadens the Scope of Title VII

Four years after *Henson*, the Supreme Court granted certiorari review to *Meritor Savings Bank v. Vinson*,[99] to decide whether a hostile work environment was actionable under Title VII.[100] Al

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

91. *Id.* (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)). Decisions of the former Fifth Circuit are binding on the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981).

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

93. *Id.*

94. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1199 (1989).

95. *Id.*

96. *See, e.g.,* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). For a thorough discussion of *Robinson*, see Nell J. Medlin, Note, *Expanding the Law of Sexual Harassment to Include Workplace Pornography:* Robinson v. Jacksonville Shipyards, Inc., 21 STETSON L. REV. 655 (1992).

97. *See id.* at 1525.

98. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

99. Meritor Sav. Bank v. Vinson, 474 U.S. 1047 (1985) (granting certiorari).

100. *Meritor*, 477 U.S. at 64. Specifically, in *Meritor*, a sexually discriminatory, hos-

though the legislative history of Title VII focused on "`tangible loss' of `an economic character,'"[101] the *Meritor* Court noted that many of the federal circuits recognized hostile work environment claims, in addition to quid pro quo claims.[102] Thus, the *Meritor* Court chose to follow the lead of cases such as *Henson* and concluded that Title VII included psychological as well as economic aspects of employment.[103]

The *Meritor* Court relied on the language of Title VII that "[t]he phrase `terms, conditions, or privileges of employment' evinces a congressional intent `to strike at the entire spectrum of disparate treatment of men and women' in employment."[104] The Court further relied on the EEOC's Guidelines which stated that conduct creating a hostile work environment was actionable under Title VII.[105] In addition, the Court noted with approval the sources upon which the EEOC drew in creating its guidelines.[106] In doing so, the *Meritor* Court stated that under Title VII, employees have the right to work in an environment "free from discriminatory intimidation, ridicule, and insult."[107]

The *Meritor* Court, however, failed to create a single standard for courts to use in determining the existence of a hostile work environment. Nevertheless, when the Court determined that a hostile work environment was actionable, it cited both *Henson v. City of*

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tile work environment existed where a bank supervisor fondled an employee in front of other employees, followed her to the bathroom, exposed himself, and raped the employee several times. *Id.* at 60.

101. *See id.* at 65; *see also* 110 CONG. REC. 2575–84 (1964).

102. *See, e.g.*, Katz v. Dole, 709 F.2d 251, 254–55 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 934–44 (D.C. Cir. 1981).

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

104. *Id.* (citations omitted).

105. *Id.* (citing 29 C.F.R. § 1604.11(a)(3) (1985)). Sexual harassment is a violation of Title VII "where `such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'" *Id*. at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

106. *Id.* "[T]he EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id*.

107. *Id*. (citations omitted).

Dundee[108] and *Rogers v. EEOC*[109] as well as the EEOC Guidelines.[110] The *Meritor* Court agreed with the *Rogers* court that mere offensiveness should not be actionable.[111] Furthermore, the *Meritor* Court agreed with the *Henson* Court when it held that the conduct must be "sufficiently severe or pervasive `to alter the conditions of [the victim's] employment and create an abusive working environment.'"[112] Although the *Meritor* Court utilized the language and reasoning of both *Rogers* and *Henson* to establish that a hostile work environment was actionable, the *Meritor* Court failed to define hostile or abusive for purposes of Title VII.

D. Post-*Meritor* Use of Psychological Injury

In the wake of *Meritor*, the federal courts of appeals attempted to follow the Supreme Court's mandate that sexual harassment is actionable when it alters employment conditions and creates a hostile work environment. Although most courts agreed with this interpretation of Title VII,[113] the circuits were unable to agree as to what constituted a hostile or abusive work environment. Specifically, many courts looked favorably upon the notion of a more tangible element — the psychological injury requirement formulated in *Henson*.[114]

Psychological injury has never been adequately defined; consequently, courts treated the psychological injury requirement in vary-

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108. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). For a discussion of *Henson*, see *supra* text accompanying notes 79–93.

109. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (indicating that employee's psychological well-being is term, condition, or privilege of employment).

110. 29 C.F.R. § 1604.11(a) (1985).

111. *Meritor*, 477 U.S. at 67 (citing *Rogers*, 454 F.2d at 238).

112. *Id*. (citing *Henson*, 682 F.2d at 904).

113. *See, e.g*., Carrero v. New York City Hous. Auth., 890 F.2d 569, 577 (2d Cir. 1989); Jordan v. Clark, 847 F.2d 1368, 1373 (9th Cir. 1988); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1557 (11th Cir. 1987).

114. *Henson*, 682 F.2d at 904. For a discussion of *Henson*, see *supra* text accompanying notes 79–93. The *Henson* court set forth the psychological injury requirement after noting that *Rogers v. EEOC* stated that an employee's psychological well-being, as well as economic benefits, is a term, condition, or privilege of employment under Title VII. *See Henson*, 682 F.2d at 904; *see also Rogers*, 454 F.2d at 238. Since the *Henson* court agreed that an employee's psychological well-being was a term, condition, or privilege of employment, it apparently decided that the employee's psychological well-being must be seriously affected to state a claim under Title VII.

ing ways. For example, the Fourth Circuit Court of Appeals held that the plaintiff needed to prove either that her ability to perform at work was impaired or that the conduct "significantly affected her psychological well-being."[115] The Eleventh Circuit Court of Appeals, citing its own leading case, *Henson*, indicated that the *Meritor* test would be satisfied by psychological injury.[116] The Seventh Circuit Court of Appeals required that the conduct be "so pervasive or psychologically debilitating that [it] affect[s] the [plaintiff's] ability to perform on the job."[117] The Third Circuit Court of Appeals, however, maintained the sole requirement that the conduct be "severe enough to affect the psychological stability of a[n] . . . employee."[118] The Ninth Circuit Court of Appeals, on the other hand, flatly rejected any requirement of psychological injury.[119]

E. The Sixth Circuit Approach Before *Harris*

Most notably, the Sixth Circuit Court of Appeals, where Teresa Harris brought her claim, required proof of psychological injury.[120] *Rabidue v. Osceola Refining Co.* was the Sixth Circuit's first consideration of a hostile work environment claim.[121] The *Rabidue* court held that a sexually discriminatory hostile work environment was not created and the plaintiff's psychological well-being was not seriously affected, despite the fact that she and other female employees were routinely called "whores," "cunts," "pussies," and "tits."[122] The plaintiff was also subjected to the display of pornographic pictures and to disparate benefits and treatment from those which her male

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115. Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989), *aff'd in part, rev'd in part*, 900 F.2d 27 (4th Cir. 1990) (employee subjected to sexually suggestive remarks and offensive touching).

116. Sparks v. Pilot Freight Carrier, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987) (employee subjected to unwelcome touching, propositions, and inquiries regarding her personal life).

117. Brooms v. Regal Tire Co., 881 F.2d 412, 418 (7th Cir. 1989) (employee subjected to "explicit racial and sexual remarks").

118. Andrews v. City of Philadelphia, 895 F.2d 1469, 1471 (3d Cir. 1990) (citation omitted) (employees subjected to "abusive language, destruction of property and . . . anonymous phone calls").

119. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (employee repeatedly subjected to overtures of infatuated fellow employee).

120. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

121. *See id.*

122. *Id.* at 624.

counterparts received.[123]

The *Rabidue* court initially looked to the EEOC Guidelines, indicating that several courts, including the Supreme Court, have looked favorably to the guidelines to decide hostile work environment claims.[124] Nonetheless, in determining whether the harassing conduct affected a term, condition, or privilege of employment, the court relied primarily upon *Henson* and the then recently decided *Meritor* to conclude that the conduct must rise to a level which would interfere with a reasonable person's[125] work performance and "affect seriously [her] psychological well-being" in order to violate Title VII.[126] In addition, the Sixth Circuit required that the defendant's conduct actually offend the plaintiff.[127] Thus, although the Supreme Court stated that Title VII protects both economic and psychological *aspects* of the workplace,[128] the Sixth Circuit stretched this protection to require serious psychological *injury*.

