

EMPLOYER DEFENSES TO SEXUAL HARASSMENT CLAIMS

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I. INTRODUCTION

Given the public notoriety of sexual harassment claims, today more than ever it is necessary for employers to face the potential legal, ethical, and work related problems resulting from sexual harassment in the workplace. The enormous financial liability for an employer is only part of the concern.¹ Sexual harassment and its aftermath may contribute to decreased worker productivity, increased employee turnover, and lower workplace morale.² Workers suffering trauma from harassment take more time off from work than the average employee, subjecting employers to increased business costs from medical insurance.³ Sexual harassment may affect employee concentration and lead to in-

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1. One study estimated that an average large American company from the Fortune 500 may spend as much as \$6.7 million a year on sexual harassment, while another study estimated that sexual harassment cost the federal government \$267 million over two years. Sara N. Kline, *Sexual Harassment, Wrongful Discharge, and Employer Liability: The Employer's Dilemma*, 43 AM. U. L. REV. 191 (1993) (citing U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 39 (1988)). An example of the possible legal costs of sexual harassment is the 1993 action against the law firm of Baker & McKenzie. The court initially awarded \$6.9 million to a legal secretary who had been repeatedly harassed, but the award was subsequently reduced to \$3.5 million—still a large blow to any business. *Weeks v. Baker & McKenzie*, No. 943043, 1994 WL 774633, at *4 (Cal. App. Dep't Super. Ct. Nov. 28, 1994). Another example of the potential legal costs of harassment is the 1997 settlement between Mitsubishi Motor Manufacturing of America Inc. and twenty-seven female employees. Amy Goldstein and Barbara Vobjeda, *Companies, Courts Differ in Defining Harassment*, WASH. POST, Apr. 5, 1998, at A16. The \$10 million dollar settlement does not include the consequences of a subsequent claim by women from Mitsubishi's Normal, Illinois plant that was settled on June 12, 1998, by the EEOC for \$34 million dollars. Barnaby J. Feder, *\$34 Million Settles Suit For Women at Auto Plant*, N.Y. TIMES, June 12, 1998, at A12. The settlement, if approved by the court, will be the largest sexual harassment settlement to date negotiated by the federal government, and will include additional remedies such as a mandatory sexual harassment training, revision of current sexual harassment policies, and investigation of all sexual harassment complaints within three weeks. Paula Lyon, *For the Record*, CRAIN'S CHI. BUS., Sept. 7, 1998, at 30.

2. STEPHEN MOREWITZ, SEXUAL HARASSMENT AND SOCIAL CHANGE IN AMERICAN SOCIETY 160-161 (1996) (stating that studies show sexual harassment experiences negatively effect workers).

3. *See id.* at 162.

creased accidents at work and frequent mistakes, contributing to a lower quality work product.⁴ Additionally, decreased motivation resulting from the deteriorated relationship with a supervisor may result in lower workplace productivity and a decline in the quality of employee performance, ultimately resulting in decreased profitability for an employer.⁵ Job turnover resulting from harassment costs the employer in terms of recruiting and training of new employees; additionally, there is the temporal cost attributed to rebuilding successful business relationships.⁶ Ultimately, these costs are then passed on to consumers and citizens through increased prices and taxes.⁷

Beyond this, statistics suggest that sexual harassment in the workplace is so pervasive that no employer can hide its head in the sand any longer. According to the Equal Employment Opportunity Commission (EEOC), 6,883 sexual harassment complaints were filed with the EEOC in 1991, rising to 10,532 complaints in 1992, then to 11,908 complaints in 1993 and 15,618 complaints in 1998.⁸ Although many claims are filed, not every claim of sexual harassment is meritorious. As an attorney exclusively representing management, I must remain current on the tools available to defend against sexual harassment claims that are lacking in either merit or legal support.

This paper focuses on the legal defenses that management advocates use to defeat sexual harassment claims for which an employer should not be held responsible. I would be remiss, however, if I did not emphasize that in my opinion the best possible *practical* defense is to train supervisors and managers to prevent meritorious claims from ever being filed.⁹ Training programs serve the dual purpose of fostering a workplace environment that is free of harassment and providing a legal basis to defend a sexual harassment claim. For instance, courts have determined in some situations that training helps an employer to avoid liability¹⁰ or facilitate the shifting of burdens in a discrimination case.¹¹ The absence of training may also provide weight for the plaintiff's claim that the employer has not exercised reasonable care to prevent sexual harassment.¹² Lastly, a

4. See *id.* at 160-161 (stating that surveys show that sexual harassment experiences lead to a decrease in the quantity and quality of work).

5. See *id.*

6. See *id.* at 162.

7. See *id.* at 161 (showing that surveys say that sexual harassment cost the federal government \$267 million during a two year period).

8. EEOC, *Sexual Harassment Charges* (last modified Nov. 9, 1998) <<http://www.eeoc.gov/stats/harass.html>>.

9. 29 C.F.R. § 1604.11(f) 1998.

10. See *Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539 (S.D. Fla. 1995) (holding that the company provided sufficient sexual harassment training to defeat a claim that the employer failed to take remedial action following complaints). See also John A. Barnes, *Does "Diversity" Help Business?*, INVESTOR'S BUS. DAILY, May 17, 1995, at A1, ("If a company or government agency gets sued, a diversity training program is a great thing to be able to point to in court as evidence of racial or ethnic sensitivity.").

11. See *Parrish v. AllState Ins. Co.*, 46 F.3d 1143 (9th Cir. 1995) (stating that evidence of harassment training and legitimate nondiscriminatory reason for firing shifted burden back to plaintiff to raise a genuine issue of material fact).

12. See *Booker v. Budget Rent-A-Car Sys.*, No. 3: 94-0048, 1998 U.S. Dist. LEXIS 12962, at *34 (M.D. Tenn. July 10, 1998) (absence of training was a factor contributing to the court's conclusion that the employer had not exercised reasonable care to prevent sexual harassment).

court may require an employer found liable for sexual harassment in the workplace to implement a training program as a remedy.¹³ In the end, the potential benefits¹⁴ of training substantially outweigh the risks.¹⁵

Training, however, is not bulletproof protection. Even where there has been training, some supervisors will ignore or misunderstand the messages, and claims will be filed. At that point, the legal defenses discussed below become important. For organizational purposes, the defenses to sexual harassment claims will be analyzed in three different categories: (i) general employer defenses to claims of sexual harassment; (ii) unique defenses to quid pro quo and hostile environment harassment; and (iii) several yet to be tested defenses to sexual harassment from the latest in employment law theory and jurisprudence.

II. GENERAL EMPLOYER DEFENSES TO SEXUAL HARASSMENT

'General employer defenses' to sexual harassment are those defenses that are applicable to both quid pro quo and hostile work environment sexual harassment.¹⁶ These defenses include, but are not limited to: (i) "it didn't happen",

13. See *Stair v. Lehigh Valley Carpenters Local Union No. 600*, 855 F. Supp. 90 (E.D. Pa. 1994) (requiring union found liable for hostile work environment sexual harassment to implement mandatory annual training program for all local members); see also *EEOC v. Domino's Pizza, Inc.*, 909 F. Supp. 1529 (M.D. Fla. 1995) (requiring yearly training of all managers on harassment and retaliation policy), *aff'd without op.*, 113 F.3d 1249 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 687 (1998).

