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The Development of Hostile Environment Sexual Harassment Law: Struggling to Define Actionable Conduct

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Introduction

Sexual harassment has always been present in the workplace. However, discussion of it was non-existent until the 1970's, when Congress amended Title VII of the 1964 Civil Rights Act to include a prohibition on sex discrimination in employment. Yet even then, sexual harassment was not recognized as sex discrimination. In fact, the term "sexual harassment" had not yet been coined. As Catherine MacKinnon pointed out, women manifested little interest in discussing or complaining about an experience without a name or a social definition to describe it.[1]

Although not discussed in so many words, sexual harassment was prevalent. In 1975, the Working Women's Institute conducted a study on the subject and found that 70% of respondents reported having been sexually harassed. A year later Redbook conducted a survey in which 88% of 9,000 female respondents reported having experienced sexual harassment on the job. Although this figure may have been overstated in that victims were more likely to respond to the survey than non-victims, better designed subsequent studies have also reported widespread sexual harassment.[2]

These studies, in conjunction with the writings of Catherine MacKinnon, raised national awareness of the problem of sexual harassment, and may have influenced the 1976 decision in which a court finally recognized that Title VII forbids the form of sex discrimination now commonly known as sexual harassment.[3] An explosion of litigation concerning sexual harassment followed the landmark decision. Courts across the country held that sexual harassment is sex discrimination,

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[1]Catherine MacKinnnon, Sexual Harassment of Working Women: A Case of Sex Discrimination, (New Haven, Connecticut: Yale University Press, 1979), p. 27.

[2]Matthew C. Hesse and Lester J. Hubble, "The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace," Washburn Law Journal 24 (1985): p. 575.

[3]Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).

and the United States Supreme Court upheld this view in 1986.[4]

Yet despite being clearly illegal today, sexual harassment is a continuing problem for women. In a 1988 study, Working Woman magazine reported that 90% of Fortune 500 companies had received complaints of sexual harassment from employees.[5] Further, in what is probably the most comprehensive study of sexual harassment yet conducted, the United States Merit Systems Protection Board (MSPB) surveyed 23,000 federal employees in 1980, and found that 42% of all women surveyed reported experiencing some form of sexual harassment.[6] In a 1986 follow-up study, the MSPB found no substantial change in the reported extent of sexual harassment.[7]

For the millions of women who experience it, sexual harassment is a primary manifestation and vehicle of the subordination of women in the workplace. It is a phenomenon which is overwhelmingly directed at women by men, systematically discriminating against women as a group.[8] Sexual harassment directly demeans and devalues the role of women employees by calling attention to their sexuality, so that they are viewed as sex objects rather than people.[9] Sexual harassment is most prevalent where women work in traditionally male-dominated occupations. As rarities in such fields, women will often be stereotyped and objectified and thus undermined as workers.[10] Sexual harassment in this context has the effect of forcing women out of the workplace

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[4]106 S.Ct. 2399 (1986).

[5]LA Times, October 21, 1990, Part A, Sunday Home Edition at 1, col. 1.

[6]Sexual Harassment in the Federal Workplace--Is It a Problem? (MSPB 1981).

[7]Sexual Harassment in the Federal Government: An Update 16 (MSPB 1988).

[8]Francis Carleton, "Women in the Workplace and Sex Discrimination Law: A Feminist Analysis of Federal Jurisprudence," Women & Politics, 13 (1993), p. 3.

[9]Jane L. Dolkart, "Hostile Environment Sexual Harassment: Equality, Obejctivity, and the Shaping of Legal Standards," Emory Law Journal 43 (Winter 1994): 187.

[10]Id at 184.

and halting their incursions upward in the workplace hierarchy.[11]

Studies show that an atmosphere which stereotypes women as sex objects affects the ability of women to do their jobs. This stereotyping overwhelms a view of women as capable, committed workers, and in effect, blots out all other characteristics. Sexual stereotyping forces women to monitor or alter their behavior either to conform to the stereotyping, in an effort to be accepted on some level, or to make clear that they are rejecting sex-object status. The resulting anxiety, emotional upset, and expanded effort which could otherwise be directed toward job performance is the burden that sexual harassment places on women. This burden constitutes an employment barrier, and therefore, discrimination.[12]

The effects of bearing the burden of sexual harassment can be profound. Many employees will simply leave the job or request a transfer rather than endure the harassment. In one study, 42% of sexual harassment victims left their jobs and another 24% were fired. Thus, 66% of the victims in the study were driven out of their jobs by sexual harassment. The costs to these victims included loss of income and seniority, a disrupted work history, problems with obtaining references for future jobs, loss of confidence in seeking a new job, and loss of career advancement.[13]

Although the law on sexual harassment has been a major ally of women in their fight to gain full equality in the workplace, its development has been haphazard since no clear definition of the phenomenon has been agreed upon by the federal courts. Cases which have been factually similar

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[11]Id at 186.

[12]Amy Horton, "Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII," University of Miami Law Review 46(1991): 442.

[13]Jane L. Dolkart, "Hostile Environment Sexual Harassment: Equality, Objectivity, and the Shaping of Legal Standards," Emory Law Journal 43 (Winter 1994): 187.

have resulted in different findings depending upon the circuit in which they were heard, the standard applied, and the judge presiding. This confusion over the definition of sexual harassment still plagues the law today. Thus sexual harassment is an interesting issue to examine because many legal questions remain unanswered. This paper will look at sexual harassment in two respects: first, a substantive examination of the development of sexual harassment law, highlighting the legal issues which remain unsettled; and second, an examination of judicial decision-making in this new and developing area of law.