F. The Eleventh Circuit: The Psychological Injury Spectrum

Since *Henson*, the Eleventh Circuit has been a pioneer in the recognition of sexually discriminatory hostile work environment claims. In fact, in citing *Rogers v. EEOC* for the proposition that one's psychological well-being is a "term, condition, or privilege" of employment,[129] *Henson* became the source for the psychological injury requirement.[130] However, psychological injury has yet to be adequately defined and courts have interpreted the psychological injury requirement inconsistently.[131] Specifically, different panels

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123. *Id.* Unlike her male counterparts, the plaintiff was not permitted to visit customers or to take them to lunch. *Id.* In a meeting regarding post-takeover procedures, the plaintiff, a manager, was seated at the back of the room with hourly female employees. *Id*. at 624. The male managers, however, were already informed of the procedures and were permitted to sit in the front of the room. *Id.*

124. *Id*. at 619 n.4 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)).

125. *Cf. id.* at 626 (Keith, J., dissenting in part) (arguing that objective standard should be that of reasonable victim).

126. *Id.* at 620.

127. *Id.*

128. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1987).

129. Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

130. *See, e.g.*, *Rabidue*, 805 F.2d at 619 (citing *Henson* as authority for the psychological injury requirement).

131. *See, e.g.,* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (requiring that conduct affect employee's "psychological stability"); Walker v. Ford Motor

within the same circuit have interpreted the psychological injury requirement in different ways.[132]

Although the Eleventh Circuit led the other circuits in requiring psychological injury, its panels were unable to adequately define psychological injury, nor uniformly apply the standard.[133] Initially, the Eleventh Circuit did not employ the psychological injury requirement in the stringent manner that the *Rabidue* court did.[134] For example, in *Walker v. Ford Motor Co.*, decided in the same year as *Henson*, the Eleventh Circuit applied the psychological injury requirement in the context of race discrimination.[135] The court observed the *Henson* language regarding the effect of harassing conduct on the plaintiff's psychological well-being.[136] The *Walker* court then concluded that the plaintiff had a claim under Title VII when the abusive language was "repeated, continuous, and prolonged" and when "the language made [him] feel unwanted and uncomfortable in his surroundings."[137] Consequently, some courts have interpreted the psychological injury requirement more liberally than the *Rabidue* court interpreted the same requirement.[138]

Furthermore, in *Sparks v. Pilot Freight Carriers, Inc.*, the Eleventh Circuit stated that an abusive work environment may be satisfied by showing that the sexual harassment was sufficiently severe or persistent "to affect seriously [the victim's] psychological well being."[139] Thus, under *Sparks*, psychological injury is permitted to be used as an element, but is not a requisite factor to determine the

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Co., 684 F.2d 1355, 1359 (11th Cir. 1987) (permitting recovery for plaintiff who felt "uncomfortable in his surroundings"); *Rabidue*, 805 F.2d at 622 (requiring serious effect on psychological well-being or psychological injury).

132. *See, e.g.*, Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987); *Walker*, 684 F.2d at 1358. For a discussion of the inconsistent interpretations these courts have accorded to the term psychological injury, see *infra* text accompanying notes 135–42.

133. For a list of Eleventh Circuit cases which have applied the standard inconsistently, see *supra* note 132.

134. For a discussion of how the *Rabidue* court applied the psychological injury standard, see *supra* text accompanying notes 122–26.

135. Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (11th Cir. 1982).

136. *Id.*

137. *Id.*

138. *See Rabidue*, 805 F.2d at 622.

139. Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987); *see* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1519, 1523 (M.D. Fla. 1991) (employee suffered from anxiety and sleeplessness, resulting in absenteeism).

existence of an abusive work environment.[140] However, in *Vance v. Southern Bell Telephone & Telegraph Co.*, the Eleventh Circuit read *Henson* and *Meritor* to require that an "actionable harassment claim must establish by the totality of the circumstances, the existence of a hostile or abusive working environment which is severe enough to affect the *psychological stability* of a minority employee."[141] As a result, the *Vance* court, unlike the *Sparks* court, required, rather than permitted, proof of psychological injury.[142] Thus, even in the circuit that pioneered the psychological injury requirement, the panels were unable to apply the standard consistently.

II. THE HARRIS *COURT*[143]

A. Majority Opinion[144]

Justice O'Connor, writing the opinion for the United States Supreme Court, accomplished three objectives in her opinion: (1) she reaffirmed and clarified the standard set forth in *Meritor Savings Bank v. Vinson*;[145] (2) she denied that psychological injury was a requirement under *Meritor*; and (3) she set forth several elements to aid in the determination of a hostile/abusive work environment.[146]

In *Meritor*, the Court recognized that Title VII of the Civil Rights Act of 1964[147] is violated by conduct which is "`sufficiently

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140. *Sparks*, 830 F.2d at 1561.

141. Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989) (emphasis added).

142. *See id.*

143. For a discussion of what occurred with *Harris* in the lower courts, see *supra* text accompanying notes 13–18.

144. A unanimous Court decided *Harris* in less than one month. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993).

145. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). For a discussion of *Meritor*, see *supra* text accompanying notes 98–112.

146. *Harris*, 114 S. Ct. 367 (1993). See *infra* note 156 for the elements that the majority suggested the factfinder use to determine the existence of a hostile/abusive work environment.

147. 42 U.S.C. § 2000e-(2)(a)(1) (1988). "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . terms conditions, or privileges of employment, because of such individual's . . . sex . . . ." *Id.*

severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[148] In reaffirming the *Meritor* standard, the *Harris* Court attempted to take "a middle path" between proscribing merely offensive conduct and requiring that the harassment result in a discernible psychological injury.[149] Thus, the Court made a concerted effort to protect management from claims from hypersensitive employees and frivolous complaints. The *Harris* Court formulated a two pronged objective/subjective test. A hostile work environment exists if: (1) a reasonable person would perceive it as such; and (2) the victim subjectively perceives the environment as hostile.[150]

In rejecting the need to prove psychological injury, the *Harris* Court reasoned that Title VII intended a "broad rule of workplace equality."[151] Thus, the very presence of an abusive work environment is discriminatory, regardless of any tangible effect.[152] Although Title VII certainly prohibits "conduct that would seriously affect a reasonable person's psychological well-being," an employee merits protection under the Act prior to actual damage to her psyche.[153] Consequently, the Court concluded that the victim is not required to prove that she suffered a nervous breakdown, clinical depression, or any other psychological illness, condition, or trauma.[154]

In addition to the two pronged objective/subjective test to determine whether a hostile work environment exists, the *Harris* Court noted that the trier of fact must look at the totality of the circumstances before concluding that an environment is hostile or abusive.[155] The Court attempted to provide some guidance to aid the factfinder in determining whether a hostile work environment exists through a list of factors. These factors include frequency and sever-

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148. *Meritor*, 477 U.S. at 67 (citation omitted). See *supra* text accompanying notes 98–112 for a discussion of *Meritor*.

149. *Harris*, 114 S. Ct. at 370. The Court reasoned that merely offensive conduct would not affect working conditions. *Id.* Furthermore, Title VII protects employees before they suffer from a nervous breakdown. *Id.*

150. *Id*. The Court reasoned that if the victim did not believe that the environment was hostile or abusive, the conduct did not alter the conditions of her employment and consequently, would not be actionable under Title VII. *Id.*

151. *Id*. at 371.

152. *Id.*

153. *Id.* at 370.

154. *See id*.

155. *Id*. at 371.

ity of the harassment, whether the conduct is physically threatening or humiliating, rather than merely offensive, and whether the conduct unreasonably interferes with the victim's performance at work.[156] The Court emphasized that this list was not exhaustive and that no particular factor was determinative.[157] Moreover, the Court refused to elaborate as to what constitutes a hostile work environment.[158]

B. The Scalia Concurrence

Justice Scalia asserted that the majority's hostile or abusive work environment standard was ambiguous.[159] Furthermore, Justice Scalia stated that his discomfort with such nebulous terms was not assuaged by adding the objective requirement to the criterion.[160] Nor was he satisfied with the list of factors that the Court provided to aid in the determination of an abusive work environment.[161] Justice Scalia agreed with Justice O'Connor that the list is far from comprehensive.[162] In addition, Justice Scalia commented that the Court failed to quantify the factors or to set forth any determinative factors.[163] According to Justice Scalia, the Court's failure to clearly annunciate what constitutes a hostile or abusive work environment leaves juries without guidance in determining sexually discriminatory hostile work environment claims.[164]

Justice Scalia recognized that courts have a long history of allowing juries to decide questions of negligence and that the negligence standard is no clearer than the "abusive" standard.[165] However, Justice Scalia reasoned that plaintiffs in a negligence action have

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156. *Id*.