14. Benefits of sexual harassment and sensitivity seminars include: increased awareness of rights and obligations, see Jennifer J. Laabs, *Sexual Harassment*, 74 PERSONNEL J., Feb. 1, 1995, at 36 (arguing that although the number of complaints may increase immediately after a training session, management representatives often "would like to have [their] employees aware of their rights and talking about them with [the employer] rather than going outside to talk about it"); improved business reputation, *id.* ("When you combine a strong policy, regular training and a detailed and timely investigation procedure into your sexual harassment strategy, experts agree that you may have a fighting chance limiting your liability and increasing your reputation of good faith and fair dealing with your work force."); and increased employee morale, see Carol Malis, *Taking Time for Training: Seminars Teach Tolerance, Diversity*, CRAIN'S DET. BUS., Jan. 2, 1995, at 8 ("[T]raining sessions are important . . . because people are going to have a happier work environment. It will keep up morale if employees are treated in a positive and respectful way.").

15. Possible risks of training include: manager retaliation, see *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257 (10th Cir. 1995) (involving instance where manager discriminated based on what an employee said in a training session); Susan L. Smith, *Diversity Training, A Workshop Goes Awry*, KAN. LAW EMPLOYMENT LETTER, June 1995, at 3 ("Highly intense diversity workshops pose risks to the employer Objectionable language or conduct may occur; employees may become angry, or defensive, or have their feelings hurt; and previously unknown and unresolved prejudices can lead to discrimination suits."); manager's comments as evidence of discrimination, see *Stender v. Lucky Stores*, 803 F. Supp. 259 (N.D. Cal. 1992) (holding that statements made by store managers during sensitivity training were admissible as evidence of discriminatory intent within the organization); see also Stuart Silverstein, *Workplace Diversity Efforts Thrive Despite Backlash*, L.A. TIMES, May 2, 1995, at A1 ("While the sessions supposedly had the noble aim of uncovering the managers' biases, they instead helped get the company into trouble."); and inappropriate actions in training leading to lawsuits, see *Hartman v. Pena*, 914 F. Supp. 225 (N.D. Ill. 1995) (simulating and role-playing in a cultural diversity seminar created a hostile work environment sufficient to establish prima facie case); see also Joyce Price, *FAA's Gantlet [sic] Exercise Assailed by Diversity Trainers*, WASH. TIMES, Sept. 11, 1994, at A1 (activities at issue in *Hartman v. Pena* were outside of the norm).

16. Quid pro quo harassment occurs when the submission to a request for sexual favors is linked to an economic or other job benefit. Hostile work environment harassment occurs when conduct creates a hostile or offensive environment or otherwise interferes with an individual's work

(ii) welcomeness, (iii) the conduct was not sexual or was not based on sex, (iv) the First Amendment; and (e) the 'equal opportunity harasser.'

A. "It Didn't Happen"

The most basic and obvious argument that an employer can make in response to a claim of sexual harassment is that it just didn't happen.¹⁷ The veracity of the plaintiff's assertions can always be challenged, as in any other litigation, to weed out false or exaggerated claims. To demonstrate that harassment actually took place, courts will permit expert testimony as to whether the plaintiff has reacted in a manner consistent with one who has suffered from sexual harassment.¹⁸ However, the last thing an employer wants to do is to go to a jury on a factual dispute over "he said" versus "she said." In these circumstances, even if there was no sexual harassment, a jury may resolve the conflicting testimony against the party with the 'deep pockets.'¹⁹ Therefore, it is imperative that employers analyze all available defenses to a claim of sexual harassment to ensure the strongest defense possible.

B. Welcomeness

A second defense available to employers in both hostile work environment and quid pro quo cases is that the conduct complained of was welcomed by the plaintiff. No matter how offensive sexual conduct in the workplace may be, an employer is not liable if the conduct is consented to or welcomed. In *Meritor Savings Bank v. Vinson*, the Supreme Court held that to successfully establish a claim of hostile work environment sexual harassment, a plaintiff must demonstrate that: (1) he or she was the subject of unwelcome advances, (2) the unwelcome conduct was based on sex, (3) the unwelcome conduct affected a term, condition or privilege of employment, and (4) the conduct should be imputed to the employer.²⁰ The definition of welcomeness endorsed by the EEOC is that the conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."²¹ It is not enough that the plaintiff believed the conduct to be distasteful; it must be demonstrated by a preponderance of the evidence that the plaintiff by his or her own conduct indicated that the complained of behavior was in fact unwelcome.²² To determine whether the conduct was unwelcome, a court may consider the following: whether the plaintiff willingly participated in

performance. See 29 C.F.R. § 1604.11(a) (1998).

17. See, e.g., *McLean v. Satellite Tech. Servs. Inc.*, 673 F. Supp. 1458 (E.D. Mo. 1987) (including a defense by the alleged harasser that no sexual overture took place).

18. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505-06 (M.D. Fla. 1991) (allowing the testimony of a consultant in the area of women in work to provide insight into how the company's work environment was conducive to sexual harassment of the female employer).

19. This is based on the author's experiences in this field.

20. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

21. EEOC Compl. Man. (CCH) P3114 (Mar. 19, 1990) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982)).

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

the very conduct about which he or she now complains, whether the plaintiff clearly made her supervisors aware that in the future such conduct would be considered unwelcome, and the period of time that elapsed between the occurrence of the conduct and the plaintiff's complaints about it.²³

The analysis of a sexual harassment claim based on unwelcomeness can be aided by categorizing the potential plaintiff's responses to unwelcome sexual advances.²⁴ The victim of the harassment may respond with outright rejection,²⁵ initial rejection and later acceptance,²⁶ initial acceptance followed by later rejection or 'soured romance',²⁷ or coerced submission.²⁸ Coerced submission can be further categorized into situations where the duress is physical²⁹ or economic.³⁰ Furthermore, because coercion to participate in or accept sexual advances need

23. See, e.g., *Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539, 1546-47 (S.D. Fla. 1995) (allowing court to consider whether plaintiff willingly participated in the activity she complains of); *Weinsheimer v. Rockwell Int'l Corp.*, 745 F. Supp. 1559, 1564 (M.D. Fla. 1990), *aff'd without op.*, 949 F.2d 1162 (11th Cir. 1991) (holding when plaintiff did not report offensive incident until months after it occurred and made "active contribution to the sexually explicit environment" of the workplace, she did not find the behavior truly unwelcome or hostile); *Perkins v. General Motors Corp.*, 709 F. Supp. 1487, 1499 (W.D. Mo. 1989) (holding that a court may determine whether behavior was unwelcome by looking to plaintiff's own conduct, plaintiff's contribution to the atmosphere through her own "profane and sexually suggestive conduct," when and if plaintiff reported conduct, and whether plaintiff made it clear to co-workers or supervisors that such conduct would be considered offensive in the future).

