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Volume 46

Issue 1 *Judge Jon. O. Newman: A Symposium  
Celebrating his Thirty Years on the Federal  
Bench*

Article 12

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January 2003

**THE ROLE OF WORKPLACE CULTURE EVIDENCE IN HOSTILE  
WORKPLACE ENVIRONMENT SEXUAL HARASSMENT  
LITIGATION: DOES TITLE VII MEAN NEW MANAGEMENT OR JUST  
BUSINESS AS USUAL?**

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**Recommended Citation**

Christopher Massaro, *THE ROLE OF WORKPLACE CULTURE EVIDENCE IN HOSTILE WORKPLACE ENVIRONMENT SEXUAL HARASSMENT LITIGATION: DOES TITLE VII MEAN NEW MANAGEMENT OR JUST BUSINESS AS USUAL?*, 46 N.Y.L. SCH. L. REV. (2002-2003).

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THE ROLE OF WORKPLACE CULTURE EVIDENCE IN  
HOSTILE WORKPLACE ENVIRONMENT SEXUAL  
HARASSMENT LITIGATION: DOES TITLE VII MEAN NEW  
MANAGEMENT OR JUST BUSINESS AS USUAL?

INTRODUCTION

Imagine that you are a woman working for a traditionally male-dominated mining company.<sup>1</sup> Perhaps, you became a miner because it offered a better salary than other available positions, or because the job appealed to you for any number of other reasons. Now suppose that the men in the mining company do not particularly enjoy working alongside women.<sup>2</sup> As a result, they often make degrading comments about women in general, and sometimes they direct gender-biased insults directly at you.<sup>3</sup> Furthermore, posters of nude women pervade the working environment and a male co-worker once even grabbed and kissed you.<sup>4</sup> Eventually, you complain to your employer about this intolerable situation. At this point, you might believe that if your employer refuses to take corrective steps you have enough evidence to quit and sue your employer for maintaining a workplace that is hostile to women in violation of Title VII of the 1964 Civil Rights Act.<sup>5</sup>

You may find, however, that not all courts would agree with you. Some courts explicitly or implicitly conclude that a litigant cannot sustain a cause of action for hostile workplace environment sexual harassment if he or she willingly enters a working environment where sexually-tinged obscenities, gender-biased commentary, or sometimes even pornography and unwanted sexual touching have been tradition-

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1. See *Jensen v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997). The hypothetical fact pattern in this introduction is largely based on *Jensen*. In *Jensen*, female miners were subjected to verbal harassment, unwanted sexual touching and pornographic materials. Although a district court judge found that the female miners were subjected to actionable sexual harassment, a district court special master found that the mining company's liability should be limited because abusive behavior towards women was historically accepted within the mining industry. The circuit court reversed and found that the employer's liability was emphasized, not lessened, by the fact that the employer historically tolerated widespread sexual harassment.

2. See *id.*

3. See *id.*

4. See *id.*

5. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1994). See *infra* text accompanying notes 12-13.

ally perceived as an “accepted” part of the workplace culture.<sup>6</sup> These courts would say that a female miner must endure behavior that might be actionable sexual harassment in another context, simply because of its prevalence in the mining industry.

Other courts have declined to allow workplace cultures to dictate whether or not objectionable behavior constitutes actionable hostile workplace sexual harassment.<sup>7</sup> These courts consider the *impact* that

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6. See, e.g., *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620-21 (finding that vulgarity, sexual innuendo and pornography are a part of some work environments and cannot be considered sexual harassment); *Gross v. Burgraff Construction Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995) (stating that profanity and vulgarity are accepted as part of the construction industry and not perceived as harassment); *Hosey v. McDonald's Corp.*, 71 Fair Empl. Prac. Cas. (BNA) 201 (D. Md. 1996), *aff'd.*, 113 F.3d 1232 (4th Cir. 1997) (holding that female employee did not sexually harass male co-worker by making lewd comments since it was common for teenagers in this work environment to use unprofessional language when asking for dates, and female employee's touching of plaintiff's buttocks was not severe enough to amount to harassment); *Halpert v. Wertheim and Co.*, 27 Fair Empl. Prac. Cas. (BNA) 21 (S.D.N.Y. 1980) (finding that references to sexual activity and male and female genitalia were an accepted part of the security trading firm environment and did not constitute sexual harassment); *Reynolds v. Atlantic City Convention Authority*, 53 Fair Empl. Prac. Cas. (BNA) 1852, at 18 (1990), *aff'd.*, 925 F.2d 419 (3rd Cir. 1991) (“to evaluate the impact on a reasonable person of the obscene gestures made by a single co-worker and the obscene remarks made by two other co-workers, we must discount the impact of those obscenities in an atmosphere otherwise pervaded by obscenity.”); *Connor v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179 (4th Cir. 2000) (referring to district court's ruling that alleged incidents of sexual harassment were not actionable because they occurred in the “rugged environment” of a machine shop); *Smith v. Sheahan*, No. 95-C-7203, 1997 U.S. Dist. Lexis 20753, at 23 (N.D. Ill. Dec. 19, 1997), *rev'd.*, 189 F.3d 529 (7th Cir. 1999) (ruling that violence was common amongst co-workers in the jail setting and that no sexual harassment occurred when a male employee physically assaulted a female co-worker, called her a “bitch” and threatened to “fuck [her] up”); *Jensen*, 130 F.2d at 1292 (referring to special master's finding that the traditional prevalence of verbal, physical and visual sexual harassment in the workplace mitigated the employer's liability).

7. See, e.g., *Atwood v. Biondi Mitsubishi*, 61 Fair Empl. Prac. Cas. (BNA) 1357 (W.D. Pa. 1993) (rejecting a “merely juvenile behavior defense” that would have reinforced gender-biased, prevailing workplace norms and holding that the conduct had to be judged from the female victim's perspective); *Bennett v. NYC Dept. of Corrections*, 705 F. Supp. 979, 986 (S.D.N.Y. 1981) (ruling that a fact-finder could conclude that the plaintiff reasonably regarded various incidents of abuse as sexual harassment even though they occurred in a harsh prison environment because “there are limits beyond which the atmosphere even in a prison may not be allowed to deteriorate”); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (plaintiff stated a valid Title VII claim when she asserted that she was subjected to vulgar sexual comments and that her workplace was filled with such sexual slurs); *Jensen v. Eveleth Taconite Co.*, 130 F.2d 1287 (8th Cir. 1997) (pervasive gender discrimination that has been traditionally accepted within an industry underscores, rather than mitigates, an employer's culpability); *Andrews v. City*

workplace cultures could reasonably have on individuals.<sup>8</sup> Following this approach, even if explicit profanity and pornography are traditionally accepted within the mining industry, if a reasonable woman could still regard the behavior as discriminatory sexual harassment, the courts will not provide blanket protection to the workplace culture.<sup>9</sup>