157. *Id.*

158. "This is not, and by its nature cannot be a mathematically precise test. We need not answer today all the potential questions it raises." *Id.* That this is not a "mathematically precise" test "may be a masterpiece of understatement." Anne Marie Ciesla, 40 PRAC. LAW. 15, 19 (1994).

159. *Harris*, 114 S. Ct. at 372 (Scalia, J., concurring).

160. *Id.*

161. *Id.* at 372. See *supra* text accompanying note 156 for the list of factors that the Court set forth.

162. *Harris*, 114 S. Ct. at 372; *see supra* text accompanying note 157.

163. *Harris,* 114 S. Ct. at 372.

164. *Id.*

165. *Id.*

already suffered tangible harm or injury.[166] Thus, the negligence standard is employed to determine whether *liability* exists, not whether a *harm* has been suffered.[167] Justice Scalia noted, however, that in an abusive work environment action, the vague terms — abusive and hostile — function to determine whether harm has even occurred.[168]

Justice Scalia opined that one of the factors from the Court's list, "whether the conduct unreasonably interferes with an employee's work performance," could be used as "an absolute test" in place of the abusive work environment test.[169] Such a test, he concluded, would be more explicit and consequently easier to comprehend and follow.[170] However, he doubted that the language of Title VII would support such a standard.[171] Furthermore, according to Justice Scalia, under the *Meritor* interpretation of "conditions of employment," the issue was not "whether *work* ha[d] been impaired, but whether working *conditions* [had] been discriminatorily altered."[172] He interpreted the *Meritor* test to focus on the atmosphere and conditions, rather than the tangible effect on the employee victim's ability to work.[173] Because Justice Scalia found no basis in statute or case law, he abandoned this alternate test.[174]

C. The Ginsburg Concurrence

Justice Ginsburg indicated that under Title VII, the focus in a hostile work environment claim should be on whether the harassing conduct affects the terms, conditions, or privileges of employment of members of one sex, but not of the other sex.[175] Although Justice Ginsburg did not elaborate on the ramifications of such a focus, her statement can be read to shift the focus from the effect of the conduct on the environment to the effect of the conduct on the employ-

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166. *See id.*
167. *See id.*
168. *See id*.
169. *Id*. The "unreasonabl[e] interfere[nce] with work performance" standard is also set forth in the EEOC Guidelines. 29 C.F.R. § 1604.11(a)(3) (1993).
170. *See Harris*, 114 S. Ct. at 372.
171. *Id.*
172. *Id.* (emphasis added).
173. *Id*. at 371.
174. *Id.* at 372.
175. *Id*. (Ginsburg, J., concurring).

ee. Thus, according to Justice Ginsburg, the Court should place emphasis on disparate treatment,[176] rather than on the type of environment created.

In addition, Justice Ginsburg addressed the same test as Justice Scalia, indicating that the dominant focus of the factfinder's inquiry should be on whether the harassment has unreasonably interfered with the victim's job performance.[177] Thus, she approved of the test suggested by the Equal Employment Opportunity Commission and found further support for the EEOC test in *Davis v. Monsanto Chemical Co.*,[178] in which the court considered a racially hostile work environment claim. Under the *Davis* analysis, a plaintiff merely needs to prove that "the harassment so altered working conditions as `to ma[k]e it more difficult to do the job.'"[179] Since Title VII groups race and sex together in the same classification, Justice Ginsburg stated that the race standard from *Davis* applies equally to sex discrimination cases.[180] As support for using the same standard for race and gender discrimination, she noted the possibility that gender might be considered under the same analysis as race in an equal protection analysis.[181] In addition, Justice Ginsburg stated

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176. *Id.* For a discussion of the disparate treatment analysis, see *supra* text accompanying notes 67–71.

177. *Harris*, 114 S. Ct. at 372. For a discussion of Justice Scalia's consideration of this standard, see *supra* text accompanying notes 169–74.

178. Davis v. Monsanto Chem. Co., 858 F.2d 345 (6th Cir. 1988). The plaintiffs, two African-Americans, alleged *inter alia* that they were subjected to racial epithets, graffiti, and segregated lunchrooms. *Id.* at 347.

179. *Id.* at 349.

180. *Harris*, 114 S. Ct. at 372–73.

181. *Id.* at 373 n.∗ (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982)). In *Davis*, the court held that it did not have to employ the same test for sexual discrimination as it did for racial discrimination. *Davis*, 858 F.2d at 348 n.1. The court asserted that under equal protection analysis, racial classifications are subject to strict scrutiny, whereas classifications based on gender are subject to an intermediate level of scrutiny. *Id.* (citing Craig v. Boren, 429 U.S. 190 (1976)). Consequently, the court held that this was sufficient support for not treating the classifications similarly under Title VII. *Id.*

Since Justice Ginsburg approved of the *Davis* test for sex discrimination as well as for race discrimination, she apparently felt that she needed to rebut the *Davis* court's reasoning that, because the two classifications are treated differently under equal protection analysis, they should be treated differently under Title VII. *See Harris*, 114 S. Ct. at 373 n.∗. To do so, she relied on a footnote in the majority opinion in *Hogan*, stating that the Court need not decide at that time whether gender based classifications were inherently suspect. *Hogan*, 458 U.S. at 724 n.9. Thus, Justice Ginsburg concluded that gender classifications were not necessarily treated differently from race classifications for

that the "unreasonable interference with work performance" standard is "in harmony" with the Court's opinion.[182]

III. CRITICAL ANALYSIS

A. Did the Court Correctly Interpret Title VII?

Title VII proscribes sexual discrimination against any person regarding the "terms, conditions, or privileges" of his or her employment.[183] In *Harris v. Forklift Systems, Inc.*, the Court reaffirmed that Congress' use of the words "terms, conditions, or privileges of employment" indicated an intent to eradicate the "entire spectrum of disparate treatment" between the sexes in employment.[184] Consequently, the *Harris* Court concluded that requiring a person to work in a hostile work environment affected the terms, conditions, or privileges of that person's employment.[185]

The legislative history of Title VII does not speak directly to whether a hostile work environment constitutes sex or race discrimination, or even to whether harassment is discrimination.[186] The legislative history reads, in part, "It will be an unlawful employment practice for an individual to fail or to refuse to hire or to discharge any individual, *or otherwise discriminate against* any individual with respect to compensation, terms, conditions, or privileges of employment . . . ."[187] Although most of the above language appears to refer to retention and hiring practices,[188] the inclusion of the phrase

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equal protection analysis. *See Harris*, 114 S. Ct. at 373.

182. *Harris*, 114 S. Ct. at 373.

183. 42 U.S.C. § 2000e-2(a)(1) (1988).

184. *Harris*, 114 S. Ct. at 370 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)) (citation omitted).

185. *Id.*

186. *See, e.g.*, H. REP. NO. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391. Protection against discrimination on the basis of sex may never have been intended by Congress. *See supra* text accompanying notes 33–51. Furthermore, employment protection was especially controversial. *See supra* note 33. Thus, the courts' ability to interpret legislation has been crucial to extending protections under Title VII. Consequently, the Court must look to the breadth of the statute to determine what is reasonably permitted within the statute's language.

187. H. REP. NO. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2402 (emphasis added). The legislative history does not include the term "sex" which was later added to Title VII. *See supra* text accompanying notes 33–51.

188. *See* 110 CONG. REC. 2575–84 (1964) (indicating that most of debate regarding "sex" amendment also focused on hiring practices).

"or otherwise discriminate" demonstrates that Congress intended the provision to cover a wide variety of discriminatory practices. Had Congress intended to limit Title VII to purely economic harm, it certainly could have used more restrictive language.[189] Thus, although Title VII's express language does not include a prohibition against sexual harassment, the language can be interpreted so as to reasonably encompass sexual harassment as a form of discrimination within Title VII's purview.

Despite the general economic overtone of the above language, the inclusion of the term "conditions" seems to suggest an intent to include the work environment within the ambit of Title VII protection. A condition refers to a prerequisite, a state of being, or attendant circumstances.[190] Therefore, because the definition indicates that a condition could be a prerequisite to obtaining or maintaining employment, a condition could thus have economic effects. However, the definition also includes the words "attendant circumstances" and "state of being" which support the notion that the work environment is protected as well. Regardless of whether Congress intended "conditions" to take on an economic connotation, the environment definition is clearly within the meaning of the word "conditions," and therefore, within the purview of the statutory language. Consequently, the Court correctly interpreted Title VII to include a cause of action for hostile or abusive work environments.