Title VII and EEOC Guidelines

In 1964 Congress enacted the Civil Rights Act to prevent discrimination against individuals on the basis of race, color, religion, or national origin. In 1972 Title VII of that act was amended to include the prohibition of gender discrimination in employment. It states:

> (a) Employers. It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[14]

There is little legislative history to explain this amendment to Title VII. In fact, the prohibition on sex discrimination was added to Title VII at the last minute on the floor of the House of Representatives by opponents of the bill who thought that its addition would cause the bill to

[14] 42 U.S.C.S. sec. 2000e-2(a)(1972).

fail. They were wrong, and the bill passed quickly, leaving little history on legislative intent.[15]

Although Title VII outlaws sex discrimination in employment, federal courts initially interpreted its prohibition narrowly so as not to include harassment. Before 1976 the courts rejected the idea that sexual harassment was actionable under Title VII as a form of sex discrimination. In the 1974 case of Barnes v. Train[16], the U.S. District Court for the District of Columbia denied relief to a plaintiff who was discharged for refusing to acquiesce to the sexual advances of her employer. The court found that the plaintiff was discharged not on the basis of her sex, but rather because she would not submit to the sexual advances of her supervisor. At the time, such a view of sexual harassment as a personal rather than a business matter was commonplace. It was argued and accepted that men would naturally find their female co-workers sexually attractive, and thus would naturally pursue them. Women were to expect such advances when they moved into the workplace. Following Barnes, other federal district courts used this line of reasoning and refused to hold that sexual harassment was actionable under Title VII.[17] As views concerning the position of women have changed, this reasoning has been deemed invalid.

Finally, in Williams v. Saxbe (1976)[18] a federal district court acknowledged that sexual harassment is a form of sex discrimination. In Williams, as in Barnes, the plaintiff alleged that she was harassed, humiliated, and eventually fired for refusing her supervisor's sexual advances.

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110 Cong. Rec. 2577-2584 (1964).

[16]13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974)

[17]Thomas Gehring, "Hostile Environment Sexual Harassment After Harris: Abolishing the Requirement of Psychological Injury," Thurgood Marshall Law Review 19 (Feb. 1994): 463.

[18]413 F. Supp. 654 (D.D.C. 1976).

Here, however, the court rejected the defendant's contention that he had discriminated not against women, but only against people who refused to submit to his sexual demands. The court held that the plaintiff's harassment and discharge did create a cause of action under Title VII because "the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other."[19]

Soon after the Williams holding, the Barnes decision was reversed upon appeal, and federal courts began to accept the idea that sexual harassment constitutes gender discrimination in violation of Title VII. However, although these two decisions established that the behavior in the two cases was discriminatory, the decisions did not set out a clear definition of sexual harassment, nor the criteria for determining its presence. As a result, the federal circuits handed down conflicting, inconsistent decisions in the sexual harassment cases that followed.

The confusion surrounding this issue prompted the Equal Employment Opportunity Commission (EEOC), the federal agency which enforces Title VII's provisions, to develop a framework for analyzing sexual harassment claims in 1980. Congress had granted the EEOC the power to issue regulations in the Civil Rights Act of 1964. Such regulations are non-binding "administrative interpretations" of the Act, but "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[20] Thus, in 1980 the EEOC published its Guidelines on Discrimination Because of Sex. These Guidelines followed well-established judicial decisions and EEOC precedent in the areas of discrimination based on

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[19]Id at 657-658.

[20]General Electric Co. V. Gilbert, 429 U.S. 125, 141-42 (1976).

race, religion, or national origin.[21]

In its Guidelines, the EEOC stated that "sexual harassment, like harassment on the basis of color, race, religion, or national origin, has long been recognized by the EEOC as a violation of Section 703 of Title VII of the Civil Rights Act of 1964, as amended. However, despite the position taken by the Commission, sexual harassment continues to be especially widespread." As a result, the EEOC felt that they needed to issue guidelines to guide courts in dealing sexual harassment.[22] These guidelines state:

> Sec. 1604.11 Sexual Harassment.
> (a) Harassment on the basis of sex is a violation of Sec.703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to or rejection of such conduct by an individual is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) 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.[23]

The guidelines also state that

> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.[24]

The guidelines proved to be instrumental in expanding sexual harassment law. Before the EEOC presented its guidelines, the courts had made findings of sexual harassment only in

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[21]Alba Conte, Sexual Harassment in the Workplace: Law and Practice (New York: John Wiley & Sons, 1990), p. 14.

[22]Interim Guidelines, 29 C.F.R. sec. 1604.11 (1980).

[23]29 C.F.R. sec. 1604.11 (1980).

[24]Ibid.

cases in which women suffered tangible economic injury as a result of refusing the sexual advances or demands or a supervisor or employer. This type of harassment, termed quid pro quo sexual harassment, is described in section 1604.11(a)(1) and (a)(2) of the EEOC Guidelines. The behavior described in section 1604.11(a)(3), however, now called hostile environment sexual harassment, had not yet been conceived by the courts. Thus, in proscribing behavior which creates an "intimidating, hostile, or offensive working environment," the EEOC opened a new avenue in which women could press claims of sexual harassment. As a result, the EEOC Guidelines have been the most important source of sexual harassment law. They are significant in that any sexual harassment claims must be processed by the EEOC before they proceed to federal court. Further, judges will look to such administrative guidelines in making their interpretation of and ruling on the law.