This Note rejects the notion that courts should require employees to endure traditionally abusive workplace environments without considering whether the workplace culture may reasonably be considered discriminatory. For instance, the fact that anti-female behavior might be generally accepted within the mining industry or within a particular mining company, does not preclude a woman from fairly regarding the behavior as discriminatory sexual harassment that violates Title VII and negatively impacts both her psyche and job performance.<sup>10</sup> In fact, rather than insulate companies from liability, evidence that a workplace culture is abusive to either men or women as a class actually supports a plaintiff's sexual harassment claim and can warrant increased damage awards.<sup>11</sup>

Part I of this Note will provide background information on sex discrimination law in the sexual harassment context. Part II will examine how courts have considered workplace culture evidence when analyzing hostile workplace sexual harassment claims. Finally, Part III will suggest how evidence of an allegedly abusive and discriminatory workplace culture can be used to help prove a sexual harassment claim and justify increased damage awards.

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of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (holding that conduct alleged to be sexual harassment must be viewed from the reasonable woman's perspective); Connor v. Schrader- Bridgeport Int'l, Inc., 227 F.3d 179 (4th Cir. 2000) (overturning district court's ruling that alleged incidents of sexual harassment were not actionable because they occurred in the "rugged environment" of a machine shop); Smith v. Sheahan, 189 F.3d 529, 534-35 (7th Cir. 1999) (holding that an employee does not assume the risk of discriminatory conduct simply by choosing to work in an environment where discriminatory behavior is prevalent).

8. See cases cited *supra* note 7.

9. See, e.g., Atwood v. Biondi Mitsubishi, 61 Fair Empl. Prac. Cas. (BNA) 1357 (W.D. Pa. 1993) (noting that the perspective of the victim must be considered in sexual harassment litigation).

10. See *Jensen*, 130 F.3d at 1304 ("it should be obvious that the callous pattern and practice of sexual harassment engaged in by Eveleth Mines inevitably destroyed the self-esteem of the working women exposed to it").

11. See *infra* notes 134, 137 & 141.

## I. BACKGROUND

Title VII of the 1964 Civil Rights Act prohibits sex-based employment discrimination.<sup>12</sup> The relevant portion of Title VII provides: "It shall be unlawful employment practice for an employer 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 . . . sex."<sup>13</sup> With little legislative history to act as a guide, Congress left the administration and interpretation of Title VII to the Equal Employment Opportunity Commission ("EEOC") and the courts.<sup>14</sup>

Both the EEOC and the courts have recognized sexual harassment in employment situations as a form of sex-based employment discrimination because sexual harassment tends to prevent victimized employees from functioning properly in the workplace.<sup>15</sup> Sexual harassment has been classified into two types: (1) *quid pro quo* harassment and (2) hostile workplace environment harassment.<sup>16</sup> *Quid pro quo* harassment occurs when an employer or supervisor takes tangible employment action against an employee because of the employee's unwillingness to provide sexual favors.<sup>17</sup> For example, a supervisor may not terminate an employee, or withhold a promotion, because an employee refuses to accede to the supervisor's sexual advances.

Even if a supervisor or employer takes no adverse employment action, the EEOC and the courts have recognized that a workplace environment which is hostile to a particular gender violates Title VII.<sup>18</sup>

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12. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1994).

13. *Id.*

14. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-65 (1986). The opinion refers to the EEOC as the agency charged with enforcing Title VII and recognizes that EEOC sexual harassment guidelines act as persuasive, but not controlling, authority for judicial interpretations of Title VII. Additionally, the opinion notes that there is little legislative history to guide the EEOC and courts in interpreting Title VII.

15. *Id.* at 63-68 (both the courts and the EEOC recognize sexual harassment as a form of sex discrimination); *infra* note 121.

16. *Meritor*, 477 U.S. at 64, 65; *Burlington Indus., Inc. v. Ellerth* 524 U.S. 742, 751 (1998); *infra* note 17.

17. *See Reynolds v. Atlantic City Convention Ctr.*, 53 Fair Empl. Prac. Cas. (BNA) 1852 (D.N.J. 1990) (*quid pro quo* sexual harassment occurs "when submission to or rejection of [unwelcome sexual] conduct by an individual is used as a basis for employment decisions affecting plaintiff").

18. *See Meritor*, 477 U.S. at 63-67 (holding that sexual harassment can be actionable even if the victimized employee does not suffer a tangible loss of an economic nature, such as a salary reduction).

Hostile workplace environment sexual harassment claims can arise when an employee is subjected to severe, gender-biased abuse in the workplace.<sup>19</sup> The abuse can occur at the hands of employers, supervisors or other co-workers, and unlike a *quid pro quo* claim, the employee need not show that he or she suffered a tangible, or economic loss because of the harassment.<sup>20</sup>

Hostile workplace environment sexual harassment claims have proven to be problematic for both courts and litigants.<sup>21</sup> Courts have found it impossible to establish a bright line test to separate actionable sexual harassment from merely annoying behavior.<sup>22</sup> Employers and victims alike are often left wondering exactly what behavior rises to the level of actionable hostile workplace harassment.<sup>23</sup>

The EEOC has issued guidelines on sexual harassment in an effort to educate victims and provide employers with information needed to develop effective anti-harassment policies.<sup>24</sup> Although the EEOC guidelines are considered merely persuasive authority, they have given the courts a starting point for defining hostile workplace environment sexual harassment.<sup>25</sup> Nevertheless, rather than adopt the EEOC's interpretation of Title VII verbatim, the courts have established their own requirements for stating a valid hostile workplace environment

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19. *See id.* (sexual harassment which is severe enough to create a hostile working environment for one sex is actionable).

20. *See id.* at 57; Faragher v. Boca Raton, 524 U.S. 775, 786 (1998) (showing of economic harm not necessary to prove a sexual harassment claim); *see also* Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

21. *See* Estelle D. Franklin, *Article: Maneuvering Through The Labyrinth: The Employer's Paradox in responding to Hostile Workplace Environment Sexual Harassment – A Proposed Way Out*, 4 FORDHAM L. REV. 1517, 1524-26 (1999).