B. Did the *Harris* Court Discard a Workable Standard?

1. The Majority Approach

The *Harris* Court affirmed that an abusive work environment is actionable under Title VII.[191] The EEOC, the agency which investigates Title VII discrimination complaints,[192] first recognized a sexually discriminatory hostile work environment as actionable under

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189. For example, Congress could have limited Title VII's protections to decisions regarding hiring and discharge or decisions regarding advancement and demotion, rather than including the less definitive words concerning "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2. Further, had Congress defined "terms, conditions, or privileges of employment," it would have also limited the application of the statute beyond its intended scope.

190. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (1971).

191. *See supra* text accompanying note 27.

192. 42 U.S.C. § 2000e-4 (1988); *see* BIRD, *supra* note 33, at 14.

Title VII in its 1980 guidelines regarding sexual harassment.[193] The issue, however, is not whether the proscribed environments must be hostile or abusive; courts have overwhelmingly accepted such standards.[194] Instead, the issue is what type of conduct constitutes a hostile or abusive work environment and whether that standard alone is sufficient to describe the conduct which Title VII prohibits.[195]

The EEOC Guidelines proscribe sexual harassment which "unreasonably interfer[es] with an individual's work *performance or* creat[es] an intimidating, hostile, or offensive working environment."[196] The Supreme Court, however, affirmed a standard which requires that the conduct be "sufficiently severe or pervasive to alter the *conditions* of the victim's employment and create an abusive working environment."[197] Thus, the *Harris* Court rejected the "unreasonable interference with work performance" standard in favor of the Title VII language which requires discrimination with respect to conditions of employment. Furthermore, the Court made the requirement conjunctive, rather than adopting the disjunctive EEOC standard, by adding that the defendant's conduct must create an abusive working environment in addition to altering work conditions.[198] In discarding the "unreasonable interference with work performance" standard from the EEOC Guidelines,[199] the *Harris* Court scrapped a very workable and tangible criterion.[200]

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193. 29 C.F.R. § 1604.11(a) (1980). "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an *intimidating, hostile, or offensive* working environment." 29 C.F.R. § 1604.11(a) (1993) (emphasis added). Section (a) of the 1993 guidelines remains faithful to the language of the 1980 guidelines.

194. For examples of courts which held that hostile or abusive work environments are actionable, see *supra* note 113.

195. Courts have readily accepted the use of the words hostile and abusive to describe the type of conduct which Title VII proscribes. See *supra* note 113 for examples of courts which have accepted the words hostile and abusive to describe the type of working environment which Title VII proscribes.

196. 29 C.F.R. § 1604.11(a) (1993) (emphasis added). Although not binding, courts may look to the EEOC Guidelines for assistance in interpreting Title VII. General Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976) (citation omitted).

197. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (citing *Meritor*, 477 U.S. at 67) (emphasis added).

198. *Id.*

199. The majority also listed this standard as a circumstance to be taken into consideration in determining the existence of a hostile or abusive work environment. *See supra* text accompanying note 156.

200. Justice Scalia, in his concurrence, looked favorably on this gauge as well. *Har-*

The *Harris* Court reaffirmed the *Meritor* standard without much consideration of why the language of that standard was proper. Thus, the Court failed to adequately consider whether the EEOC standard was appropriate. Consequently, to understand the *Meritor* test, and to determine whether the EEOC standard is appropriate under that test, one must look to the *Meritor* court's analysis.

After scrutinizing Title VII, the Court concluded that the language "terms, conditions, or privileges of employment" was sufficiently broad to reasonably include a prohibition against hostile work environments.[201] By stating that the conduct must be sufficiently severe or pervasive to alter the conditions of employment, the *Meritor* Court apparently placed great emphasis on the word conditions in Title VII. Perhaps, then, the *Meritor* Court was not so much rejecting the language of the EEOC Guidelines, but trying to provide statutory support for its rather innovative decision.

Although the majority opinion set forth a number of factors to determine whether a hostile work environment exists,[202] such factors do not make the majority's test more workable. Enumerating every instance of conduct which Title VII prohibits is both impossible and undesirable.[203] Thus, the Court needs to differentiate between a standard for determining whether conduct should be proscribed and specific instances of proscribed conduct. A standard which focuses on the effect on the employee, rather than the resulting environment provides a more objective, concrete criteria to determine whether an employee has been discriminated against. The question is not whether working conditions must be altered; clearly

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ris, 114 S. Ct. at 372 (Scalia, J., concurring). However, like the majority, he rejected this standard because he believed it did not comport with the *Meritor* standard, nor did he find the language faithful to the "inherently vague statutory language" of Title VII. *Id.* Using stare decisis, Justice Scalia looked to the *Meritor* interpretation of terms and conditions to determine that the consideration under that test is whether employment *conditions* had been altered, not whether *actual work* had been impaired. *Id.* See *infra* text accompanying notes 205–08 for an analysis of Justice Scalia's concurrence. For a discussion of the *Meritor* test, see *supra* text accompanying notes 98–112. *See also* Gomez, *supra* note 32, at 1917 (suggesting that if Court were to "revisit" the issue, it might give some deference to concurring opinions which discussed "unreasonable interference with work performance" standard).

201. *Meritor*, 477 U.S. at 67.

202. See *supra* text accompanying note 156 for a list of the factors the Court provided.

203. *See supra* note 157 (indicating the Court did not want to list specific conduct which Title VII proscribed).

Title VII requires that the conditions of employment be altered.[204] Rather, the consideration should be *how* the plaintiff must prove that such conditions have been altered.

Requiring that the conduct create a hostile work environment maintains the focus on the specific conduct because such a test still leaves open to question how one can prove that the resulting environment is hostile. Without an established method for determining whether a hostile work environment has been created, one must look to the type of conduct. This results in an ad hoc determination of what type of conduct creates a hostile work environment. However, focusing on whether the victim's job has become more difficult helps to determine whether a hostile work environment has been created, thereby shifting the focus away from a laundry list of proscribed conduct. Focusing on the effect of the conduct on the reasonable employee creates a more objective, comprehensive standard to be used in all cases. Such a focus is preferable to relying on a list of proscribed conduct which, by its nature, cannot be comprehensive.

2. The Scalia Approach

In his concurrence in *Harris*, Justice Scalia indicated that the EEOC Guidelines were inconsistent with the *Meritor* standard.[205] Certainly they are inconsistent in that the EEOC Guidelines permits a showing that *either* the work environment is hostile *or* that the conduct unreasonably interferes with the plaintiff's work performance, whereas the *Meritor* standard requires the plaintiff to show that the work environment is hostile, *in addition to* an alteration in work conditions.[206] However, unreasonable interference with the employee's work performance would be an effective means of showing that the conditions of employment have been altered.

Justice Scalia split a multitude of hairs when he stated that the work performance standard was inconsistent with the working conditions requirement.[207] Certainly few aspects of work are more indicative of a change in conditions than one's performance on the

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204. *See* 42 U.S.C. 2000e.

205. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 372 (1993) (Scalia, J., concurring).

206. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986). See *supra* notes 98–112 for a discussion of *Meritor*.

207. *See Harris*, 114 S. Ct. at 372.

job. Conditions and performance are not synonymous, but they are clearly related. Justice Scalia failed to seize this opportunity to enunciate a method by which to determine whether working conditions have been altered. Furthermore, by refusing to take responsibility for setting forth a clearer standard, Justice Scalia and the Court in general diluted Title VII's protection because employers are left without a clear standard by which to measure what conduct they are required to regulate.

Ultimately, Title VII is concerned with removing artificial barriers that benefit one group of employees to the detriment of another group of employees, thus creating equal employment opportunities.[208] Therefore, Title VII pertains to the employee's ability to obtain a job and to work free from discrimination. Certainly part of that concern would incorporate the employee's ability to work while on the job. Interference with one's work performance undoubtedly would be of concern if it is affected by discrimination. Most likely, conduct which unreasonably interferes with one's work performance would *ipso facto* alter the conditions of employment.

3. The Ginsburg Approach

In her concurrence in *Harris*, Justice Ginsburg also approved the unreasonable interference with plaintiff's work performance standard.[209] However, Justice Ginsburg pushed the criteria one step further. She argued that the harassing conduct does not have to actually affect the victim's work; it merely has to make the victim's job objectively more difficult to perform.[210]

The "unreasonable interference with work performance" standard which Justice Ginsburg extracted from *Davis v. Monsanto Chemical Co.*[211] involved Title VII in a racial context.[212] Nonetheless,

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208. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

209. *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring).