24. See generally BARBARA LINDEMANN & DAVID KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW*, 53-74 (1992).

25. See, e.g., *Jones v. Wesco Invest., Inc.*, 846 F.2d 1154 (8th Cir. 1988) (holding that unwelcomeness was sufficiently demonstrated by plaintiff by pushing away her supervisor, stating that she was only interested in a business relationship, and leaving the room); *Sparks v. Pilot Freight Carriers Inc.*, 830 F.2d 1554 (11th Cir. 1987) (holding that unwelcome sexual advance followed by denial of tangible benefits was sufficient to survive summary judgment in both hostile work environment and quid pro quo sexual harassment claims).

26. See, e.g., *Trautvetter v. Quick*, 916 F.2d 1140, 1149 (7th Cir. 1990) (finding that the record "appears to substantiate the district court's findings that Ms. Trautvetter grew to 'welcome' [the] advances and even participated in an active way so as to encourage them").

27. Often adverse employment action in these cases stems from personal circumstances rather than the gender of the alleged victim of sexual harassment. See *Keppler v. Hinsdale Township High Sch. Dist.*, 715 F. Supp. 862 (N.D. Ill. 1989) (discussing variations in "soured romance" situations and determining that new, unwelcome advances following the end of a relationship is sufficient grounds for a sexual harassment claim). See also LINDEMANN & KADUE, *supra* note 24, at 136-137, 172-173 ("[T]he complainant's prior consent is not a defense to a claim of later harassment . . . [c]onduct that is initially welcome may become unwelcome. A complainant in that situation has waived no rights by initially accepting the behavior, but has complicated any attempt to prove unwelcomeness.").

28. See, e.g., *Chamberlin v. 101 Realty Inc.*, 915 F.2d 777, 784 (1st Cir. 1990) (stating that welcomeness determination must include consideration of whether plaintiff "reasonably perceives" that protest will facilitate termination); *Babcock v. Frank*, 729 F. Supp. 279, 288 (S.D.N.Y. 1990) (alleging that coercion resulted from job-related threats by supervisor and subsequent sexual conduct was not consensual).

29. See, e.g., *Gilardi v. Schroeder*, 672 F. Supp. 1043 (N.D. Ill. 1986) (holding that sexual advances were clearly unwelcome where plaintiff was drugged and then raped), *aff'd*, 833 F.2d 122 (7th Cir. 1987).

30. See, e.g., *Phillips v. Smalley Maintenance Serv., Inc.*, 711 F.2d 1524 (11th Cir. 1983) (holding that lower court was correct to consider that alleged harasser knew plaintiff needed job to make house payments and exploited her financial need to solicit sexual relations).

not be explicit, implicit duress may also be sufficient to demonstrate that the conduct was unwelcome.³¹ Finally, when coercion of any sort is alleged, it is essential to remember that voluntary participation³² and a failure to protest are not always indicative of welcomeness.³³

Proof of unwelcomeness is a question of fact to be determined in light of all circumstances surrounding the conduct, and it is not necessarily precluded by participation in sexual banter.³⁴ Where the employee voluntarily entered into a consensual relationship with the alleged harasser without coercion, an employer will generally be entitled to a favorable judgment.³⁵ Where, however, the relationship is not consensual or where advances were rejected, the conduct will be held to be unwelcome and an employer will not avoid liability by using this defense.³⁶

31. See *Thoreson v. Penthouse Int'l*, 149 Misc. 2d 150, 563 N.Y.S.2d 968, 975-76 (Sup. Ct. N.Y. Co. 1990) (holding that implicit coercion is equivalent to explicit coercion in analyzing a sexual harassment claim), *aff'd* 80, N.Y.2d 490 (1992).

32. "Evidence of plaintiff's participation in the conduct is not determinative, but it may suggest that the conduct was welcome. However, participation may be viewed as a response linked to the plaintiff's fear of losing her job." ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE* 334-35 (1994) (citations omitted). See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (stating that appropriate inquiry for welcomeness "is whether [complainant] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary"); *Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872 (S.D. Ga. 1983) (holding that summary judgment is not appropriate for the employer even though plaintiff voluntarily submitted to sexual advances where plaintiff alleges she submitted due to intimidation).

33. See, e.g., *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (holding inter alia that plaintiff need not demonstrate resistance to the alleged sexual harassment).

34. See *Swentek v. USAir, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987) ("[U]se of foul language or sexual innuendo in a consensual setting does not waive [a plaintiff's] legal protections against unwelcome harassment." (quoting *Katz v. Dole*, 709 F.2d 251, 254, n.3 (4th Cir. 1983))).

35. See, e.g., *Reed v. Shepard*, 939 F.2d 484, 486-87, 492 (7th Cir. 1991) (holding that plaintiff, a civilian jail employee who was often handcuffed to furniture or doors, subjected to suggestive remarks and conversations involving oral sex, and forcefully placed on male employees' laps had no actionable sexual harassment claim because she participated willingly in the "sexual hogans" and reciprocated in kind); *Koster v. Chase Manhattan Bank*, 687 F. Supp. 848, 861-62 (S.D.N.Y. 1988) (stating that plaintiff's allegations that bank president who caused her to be denied salary increases, transferred, and ultimately terminated upon cessation of their sexual relationship were dismissed because there was no demonstration that the relationship was not consensual); *Jensen v. Kellings Fine Foods, Inc.*, 51 Fair Empl. Prac. Cas. (BNA) 1752, 1760 (D. Kan. 1987) (holding that plaintiff who had been terminated by her supervisor and his wife, both of whom were stockholders in the company, upon discovery of her affair with the supervisor had no action based on sexual harassment because the relationship was consensual).

36. See, e.g., *Carr v. Allison Gas Turbine Div. Gen. Motors Corp.*, 32 F.3d 1007, 1011-1012 (7th Cir. 1994) (reversing a dismissal of plaintiff's claims based on plaintiff's participation in rowdy behavior in a tinsmith shop because plaintiff's words and conduct was not comparable to the men's and plaintiff, the first woman to work in the shop, was subjected to a daily barrage of sexually harassing comments and pranks); *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1211 (D.R.I. 1991) (holding that male plaintiff who was forced to observe and engage in sexual activity with his supervisor's secretary on a regular basis after plaintiff's supervisor threatened to terminate his job and/or medical benefits had an actionable claim despite the fact that he "willingly contributed to the environment of sexual innuendo" by making proposals of his own because his express rejections of initial invitations were sufficient to demonstrate unwelcomeness), *sub nom.* *Phetosomphor v. Allison Reed Group, Inc.*, *aff'd*, 984 F.2d 4 (1st Cir. 1993); *Broderick v. Ruder*, 685 F. Supp. 1269, 1280 (D.D.C. 1988) ("[C]onsensual sexual relations, in exchange for tangible employment benefits, while possibly not creating a cause of action for the recipient of such sexual advances who does not find