22. “The extreme boundaries [of actionable conduct] are defined: on one side, ‘merely’ offensive conduct is not actionable; on the other side, psychologically debilitating conduct is actionable. What is sufficient between those two points, however, is anybody’s guess.” Franklin, *supra* note 21, at 1535.

23. *See id.* at 1538.

24. *See* Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a). The Guidelines indicate that “Harassment on the basis of sex is a violation of section 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 such conduct 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 a 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.”

25. *See supra* note 14.

claim.<sup>26</sup> Although variations exist, most courts agree that the rule is roughly comprised of the elements discussed in the case of *Henson v. City of Dundee*.<sup>27</sup> To state an actionable hostile workplace environment sexual harassment claim, the plaintiff must show the following:

- (1) the employee belongs to a protected class; (2) the employee was subject to harassment, that is, unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment, that is, the conduct was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) a basis for imputing liability to the employer.<sup>28</sup>

A plaintiff must additionally prove that he or she found the environment subjectively offensive and show that an objective person would come to the same conclusion.<sup>29</sup> Although this doctrinal rule has helped to focus the decision-making process of the courts, it has by no means resolved all issues.<sup>30</sup> Each element has forced the courts to face difficult, new questions.<sup>31</sup>

For example, plaintiffs will fall within the class of individuals that Title VII protects only if they claimed that they were harassed because of their gender.<sup>32</sup> Conduct, however, need not be literally sexual in nature to constitute sexual harassment; it is enough that it is motivated by gender animus.<sup>33</sup> A man or woman satisfies elements one and three of the *Hensen* test by showing that they were harassed by a member of the opposite sex because of their gender.<sup>34</sup> In *Oncale v. Sundowner Offshore Services*, however, the plaintiff filed a sexual harassment claim

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26. For example, courts state that actionable harassment must be sufficiently "severe or pervasive" to be actionable, and the words "severe or pervasive" do not appear in the EEOC Guidelines. *See id.* at 65-67 (referring to both the EEOC Guidelines on Sexual Harassment and the "severe or pervasive" requirement); *see also* *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982) (finding that actionable harassment must be "severe or pervasive").

27. *See* Franklin, *supra* note 21, at 1533; *Henson*, 682 F.2d at 897.

28. Franklin, *supra* note 21, at 1527.

29. *Id.* at 1533.

30. *Id.* at 1528-48.

31. *See id.*

32. *Id.* at 1528.

33. *Id.* at 1532, 1533.

34. *See id.*

against a person of the same gender.<sup>35</sup> Although at first blush one might wonder how a person of one sex could discriminate against another person of the same sex on the basis of gender, the Supreme Court has held that same-sex harassment claims are cognizable if the evidence shows that the victim has indeed been targeted for harassment because of his or her gender.<sup>36</sup>

Different courts have applied the second and fourth elements of the *Hensen* test to similar situations with drastically different results.<sup>37</sup> The disparate conclusions stem from the courts' differing perceptions concerning whether questionable behavior was actually gender-biased and severe or pervasive enough to warrant awarding damages to a plaintiff.<sup>38</sup> Conduct that one person considers "merely juvenile" or tolerable because it is an accepted part of the workplace environment, may be regarded as severely offensive and unacceptable to another person.<sup>39</sup> Courts have attempted to separate minor workplace teasing and friction from actionable harassment by redressing only severe instances of harassment.<sup>40</sup>

The requirement that the conduct be severe or pervasive enough to alter the conditions of employment is a tough hurdle for plaintiffs to clear.<sup>41</sup> In *Faragher v. City of Boca Raton*, the Court reiterated its holding in *Harris v. Forklift Systems* that mere teasing, offhand comments and isolated incidents of a trivial nature could not form the basis of a sexual harassment claim.<sup>42</sup> Courts should "determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening . . . humiliating . . . and unreasonably interferes with an employee's work environment.'"<sup>43</sup>

A literal reading of the requirement that the harassment "alter the condition of the victim's employment" might suggest that a woman who knowingly enters an abusive workplace cannot later use the abusive conduct of the workplace culture as a basis for a sexual harassment suit because the behavior was always present in the workplace and con-

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35. See *id.*; *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

36. *Oncale*, 523 U.S. at 80.

37. Compare, cases cited *supra* note 6, with cases cited *supra* note 7.

38. See cases cited *supra* notes 6-7.

39. See *Atwood v. Biondi Mitsubishi*, 61 Fair Empl. Prac. Cas. (BNA) 1357 (W.D. Pa. 1993).

40. See *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998) ("offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'").

41. See *Franklin*, *supra* note 21, at 1533-38.

42. See *Faragher*, 524 U.S. at 777, 787.

43. See *id.* at 787.



ditions never changed. Many courts reject this reading and simply require that the conduct be severe or pervasive enough to intimidate the employee or interfere with work performance.<sup>44</sup> The Seventh Circuit has expressly rejected the argument that a plaintiff “assumes the risk” of working in a traditionally abusive workplace.<sup>45</sup>

Additionally, the *Hensen* test also requires the plaintiff to show that he or she subjectively felt offended by the alleged harassment and that an objective person would come to the same conclusion.<sup>46</sup> The perspective that should be taken when conducting the objective component of this analysis is still a subject of controversy.<sup>47</sup> Some courts say that we should ask whether a reasonable person in similar circumstances would find the conduct objectionable.<sup>48</sup> Other courts and legal commentators advocate taking the perspective of a reasonable woman when analyzing suspect conduct (reasonable man standard when applicable).<sup>49</sup> These courts and commentators believe that a reasonable woman standard takes into account the fact that men and women often perceive behavior differently.<sup>50</sup> Still other scholars have noted, however, that the reasonable woman standard is a double-edged sword; it may force men to take women’s views into account, but it also implies that women are fundamentally different from men, thereby creating a basis for further discrimination.<sup>51</sup> A 1999 psychological study suggests that using a reasonable woman standard instead of a reasonable person standard may have little actual impact on litiga-

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44. See, e.g., cases cited, *supra* note 7. In these cases the decisions do not protect workplaces under the theory that plaintiffs assume the risk of harassment when entering work environments where objectionable, gender-biased conduct has traditionally been present. Instead, the courts focus on whether the plaintiff could reasonably regard the alleged incidents of harassment as severe or pervasive enough to interfere with his or her job performance or psychological well being.

45. *Smith v. Sheahan*, 189 F.3d 529, 534-35 (7th Cir. 1999) (holding that an employee does not assume the risk of discriminatory conduct simply by choosing to work in an environment where discriminatory behavior is prevalent).