210. *Id.* (citing Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989)). Justice Ginsburg believed that this test should apply equally well to sex discrimination cases because "Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful." *Id.* at 373 (footnote omitted).

211. Davis v. Monsanto Chem. Co., 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989). See *supra* text accompanying notes 178–79 for a discussion of how Justice Ginsburg used *Davis*.

212. *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring).

this standard should be equally applicable for gender discrimination cases under Title VII. The *Davis* court, however, denied that it had to apply the same standard to Title VII race discrimination cases as that which courts applied to gender discrimination cases arising under Title VII.[213] The *Davis* court reasoned that because gender classifications are subject to an intermediate level of scrutiny under an equal protection analysis, whereas race classifications are subject to strict scrutiny under the same analysis, it need not use the same standard for race and sex under Title VII.[214] Perhaps this statement accounts for Justice Ginsburg's rather cryptic allusion to whether classifications based on gender are inherently suspect.[215]

The fact that gender and race are treated differently under an equal protection analysis does not justify treating the two classifications differently for Title VII purposes. Congress specifically proscribed gender-based employment discrimination at the same time and under the same legislation in which it proscribed employment discrimination on the basis of race.[216] Although Congress apparently did not want to prohibit sex discrimination at all when it originally discussed Title VII,[217] the legislative history does not indicate that if the bill passed with the sex provision, discrimination on the basis of sex should be accorded different treatment from the other classifications.[218] Furthermore, unlike the Equal Protection Clauses under the Fifth and Fourteenth Amendments to the United States Constitution which prohibit the denial of equal protection to any *person*,[219] Title VII specifically describes the classes of person to whom its protection extends.[220]

Consequently, because the Fifth and Fourteenth Amendments use the word "person," equal protection has been accorded to racial minorities and to women through judicial interpretation of the word

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213. *Davis*, 858 F.2d at 348.

214. *Id.* at 348 n.1 (citing Craig v. Boren, 429 U.S. 190 (1976)).

215. *Harris*, 114 S. Ct. at 373 n.* (Ginsburg, J., concurring). See *supra* note 181 and accompanying text for a discussion of Justice Ginsburg's footnote regarding gender as a suspect classification under an equal protection analysis.

216. *See* 42 U.S.C. § 2000e (1988).

217. For legislative history regarding the amendment of the word "sex" to Title VII, see *supra* notes 33–51.

218. *See* 110 CONG. REC. 2575–84 (1964).

219. U.S. CONST. amends. V & XIV, § 1.

220. 42 U.S.C. § 2000e-2 (1988).

person.[221] Equal protection was not extended to women and to racial minorities simultaneously.[222] Thus, the Court was called upon to determine the applicability of the word "person" to these two groups at different times. The resulting interpretations of equal protection led to applying different standards to the two classes of persons.[223] However, under Title VII, strict construction does not permit different interpretations because the classifications are listed together under a blanket provision which prohibits employment discrimination. Thus, the two classifications should be treated similarly under Title VII as many courts, including the Supreme Court, have done.[224]

Justice Ginsburg's interpretation of the "unreasonable interference with work performance" standard provides a very workable framework for analyzing sexually discriminatory hostile work environments under Title VII. Webster defines "interfere" as to be in opposition, to meddle, or to diminish.[225] Such a definition comports with Justice Ginsburg's concurrence in *Harris*, stating that the conduct need only make it more difficult to do the work.[226] If the conduct is in opposition to or meddles with one's ability to work, the

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221. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (stating that Fourteenth Amendment was enacted to provide protection to African-Americans and that the amendment did not extend same protection to women); Reed v. Reed, 404 U.S. 71 (1971) (extending equal protection to include women); *see also* John D. Johnston Jr., & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 711 (1971) (discussing string of cases which hold that "person" was not intended to include women within its definition). *See generally* HOFF, *supra* note 37, at 223–75 (providing thorough discussion of constitutional protections and constitutional equality for women).

222. *See, e.g.*, *Strauder*, 100 U.S. at 310 (stating that the Fourteenth Amendment was enacted to provide protection to African-Americans and that amendment did not extend same protection to women); *Reed*, 404 U.S. at 71 (extending equal protection to women).

223. *See, e.g*, Frontiero v. Richardson, 411 U.S. 677 (1973) (indicating that, although race is suspect classification, the majority of justices refused to consider gender a suspect classification); *see also* HOFF, *supra* note 37, at 247–75 (discussing disparate treatment that women receive under Constitution).

224. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (citing Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). For purposes of stare decisis, *Meritor*, a case involving sexual harassment, cited *Rogers*, a case involving racial harassment. *See also* Boutros v. Canton Regional Transit Auth., 997 F.2d 198, 203 (6th Cir. 1993) (stating that plaintiff's burden of proof is same for claims of hostile environment whether based on sex, race, or national origin).

225. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1178 (1961).

226. *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring) (citing Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) (holding that racially hostile work environment is actionable under Title VII)).

conduct has interfered with a reasonable person's ability to work. The only remaining question would be whether the interference has been unreasonable. By declining to require proof of a tangible decline in the employee's productivity, Justice Ginsburg would provide a cause of action to a plaintiff who is able to continue with her work, but who has had every bit of fulfillment drained from her daily routine because of the opposition which she faces on a regular basis.[227]

Like Fermat's Last Theorem,[228] Justice Ginsburg stated without explanation that her opinion was in harmony with the Court's opinion.[229] Perhaps this is true, but unless the Court recognizes the more concrete standard which she proposed, the Court is setting itself up for another *Henson* progeny where the circuits yearn for a tangible injury standard.[230]

C. Should Psychological Injury Be a Requirement?

Henson v. City of Dundee was the first case to recognize that an employee's psychological well-being was a term, condition or privilege of employment for purposes of sexual discrimination.[231] In doing so, the *Henson* court also created the psychological injury requirement by stating that the harassing conduct must be "sufficiently severe and persistent to affect seriously the psychological well being" of the victim.[232] The *Henson* court apparently utilized *Rogers v. EEOC*[233] to formulate the psychological well-being requirement.[234] However, when the *Rogers* court stated that an employee's psy-

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227. *Id.*

228. Pierre de Fermat, a 17th century mathematician discovered "a rather marvelous proof" for a mathematical theorem, but he failed to set out the proof because he did not have enough space in the book's margin where he was doodling. John Kalbfleisch, *Mathematician Misses "Deadline" on Fermat's Theorem*, MONTREAL GAZETTE, Mar. 1, 1994, at A3. Over three hundred years later, the quest to prove Fermat's Last Theorem continues. *Id.*

229. *Harris*, 114 S. Ct. at 373 (Ginsburg, J., concurring).

230. *See* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). See *supra* text accompanying notes 79–93 for a discussion of *Henson*. See also *supra* notes 129–42 for a discussion of the *Henson* progeny.

231. *Henson*, 682 F.2d at 904. For a discussion of *Henson*, see *supra* text accompanying notes 79–93.

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

233. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971). The *Henson* court used *Rogers* to determine that psychological well-being is a term, condition, or privilege of employment. *See supra* text accompanying note 91.

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

chological well-being was a term, condition or privilege of employment, the court was not indicating that Title VII is offended only when one's psyche has been damaged.[235] Rather, the court was merely differentiating between quid pro quo claims and hostile work environment claims.[236]

The *Rogers* court specifically stated that it would also consider causes of action regarding psychological aspects of employment, rather than solely considering economic aspects such as hiring, firing, and wage and hour practices.[237] Thus, where an employee filed suit because she was discriminated against because of her national origin by only being permitted to see patients of certain national origins, the *Rogers* court was not stating that she had to be psychologically injured, but rather that she had a cause of action when the atmosphere at work was discriminatory.[238] If the court had not created a cause of action regarding a discriminatory environment, the plaintiff would not have been able to proceed because, under the traditional quid pro quo action, she would have been unable to show that she was economically affected by the discriminatory segregation of her patients.

Although the *Henson* court's requirement that the harassment seriously affect the plaintiff's psychological well-being did not necessarily follow from the language in *Rogers*, the *Henson* court did not apply the standard in a manner inconsistent with *Rogers* because it remanded the case to the district court so that the plaintiff could prove her claim.[239] Without having applied its own standard regarding psychological well-being, it is difficult, if not impossible, to determine what type of conduct the *Henson* court believed would be sufficient to satisfy this criteria. As a result of the *Henson* court's failure to adequately explain its reference to psychological well-being, the panels that followed *Henson* have applied the psychological injury requirement inconsistently.[240]

In considering the psychological injury requirement, the Su-

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235. *Rogers*, 454 F.2d at 238.