Verbal indications that the plaintiff did not welcome the advances may not always be sufficient to support a sexual harassment claim.³⁷ For example, in *Trautvetter v. Quick*,³⁸ the Seventh Circuit found that, when viewed in the totality of the circumstances, the complained of behavior was welcome despite the fact that the plaintiff “initially declined [the alleged harasser’s] offer for drinks, etc.”³⁹ In that case, a teacher who had a consensual sexual relationship with the principal of the school in which she taught brought suit alleging various claims, including a section 1983 equal protection claim,⁴⁰ which the court analyzed using the contours of a Title VII⁴¹ sexual harassment claim.⁴² The district court determined that the plaintiff had not raised a genuine issue of material fact as to whether the principal’s advances were unwelcome, stating that “[t]he fact that [Mrs. Trautvetter] sometimes said no to [Mr. Quick’s] suggestions or made excuses not to meet him does not imply that she did not welcome his advances, especially when she often did agree to meet him and participated actively in the relationship.”⁴³ The Seventh Circuit affirmed the decision, agreeing that the conduct appeared welcome, observing that

[b]eyond the fact that [the plaintiff] initially declined [the principal’s] offer for drinks, etc., the record is void of any evidence showing that she declared those advances to be unwelcome. Much to the contrary, the course of conduct when reviewed in its entirety, appears to substantiate the district court’s findings that [the plaintiff] grew to ‘welcome’ [the principal’s] advances and even participated in an active way so as to encourage them.⁴⁴

Thus, evidence of verbal indications of unwelcomeness, when viewed in conjunction with other factors, may not be enough to support a claim of sexual harassment.

Nevertheless, welcomeness remains an important inquiry. Under *Meritor*, the correct inquiry as to welcomeness is whether the plaintiff indicated through

them unwelcome, do, and in this case did, create and contribute to a sexually hostile working environment.”).

37. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986).

38. *Trautvetter v. Quick*, 916 F.2d 1140, 1144 (7th Cir. 1990).

39. *Id.* at 1149.

40. 42 U.S.C. § 1983 states in material part that “every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983 (1998).

41. Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to 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.” 42 U.S.C. § 2000e-2(a)(1). Though courts generally follow the contours of Title VII for 42 U.S.C. § 1983 claims, one important distinction between the two is that in 42 U.S.C. § 1983 claims, plaintiff must prove an intent to discriminate. In Title VII cases, there is no such intent requirement. See *Trautvetter*, 916 F.2d at 1149; see also *King v. Board of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990).

42. *Trautvetter*, 916 F.2d at 1148-54.

43. See *id.* at 1149.

44. *Id.*

his or her conduct that the “alleged sexual advances were unwelcomed.”⁴⁵ Of course, it is always possible that the alleged victim welcomed any complained of advances or conduct.⁴⁶ Courts have looked to various factors as indicators of consent, participation, and welcomeness of sexual advances. Factors that may be interpreted as indicative of welcomeness range from sexually provocative speech or dress⁴⁷ to the giving of an expensive gift.⁴⁸ In addition, welcomeness may be demonstrated by showing that the plaintiff participated in or encouraged the complained of conduct.⁴⁹ Furthermore, an employer may rely on evidence of prior sexual history to demonstrate welcomeness.⁵⁰

In order to use evidence of prior sexual history to demonstrate welcomeness some hurdles must be overcome. As an initial matter, the discoverability of this type of evidence is regulated by Federal Rule of Evidence 412.⁵¹ The rule

45. 477 U.S. 57, 68.

46. See, e.g., *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 650 (6th Cir. 1986) (holding that both plaintiff's attitude and her failure to report a second incident for three months demonstrated plaintiff was not offended by the incidents); *Reichman v. Bureau of Affirmative Action*, 536 F. Supp. 1149 (M.D. Pa. 1982) (holding that plaintiff's initiation of a sexual relationship with her supervisor demonstrated that it was welcome).

47. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986); *Jones v. Wesco Invest., Inc.*, 846 F.2d 1154, 1155 n. 4 (8th Cir. 1988) (“[C]ourt must consider any provocative speech or dress of the plaintiff in a sexual harassment case.”); see also *McLean v. Satellite Tech. Servs., Inc.*, 673 F. Supp. 1458, 1459-1450 (E.D. Mo. 1987) (using plaintiff's past behavior, including an instance in which she lifted her dress to show the alleged harasser that she was not wearing any undergarments, to indicate that any sexual advances that defendant made were not unwelcome).

48. See *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995). The Eighth Circuit affirmed the District Court's granting of summary judgment for the employer on the plaintiff-employee's quid pro quo claim which alleged sexual harassment and retaliatory termination. The court found, in part, that the conduct was not unwelcome because the foreman accused of harassment “did not make any sexual comments, advances or requests after their consensual relationship ended, and [the plaintiff] gave him an expensive Valentine's Day gift which indicates that whatever nonsexual advances he made were not unwelcome.” *Id.* at 468-70.

49. See, e.g., *Smith v. Acme Spinning Co.*, No. C-C-85-066-M, 1986 U.S. Dist. LEXIS 27059, at *5 (W.D.N.C. Apr. 8, 1986) (rejecting unwelcomeness claim where plaintiff “frequently participated in on-the-job horseplay that included a good deal of rubbing and touching of male employees” and holding that evidence of prior sexual history is relevant as to question of whether plaintiff was aggressor); *Gan v. Kepro Circuit Sys., Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 639, 640-641 (E.D. Mo. 1982) (holding admissible as evidence of welcomeness that plaintiff used crude and vulgar language, initiated sexually explicit conversations with male co-workers, asked others about sexual relationships, divulged voluntarily information about her own sexual relationships, pinched a male co-worker on the buttocks, participated in workplace “horseplay,” and ate lunch with male co-workers).

50. See, e.g., *Swentek v. USAir, Inc.*, 830 F.2d 552, 556 (4th Cir. 1987) (permitting the use of testimony that described plaintiff's prior sexual history in the workplace, which included sexual propositions of co-workers, to demonstrate welcomeness in a sexual harassment case). Cf. *Priest v. Rotary*, 98 F.R.D. 755, 758 (N.D. Cal. 1983) (holding that discovery into plaintiff's prior sexual conduct was inadmissible to demonstrate a propensity to engage in similar sexual conduct).

51. Federal Rule of Evidence 412 provides:

(a) Evidence [is] generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
 (2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

limits use of prior sexual history but permits broad discretion at the trial court level with respect to relevance and admissibility of this type of evidence.⁵² This rule facilitates participation in a legal proceeding by preventing public disclosure of details that may result in embarrassment and sexual stereotyping.⁵³

In a ruling on discovery, one court wrote: “Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case and cannot be obtained except through discovery.”⁵⁴ Thus, defense lawyers seeking to delve into a plaintiff’s prior sexual conduct will have to show both relevance and need before they will be allowed discovery on such matters. Conduct outside of the workplace or conduct not known to the other party at the time of the alleged harassment is generally not admissible.⁵⁵ On the other hand, evidence that pertains to a victim’s workplace behavior will generally be deemed relevant, and thus admissible, sometimes with a protective order or confidentiality agreement.⁵⁶ Once evidence of prior sexual history is admitted, it may be used to determine both what conduct the plaintiff found unwelcome and what conduct the alleged harasser believed was welcome.⁵⁷ Clearly, sufficient evidence of welcomeness will not be available in every case of sexual harassment. Thus, it may be necessary for em-

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim.