Yet there are some problems with the EEOC guidelines. For example, by defining sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," the EEOC focuses on harassment of a sexual nature rather than harassment due to gender.[25] By defining sexual harassment in this way, the EEOC has led some courts into believing that sex-based harassment must necessarily involve sexual conduct. After some courts interpreted the guidelines in this manner, the EEOC clarified its interpretation of sexual harassment:

> Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment--that is, harassment not involving sexual activity or language--may also give rise to Title VII liability (just as in the case of harassment based on race, national origin, or religion) if it is "sufficiently

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[25]29 C.F.R. sec. 1604.11 (1980).

patterned or pervasive" and directed at employees because of their sex."[26]

Early Hostile Environment Sexual Harassment Cases

When the EEOC issued its guidelines in 1980, the only issue settled in the courts was that sexual harassment did indeed constitute gender discrimination under Title VII.[27] Several legal issues remained unresolved. For example, the courts had yet to determine:

1. Whether proof of tangible economic injury was necessary for a finding of sexual harassment;
2. Whether sexual harassment included only sexual advances and other sexually-related conduct, or whether behavior which was not sexual but discriminated on the basis of sex was included;
3. Whether the courts should use an objective or subjective standard in deciding sexual harassment claims;
4. How pervasive a behavior must be to constitute hostile environment sexual harassment;
5. Whether an employer could be held liable for the actions of his supervisors and workers; and
6. Whether sexual harassment claims may threaten the free speech rights of employees in the workplace.

Over time, some of these questions have been settled by the courts, while others have not.

Based on Section 1604.11(a)(3) of the 1980 EEOC guidelines, the Court of Appeals for the District of Columbia made a finding of hostile environment sexual harassment in the landmark case, Bundy v. Jackson (1981).[28] In Bundy, a female employee who complained to her supervisor that she had been propositioned by two co-workers was told, "any man in his right mind would want to rape you" and then was propositioned by the supervisor himself.[29] The

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[26]EEOC Compliance Manual (BNA) sec. 615.6, p. 17-18 (1990).

[27]Williams v. Saxbe, 413 F.Supp. 654 (D.D.C. 1976).

[28]641 F.2d 934 (D.C. Cir. 1981).

[29]Id at 940.

plaintiff claimed that in addition to the continual sexual advances, her co-workers and supervisors had questioned her about her sexual proclivities, ignored her complaints, criticized her work performance, and blocked her bid for promotion.[30] Drawing from precedent on racial, religious, and national origin hostile environment cases, the court said:

> The relevance of these "discriminatory environment" cases to sexual harassment is beyond serious dispute. Racial or ethnic discrimination against a company's minority clients may reflect no intent to discriminate directly against the company's minority employees, but in poisoning the atmosphere of employment it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?[31]

Although no court had yet recognized hostile environment sexual harassment, the court agreed with the plaintiff and the EEOC that the conditions of employment include the psychological and emotional work environment, and that the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected, and which caused her anxiety and debilitation, illegally poisoned that environment and so discriminated against her.[32] It stated:

> [t]hough no court has as yet so held, we believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination.[33]

Thus, based upon Section 1604.11(a)(3) of the EEOC Guidelines, the Bundy court upheld a claim of hostile environment sexual harassment for the first time. According to this theory, a

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[30]Alba Conte, Sexual Harassment in the Workplace: Law and Practice (New York: Wiley Law Publications, 1990), p.32.

[31]641 F.2d 934 (D.C. Cir. 1981) at 945.

[32]Annot., 78 A.L.R. Fed. 260 (19__).

[33]641 F.2d 934 (D.C.Cir. 1981) at 943-944.

hostile work environment exists and is actionable under Title VII if the workplace is heavily charged with sex discrimination, even if the hostile environment does not result in a tangible economic injury.[34] The Bundy decision effectively determined that proof of tangible economic injury is not necessary to win on a claim of sexual harassment.

The Bundy decision also offered guidance on the issue of employer liability, stating that "an employer is liable for discriminatory acts committed by supervisory personnel."[35] This holding followed the EEOC Guidelines and a previous court holding.[36] However, unlike the economic injury question, the issue of employer liability was not settled here, and courts continued to hand down different holdings on the matter.

Shortly after Bundy the Eleventh Circuit Court of Appeals used the hostile environment sexual harassment theory established in Bundy to decide Henson v. City of Dundee (1982).[37] The plaintiff, a police dispatcher, alleged that she had resigned under duress because she had been threatened with discharge if she did not yield to the police chief's sexual advances, and was prevented from attending the police academy because she did not comply with his demands. In its decision the court drew upon the history of racial harassment decisions, and compared such harassment to sexual harassment. The Court stated that

> [s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work

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[34]Amy Horton, "Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII," University of Miami Law Review 46 (1991): 411.

[35]641 F.2d 934 (D.C.Cir. 1981) at 943.

[36]Barnes v. Costle, 561 F.2d 983 (D.C.Cir. 1977) at 993.

[37]682 F.2d 897 (11th Cir. 1982).

> and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[38]

Addressing the economic injury issue, the court reinforced Bundy's holding that under certain circumstances, the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers tangible job injury. It stated:

> 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. There is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered tangible job detriment.[39]

The court also considered whether harassment must be of a sexual nature or merely based upon sex within its discussion of the prima facie elements of hostile environment sexual harassment. Prima facie evidence is proof, which if not later contradicted or in some way explained, is sufficient to sustain one's claim.[40] The court held that these elements were:

1. The employee was a member of a protected group;
2. The employee was subject to unwelcome sexual advances;
3. The harassment was based on sex;
4. The harassment affected a "term, condition, or privilege" of employment; and
5. The harassment was either actively or constructively known by the employer who failed to take prompt remedial action.[41]

The court's second element would seem to mean that sexual harassment must involve

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[38]682 F.2d 897 (11th Cir. 1982) at 902.

[39]Ibid.

[40]Albert P. Melone, Researching Constitutional Law, (United States: Harper Collins Publishers, 1990), p. 172.

[41]Id at 903-905.

conduct of a sexual nature, and in its discussion of this element, the court did focus on sexual advances. However, in its third element, the court seems also to accept harassment which a plaintiff would not have suffered "but for the fact of her sex."[42] Such harassment could conceivably include behavior which involved no sexual elements at all, but that nonetheless discriminated against women. Yet here again the court discussed this requirement in terms of sexual advances, and thus drew no clear lines on this issue.