236. *Id.* See *supra* text accompanying notes 65–75 for a comparison of quid pro quo and hostile work environment harassment.

237. *See Rogers*, 454 F.2d at 238.

238. *Id.*

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

240. See *supra* text accompanying notes 132–42 for a discussion of how the panels in the 11th Circuit have applied the psychological injury requirement inconsistently.

preme Court in *Harris* discussed the language in *Rogers* which referenced "environments `so heavily polluted with discrimination as to destroy completely the emotional and *psychological stability* of minority group workers.' "[241] The *Harris* Court reasoned that the "psychological injury" requirement might mistakenly center the court's or the jury's attention on concrete psychological harm, which is not an element that Title VII requires.[242] Thus, the problem with the psychological injury requirement arises when a court requires that the conduct reach a level that causes concrete psychological injury to the plaintiff.[243] The Court apparently believed that *Rabidue v. Osceola Refining Co.*[244] had reached this level and thus provided an impermissible standard for review of Harris' claim.[245]

Consequently, not all applications of the psychological injury requirement are impermissible. For example, in *Walker v. Ford Motor Co.*, the court held within the context of racial discrimination that the plaintiff's psychological well-being was seriously affected when the harassment was "repeated, continuous, and prolonged" and where the conduct "made [him] feel unwanted and uncomfortable in his surroundings."[246] Certainly, feeling uncomfortable in one's surroundings does not rise to the level of concrete psychological harm. Feeling unwanted and uncomfortable undoubtedly could result from hostile or abusive work environments; however, such a lax requirement fails to take into consideration the hypersensitive employee and may be so broad that it proscribes conduct not intended by Title VII. Nonetheless, consideration of the emotional effects of harassing conduct would be useful because one would expect an abusive work environment to affect the employee in some intangible way. Thus, courts should look at the psychological effects

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241. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993) (emphasis added) (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

242. *Id.*

243. Harassing conduct is actionable under Title VII before the victim suffers a "nervous breakdown." *Id.* at 370.

244. Rabidue v Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

245. *Harris*, 114 S. Ct. at 371. See *supra* text accompanying notes 120–28 for a discussion of *Rabidue.*

246. Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982). See *supra* text accompanying notes 135–37 for a discussion of the *Walker* court's use of the psychological injury requirement.

of harassing conduct.[247]

Courts should not, however, require that the plaintiff become psychologically disturbed or suffer some other tangible psychological injury. The Eleventh Circuit stretched the psychological injury requirement to this end of the spectrum when it required that the hostile work environment affect the psychological stability of the employee.[248] Such a requirement is overly strict and creates a nearly insurmountable barrier for the plaintiff.

If the conduct has affected the employee's psychological stability, it has probably been overly severe and overly pervasive. Title VII should be used as a preventative measure, not as a bandage. Discriminatory conduct should be halted as soon as possible, rather than waiting for the greatest amount of potential damage to occur. Requiring that the victim's psychological stability be affected undermines the purpose of Title VII. A psychological instability requirement would likely lead to feigned symptoms,[249] an entourage of experts at trial, and victims who are now so seriously affected that they can no longer work. Certainly, Title VII intends to provide protection so employees can obtain and *maintain* employment.

Thus, the *Harris* Court correctly held that a plaintiff need not prove psychological injury to succeed under a hostile work environment theory.[250] Nevertheless, consideration of the psychological effects of sexual harassment can be useful. The *Harris* Court, however, did not consider the entire psychological injury spectrum; it merely considered the impermissible end which requires concrete psychological harm.[251] The difficulty with the psychological injury requirement is that the courts have failed to clearly enunciate how one's psychological well-being must be affected. If psychological effects are to be taken into consideration, the Court needs to formulate what those effects must be for a victim to recover.

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247. *Cf.* Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987) (stating that effect on victim's psychological well-being may be used to determine the existence of hostile work environment).

248. *See supra* text accompanying note 141.

249. *See* Stuart Taylor Jr., *Setting Limits for Language*, RECORDER, Oct. 20, 1993, at 10.

250. For a discussion of the Court's rejection of the psychological injury requirement, see *supra* text accompanying notes 151–54.

251. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993).

D. Further Considerations: Effect on the Victim

Perhaps the Court should consider other terms which describe how the harassing conduct must affect the victim. For example, the EEOC Guidelines, from which the hostile work environment language originated, include the words "offensive" and "intimidating" to describe the type of sexually charged work environment that is actionable under Title VII.[252] The *Harris* Court specifically rejected the argument that conduct which merely offends an employee is actionable because such conduct fails to affect the conditions of employment.[253]

The Court rejected the offensiveness standard for the wrong reason. One cannot correctly state that offensive conduct does not affect conditions of employment; rather the problem lies in the offensiveness standard being overly subjective and excessively burdensome for an employer. For a hypersensitive employee, offensive behavior may affect her working conditions. Proscribing all statements that may offend any employee, however, reaches beyond employment protection and extends into the realm of legislating political correctness. Title VII should provide the greatest possible employee protection without placing an impossible or undesirable burden on the employer. Permitting merely offensive conduct to be actionable would not further this desired aim because employers would be unable to anticipate offense in hypersensitive employees.

The EEOC Guidelines and the *Harris* Court both refer to intimidating conduct.[254] A standard which requires the harassing conduct to be intimidating would be a stricter test than a test requiring the conduct to be merely offensive. Furthermore, intimidating conduct describes the type of conduct that most people would agree should be proscribed from the work place. One can certainly imagine intimidating conduct which affects working conditions. Nonetheless, "intimidating" is no more concrete than "hostile" or "abusive." Even adding an objective requirement fails to adequately put employers on notice of what type of conduct is actionable. Consequently, providing adjectives which describe the proscribed work environment is

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252. 29 C.F.R. § 1604.11(a)(3) (1993).

253. *Harris*, 114 S. Ct. at 370; *see supra* text accompanying note 111.

254. 29 C.F.R. § 1604.11(3)(a); *Harris*, 114 S. Ct. at 370 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

not helpful. The Court needs to find a better standard to describe how harassing conduct affects an employee, not to describe the environment in which the employee works.

E. The New EEOC Guidelines

The EEOC has proposed new sexual harassment guidelines which proscribe harassment resulting from gender-based animus,[255] in addition to harassment which has a sexual basis.[256] The *Harris* Court declined to address these new regulations.[257] However, courts have already recognized the type of harassment that proposed § 1609.1 of the Code of Federal Regulations prohibits.[258] For example, the United State District Court for the Middle District of Florida determined that a trailer intended for use by male and female shipfitters on which a "Men Only" sign was posted constituted harassment of a nonsexual nature.[259]

In the present case, Teresa Harris was also subjected to harassment that was not sexual in nature. For example, Hardy's

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255. 58 Fed. Reg. 51,266 (1993) (proposed 29 C.F.R. § 1609.1). The terms "gender" and "sex" are often used interchangeably. However, for purposes of distinguishing between sex-based harassment and gender-based animus, the word "sex" is used in its biological context. The word "gender" is used to signify those characteristics which are attributed to women due to society's concept of what it means to be female. Thus, gender-based animus is conduct that is motivated solely by an antagonistic attitude toward a specific gender. For the purposes of this Note, gender-based animus is misogynic conduct. See *supra* note 21 for a discussion of why harassment in this Note is limited to men as offenders and women as victims. Thus, for example, harassing conduct which is prompted by one's gender, but which does not refer to the victim in a sexual manner, is gender-based animus. Compare *infra* note 256 for a discussion of harassment which has a sexual basis.

256. 29 C.F.R. § 1604.11(a). Sex-based harassment occurs when the offending party harasses the victim in a way that refers to her in a sexual manner. For example, if the harasser asks the victim to engage in sexual acts in order to negotiate a raise or makes harassing comments regarding her body, he has engaged in harassing conduct of a sexual nature. Compare *supra* note 255 for a discussion of harassing conduct which is not sexual in nature.

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

258. *See, e.g.*, Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (male employees urinated in gas tank of female employee and failed to fix her work truck which emitted harmful fumes); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (male employees placed "Men Only" sign on door to trailer intended for male and female shipfitters' use).