46. See *supra* note 27.

47. Compare *Rabidue*, 805 F.2d at 620 (a “reasonable person” standard applies in sexual harassment cases), with *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (a gender-based standard, such as “reasonable woman,” applies in sexual harassment cases).

48. See, e.g., *Rabidue*, 805 F.2d at 620.

49. See *Ellison v. Brady*, 924 F.2d 872; *Rabidue*, 805 F.2d at 611. (Keith, J., dissenting); *Atwood v. Biondi Mitsubishi*, 61 Fair. Empl. Prac. Cas. (BNA) 1357 (quoting *Andrews*, 895 F.2d at 1485-86); DEBORAH L. SIEGEL, LEGAL DEFINITIONS OF SEXUAL HARASSMENT MUST BE BROAD, IN *SEXUAL HARASSMENT* 143, 147-48 (Bender et al., 1992).

50. See *supra* note 49.

51. See Robert Unikel, *Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 *Nw. U. L. Rev.* 326, 331 (1992).

tion.<sup>52</sup> The study found that men and women seem to define their respective notions of sexual harassment with little consideration for the particular legal standard employed by courts.<sup>53</sup>

Even if a plaintiff manages to satisfy all of the other elements, he or she must still establish that the employer is liable for the conduct.<sup>54</sup> The Supreme Court has held that in cases of *quid pro quo* harassment by a supervisor, an employer is strictly liable because the supervisor is deemed to have acted as the agent of the employer.<sup>55</sup> When a supervisor takes sex-based tangible employment action against an employee, the Supreme Court has held that it is proper to hold the employer liable because the supervisor's tortious actions were aided directly by the power of the agency relationship with the employer.<sup>56</sup> If a co-worker sexually harasses another employee, however, the employer is not automatically liable because the co-worker is not empowered to take tangible employment action and, therefore, is not necessarily aided by the power of an agency relationship with the employer.<sup>57</sup> In cases involving co-worker harassment, courts are instructed to look at general agency law principles to determine if an employer must be held accountable for co-worker harassment.<sup>58</sup>

The Supreme Court has since announced another rule to be applied when a supervisor, rather than a co-worker, is accused of creating a sexually hostile workplace without actually taking tangible employment action against an employee.<sup>59</sup> Currently, an employer is strictly liable for damages arising from hostile workplace environment sexual harassment claims involving supervisors unless the employer can overcome this presumption by using a newly promulgated affirmative defense.<sup>60</sup> An employer can avoid or reduce liability for a hostile workplace environment sexual harassment claim if the employer can show that (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the plaintiff

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52. See Gutek, et al., *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCHOL. PUB. POL'Y. & L. 596, 623-26 (1999).

53. See *Id.* at 623.

54. See generally, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

55. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 756, 756-65 (1998).

56. See *id.*

57. See *id.*

58. See *id.*

59. See *id.*

60. See *id.*

unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>61</sup>

An examination of cases that apply these elements to real-world situations reveals the types of specific behavior that might constitute actionable hostile workplace environment sexual harassment. In *Andrews v. City of Philadelphia*, the court held that “the pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally might serve as evidence of a hostile work environment.”<sup>62</sup> Other courts, however, have declined to brand sexually-tinged vulgarities as harassment when defendants have demonstrated that plaintiffs “welcomed” vulgarity by using it in the workplace themselves.<sup>63</sup>

Some courts state that exposure to pornography in the workplace can be classified as sexual harassment. Other courts have rejected this notion and concluded that pornography is something that our society generally tolerates; therefore, a reasonable person would not find “girlie magazines” objectionable.<sup>64</sup> Even unwanted touching of a sexual nature is not certain to guarantee a victory for the plaintiff.<sup>65</sup> Again, courts have differed as to the number and types of incidents necessary to support a hostile workplace environment claim.<sup>66</sup> Ulti-

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61. *See id.*

62. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1487 (3d Cir. 1990).

63. *See Halpert v. Wertheim & Co.*, 27 Fair Empl. Prac. Cas. (BNA) 21 (S.D.N.Y. 1980) (plaintiff's claim dismissed, partly because plaintiff also used foul language); *Ukarish v. Magnesium Elektron*, 31 Fair Empl. Prac. Cas. (BNA) 1315 (D.N.J. 1983) (plaintiff's claim dismissed, partly because plaintiff also used foul language). *But see Swentek v. USAIR*, 830 F.2d 552, 557 (4th Cir.1987) (plaintiff's consensual use of foul language does not constitute a waiver of legal protection against unwelcome harassment).

64. *Compare Rabidue*, 805 F.2d at 620-21 (exposure to pornographic materials is not actionable harassment), *with Jensen*, 130 F.3d at 1292 (exposure to pornographic materials can be considered as evidence of sexual harassment).

65. *See Franklin*, *supra* note 21, at 1538.

66. *See, e.g., Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333 (7th Cir. 1993) (holding that several attempts to kiss plaintiff combined with several sexual advances insufficient to state a sexual harassment claim); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995) (holding several instances of sexually-tinged, offensive behavior including one instance of feigned masturbation insufficiently severe or pervasive to constitute a claim); *Adusumilli v. City of Chicago*, 164 F.3d 353 (7th Cir. 1998) (holding that several sexual jokes aimed at plaintiff combined with the fact that co-workers repeatedly stared at her breasts and once touched her buttocks insufficiently severe to support a claim); *Timm v. Progressive Steel Treating Inc.*, 137 F.3d 1008 (7th Cir. 1998) (holding that sexual propositions and repeated touching of buttocks and thighs sufficient to state an actionable claim); *Williams v. Gen. Motors*, 187 F.3d 553 (6th Cir. 1999) (finding sufficient evidence to support a claim where plaintiff alleged supervisor looked at plaintiff's breasts and made several vulgar, sexually demeaning comments);

mately, the sense one gets from the cases is that sexual harassment can be visual, tactile or verbal in nature, but that specific determinations often depend upon a particular court's view of the conduct and the circumstances surrounding it.<sup>67</sup>

In fact, before 1991 specific determinations depended solely on the courts' view of the alleged harassment because there were no jury trials for these types of cases prior to that date.<sup>68</sup> The Civil Rights Act of 1991 added the right to jury trials because of the perception that the male-dominated federal judiciary lacked the gender diversity and real-world experience of a jury, and that these qualities were necessary to decide hostile workplace sexual harassment claims fairly.<sup>69</sup>

The discussion in this section has set forth the current state of sex discrimination law in the sexual harassment context. The next section will examine how courts have considered workplace culture evidence when determining whether a plaintiff's work environment is actionably hostile.