The fourth prima facie element, whether the detriment caused by the harassment is sufficiently severe to be actionable under Title VII, is probably the most important and difficult question to answer in a hostile environment sexual harassment case. In discussing the question, the Henson court stated that in order to affect a "term, condition, or privilege" of employment, the action must be pervasive and "sufficiently severe and persistent to affect seriously the psychological well-being of the employee," and that this determination must be made with regard to the "totality of the circumstances."[43] Some later courts interpreted this statement to mean that proof of psychological injury is necessary to prevail on a hostile environment sexual harassment claim. Others, however, have taken this to mean that the complainant need not wait for psychological injury to occur before pressing a claim of sexual harassment, so long as the harassment could reasonably be expected to have that effect.[44]

Finally, the court addressed the issue of employer liability. The court retreated from the holding in Bundy, deciding that in the case of hostile environment sexual harassment, an

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[42]Id at 904.

[43]Id at 904.

[44]Barbara Lindemann and David D. Kadue, Sexual Harassment in Employment Law, (Washington, D.C.: Bureau of National Affairs, 1992), p. 175.

employer could only be liable if he knew or should have known of the harassment in question and failed to take prompt remedial action.[45]

Thus, in Henson, the Eleventh Circuit upheld a finding of hostile environment sexual harassment, declaring no need for tangible economic injury to be proven on such a claim. The court drew no clear conclusions about whether actionable conduct must be sexual in nature or merely gender-based. The court discussed the pervasiveness question, but issued no definitive statements on it. Finally, the Henson court upheld employer liability only when the employer knew or should have known of the harassment, and took no action to end it.

Courts in other circuits expanded the prima facie framework established in Henson. For instance, in Rabidue v. Osceola Refining Co. (1986)[46], the Sixth Circuit Court of Appeals used a slightly-modified prima facie test and refused to find a hostile work environment where the workplace contained posters of naked and partially-dressed women, and where male employees customarily called women derogatory names. The Rabidue court adopted the prima facie requirements set in Henson: that the employee was a member of a protected class; that the employee was subject to unwelcome sexual advances, requests for sexual favors, or other verbal or physical contact of a sexual nature; that the harassment complained of was based on sex; that the conduct had the effect of unreasonably interfering with the complainant's work performance and creating an intimidating or offensive working environment; and employer liability where the employer knew or should have known of the harassment and took no corrective action. Yet although the Rabidue court adopted the Henson framework, it took a clear position in discussing

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[45]Id at 905.

[46]805 F.2d 611 (6th Cir. 1986).

the fourth requirement, and stated that the conditions of a worker's employment are not altered unless the harassment "is sufficiently severe and persistent to affect seriously the psychological well-being of employees".[47]

Further, the Rabidue court declared that in reviewing allegedly harassing behavior, the trier of fact should adopt the perspective of a reasonable person.[48] The majority argued that a reasonable person would not have found the alleged conduct to constitute harassment. The court stated:

> Indeed it cannot seriously be disputed that in some work environments, humor and language are rough, hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to--nor can--change this... [I]t is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.[49]

In finding that the plaintiff was "a capable, independent, ambitious, aggressive, intractable, and opinionated woman", the court reasoned that the actions of the defendants did not cause the plaintiff severe psychological injury, and therefore were not actionable under Title VII. The majority held that the sexist remarks and pin-up posters had only a "de minimis" effect on the plaintiff's work environment when considered "in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica".[50]

In his dissent, Judge Keith argued that the majority's finding that the work environment was not hostile was flawed. Keith argued that "Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the

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[47]682 F.2d 897 (11th Cir. 1982).

[48]805 F.2d 611 (6th Cir. 1986) at 620.

[49]805 F.2d 611 (6th Cir. 1986) at 620-621.

[50]Ibid at 612-613.

Act."[51] Judge Keith argued that instead of viewing the work environment from a "reasonable person" perspective, the court should look at the behavior as a "reasonable woman" would. He said:

> In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men...I would have the courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant. Moreover, unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men.[52]

Further, Keith stated:

> I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetrated in American culture. In fact, pervasive societal approval thereof and of other stereotypes stifles female potential and instill the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy. That some men would condone and wish to perpetuate such behavior is not surprising. However, the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery.[53]

Legal scholars also criticized the Rabidue decision, arguing that it had adopted the perspective of a "reasonable male" rather than that of a "reasonable women". One critic argued,

> The traditional perspective [of the "reasonable person"] abounds with myths based on male perceptions that it is harmless kidding around, that women really welcome the sexual overtures, that "no" is really a coy way of saying "yes", and that women who complain, far from being reasonable, are overly sensitive or prudish or are too assertive or unable to get along with people. When courts allow these male myths to infect their measurement of a reasonable person, they bias the formulation of the standard itself and trivialize sexual harassment by assuming that the complained-of

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[51]Id at 626.

[52]805 F.2d 611 (6th Cir. 1986) at 626.