See, e.g., *Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab.*, 171 F.R.D. 179, 182 (D. Md. 1997) (stating that “[I]n determining whether the requested discovery in [a sexual harassment case] is appropriate, I must look to both FED. R. CIV. P. 26 and FED. R. EVID. 412”); *Sanchez v. Zabihi*, 166 F.R.D. 500, 501-502 (D.N.M. 1996) (holding that FED. R. EVID. 412 is significant in resolving discovery disputes in sexual harassment cases regarding the victims’ past behavior in the workplace); *Barta v. City and County of Honolulu*, 169 F.R.D. 132, 135 (D. Haw. 1996) (stating that in sexual harassment cases FED. R. EVID. 412 “inform[s] the proper scope of discovery”).

52. See *Barta*, 169 F.R.D. at 135.

53. FED. R. EVID. 412 ADVISORY COMMITTEE NOTES (amended 1994).

54. *Barta*, 169 F.R.D. at 135; see also *Mitchell v. Hutchings*, 116 F.R.D. 481, 484 (D. Utah 1987) (holding that evidence as to plaintiff’s sexual activity was not discoverable as defendant was not aware of it at the time of the alleged harassment).

55. See, e.g., *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 963 (8th Cir. 1993) (“A Title VII plaintiff’s behavior at work, if provocative and suggestive, may be relevant to the employer’s defense, but conduct in her private life unrelated to work is not [relevant]”); *Herchenroeder*, 171 F.R.D. at 182, n.11 (describing how holding in *Burns* relates to present facts); *Stalnaker v. Kmart Corp.*, 71 Fair Empl. Prac. Cas. (BNA) 705, 707 (D. Kan. 1996) (“[N]on-work place conduct [of the victim] will usually be irrelevant . . . Any sexual harassment by [the defendant] is relevant, however, whether of plaintiff or of others”); *Barta*, 169 F.R.D. at 136 (holding that defendants are not necessarily permitted by FED. R. CIV. P. 26(b)(1) to inquire into plaintiff’s sexual conduct “while she was off duty, outside the workplace and which did not involve conduct with the defendants”); *Sanchez*, 166 F.R.D. at 501 (holding that FED. R. EVID. 412 establishes a presumption of inadmissibility of evidence of past sexual behavior).

56. See *Herchenroeder*, 171 F.R.D. at 182 (protective order granted where plaintiff’s sexual conduct at work relevant to claim of sexual harassment).

57. See *Weiss v. Amoco Oil Co.*, 142 F.R.D. 311, 316 (S.D. Iowa 1992) (stating that discovery of plaintiff’s prior sexual conduct may explain the context of the defendant’s words and actions).

ployers to turn to another defense.

C. Conduct Was Not Sexual Conduct or Was Not Based On Sex

Under Title VII, a plaintiff alleging sexual harassment must prove “but for” causation; i.e., that the plaintiff would not have suffered sexual harassment had he or she been of a different gender.⁵⁸ According to EEOC Guidelines, a claim of sexual harassment requires that the unwelcome conduct include “sexual advances . . . and other verbal or physical conduct of a sexual nature.”⁵⁹ This requirement, however, is both under and over-inclusive: under-inclusive because it would not reach nonsexual gender based harassment, and over-inclusive because it would include all offensive sexual conduct, even if it is not gender based.⁶⁰ To clarify this potentially misleading language, the EEOC has stated:

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 patterned or pervasive” and directed at employees because of their sex.⁶¹

Thus, conduct need not be sexual to be considered sexual harassment. However, the less that the alleged conduct is actually sex based, the less likely a court is to interpret the harassment as “based on sex” and therefore in violation of Title VII.⁶²

Traditionally, courts have considered that sexual allegations in sexual harassment cases are inherently gender based, and therefore under the purview of Title VII.⁶³ However, as previously mentioned, plaintiffs in Title VII actions

58. See *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981). A distinction is made between harassment based on sex and harassment based on sexual orientation. As has already been stated, harassment based on sex is proven by showing “but for” causation, and is actionable under Title VII. *Id.* Harassment based on sexual orientation, however, is not actionable under Title VII because “but for” causation cannot be proven. See generally *Brennan v. Metropolitan Opera Ass’n*, 95 Civ. 2926, 1998 U.S. Dist. LEXIS 5562, at *40 (S.D.N.Y. Apr. 22, 1998) (where plaintiff could not substantiate her claims that defendant’s homosexual comments created a hostile work environment towards females because the lewd comments were not directed to females but to males).

59. 29 C.F.R. § 1604.11(a) (1998).

60. See LINDEMANN & KADUE, *supra* note 24, at 173.

61. EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT, 405:6692. See, e.g., *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (holding that gender based conduct sufficiently offensive, severe, and pervasive to maintain a claim need not be sexual in nature).

62. See, e.g., *Seligson v. Massachusetts Inst. of Tech.*, 677 F. Supp. 648 (D. Mass. 1987).

63. See, e.g., *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 806 n.2 (5th Cir. 1996) (stating that the fact that the defendant allegedly asked about the plaintiff’s sexual activity or made other offensive comments was “unquestionably based on gender”); *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994) (“[S]exual harassment is *ordinarily* based on sex. What else could it be based on?”); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (“The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual[ly] derogatory language is implicit, and thus should be recognized as a matter of course.”); *King v. Board of Regents*, 898 F.2d 533, 538 (7th Cir. 1990) (rejecting the male defendant’s argument that his sexual overtures to the female plaintiff were not gender based because they “were merely the result of his desire for [her] as an individual and, therefore, were not sex-based harass-

must prove “but for” causation. In *Henson v. City of Dundee*, the Eleventh Circuit stated:

In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion. It will therefore be a [simple] matter for the plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment.⁶⁴

Following that enunciation, other courts have relied on and applied the “but for” test of causation.⁶⁵ For instance, relying on a lack of “but for” causation, a court may find that an individual was not harassed because of sex, but because of sexual orientation, and therefore dismiss the Title VII claim.⁶⁶ In addition, some courts have held that sexual harassment was not actionable due to a lack of causation because it was attributable to other factors besides sex, including mental state,⁶⁷ sexual affiliations,⁶⁸ transsexualism,⁶⁹ and personal dislike.⁷⁰

One way to demonstrate “but for” causation is through comparison to other

ment”).

64. *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (citing *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981)).

65. See, e.g., *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995) (applying the “but for” test, the court stated that “[I]f the nature of an employee’s environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination. . . .”) (citations and quotations omitted); *Jones v. Flagship Int’l*, 793 F.2d 714, 719 (5th Cir. 1986), cert. denied, 479 U.S. 1065 (1987) (applying “but for sex” test); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990) (applying the “but for sex” test); *Stewart v. Weis Markets*, 890 F. Supp. 382, 390 (M.D. Pa. 1995) (applying the “but for sex” test), *aff’d sub nom.*, *Stewart v. Botsford*, No. 95-7415 and 94-7435, 1996 U.S. App. LEXIS 14998 (3d Cir. May 7, 1996).