## II. THE IMPACT OF WORKPLACE CULTURE ON HOSTILE WORKPLACE ENVIRONMENT SEXUAL HARASSMENT LITIGATION: SPECIFIC CASES

Case law suggests that workplace culture may be defined as a set of standard practices and mores that have been traditionally identified with workers of specific industries and workplaces.<sup>70</sup> Many cases explicitly refer to workplace culture when analyzing hostile workplace environment sexual harassment claims, but not all courts regard workplace culture in the same manner. Some courts have concluded that traditionally accepted workplace behavior cannot be classified as actionable sexual harassment.<sup>71</sup> Other courts expressly reject the idea that indus-

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Howard v. Burns Bros., Inc., 149 F.3d 835 (8th Cir. 1998) (sufficient where defendant intentionally brushed up against plaintiff and stated "that he was going to get her" and harassed other female employees); *see also* cases cited *supra* notes 6 & 7.

67. *See* cases cited *supra* notes 6-7.

68. *See* 42 U.S.C. 1981a (c) (1994); *infra* note 69.

69. Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277, 298 (1999) ("Because very few women . . . have been appointed to the federal judiciary . . . jury trial proponents were well aware that [male judges] decided sex discrimination cases. [However] federal law as well as the Constitution, assures that a civil jury would include men and women with a wide range of experiences and perspectives. Congress could sensibly conclude that a jury . . . would bring an invaluable understanding of workplace realities, of the nuances . . . of gender relations, and of the complexities of human motivation.").

70. *See* cases cited *supra* notes 6-7.

71. *See* cases cited *supra* note 6.

tries and individual workplaces can define sexual harassment according to their own practices.<sup>72</sup> Often, these “accepted” workplace practices could reasonably be regarded as discriminatory sexual harassment.<sup>73</sup> Additionally, a court’s statements about the level of deference workplace culture should receive in sexual harassment litigation can still be disturbing even when a particular case is weak from *any* perspective.<sup>74</sup>

First, we will examine cases that have allowed abusive gender-biased workplace cultures to negate hostile workplace environment sexual harassment claims. In *Rabidue v. Osceola Refining Co.*, the plaintiff alleged that one of her male co-workers routinely made denigrating comments about women in general.<sup>75</sup> Sometimes these comments were specifically directed towards her.<sup>76</sup> The plaintiff also indicated that other female employees were affected by this co-worker’s behavior.<sup>77</sup> Furthermore, the plaintiff complained that male co-workers displayed pictures of “nude and scantily clad women in their offices and/or work areas, to which the plaintiff and other women employees were exposed.”<sup>78</sup> The Tenth Circuit court affirmed the district court’s judgment for the defendant.<sup>79</sup> The circuit court quoted the district court in saying that “[i]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to –or can- change this.”<sup>80</sup> The *Rabidue* court also stated that “the lexicon of obscenities that pervaded the environment of the workplace both before and after the plaintiff’s introduction into its environs, coupled with the reasonable expectation of the plaintiff

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72. See cases cited *supra* note 7.

73. See cases cited *supra* notes 6-7.

74. See, e.g., *Halpert v. Wertheim & Co.*, 27 Fair Empl. Prac. (BNA) 21 (S.D.N.Y. 1980). Here the court implied that women could not complain about sexual comments in the securities trading firm because these comments were an accepted part of the workplace culture without considering that severe or pervasive “sexual commentary” might reasonably be seen by women as sexual harassment. However, the plaintiff in this case probably would have lost anyway because there was little evidence that she was subjectively offended by the comments.

75. 805 F.2d 611 (6th Cir. 1986).

76. *Id.* at 615.

77. *Id.*

78. *Id.*

79. *Id.* at 623.

80. *Id.* at 620-21.

upon voluntarily entering the environment,” must be considered.<sup>81</sup> Thus, the court implied that a plaintiff could not claim that conduct was discriminatory sexual harassment if it was an established part of a workplace culture, and the plaintiff should have known that he or she would be exposed to it after accepting an offer of employment.

Judge Keith, dissenting in part from the *Rabidue* majority, stated that the evidence was sufficiently anti-female to support a hostile environment claim.<sup>82</sup> The plaintiff established that her co-worker regularly referred to women as “whores,” “cunt,” “pussy,” and “tits.” “One poster. . . showed a prone women who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling “fore”.<sup>83</sup> Furthermore, the plaintiff was also subjected to remarks such as, “[a]ll that bitch needs is a good lay,” and “fat ass.”<sup>84</sup> Finally, the plaintiff’s employer prevented her from having luncheon meetings with male clients because the employer felt it was improper for a married woman to have lunch with other men.<sup>85</sup> The company, however, allowed married men to meet female clients for lunch.<sup>86</sup> This disparate treatment was additional evidence that the workplace environment was biased against women. After citing these incidents, Judge Keith stated the following: “In my view, Title VII’s precise purpose is to prevent such behavior from poisoning the work environment of classes protected under the Act. To condone the majority’s notion of the ‘prevailing workplace’ I would also have to agree that if an employer maintains an anti-Semitic workforce . . . a Jewish employee assumes the risk of working there, and a court must consider such a work environment as ‘prevailing.’”<sup>87</sup>

Many courts have rejected the reasoning of the majority in *Rabidue*.<sup>88</sup> Yet, despite heavy criticism, *Rabidue* has not disappeared. Recently, the court in *Wieland v. Indiana Department of Transportation*, made the following comment that smacks of *Rabidue*’s reasoning: “Title VII was not designed to purge the workplace of vulgarity, for a certain amount of vulgar banter tinged with sexual innuendo is inevitable in

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81. *Id.* at 620.

82. *Id.* at 623.

83. *Id.* at 624.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 626.

88. *See* cases cited *supra* note 7.

the modern workplace.”<sup>89</sup> This comment leaves us wondering exactly what types of sexually-tinged vulgarities will be excluded from consideration in a sexual harassment suit, as well as when and how often an employee is expected to endure these potentially gender-biased vulgarities.