[53]Id at 627.

conduct is not really serious or harmful.[54]

Although the majority in Rabidue adopted a reasonable person view, Keith's dissent led some courts to subsequently adopt a reasonable women perspective. Further, following Rabidue, many courts adopted a dual objective-subjective standard in which the court must determine, in objective terms, the likely effect of the offensive conduct upon a reasonable person's ability to perform work and upon that person's well-being, and in subjective terms, the actual effect upon the particular complainant.[55]

The Supreme Court Rules on Sexual Harassment in the Meritor Case

The United States Supreme Court regularly accepts cases for review that involve points of law which have been decided differently by different lower courts. In the case of hostile environment sexual harassment decisions, the federal circuits have handed down various interpretations of the elements necessary to prove a Title VII hostile environment sexual harassment claim. For example, the courts have disagreed on whether a hostile environment must cause psychological injury in order to be actionable under Title VII, under what conditions an employer can be held responsible for the acts of his supervisors in an hostile environment claim, and the proper standard to be used in deciding a hostile environment sexual harassment case. As a result, in 1986, the U.S. Supreme Court granted certiorari on the case of Meritor

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[54]Finley, "A Break in the Silence: Including Women's Issues in a Tort's Course," Yale Journal of Law and Feminism 41(1989): pp. 60-62.

[55]Koster v. Chase Manhattan Bank, 687 F.Supp. 848 (S.D.N.Y. 1988); Andrews v. City of Philadelphia, 895 F.2d 1482 (3rd Cir. 1986); Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1990); Yates v. Avco Corp.; 819 F. 2d 630 (6th Cir. 1987); Docter v. Rudolf Wolff Futures, 913 F.2d 456 (7th Cir. 1990); Scott v. Sears, Roebuck, & Co.; 605 F.Supp. 1047 (N.D. Ill. 1985).

Savings Bank v. Vinson (1986)[56] and considered a claim of sexual harassment for the first time.

The case originated from an expansive hostile environment ruling from the Third Circuit in Vinson v. Taylor (1985).[57] In that case, Vinson, an assistant branch manager of a savings and loan association, claimed that she had been sexually harassed by the bank's manager. Vinson testified that after initially declining sexual advances by the manager she submitted because she was afraid that her continued refusal would jeopardize her employment. Vinson stated that she was forced to submit to sexual advances by the manager both during and after business hours, that the manager fondled her in front of other female employees, that he followed her into the woman's restroom and exposed himself to her, and that he even forcibly raped her on several occasions. Reversing the district court's finding that Vinson was not required to grant sexual favors as a condition of her employment, the Court of Appeals found that the manager's actions constituted pervasive on-the-job sexual harassment.[58] The court also held that an employer was absolutely liable for sexual harassment by its supervisors, whether or not the employer knew or should have known of the misconduct.[59] Taylor's employer, Meritor Savings Bank, appealed the decision to the Supreme Court.

In its decision, the Supreme Court began by stating that Title VII protects workers from sexual harassment. The Court stated, "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of

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[56]106 S.Ct. 2399 (1986).

[57]753 F. 2d 141 (D.C. Cir. 1985).

[58]Annot., 78 A.L.R. Fed. 261 (19__).

[59]Alba Conte, Sexual Harassment in the Workplace: Law and Practice (New York: Wiley Law Publications, 1990), p. 35-36.

sex."[60] Second, the Court upheld the holding established in several lower federal courts that Title VII's protections are not limited to disparate wages or other "economic" or "tangible" benefits of employment, stating "the 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'."[61]

In an attempt to define hostile environment sexual harassment, the Court noted that the EEOC guidelines state that actionable conduct includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[62] Further, the Court stated, the guidelines provide that

> such sexual misconduct constitutes prohibited "sexual harassment" whether or not it is directly linked to the grant or denial of an economic quid pro quo, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an offensive working environment".[63]

The Court stated that the manager's conduct in this case, "which include[d] not only pervasive harassment but also criminal conduct of the most serious nature...[was] plainly sufficient to state a claim for 'hostile environment' sexual harassment".[64] Yet the Court failed to establish whether harassment of a non-sexual nature, but nevertheless based on gender, was actionable under Title VII.

The Supreme Court also rejected the district court's holding that the conduct could not

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[60]106 S.Ct. 2399 (1986) at 2404.

[61]Id quoting LA Department of Water & Power v. Manhart, 435 U.S. 702 (1978).

[62]29 C.F.R. sec. 1604.11(a)(1985).

[63]Meritor v. Vinson, 106 S.Ct. 2399 (1986) at 2404, citing sec. 1604.11(a)(3)(1985).

[64]106 S.Ct. 2399 (1986) at 2405-2406.

constitute harassment since Vinson's sexual relations with the manager were voluntary. Stating that a plaintiff's voluntary submission to sexual conduct was not a defense to sexual harassment under Title VII, the Court said:

> The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determination committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.[65]

However, the Court reversed the Court of Appeal's holding that evidence of an employee's sexually provocative speech and dress are inadmissible in a sexual harassment trial. The Court held that such evidence is relevant in determining whether sexual advances were unwelcome, since the EEOC guidelines emphasize that the trier of fact must consider "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred".[66] Thus, the Supreme Court stated that courts should consider whether the plaintiff reported the incidents of harassment, the plaintiff's dress and appearance, and the plaintiff's relationship with the alleged harasser, in determining whether sexual conduct is unwelcome.[67]

The Supreme Court failed to issue a definitive statement on employer liability, saying only that the mere existence of an employee grievance procedure and a policy against discrimination, coupled with the plaintiff's failure to invoke that procedure, does not necessarily

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[65]106 S.Ct. 2399 (1986) at 2406.

[66]29 C.F.R. sec. 1604.11(b)(1985).