259. *Robinson*, 760 F. Supp. at 1514–15, 1522. This sign apparently was placed on the door in response to the plaintiff's complaint about a sexually explicit calendar in the trailer. *Id.* at 1514.

statements that Harris was a "dumb ass woman" and that because she was a woman, she did not know anything[260] did not refer to sex or refer to Harris in a sexual manner. However, Hardy directed his conduct at Harris because of her *gender*. Such gender-based animus will be specifically proscribed under the EEOC's proposed regulations.

The proposed guidelines are not so important because they proscribe gender-based animus, but because they seem to create internal inconsistencies within the EEOC Guidelines. These inconsistencies illustrate the confusion that exists even within the EEOC regarding the interpretation of the present hostile work environment standard. Section 1604.11 states that sexual harassment is unlawful when the conduct unreasonably interferes with the victim's job performance *or* creates a hostile work environment.[261] The proposed guidelines provide three criteria to determine whether conduct is unlawful harassment: (1) if it creates a hostile work environment; (2) if it unreasonably interferes with the victim's job performance; *or* (3) if it detrimentally affects the victim's work opportunities.[262] Section 1609.1(c) of the proposed guidelines establishes the standard to determine whether the conduct alters the conditions of employment *and* creates a hostile work environment.[263] This language tracks the language of the test the Supreme Court first used in *Meritor*.[264] Although the language from section 1609.1(c) regarding conditions of employment and hostile work environments is not found in the Sexual Harassment Policy Guidelines,[265] the EEOC imputes this same standard to those guidelines.[266]

Consequently, the EEOC appears to have adopted or brought itself in line with the courts' current standard on sexual harassment. However, this standard is not in harmony with the rest of the EEOC Guidelines. Since the guidelines require a hostile work environment *or* unreasonable interference with work performance whereas the *Harris* test requires a change in the victim's conditions

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260. *Harris*, 114 S. Ct. at 369.

261. 29 C.F.R. § 1604.11(a)(3).

262. 58 Fed. Reg. 51,266 (proposed 29 C.F.R. § 1609.1).

263. *Id*. (proposed 29 C.F.R. § 1609.1(c)).

264. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986). See *supra* text accompanying notes 98–112 for a discussion of *Meritor*.

265. 29 C.F.R. § 1604.11.

266. *See* 58 Fed. Reg. 51,266 n.4.

of employment, *in addition to* proof of a hostile work environment, two issues arise. First, if unreasonable interference with work performance is synonymous with a change in conditions of employment, the *Harris* test is more stringent than the EEOC test. Second, if the two phrases are not synonymous, internal conflict exists in the guidelines because the guidelines purport to set forth one standard, yet in the same ink, accept a different standard.[267]

The Justices were unable to determine the relationship between work conditions and an employee's work performance. For example, in his concurrence in *Harris*, Justice Scalia stated that unreasonable interference with work performance is not synonymous with an alteration in work conditions.[268] It is puzzling that Justice Scalia stated that he found unreasonable interference with work performance to be a favorable, concrete standard, yet failed to see that it could be interpreted consistently with both *Meritor* and Title VII.[269] Although Justice Ginsburg failed to provide the framework for her analysis, she apparently found the two terms to be consistent because she endorsed the work performance standard and stated that Court's opinion was "in harmony" with her opinion.[270]

The harmony of the two standards lies not in their being synonymous, but in their synergistic relationship. Title VII requires that the terms, conditions, or privileges of employment be altered. In the guidelines, the EEOC set forth the criteria to determine *whether* terms, conditions, or privileges have been altered. The conditions have been altered when the harassing conduct unreasonably interferes with an employee's job performance. Since Title VII is concerned with employment, the focus should be on the effects on the employee in the employment context. If the conduct does not at least hypothetically affect the employee in the employment context, Title VII does not control because Congress has no power to legislate private bigotry which does not in some way affect interstate commerce.[271]

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267. *See infra* text accompanying notes 272–73.

268. *Harris*, 114 S. Ct. at 372 (Scalia, J., concurring).

269. *See id.*

270. *Id.* at 373 (Ginsburg, J., concurring).

271. Under the Commerce Clause, Congress may legislate anything that affects interstate commerce. Certain employment practices affect interstate commerce; consequently, Congress has the power to enact legislation concerning such employment practices. *See supra* note 13.

Since the work interference standard shares a common bond with the change in conditions standard, the new guidelines have created internal inconsistencies by requiring a hostile work environment in the disjunctive in one instance,[272] and in the conjunctive in the next paragraph.[273] The EEOC apparently wants to remain in harmony with the courts' decisions, but in doing so, the Commission has created circular reasoning. If the courts rely on the EEOC and the EEOC relies on the courts, the water is muddied and parties are left to wonder which came first.

Congress created the EEOC to monitor Title VII. Some deference should be given to a commission whose purpose is to protect against employment discrimination. This is especially true when the EEOC provides a very workable and useful standard. The guidelines provide two different ways to determine whether the conditions of employment have been altered: unreasonable interference with job performance or the creation of a hostile work environment. Title VII requires only that the employee be discriminated against regarding conditions of employment. Thus, the Court should concern itself with how to show that conditions have been altered, not with creating further requirements.

F. Equal Protection Arguments: Disparate Treatment as a Possible Basis of Harassment

Professor Glenn George argued that proof of disparate treatment[274] should be sufficient to state a claim because the conduct is

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272. Title VII proscribes conduct which: "(i) [h]as the purpose or effect of creating an intimidating, hostile, or offensive work environment; (ii) has the purpose or effect of unreasonably interfering with an individual's work performance; *or* (iii) otherwise adversely affects an individual's employment opportunities." 58 Fed. Reg. 51,266 (1993) (proposed 29 C.F.R. § 1609.1(b)) (emphasis added).

273. "Proposed § 1609.1(c) sets forth the standard for determining whether the alleged harassing conduct is sufficiently severe or pervasive to alter the conditions of employment *and* create an intimidating, hostile, or abusive work environment." *Id*. (proposed 29 C.F.R. § 1609.1(c) (emphasis added)).

274. Courts have traditionally analyzed sexual harassment cases under a disparate treatment analysis. *See supra* text accompanying notes 65–71. However, the order of proof for disparate treatment claims is ill-suited to analyzing hostile work environment claims. George, *supra* note 78, at 18; Note, *supra* note 66, at 1456.

The disparate treatment analysis under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973), centers on discriminatory intent. For a discussion of the intent element in the test for quid pro quo sexual harassment, see *supra* text accompanying note 70. As Professor George indicated, however, an employer would never be asked to

discriminatory and based on gender.[275] Under this reasoning, perhaps the mere existence of disparate treatment constitutes a hostile work environment. Justice Ginsburg appears to have considered this possibility. During oral arguments, she stated the possibility that when "one sex has to put up with something the other sex doesn't have to put up with," Title VII is violated.[276] Furthermore, Justice Ginsburg confirmed that the pivotal issue was whether one sex was subjected to adverse terms and conditions to which the other sex was not subjected.[277]

Because these equal protection-like sentiments follow Justice Ginsburg's agreement that a hostile work environment provides a claim under Title VII, she apparently believed that a hostile or abusive work environment would be created when the sexes were subjected to disparate treatment. "Abusive" is defined as "ill treatment, injurious, improper, hurtful, [or] offensive" conduct.[278] Furthermore, "hostile" is defined as "displaying enmity or antagonism."[279] Certainly, harassing someone because of her gender is injurious and improper and perhaps constitutes a display of enmity or antagonism. Therefore, a hostile work environment would be created merely by harassing someone based on her gender. However, this standard would not be any less problematic because courts would again be left to determine what constitutes harassment.

G. Severe and Pervasive Requirement

The *Harris* Court is also correct in taking into consideration the

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"articulate a legitimate, nondiscriminatory reason" for sexually harassing conduct. George, *supra* note 78, at 18. This phrase is one of the three levels of proof for a sexual harassment quid pro quo claim. See *supra* text accompanying notes 69–71 for a discussion of the order of proof for quid pro quo claims.

In the context of the *Harris* case, it would be ludicrous to ask Hardy, Forklift's president, for "legitimate nondiscriminatory reasons" for asking Teresa Harris to retrieve coins from the front of his pants or for calling Harris a "dumb ass woman." Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 369 (1993). Asking for such legitimate nondiscriminatory reasons merely begs the question — the discriminatory conduct occurred because of the employee's gender.