In *Gross v. Burggraf Construction Company*, a female plaintiff alleged that her supervisor verbally harassed her by repeatedly calling her “dumb”, and once telling her to get her “ass” back into a work truck.<sup>90</sup> Additionally, on one occasion the plaintiff was having trouble communicating with her supervisor over a CB radio.<sup>91</sup> Her frustrated supervisor turned toward a male worker and said: “Mark, sometimes don’t you just want to smash a woman in the face?”<sup>92</sup> The plaintiff overheard this comment because it was broadcast over the radio.<sup>93</sup> The Court held that the words “dumb” and “ass” are gender neutral and cannot support a hostile workplace sexual harassment claim, and that the comment made over the radio was an isolated incident which was insufficient to show severe and pervasive harassment.<sup>94</sup>

Yet, even assuming that the *Gross* court correctly analyzed the claim, the court, in dicta, went beyond the particular facts of the case and made sweeping comments about the weight that the workplace culture should generally play in sexual harassment cases.<sup>95</sup> First, the court cited *Rabidue* with approval.<sup>96</sup> Secondly, the court stated “that in the real world of construction work profanity and vulgarity are not perceived as hostile or abusive” and that the plaintiff’s claim must be analyzed “in the context of a blue-collar environment.”<sup>97</sup> The court

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89. 98 F. Supp 2d 1009, 1018 (2000) (quoting *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1144 (1997)). See also *Connor v. Schrader - Bridgeport Int’l, Inc.*, 227 F.3d 179 (4th Cir. 2000) (overturning district court’s ruling that alleged incidents of sexual harassment were not actionable because they occurred in the “rugged environment” of a machine shop); *Smith v. Sheahan*, No. 95-C-7203, at 23 (N.D. Ill. 1997), *rev’d*, 189 F.3d 529 (7th Cir. 1999) (ruling that violence was common amongst co-workers in the jail setting and that no sexual harassment occurred when a male employee physically assaulted a female co-worker, called her a “bitch” and threatened to “fuck [her] up”).

90. 53 F.3d 1531, 1536 (10th Cir. 1995).

91. *Id.* at 1542.

92. *Id.* at 1535.

93. *Id.*

94. *Id.* at 1542, 1543.

95. *Id.* at 1537, 1538.

96. *Id.* at 1538.

97. *Id.* at 1539.

implied that no reasonable construction worker could have ever regarded any type of vulgarity as sexual harassment because vulgarity was, stereotypically, considered an accepted part of the construction industry. Thus, a woman who chooses to work in a “blue-collar” environment like the construction industry might be forced to endure vulgar statements like those found in *Rabidue* without any recourse.

Another example of a sexually hostile workplace afforded judicial protection is seen in *Hosey v. McDonalds*.<sup>98</sup> In this case, the plaintiff was a young male who alleged that he suffered psychological injury because a female co-worker pinched his buttocks on 10 occasions, made repeated requests for dates and made numerous sexually oriented comments, such as “she would like to know what it felt like to have me inside her.”<sup>99</sup> The plaintiff reported this activity to management, but since there was no indication that the complaints were taken seriously, the plaintiff left his position and brought a hostile workplace environment sexual harassment claim under Title VII.<sup>100</sup> The district court dismissed the plaintiff’s claim on summary judgment, holding that the alleged incidents of sexual touching were not severe or pervasive and that “a court must consider the plaintiff’s work environment. Here, it is common for teenagers to ask each other out on dates and unfortunately, to use unprofessional language.”<sup>101</sup> The appellate court upheld this judgment.<sup>102</sup>

Although the rulings in some sexual harassment cases shield oppressive conduct when it is considered a normal part of a particular workplace or industry, other courts expressly reject this notion.<sup>103</sup> In *Bennett v. NYC Department of Corrections*, the plaintiff, a prison guard, claimed that her co-workers subjected her to a sexually hostile work environment.<sup>104</sup> She alleged the following incidents in support of this contention: (1) a co-worker once called her a “bitch”; (2) another co-worker repeatedly asked her out; (3) twice she was subjected to humor that, arguably, had an implied sexual connotation; (4) a Deputy Warden asked her to sit on his lap once; (5) twice plaintiff found obscene graffiti on the walls that was directed towards her; and (6) she once

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98. 71 Fair Empl. Prac. Cas. (BNA) 201 (D. Md. 1996).

99. *Id.* at 202.

100. *Id.*

101. *Id.* at 203.

102. *Hosey v. McDonalds*, 113 F.3d 1232 (4th Cir. 1997).

103. *See* cases cited *supra* notes 6-7.

104. 705 F. Supp. 979 (S.D.N.Y. 1981).



overheard a conversation between two prison guards that referenced a sexual experience with a prostitute.<sup>105</sup> The court refused to dismiss the plaintiff's complaint and stated that "prisons are coarse and rowdy . . . but that does not mean anything goes, particularly among those that are charged with maintaining discipline of the staff . . . there are limits beyond which even the atmosphere of a prison may not be allowed to deteriorate."<sup>106</sup> Here, the court recognized that conduct could still amount to discriminatory sexual harassment despite the prevalence of the conduct within a specific workplace or industry.

In *Atwood v. Biondi Mitsubishi*, the plaintiff alleged that her co-workers were taking bets on the color of her underwear and that her employer directed sexually-tinged comments toward her.<sup>107</sup> In rejecting a "boys will be boys" defense, the court replied, "We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share concerns that men do not necessarily share," and, "[M]en, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence a woman may perceive."<sup>108</sup> Rather than insulate conduct from scrutiny simply because of its prevalence in a specific workplace, the court indicated that the perspective of the victim must be taken into account.<sup>109</sup> The court noted that the Third Circuit and the Ninth Circuit have adopted a "reasonable woman" standard to accomplish this goal.<sup>110</sup>

In *Jensen v. Eveleth Taconite Co.*, the court found that the Eveleth mining company was "male-dominated in terms of power, position and atmosphere," and that Eveleth's male employees lashed out at female employees with sexual harassment in all its forms.<sup>111</sup> Pornographic materials saturated the work environment.<sup>112</sup> Female workers recounted incidents involving unwelcome "kissing, pinching and grabbing," and reported that male workers frequently used offensive language aimed at women.<sup>113</sup> Furthermore, male employees told their female counterparts that they belonged at home with their children,

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105. *Id.* at 984, 986.

106. *Id.* at 986 (quoting *Snell v. County of Suffolk*, 782 F.2d 1094 (2d Cir. 1986)).

107. 61 Fair Empl. Prac. Cas. (BNA) 1357 (W.D. Pa. 1993).

108. *See id.* at 1359.

109. *See id.*

110. *See id.*

111. 130 F.3d 1287 (8th Cir. 1997).