66. See, e.g., *Wehrle v. Office Depot*, 954 F. Supp. 234, 236 (W.D. Okla. 1996); *Johnson v. Community Nursing Servs.*, 932 F. Supp. 269, 273 (D. Utah 1996). Both cases cite the EEOC Compliance Manual, which interprets Title VII as not proscribing discrimination and harassment motivated by the plaintiff’s sexual orientation. 2 EEOC Compl. Man. (CCH) § 615.2. See, e.g., *Swage v. Inn Philadelphia*, No. 96-2380, 1996 WL 368316, at *3 (E.D. Pa. June 21, 1996) (holding that harassment by a homosexual against a homosexual may be based on sexual orientation); *Vandeventer v. Wabash Nat’l Corp.*, 887 F. Supp. 1178, 1180 (N.D. Ind. 1995) (holding, on reconsideration, that sexual harassment is only actionable because it is a form of gender discrimination; discrimination on the basis of sexual orientation is not actionable); *Shermer v. Illinois DOT*, 937 F. Supp. 781, 784 (C.D. Ill. 1996) (“[A]ll the evidence suggests [that] Plaintiff was harassed not because of his sexual gender but because of his sexual orientation.”).

67. See, e.g., *Galloway v. G.M. Servs. Parts Operations*, 78 F.3d 1164, 1167-68 (7th Cir. 1996) (finding no merit in sexual harassment claim based on co-worker’s comments that plaintiff was a “sick bitch”).

68. See, e.g., *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306-07 (2d Cir. 1986) (holding that males were not prejudiced because of sex but because of their supervisor’s preference for someone with whom he had a relationship and that “[T]he proscribed differentiation under Title VII . . . must be a distinction based on a person’s sex, not on his or her sexual affiliations.”), cert. denied, 484 U.S. 825 (1987).

69. See, e.g., *Blackwell v. United States Dep’t of Treasury*, 830 F.2d 1183 (D.C. Cir. 1987) (holding failure to hire a transvestite is not actionable under Rehabilitation Act); *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470, 476-77 (Iowa 1983) (holding that transvestitism is not actionable under state human rights statute).

70. See, e.g., *Johnson v. Hondo, Inc.*, 940 F. Supp. 1403, 1411 (E.D. Wis. 1996) (“[P]ersonality conflicts between employees are not the business of the federal courts.”), *aff’d*, 125 F.3d 408 (7th Cir. 1997).

employees who are not in the protected class but who are similarly situated.⁷¹ A plaintiff may be able to establish an inference of discrimination in a termination or other discipline case by establishing that similarly situated individuals not in the protected class were treated differently.⁷² To sustain a claim on this basis, plaintiffs must do more than rely on conclusory statements because “sweeping allegations unsupported by admissible evidence do not raise a genuine issue of material fact.”⁷³ Even if the conduct is sexual in nature, where a plaintiff cannot prove “but for” causation, an employer should be able to prevail in a sexual harassment case.

D. First Amendment

The First Amendment provides another theoretical defense for employers. Using this defense, a defendant would argue that his allegedly harassing speech is not punishable because of his First Amendment right to free expression. Because sexual harassment claims are often based on verbal or expressive conduct, First Amendment rights frequently come into play.⁷⁴ The tension arises between the right to be free from gender-based discrimination in the workplace, and the right of free expression that exists in the workplace, as elsewhere.⁷⁵ In short, workplace expression that is protected speech must be sifted out from workplace expression that is prohibited harassment.⁷⁶

The First Amendment is relevant to both claims of quid pro quo harassment and hostile work environment harassment, as expression is central to both forms of sexual harassment. In quid pro quo claims expression takes the form of demands for sexual favors. In contrast, the expression in a hostile work environment is the conduct itself.⁷⁷ In quid pro quo cases, First Amendment tensions are less prevalent, however, because the First Amendment generally does not protect threats or extortion.⁷⁸ Thus, to the extent that courts recognize the First

71. See *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997). The Second Circuit has held, “[T]o be ‘similarly situated,’ the individuals with whom [plaintiff] attempts to compare herself must be similarly situated in all material respects.” *Id.* at 64 (citation omitted).

72. See *id.* at 64 (finding a lack of causation given that the claims of male employees who alleged violations of a “no fraternization” policy were treated no differently than those of the plaintiff).

73. *Id.* at 65.

74. Although the First Amendment directly constrains only government actions, and not those of private sector employers, a private employer is considered to act as a government agent when he restricts employees’ speech to comply with government mandates such as Title VII and the EEOC Regulations. See Nadine Strossen, *The Kenneth M. Piper Lecture: The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 707-708 (1995).

75. *Id.* at 701-702. See generally Nadine Strossen, *The American Civil Liberties Union and Women’s Rights*, 66 N.Y.U. L. REV. 1940 (1991) (discussing the ACLU’s history of working in support of women’s rights, including its Women’s Rights Project and Reproductive Freedom Project).

76. See Strossen, *supra* note 74, at 702-703.

77. See LINDEMANN & KADUE, *supra* note 24, at 592; *id.* at 704.

78. See LINDEMANN & KADUE, *supra* note 24, at 593. See also *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 597 n.6 (5th Cir. 1995), *cert. denied*, 516 U.S. 974 (1995) (clarifying that in raising the First Amendment issue in the sexual harassment context, the court “[did] not mean that sexual propositions, quid pro quo overtures, discriminatory employment actions against women or ‘fighting words’ involve the First Amendment”).

Amendment as a valid defense, it will usually only be available in the context of a hostile environment claim so that words or conduct that are protected outside the workplace setting may remain protected even if they create a hostile environment.⁷⁹

In practice, however, the defense is seldom used.⁸⁰ The 1991 federal district court decision, *Robinson v. Jacksonville Shipyards*, was the first reported Title VII case in which a First Amendment defense was asserted and ruled upon.⁸¹ Although the defendants did not expressly articulate a First Amendment defense, they explained that their failure to respond to the plaintiff's complaints of sexual harassment resulted from their belief that the plaintiff's co-workers had constitutional rights to behave in the manner that they did.⁸²

In finding that "[sexually explicit] pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment,"⁸³ the court categorized the restriction of such expression as "nothing more than a time, place, and manner regulation of speech."⁸⁴ The court also found that the governmental interest in "cleansing the workplace of impediments to the equality of women" was a compelling interest that permitted regulation of such workplace expression, and that the regulation was narrowly drawn to serve that interest.⁸⁵

Although courts since *Robinson* have frequently acknowledged that First Amendment issues are likely to arise in cases involving sexual harassment, they have seldom addressed the validity of this defense.⁸⁶ Nevertheless, a few cases

79. See Strossen, *supra* note 74, at 705 n.15 (citing KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH*, 80 (1995)). See also Note, *Aileen v. Kent, First Amendment Defense to Hostile Environment Sexual Harassment: Does Discriminatory Conduct Deserve Constitutional Protection?*, 23 HOFSTRA L. REV. 513, 532 (1994) ("[T]he use of the First Amendment to protect sexual harassment perpetrators will have a negative impact on the victims of sexual harassment and the workforce in general.").