[67]Barbara Berish Brown and Intra L. Germanis, "Hostile Environment Sexual Harassment: Has Harris Really Changed Things?" Employee Relations Law Journal 19 (Spring 1994): 567.

insulate the employer from liability for its supervisors' sexual harassment. The Court further stated that courts should look to the EEOC's agency principles for guidance in this area.[68] The Court noted that according to the EEOC's traditional agency guidelines,

> where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.[69]

Thus, Meritor did take an important step in recognizing hostile environment sexual harassment as a valid cause of action under Title VII. However, in terms of the prima facie elements of a hostile environment sexual harassment claim, the court failed to state whether harassment on the basis of gender was a form of sexual harassment. On the "pervasiveness" issue, the Court required that the harassment be so pervasive as to affect a "term, condition, or privilege" of employment, but it failed to instruct the courts about what this meant. Further, the court further did not comment on whether a woman must suffer psychological injury before the conduct would be considered pervasive enough to be actionable. The Court instructed lower courts to use a totality of circumstances approach, and as a result, the lower courts have been given little guidance on how to determine when hostile environment sexual harassment is severe and pervasive enough to be a legal violation. Indeed, such an approach leaves courts considerable leeway to develop their own definition of what constitutes actionable harassment. Finally, the Court avoided deciding the issue of employer liability, merely instructing the lower courts to look to traditional agency principles, such as those found in the EEOC Guidelines on Harassment Because of Sex. One potential problem with this recommendation is that the lower

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[68]106 S.Ct. 2399 (1986) at 2408.

[69]Id at 2407.

court decisions since 1980 had looked to the EEOC Guidelines, and yet the courts still came up with different findings.

Expansion of Hostile Environment Case Law

Post-Meritor case law reflected confusion and uncertainty about the contours of hostile environment sexual harassment. In particular, the federal courts of appeal continued to disagree about what conduct is sufficiently "severe or pervasive" to alter the conditions of employment and create an abusive work environment.[70] Many rulings following Meritor turned to more liberal criteria for a finding of hostile environment sexual harassment than had previously been used.

For instance, many courts made findings of hostile environment sexual harassment on the basis of the existence of sexist or derogatory speech or sexually-explicit materials in the workplace. In 1990 the Third Circuit Court of Appeals held that Priscilla Kelsey Andrews had been sexually harassed in a hostile work environment similar to those rejected in Rabidue (1986) and Scott (1986). In Andrews v. City of Philadelphia (1990)[71], the court held that the pervasive use of derogatory and insulting terms relating to women, and the posting of sexually-explicit pictures in common areas, could serve as evidence of hostile environment sexual harassment. The court reasoned that in order to make a case under Title VII it is only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff "had not

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[70]Jane L. Dolkart, "Hostile Environment Sexual Harassment: Equality, Objectivity, and the Shaping of Legal Standards," Emory Law Journal 43 (Winter 1994): 161.

[71]895 F.2d 1469 (3rd Cir. 1990).

been a woman she would not have been treated in the same manner."[72] Thus the Andrews court differed from previous decisions in defining sexual harassment not as unwelcome sexual advances, but as discriminatory behavior on the basis of gender.[73]

In Ellison v. Brady[74], the Ninth Circuit Court of Appeals agreed with the Andrews court and resoundingly rejected the reasoning of both Rabidue and Scott, stating that their analyses did not follow from the analysis set forth in Meritor. Using the reasoning set by Judge Keith in his Rabidue dissent, the court stated, "conduct many men consider unobjectionable may offend many women."[75] The court adopted the reasonable woman standard arguing that

> in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination.[76]

The court also offered some clarification of the pervasiveness element. The court stated that "hostile work environment harassment exists when conduct which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment is present."[77] The court offered a sort of yardstick for judging action by stating that in determining whether conduct is pervasive enough to be actionable, the required showing of severity of conduct should vary inversely with the pervasiveness of the conduct. In addition, the court stated that employees need not endure

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[72]Id at 1485.

[73]Id at 1478.

[74]924 F.2d 872 (9th Cir. 1991).

[75]924 F.2d 873, 874 (9th Cir. 1991).

[76]924 F.2d 872 (9th Cir. 1991) at 878.

[77]Ibid.

sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation.

The most expansive decision concerning hostile environment sexual harassment was handed down in by a federal district court in Florida. In Robinson v. Jacksonville Shipyards, Inc., (1991).[78] Lois Robinson, a female welder in a predominantly male workforce, claimed that she had been subject to pervasive sexual harassment. Throughout her employment at JSI, male workers posted pictures of nude and partially-nude women prominently in common work areas and in selective spots where Robinson could not avoid encountering them directly. At one time, a "Men Only" sign was painted on the door of the shipfitter's trailer, a work area that Robinson could not avoid during her daily routines. Further, Robinson received remarks from co-workers that were sexually suggestive or offensive to her. Robinson complained about the behavior repeatedly to both her supervisors and her male co-workers, but no action was taken to stop the harassment.[79]

In its decision, the court found that the posting of sexually-oriented pictures, together with the sexual remarks, created a hostile environment in violation of Title VII. The court went beyond the previous rulings in Rabidue and Andrews that held that sexually-explicit material in the workplace could serve as evidence of a hostile environment. The Robinson court declared that the sexually-explicit material itself created the hostile environment and fomented the

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[78]760 F.Supp. 1486 (M.D. Fla. 1991).

[79]Nell J. Medlin, "Expanding the Law of Sexual Harassment to Include Workplace Pornography: Robinson v. Jacksonville Shipyards, Inc.," Stetson Law Review 21 (Spring 1992): 656.

additional incidents.[80] In issuing an extensive remedial order prohibiting possession or display of such material in the workplace, the court held that the pictures containing nudity were not protected speech because they acted as discriminatory conduct in creating a hostile work environment. The court cited several justifications for its prohibition on such pictures: that it created a special harm which can be regulated, that it is a time, place, and manner restriction which is narrowly tailored, and that the women employees of JSI were members of a captive audience.[81]

The Robinson decision is significant in that it expanded the concept of sexual harassment in the workplace. The decision acknowledged that the presence of sexist speech or sexually-explicit materials may in themselves create a hostile environment. Further, the decision demonstrated sensitivity to women like Robinson who are employed in workplaces which are predominantly male. While the Robinson holding was limited to specific workplace circumstances, it has great potential for facilitating a broader understanding of sexual harassment.[82]

The Supreme Court Rules Again in Harris v. Forklift Systems, Inc.