112. *See id.*

113. *Id.* at 1291.

not working in the mines.<sup>114</sup> The district court special master found that the culture of the Iron Range mining industry historically tolerated sexual harassment and that this should count as a mitigating factor for Eveleth Mines.<sup>115</sup> The Court of Appeals disagreed, holding that Eveleth's responsibility was underscored by the fact that it tolerated sexual harassment along with the rest of the mining industry.<sup>116</sup>

The cases reveal that workplace culture evidence can impact the outcome of hostile workplace environment sexual harassment claims.<sup>117</sup> One line of reasoning suggests an employee must simply tolerate gender-biased and abusive conduct when it is a prevailing component of the workplace.<sup>118</sup> Another perspective discounts this line of reasoning, and instead suggests that the propriety of workplace behavior depends upon a more complex analysis that takes the perspective of the victim into account.<sup>119</sup>

### III. A SUGGESTED APPROACH FOR CONSIDERING EVIDENCE OF A GENDER-BIASED WORKPLACE CULTURE IN HOSTILE WORKPLACE ENVIRONMENT SEXUAL HARASSMENT LITIGATION

Conduct should not automatically be legitimized merely because it is an accepted part of a particular workplace or industry.<sup>120</sup> Title VII promised to open industries to persons of both genders, and courts have concluded that Title VII prohibits sexual harassment because it can be used as a tool to drive one gender out of specific employment settings or make it more difficult for them to perform their jobs.<sup>121</sup> For example, if certain behavior that reasonable women would regard

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114. *See id.*

115. *Id.* at 1292.

116. *Id.*

117. *See, e.g.,* cases cited *supra* notes 6-7.

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

119. *See, e.g.,* *Atwood v. Biondi Mitsubishi*, 61 Fair Empl. Prac. Cas. (BNA) 1357 (W.D. Pa. 1993).

120. *See id.; Rabidue*, 805 F.2d at 611 (Keith, J. dissenting).

121. *See Rabidue*, 805 F.2d at 627 (Keith, J., dissenting) (concluding that sexual posters and anti-female language can seriously affect the psychological well-being of reasonable women and interfere with their job performance); Sandy Welsh & James Gruber, *Not Taking It Any More: Women Who Report or File Complaints of Sexual Harassment*, 36:4 THE CANADIAN REVIEW OF SOCIOLOGY AND ANTHROPOLOGY 559 (1999) (containing survey finding that severe sexual harassment can prompt women to quit their jobs); *see also* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) ("Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being al-

as sexual harassment is allowed to persist in a workplace simply because of its prevalence, women may leave positions in these settings to avoid abuse, or their work performance may suffer because of psychological stress.<sup>122</sup> This serves to undermine the policy behind Title VII by effectively giving individual businesses and industries the ability to tolerate, or even foster, workplace cultures that are gender-biased without incurring any liability.<sup>123</sup>

If we rely on workplace culture as a conclusive method for evaluating conduct, we are also left with a rather perverse implication. The law would afford greater protection to businesses where sexual harassment occurs regularly than to companies where sexual harassment occurs with so much less frequency that it cannot be considered a dominant part of the workplace culture.<sup>124</sup> Businesses could avoid liability for gender-biased, objectionable conduct simply by making it a "normal" part of the workplace. Conversely, employers that work hard to maintain harassment-free workplaces could face liability for similar incidents of sexual harassment precisely because they did not allow sexual harassment to become a customary part of the workplace.

The better approach gives greater weight to the viewpoint of the victim and less to the nature of the workplace culture.<sup>125</sup> We must consider whether someone in the plaintiff's position could reasonably consider the behavior accepted within a particular workplace culture as sexual harassment.<sup>126</sup> Again, scholars and courts continue to disagree about how we should take the victim's perspective into account when analyzing hostile workplace environment sexual harassment claims.<sup>127</sup> Whether the appropriate legal standard for considering the

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lowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.").

122. See *supra* note 121.

123. See *Rabidue*, 805 F.2d at 626 (Keith, J. dissenting) ("... unless the outlook of a reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders. . . the majority suggests that [women] assume the risk of working in an abusive, anti-female environment. . . . In my view, Title VII's precise purpose is to prevent such behavior . . . from poisoning the work environment.").

124. *Rabidue* implies that while conduct alleged to be sexual harassment must occur frequently to be actionable, once the conduct surpasses a certain level of pervasiveness, it can become part of a "prevailing workplace environment" that the plaintiff must endure. 805 F.2d at 611.

125. See *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

126. See *id.*

127. See *supra* notes 50-52.

victim's perspective is gender-neutral (reasonable person or victim standard) or gender-sensitive (reasonable woman or man standard),<sup>128</sup> jurors should have the ability to decide that a plaintiff reasonably regarded conduct as actionable sexual harassment even when that conduct is a dominant part of the workplace culture.<sup>129</sup>

This is not to say, however, that workplace norms are irrelevant in hostile workplace environment sexual harassment litigation. Workplace cultures provide a context for evaluating sexual harassment claims.<sup>130</sup> Information about an allegedly gender-biased workplace culture can help judges and juries understand whether women or men have been intentionally, pervasively or severely harassed within a particular workplace.<sup>131</sup> Evidence of a gender-biased, abusive workplace culture tends to support a plaintiff's hostile workplace environment sexual harassment claim. For instance, a workplace filled with harassment that is purposefully designed to discriminate on the basis of gender, or takes a form that is especially likely to cause psychological injury, will warrant an increased damage award.<sup>132</sup> Furthermore, evidence that a workplace culture is contaminated by sex-based discrimination might help plaintiffs prove the "severe and pervasive" element of a hostile workplace environment sexual harassment claim.<sup>133</sup>

If a plaintiff can show that a particular workplace environment is so heavily polluted with sexual harassment that it forms a part of the dominant workplace culture and the employer failed to take action, it may give rise to the inference that the employer purposely encouraged or recklessly ignored instances of sexual harassment.<sup>134</sup> Although a

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128. See *supra* note 127.

129. See generally *Ellison*, 924 F.2d at 878; *Rabidue*, 805 F.2d at 626 (Keith, J. dissenting).

130. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). Harris instructed courts to consider all the circumstances when evaluating a hostile workplace environment sexual harassment claim. This would include a consideration of the plaintiff's work environment, but many courts have not interpreted Harris to mean that the work environment must be tolerated under any circumstances. See also cases cited *supra* note 7.