80. See Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789, 792-793 (1995) (reiterating Judge Kozinski's observation that the First Amendment defense in sexual harassment cases is rarely raised).

81. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1534-1537 (M.D. Fla. 1991); see LINDEMANN & KADUE, *supra* note 24, at 593 (noting that in an earlier decision, a free speech defense had been raised *sua sponte* by the court (citing *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419 (E.D. Mich. 1984))).

82. See *Robinson*, 760 F. Supp. at 1515 (employer did not regulate employees' practice of hanging pictures of nude and partially nude women because of his belief that the employees had "constitutional rights" to post such pictures).

83. *Id.* at 1535 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("Potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.")).

84. *Id.*

85. *Id.* at 1536 (citing *United States v. Paradise*, 480 U.S. 149, 171-85 (1987) ("performing similar analysis for race-conscious remedy to race discrimination")).

86. See, e.g., *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995) (stating that Supreme Court precedent has not conclusively resolved the First Amendment question, but finding it unnecessary on the facts of the case to explore that question further); *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 431-33 (E.D. Mich. 1984) (declining to address the First Amendment issue after finding the conduct alleged insufficient in itself to constitute a finding of hostile environment), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

have explored the tension between First Amendment rights and the prohibition of sexual harassment. One such case is *Cohen v. San Bernardino Valley College*, in which the Ninth Circuit rejected a college student's allegation that her teacher's unorthodox methods amounted to sexual harassment.⁸⁷ Although the court touched on the availability of a First Amendment defense, it declined to define the scope of the First Amendment's protection of a college professor's classroom speech.⁸⁸

A California district court, however, did address a First Amendment argument directly in *Johnson v. County of Los Angeles Fire Dept.*⁸⁹ This district court found that a fire department's sexual harassment policy, prohibiting the private reading of Playboy magazine at the station was in violation of the First Amendment.⁹⁰ It found that the prohibition was content-based and that it impermissibly restricted the free expression of the firefighters.⁹¹

In contrast, in *Jenson v. Eveleth Taconite Co.*, a Minnesota district court wrote that "Title VII may legitimately proscribe conduct, including undirected expressions of gender intolerance, which create an offensive working environment," and that the First Amendment is not violated simply because expression is "swept up" in this proscription.⁹²

In support of a First Amendment defense to sexual harassment claims, it may be argued that outside the workplace comparable speech has been found to be entitled to protection.⁹³ As the ACLU has suggested, all employees should have free expression in the workplace "as long as that expression does not substantially interfere with workplace operations."⁹⁴ Whether verbal sexual harassment "substantially interferes" with the working conditions of the targeted employee would probably have to be decided on a case by case basis.

Apart from arguing substantial interference, an employee could also argue that (i) the use of words in connection with otherwise actionable conduct does not immunize such conduct from appropriate regulation, and (ii) employees in the workplace are in fact a captive audience, with no choice but to be present and a part of a generally hierarchical structure, which enables a supervisor to force them to listen to harassing words while sitting 'captive' at their desks or while 'trapped' in the supervisor's office or any other isolated business setting.⁹⁵

In response to the targeted employee's 'captive audience' contention, an argument can also be made on behalf of the employer that the workplace is not a captive audience because the speaker is no more free to go elsewhere than is the

87. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 972-73 (9th Cir. 1996), (finding the college's sexual harassment policy to be unconstitutionally vague as applied to the defendant), *cert. denied, sub nom.* *Beeman v. Cohen* 117 S. Ct. 1290 (1997). See also JANA HOWARD CAREY, AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS 61-62 (1997).

88. See CAREY, *supra* note 87, at 62 (citing *Cohen*, 92 F.3d at 971).

89. *Johnson v. County of L.A. Fire Dept.*, 865 F. Supp. 1430, 1442 (C.D. Cal. 1994).

90. See *id.* at 1442.

91. See *id.*

92. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (D. Minn. 1993) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992)).

93. See Strossen, *supra* note 74, at 708.

94. *Id.* at 707 (citing ACLU POLICY GUIDE, at Policy No. 53).

95. See *id.* at 705-707.

audience, and that selective viewpoint restriction is unconstitutional.⁹⁶ Further, one might argue that unless it constitutes intentional incitement to imminent illegal discrimination or violence, speech may not be suppressed simply because it conveys ideas inconsistent with gender equality.⁹⁷

Despite the lack of clarity and guidance regarding the First Amendment defense in the sexual harassment context, the Supreme Court has yet to come out with a definitive stance on the validity of the First Amendment as a defense to sexual harassment claims, and there is little guidance elsewhere to indicate whether such a defense is valid.⁹⁸ As one commentator has suggested, the differentiation between protected expression and illegal harassment may in the end have to be made on a case by case basis.⁹⁹

E. Equal Opportunity Harasser and the Bisexual Harasser

A final defense that is available to employers involves the situation where the alleged harasser is accused of harassing members of both sexes. The harasser in this case has been labeled both the bisexual harasser and the equal opportunity harasser. Under one scenario, a bisexual defendant is accused of sexually harassing members of both sexes, thus giving rise to the bisexual harasser defense.¹⁰⁰ Similarly, heterosexual or homosexual defendants accused of sexually harassing members of both sexes may attempt to use the equal opportunity defense.¹⁰¹ Regardless of the label used, the defense is based on the requirement that for an employer or individual to be held liable for sexual harassment, the offensive conduct, by definition, must occur “because of sex” under Title VII of the Civil Rights Act of 1964.¹⁰²

Thus, an employer may be able to claim that sexual harassment of an employee was not “because of sex” if an alleged harasser is bisexual.¹⁰³ However, a supervisor’s bisexuality is not sufficient in and of itself to preclude liability for sexual harassment; the supervisor must actually harass both men and women.¹⁰⁴

96. See *id.* at 709.

97. See *id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

98. See *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 597 (5th Cir. 1995) (stating that the Supreme Court has not conclusively resolved the First Amendment question).

99. See *Strossen*, *supra* note 74, at 715-17.

100. See generally Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII*, 27 RUTGERS L. J. 383, 407 (1996) (defining an equal opportunity harasser as a supervisor who creates a hostile environment for employees of both sexes, and defining a bisexual harasser as a supervisor who engages in quid pro quo sexual harassment against employees of both sexes.).

101. See *Holman v. State of Indiana*, 24 F. Supp. 2d 909, 915 (1998) (holding that the “equal opportunity harasser escapes the purview of Title VII liability”).

102. 42 U.S.C. § 2000e-2(a)(1) (1994).

103. For a discussion of the evolution of the bisexual defense, see generally Sandra Levitsky, *Footnote 55: Closing the “Bisexual Defense” Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013 (1996). See also Brief of Amicus Curiae Texas Ass’n of Bus. & Chambers of Commerce in Support of Respondent, 1997 WL 673838, at *5, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (No. 96-568) (arguing that recognizing same-sex harassment claims would encourage all alleged harassers to claim that they are bisexual).