275. George, *supra* note 78, at 18.

276. Taylor, *supra* note 249, at 12.

277. *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring).

278. BLACK'S LAW DICTIONARY 11 (5th ed. 1979).

279. *Id*. at 664.

severity and pervasiveness of the conduct.[280] The requirement that the conduct be pervasive permits a well-intentioned person to correct the error of his ways if he unintentionally acts, on a single occasion, in a harassing manner. Yet, the requirement that the conduct be severe would allow for a balancing test between the victim's rights and the rights of the one-time offender. Certainly, one can imagine a situation in which the conduct is so severe that it should be actionable without requiring a repeat performance. Thus, the more severe the conduct, the more weight should be given to the employee victim's rights.

In essence, Title VII should aim to provide the broadest protection possible. In all fairness to management, hypersensitive plaintiffs must slip through the grasp of Title VII's protection. To allow otherwise would be to hold employers to an impossible burden because they would have to recognize the peculiar sensibilities of every employee. This is neither possible nor desirable. However, holding employers liable for conduct which is severe or pervasive enough to make a reasonable person's job more difficult to perform puts employers on notice of their duty. Furthermore, demanding a severe and pervasive requirement allows the inadvertent clod to learn the error of his ways and to correct his future conduct.

Just as some hypersensitive plaintiffs will slip through the net of Title VII's protection, some people in jobs where such conduct is the nature of the business will be caught in the same net. For instance, in many blue collar jobs which have traditionally been reserved for male workers, where harsh language and pornographic pictures may abound, the effect of Title VII might seem harsh.[281] However, the demographics of the work force are slowly changing and many traditionally "male" jobs now include female employees. Legislation and judicial interpretations must respond to the changing work force.

Although it is no longer acceptable to make racial slurs, such a strong stigma is not attached to gender-based animus. Legislation aimed at fighting discrimination against racial minorities has made

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280. *But see* George, *supra* note 78, at 20–26 (rejecting that conduct must necessarily be pervasive).

281. For a discussion of hostile work environments in traditionally male occupations, see Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1832–39 (1990).

it clear that such bigotry is unacceptable. Certainly, neither Congress nor the courts can legislate private morality; however, by demonstrating that such conduct is unacceptable in the workplace, employers and employees alike receive the message that bigotry is unacceptable simpliciter.[282] Continuing to allow harassment to occur merely because it has been acceptable in the past sends a message that change is neither necessary nor desired. This is the wrong message to send. Although the private sphere will not transform overnight, the Court should not wait for private ethics to advance so that judicial change will be more comfortable. It is the Court's job to enforce Title VII and if in doing so it creates positive reformation in the private sphere, so much the better.

H. The Test

So what is the answer? No test will completely satisfy management, employees, courts, and anyone else with an interest in sexual harassment litigation. Nonetheless, a clearer, more concrete, and workable standard than the current hostile work environment standard can and should be devised.

First, the test should be entirely objective. A subjective test may punish women who defend themselves and their jobs by displaying an air of tolerance. Some women may initially try to endure the harassing treatment without resorting to the courts.[283] Others may attempt to cope by participating in the offensive conduct so as to appear as if they are "fitting in." Women who find themselves in such situations should not lose their causes of action merely because they pragmatically chose a defense with which the Court does not agree.[284]

A purely objective standard would not be overly burdensome to employers. Most likely, if a plaintiff brings a sexual harassment

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282. *See generally* Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).

283. "[T]he image . . . [of] exit as the normal prompt response to harassment is inconsistent with the actions of the majority of women who neither report harassment nor leave their jobs." Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1288 (1992).

284. Critics of this proposed standard may argue that potential plaintiffs should be required to put the employer on notice that his actions are discriminatory. Nonetheless, the reasonable person standard should be sufficient to inform the employer of what conduct constitutes a hostile work environment.

claim, she does so because she was at least offended. Concern arises for employers regarding those employees who were neither harassed nor offended, but instituted a claim for vindictive reasons. Yet, if the conduct is not severe and pervasive enough to make a reasonable person's job more difficult to do, the claimant will not succeed, regardless of actual offense. However, if the factfinder determines that the conduct would interfere with a reasonable person's ability to work, no harm results if the plaintiff is not subjectively offended. If the conduct hinders the work performance of a reasonable person, that should be sufficient.

Since the concern under Title VII is employment opportunities, the proper test should determine how the conduct has affected the victim in her capacity as an employee. The test that Justice Ginsburg and the EEOC suggest calls for unreasonable interference with work performance.[285] Such a test provides a workable, concrete standard by which to judge whether harassing conduct has affected the victim. Therefore, the final issue is how much interference is tolerable.

One must wonder whether it is ever reasonable to allow sexually harassing conduct to interfere with a victim's work performance. Justice Ginsburg stated that the test is satisfied if the conduct merely makes the victim's job more difficult to do.[286] Yet, this standard seems too lenient and imprecise. It would prohibit any harassing conversation which expends the employee's time because such conduct can make her job more difficult to do if she is unable to complete her tasks because someone has partially exhausted her work time. However, courts should not employ Title VII to proscribe conduct which merely expends employee time. The harassing conduct should make the victim's work more than slightly more difficult to do.

If it is never reasonable to allow harassing conduct to interfere with a victim's work performance and Justice Ginsburg's suggestion that the conduct merely make the job more difficult to do is similarly unworkable, another standard must be developed. To provide the greatest protection to employees without placing an undue burden on management, something more than slight interference should be required. Significant interference connotes that the interference

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285. *See supra* text accompanying notes 177–79.
286. *See supra* note 179.

needs to be more than slight, yet stops short of requiring complete interference. Although significant is not the only word that could be used to describe the type of interference that Title VII should prohibit, it strikes at the heart of what should be proscribed.

Furthermore, the test should require that the conduct be severe and pervasive. The severe and pervasive requirement allows the ignorant clod an opportunity to adjust to the changing norms of the workplace because he is not liable for a single act of harassment unless that act, alone, is severe enough to meet the rest of the test. But perhaps the test *ipso facto* includes a severe and pervasive requirement because if the conduct is not severe or pervasive, one must wonder whether it would interfere with a reasonable person's work performance. Nonetheless, the inclusion of the words "severe" or "pervasive" in the test would harm neither management nor employees.

Consequently, the test should incorporate the goals and aims of Title VII. It should also be entirely objective and should indicate how much work interference will be tolerated. Furthermore, the test should incorporate a severe and pervasive requirement. Therefore, the test should be that Title VII is violated by speech or conduct which is aimed at a person because of his or her gender, and which is sufficiently severe or pervasive to significantly affect a reasonable person's[287] ability to work.

IV. CONCLUSION

The *Harris* Court has set itself up for another progeny of misinterpretations. Title VII is intended to provide protection for employees, not employers. By failing to set forth a concrete standard, the Court sends the message that the circuits can again attempt to scale back employee protections. Although the Supreme Court may have only elected to review *Harris* in order to strike down the psychological injury requirement, the Justices should recognize that history is

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287. But see Jeffrey A. Gettle, Comment, *Sexual Harassment and the Reasonable Woman Standard: Is it a Viable Solution?*, 31 DUQ. L. REV. 841 (1993), for a discussion of why the objective standard should be that of a reasonable woman or reasonable victim. *Cf.* Walter C. Arbery, Note, *A Step Backward for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims*, 27 GA. L. REV. 503 (1993) (arguing against reasonable woman standard). Whether the standard should be that of a reasonable person or that of a reasonable woman is beyond the scope of this Note.

likely to repeat itself.

The Court should adopt a test which incorporates the EEOC's standard to determine whether working conditions have been altered — whether the conduct interferes with the victim's job performance. The analysis should proceed to some extent — under the objective standard that Justice Ginsburg espoused — whether the conduct makes the job more difficult to do. The interference with work performance standard places the emphasis where it belongs: on whether the employee can continue to perform the tasks for which she was hired. Furthermore, the EEOC standard provides the greatest ambit of protection to the employee without creating an undue burden for the employer. If the conduct would make a reasonable person's job more difficult, the employer should want to correct the problem so as to maintain productivity.

The Court should incorporate these standards into a single, unified test. The test should be entirely objective and include a severe and pervasive requirement. The standard should also require that the harassing conduct significantly, or at least more than slightly, interfere with the employee victim's ability to work. By creating such a test, the Court will provide greater guidance to juries and lower courts and will afford the greatest protection to both employers and employees.