131. See *infra* notes 134, 136-37 and accompanying text.

132. See *id.*

133. See *infra* note 141 and accompanying text.

134. See *Jensen v. Eveleth Taconite Co.*, 130 F.3d 1287, 1291-92 (8th Cir. 1997). In *Jensen*, the court found that sexual harassment was so pervasive in the mining company that the employer must have been aware of its existence. It is no stretch to say that a reasonable fact-finder might interpret this to mean that the employer callously disregarded or approved of the harassment. When an employer intentionally or recklessly violates Title VII, plaintiffs may bring claims for punitive damages. See 42 U.S.C. § 1981(a) (1991).

plaintiff need not show that an employer intentionally fostered a discriminatory environment, this fact may underscore the culpability of the employer and make punitive damages more appropriate.<sup>135</sup> In contrast, if an employer tried unsuccessfully, but in good faith, to respond to complaints of widespread harassment, a plaintiff's damage award should properly exclude punitive damages.<sup>136</sup>

Plaintiffs might also use workplace culture evidence to show that the prevalent behavior in a certain workplace was especially likely to cause psychological distress and negatively affect their job performance.<sup>137</sup> According to a recent Canadian psychological study, an employee who is subjected to very severe sexual harassment, harassment by multiple harassers, or both *quid pro quo* and hostile workplace sexual harassment may be more likely to suffer adverse employment and psychological consequences than victims exposed to other forms of sexual harassment.<sup>138</sup> Thus, there is statistical evidence that plaintiffs working in environments where these forms of harassment exist may have greater damages as compared with plaintiffs that have been exposed to other forms or levels of sexual harassment.<sup>139</sup>

Plaintiffs could also use evidence of an abusive workplace culture to show that harassment pervaded the work environment. Unless severe, only pervasive incidents of sexual harassment are actionable; therefore, the courts will not redress merely episodic occurrences.<sup>140</sup> A plaintiff might produce evidence tending to show that employees of one gender are routinely targeted for harassment.<sup>141</sup> This may be important in cases where a plaintiff's claim could be viewed by some as

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135. See *supra* note 134.

136. See 42 U.S.C. § 1981(a) (1991) (punitive damages available when an employer intentionally or recklessly creates a hostile working environment).

137. A study of Canadian women found that women experience adverse psychological and job consequences as a result of sexual harassment especially if it was severe or involved either several people or several forms of sexual harassment. See Welsh & Gruber, *supra* note 121 ("women experience adverse outcomes as a result of [sexual harassment], especially if it was severe or involved either several people or several forms of [sexual harassment]"). These findings imply that a plaintiff exposed to an environment where these specific forms of harassment exist, might be entitled to greater damage awards than victims of other forms of actionable harassment.

138. See *id.*

139. See *id.*

140. See *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998).

141. See *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777 (10th Cir. 1995) (noting that the prevailing work atmosphere, including evidence that other men or women were harassed, may be considered in evaluating a [hostile workplace environment sexual harassment] claim so long as the plaintiff was aware of the harassment).

pervasive, and others as episodic. For example, a plaintiff who claims he or she was personally subjected to four or five instances of verbal harassment during a one year period might have a better chance of proving that sexual harassment pervaded the environment if he or she could show that they knew other similarly situated employees who experienced sexual harassment.<sup>142</sup>

Only under very limited circumstances should employers be allowed to maintain seemingly gender-biased workplaces without an inquiry into the effect that the environment has on employees. Title VII excuses the employer from liability if the employer can show that the allegedly gender-biased harassment is a bona fide requirement of the occupation.<sup>143</sup> For example, a person who worked for a magazine company as a salesperson could not object to the fact that he or she was exposed to copies of adult magazines, if those magazines were sold by the company.<sup>144</sup>

Employers can also escape liability in hostile workplace environment sexual harassment cases involving supervisors if they can show that they acted reasonably to prevent and correct gender-biased behavior and the plaintiff unreasonably failed to take advantage of these measures.<sup>145</sup> In fairness, an employer should be allowed to introduce evidence that the workplace culture has been traditionally *free* from sexual harassment to help prove it responded reasonably to complaints of harassment. For example, an employer might indicate that only a few incidents of sexual harassment occurred at the company over the past decade and that they were all resolved promptly by speaking with the offenders. The employer can now argue that with so few incidents of harassment it was sufficient to promulgate a sexual harassment policy and respond to complaints as they were filed because there was no reason to believe that more extreme measures, such as extensive mandatory training programs, were necessary.<sup>146</sup>

Of course, a plaintiff always has the opportunity to rebut the employer's characterization of the workplace culture and instead offer evidence that the employer knew or should have been aware of widespread sexual harassment within the environment and that merely

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142. *See id.*

143. *See* 42 U.S.C. §§ 2000e-1 to 2000e-17 (1994).

144. *See id.*

145. *See Faragher*, 524 U.S. at 807.

146. *See id.* The court even implies that a formal anti-sexual harassment policy is not always necessary to show that an employer acted reasonably.

having a sexual harassment policy was insufficient.<sup>147</sup> In some environments, an employer might be required to actively question its workforce to determine the scope of a sexual harassment problem, and might even have to institute mandatory sensitivity training for its employees.<sup>148</sup>

#### IV. CONCLUSION

Title VII prohibits sexual harassment in the workplace. Although some courts undermine Title VII by condoning gender-biased conduct when it is a dominant part of a workplace culture, other courts reject this notion and instead ask if the victim could have reasonably regarded the conduct as sexual harassment despite its prevalence within the workplace. Plaintiffs should be able to use evidence of a gender-biased workplace culture to help prove their hostile workplace environment sexual harassment claims. Workplace culture evidence can help jurors and judges to understand whether employers intentionally promote or condone sexual harassment. Furthermore, workplace culture evidence can help a plaintiff prove that sexual harassment pervaded a particular work environment, as well as the damages that he or she likely suffered as a result of such an environment. The legal standards that govern hostile workplace environment sexual harassment claims must be interpreted so that Title VII's underlying policy is served in the fairest possible manner to both employers and employees. Businesses and industries, however, should not be able to escape liability and perpetuate injustice simply by calling sexual harassment a dominant part of the workplace culture.

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147. See, e.g., *Jensen v. Eveleth Taconite Co.*, 130 F.3d 1287, 292 (8th Cir. 1997) (employer did nothing to stop widespread sexual harassment within company).

148. See *id.* *Jensen* depicts a situation where an employer would probably have to do much more than simply promulgate an anti-harassment policy before a judge or jury could conclude that the employer acted reasonably.