In 1993, the Supreme Court handed down its second and most recent ruling on hostile

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[80]Nell J. Medlin, "Expanding the Law of Sexual Harassment to Include Workplace Pornography: Robinson v. Jacksonville Shipyards, Inc., Stetson Law Review 21 (Spring 1992): 672.

[81]Michael E. Collins, "Pin-Ups in the Workplace--Balancing Title VII Mandates with the Right of Free Speech," Cumberland Law Review 23 (Spring 1993): 641.

[82]Amy Horton, "Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII," University of Miami Law Review 46 (1991): 409.

environment sexual harassment in the case of Harris v. Forklift Systems, Inc. (1993).[83] The plaintiff in the case, Teresa Harris, had been subject to continual sex-based derogatory speech and conduct from her company's president, Charles Hardy. Hardy often made sexist remarks to and about Harris in front of other employees. He said things like, "You're a woman, what do you know?" and "We need a man [in your position]". He once said, "Let's go to the Holiday Inn to negotiate your raise." Further, after Harris had secured a business deal, Hardy said, "What did you do, Teresa, promise the guy [sex] Saturday night?" In addition, Hardy often asked Harris and other women to retrieve coins from his front pants pocket, and regularly threw objects on the ground in front of Harris and other women, telling them to pick them up, so that he could look at them and comment on exposed parts of their bodies.[84]

At trial, the district court judge adopted the magistrate's finding that Hardy was "a vulgar man" who "demeans the female employees at his workplace," but said that his behavior was merely "annoying and insensitive" and not sufficiently severe to seriously affect Harris' psychological well-being. The district court's finding that no hostile environment sexual harassment existed was affirmed without comment by the Sixth Circuit Court of Appeals.[85]

In Harris, the Supreme Court granted certiorari on the narrow issue of whether proof of severe psychological injury is required to prevail on a Title VII hostile environment sexual harassment claim. In light of the disarray among the circuits, however, the Court also attempted to clarify the legal definition of a discriminatory hostile work environment. Speaking for the

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[83]114 S.Ct. 367 (1993).

[84]Id at 369.

[85]Jane L. Dolkart, "Hostile Environment Sexual Harassment: Equality, Objectivity, and the Shaping of Legal Standards," Emory Law Review 43 (Winter 1994): 160.

majority, Justice O'Connor reaffirmed the Meritor standard for conduct that it be "sufficiently severe or pervasive to alter the conditions of employment."[86] Justice O'Connor described this as "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[87] Employing the dual objective-subjective standard which arose out of Rabidue, the Court held that discrimination thus occurs when conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive,"[88] and which the victim subjectively perceives to be abusive.[89] The Court emphasized that "Title VII comes into play before the harassing conduct leads to a nervous breakdown" because a hostile work environment, "even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[90]

Like previous decisions, the Harris holding encouraged the courts to use a totality-of-circumstances approach. The Court stated that the factors to consider include, but are not limited to: the frequency of the harassing conduct, its severity, whether it is physically threatening or humiliating, whether it unreasonably interferes with work performance, and possible psychological injury.[91] As stated previously, such a standard can, and has, lead to varying

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[86]Barbara Berish Brown and Intra L. Germanis, "Hostile Environment Sexual Harassment: Has Harris Really Changed Things?" Employee Relations Law Journal 19 (Spring 1994): 571.

[87]114 S.Ct. 367 (1993) at 370.

[88]Ibid.

[89]Ibid.

[90]Id at 370-371.

[91]Id at 571.

applications of the law around the country.

Therefore, in Harris the Supreme Court failed to adopt any bright line standards to distinguish between "merely offensive" conduct and actionable conduct, other than to say that harassment does not have to cause psychological injury before it constitutes a legal violation. The Harris decision thus left several questions of law unanswered. For instance, the Court did not resolve the conflicting holdings of the lower federal courts concerning whether the presence of sexist speech or sexually-explicit pictures alone can create a hostile work environment in violation of Title VII.

However, the Court did quote Meritor, saying that "the mere utterance of an...epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII,"[92] it nevertheless remains unclear whether such sexist epithets, when stated repeatedly, could have the effect of discriminating on the basis of gender and thus violate Title VII. The Court does seem open to this possibility since it stated that "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated."[93] Seemingly, such "intimidation, ridicule, and insult" could be purely verbal.

Does Title VII Limit Freedom of Expression in the Workplace?

In determining whether sexist speech or sexually-explicit material alone can violate Title

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[92]114 S.Ct. 367 (1993) at 370.

[93]114 S.Ct. 367 (1993) at 370.

VII, courts must determine whether such speech deserves any First Amendment protection, and if so, how much. The EEOC has issued guidelines classifying certain expressive conduct as proscribable workplace harassment. Its 1980 guidelines specifically state that "...verbal conduct of a sexual nature constitute[s] sexual harassment" when it creates a hostile work environment.[94] Nevertheless, there has been almost no judicial or academic discussion of the extent to which these guidelines may be enforced without infringing on freedom of speech.[95] Most courts which have made findings of hostile environment sexual harassment have based those findings upon unwanted touchings or physical assaults. In most cases where a Title VII claim has been made because of sexist speech or sexually-explicit material, the claims have not been upheld. Further, as demonstrated earlier, the few courts which have addressed this question have done so in a cursory fashion. For example, in Rabidue v. Osceola Refining Co.[96], the court questioned whether the First Amendment permits the judiciary to prohibit people from using offensive, yet not obscene language. The court, however, never resolved the question, deciding the case on statutory grounds instead.[97]

Nevertheless, it is essential that this legal dilemma be resolved because of the special problem in trying to achieve full equality for women and protect freedom of expression at the same time. Ensuring equal employment conditions requires addressing the more subtle ways in which women are excluded from full participation in the workplace. Many women argue that sexist speech in the workplace should be regulated since "sexist speech in the employment

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[94]29 C.F.R. sec. 1604.11 (1980).

[95]Nadine Strossen, "Freedoms in Conflict," Index on Censorship 22 (Jan. 1993): 7.

[96]805 F.2d 611 (6th Cir. 1986).

[97]Mary Strauss, "Sexist Speech in the Workplace," Harvard Civil Rights-Civil Liberties Law Review 25 (1990): 3.

context has unique and qualitatively different effects than does such speech elsewhere, since women have historically been discriminated against in employment."[98] Sexist speech reinforces barriers in the workplace based upon gender. When as a result of being subjected to sexist speech women leave the job, or persist but with decreased productivity, male dominance, rather than gender equality, in the workplace is perpetuated.[99] Thus, favoring the First Amendment right to free speech in the employment context can feed a power dynamic which discriminates against women.[100]

Perhaps one reason that courts have found it difficult to deal with the question of sexist speech as sexual harassment is that it is difficult both to define and to categorize sexist speech. A functional definition has been provided by Marcy Strauss, who described sexist speech as:

> 1) speech demanding or requesting sexual relationships;
> 2) sexually explicit speech directed at women;
> 3) degrading speech directed at women because of their gender; or
> 4) sexually explicit or degrading speech that women employees know exists in the workplace, even though it is not directed at them.[101]

It is well established that the First Amendment guarantee of free speech was created to protect political speech, which includes expression about philosophical, social, artistic, economic, literary, and ethical matters.[102] Many civil libertarians argue that sexist speech is

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[98]Marcy Strauss, "Sexist Speech in the Workplace," Harvard Civil Rights-Civil Liberties Law Review 25 (1990): 5.

[99]Id at 14.

[100]Amy Horton, "Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII," University of Miami Law Review 46 (1991): 429.

[101]Id at 6-7.

[102]Id at 23.

inherently political, in that it deals with ideas about a woman's role and responsibility in society, and therefore even in the workplace, should be protected by the First Amendment.[103] Yet while political speech is afforded greater protection than other types of expression, the right to free speech has never been held to be absolute, and the Supreme Court has stated on several occasions that the state may even regulate political speech in some instances. Further, the Supreme Court has increasingly drawn a distinction between political speech and sexist speech, recognizing greater state authority to regulate sexist speech than other types of expression which go more to the "core" of the First Amendment.[104] Ordinarily, the state's interest in regulating sexist speech overrides the right to free speech if a compelling state interest exists.[105]

In the case of sexist speech which permeates a workplace and causes a hostile environment, a compelling state interest clearly exists. There are several reasons for regulating sexist speech. First, the state has an interest in preventing the offense and hurt suffered by victims of sexist speech. Most victims of sexual harassment through sexist speech experience isolation, decreased job satisfaction, and diminished ambition as a result of their feelings of personal anguish and powerlessness.[106] Second, the state has an interest in promoting gender equality in the workplace. Since sexist speech effectively causes inequality by creating a hostile or abusive work environment, it may be regulated by the state.

Finally, the state has an interest in protecting women as captive audiences in the

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[103]Id at 25-26.

[104]NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) and First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978).

[105]Marcy Strauss, "Sexist Speech in the Workplace," Harvard Civil Rights-Civil Liberties Law Review 25 (1990): 23.

[106]Id at 11.

workplace.[107] The Supreme Court has held that the First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the expression.[108] Although the Court has not precisely defined the concept of a captive audience, the definition at least requires that the individual in question be in a particular place at a particular time to pursue an important purpose.[109] Thus, when a co-worker or supervisor directs the sexist speech at a female worker, her ability to avoid such speech is severely limited. In such circumstances, a finding of captivity is reasonable, and the speech may be regulated without abridging the First Amendment. Further, when sexist speech permeates the work environment, even if it is not directed at any particular employee, a female employee is in effect a captive audience because the only way for her to avoid the sexism is to leave her job.

Conclusion

Congress, the EEOC, and the federal courts have all contributed to the development of sexual harassment law. Each, in its own realm, has acted to protect women from the invidious, discriminatory behavior often directed against them in the workplace. While in some instances the courts have failed to punish discriminatory behavior, due to traditional male perspectives on sexual harassment, since 1976, the courts and the EEOC have made great progress in providing women with a forum for pressing their claims of gender discrimination.

The Supreme Court has settled some issues If law. First, it has held that sexual

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[107]Ibid.

[108]Frisby v. Schultz, 108 S.Ct. 2495 (1988).

[109]Nadine Strossen, "Regulating Workplace Sexual Harassment and Upholding the First Amendment--Avoiding a Collision," Villanova Law Review 37 (Sept. 1992): 760.

harassment qualifies as sex discrimination under Title VII. Second, the Court has stated that harassment need not cause tangible economic injury nor psychological injury to be actionable. Third, the Court has held that courts should use a dual subjective-objective standard in judging sexual harassment claims.

The law, however, is not perfect. The Supreme Court has failed to address many issues in sexual harassment cases which lower courts are struggling to resolve. It has never definitively stated whether sexual harassment consists only of conduct of a sexual nature, or if non-sexual gender-based conduct is included as well. The Supreme Court has said little about employer liability, other than to recommend that courts look to traditional agency principles in determining liability. Further, the Court has provided the courts with no clear way to determine when an environment becomes hostile; it has merely stated that courts use a totality of circumstances approach in deciding each claim. Finally, difficult legal dilemmas such as whether free expression may be limited to prevent sexual harassment have already arisen, and must be resolved.

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