104. See Michael D. Vhay, Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment Law*, 55 U. CHI. L. REV. 328, 348 nn.85-86 (1988) (arguing that if a bisexual har-

Similarly, in the case of 'equal opportunity harassers,' where members of both sexes are harassed, an employer may be able to claim that the alleged sexual harassment was not "because of sex."¹⁰⁵ In either case, liability may be avoided because victims were not singled out for harassment due to their sex.¹⁰⁶ Most courts have determined that such harassment is not actionable under Title VII.¹⁰⁷

For example, in *Barnes v. Costle*, Judge Robinson discussed the possibility of the bisexual defense theory, while addressing the feasibility of a claim under Title VII for same sex harassment:

These situations . . . are to be distinguished from a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.¹⁰⁸

Due to a technicality in the wording of Title VII and an underlying philosophy that emphasizes formal gender equality,¹⁰⁹ rather than the actual detriments caused by harassment in the workplace, sexual misconduct that would otherwise constitute harassment is not within the scope of the statutory prohibition because everyone is subjected to similar treatment, regardless of gender.¹¹⁰

asser targets both sexes, he or she may be able to avoid liability under an orientation analysis, but would be held liable if gender stereotypes were a "but for" cause of the harassment).

105. See Levitsky, *supra* note 103, at 1026-1030. See, e.g., *Cabaniss v. Coosa Valley Med. Ctr.*, No. CV 93-PT-2710-E, 1995 WL 241937, at *26-28 (N.D. Ala. Mar. 20, 1995) (holding that the plaintiff did not state a claim for sexual harassment because not only was there was no evidence that the medical center knew of pervasive gender-based mistreatment, but the harasser had treated men and women equally); *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (using the term "equal-opportunity" harasser for one whose inappropriate comments were directed at men and women) (citation omitted).

106. *Compare Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (stating that the essence of a disparate treatment claim presented under Title VII is that the plaintiff is intentionally singled out for adverse treatment on the bases of a prohibited characteristic); *and Bundy v. Jackson*, 641 F.2d 934, 942 & n.7 (D.C. Cir. 1981) (holding that a plaintiff in a sexual harassment case filed under Title VII must demonstrate that he or she would not have been subjected to harassment but for the fact of his or her sex and that "[o]nly by a reductio ad absurdum could we imagine a case of harassment that is not sex discrimination where a bisexual supervisor harasses men and women alike."); *and EEOC v. Walden Book Co.*, 885 F. Supp. 1100, 1103-04 (M.D. Tenn. 1995) ("When a homosexual supervisor is making offensive sexual advances to a subordinate of the same sex, and not doing so to employees of the opposite sex, it absolutely is a situation where but for the subordinate's sex, he would not be subjected to that treatment."), *with Demele v. Belle of Orleans*, 1997 U.S. Dist. LEXIS 10728, at *17 (E.D. La. July 21, 1997) ("Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based on sex.") (citing *Jones v. Flagship Int'l*, 793 F.2d 714, 720 n.5 (5th Cir. 1996)), *and Ryczek v. Guest Servs., Inc.* 877 F. Supp. 754, 761 (D.D.C. 1995) (stating that the D.C. Circuit did not recognize a cause of action for harassment under Title VII when the supervisor is bisexual).

107. See Levitsky, *supra* note 103 and accompanying text. See also *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (holding that one who commits equal opportunity harassment is not violating Title VII's prohibition against gender discrimination), *cert. denied*, 481 U.S. 1041 (1987).

108. *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

109. See Levitsky, *supra* note 103, at 1028 ("Because Title VII is premised on an ideal of formal equality that defines the discrimination as the act of treating men and women differently who are actually similarly situated, equal opportunity harassment is not sex discrimination.").

110. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring)

Though not directly addressing the bisexual defense, the Supreme Court enunciated its adherence to the “because of sex” requirement in *Oncale v. Sundowner Offshore Services, Inc.*¹¹¹ In *Oncale*, the Court held that same sex sexual harassment is actionable under Title VII even if the harasser’s motivation was not sexual desire, so long as the plaintiff can prove that the harassment was because of the victim’s sex.¹¹² The Court stated that “Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at ‘discrimin[ation] . . . because of . . . sex.’”¹¹³ Additionally the Court accepted Justice Ginsburg’s language from *Harris v. Forklift System’s Inc.*, stating that “[t]he critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹¹⁴

The Court’s language in *Oncale* provides at least tangential support for the equal opportunity harasser defense. If employees of both sexes are targeted by a harasser, it can be argued that it is not “because of sex.”

III. UNIQUE EMPLOYER DEFENSES

‘Unique employer defenses’ are those defenses that refute specific elements of the quid pro quo or hostile work environment tests. Defenses to a claim of quid pro quo harassment include that (i) no adverse action was taken, or (ii) there was a business justification for any action taken. Defenses unique to a hostile work environment claim include that (i) the alleged conduct was not severe or pervasive, (ii) the conduct was not offensive to a reasonable person, (iii) the conduct was customary in the prevailing work environment, and/or (iv) prompt and effective remedial action was taken.

A. Quid Pro Quo

1. No Adverse Action

Until recently, to establish quid pro quo sexual harassment under Title VII a plaintiff had to demonstrate that she suffered a loss of tangible employment benefits or that her employment was tangibly affected, such as through dis-

(“[A] substantive violation of [Title VII] only occurs when consideration of an illegitimate criterion is the ‘but-for’ cause of an adverse employment action.”); *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 105 (2d Cir. 1988) (holding that a supervisor is not liable for sexual harassment because, among other reasons, even though he displayed his temper to his employees, he did so discriminately), *cert. denied*, 488 U.S. 891 (1988); *Hill v. K-Mart Corp.*, 699 F.2d 776 (5th Cir. 1983) (stating that supervisor treated male and female subordinates with equal indifference); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (holding that there is no claim for sexual harassment where conduct is equally offensive to both male and female employees); *McCoy v. Johnson Controls World Servs.*, 878 F. Supp. 229, 232 (S.D. Ga. 1995) (holding that plaintiff must demonstrate her harassment was based upon sex by establishing a but-for connection between her sex and the harassment and that male employees were not treated similarly).

111. 118 S. Ct. 998, 1003 (1998) (holding that same-sex sexual harassment is within the coverage of Title VII).

112. *Id.* at 1002.

113. *Id.*

114. *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

charge, demotion, withholding of favorable employment actions, or other disciplinary action.¹¹⁵ It was usually insufficient to merely show threatened job detriment together with evidence that the plaintiff refused to submit to the unwelcome advances to avoid the adverse consequence.¹¹⁶ Following the recent Supreme Court decisions of *Burlington Industries, Inc. v. Ellerth*¹¹⁷ and *Faragher v. City of Boca Raton*,¹¹⁸ this once prevalent defense that the victim was not subject to adverse consequences as a result of refusing to submit to unwelcome sexual advances has been neutralized.¹¹⁹

In *Ellerth*, the Court held that an employee who suffers no adverse job consequences can recover against his or her employer.¹²⁰ Although it is no longer necessary for a plaintiff to demonstrate that she suffered an adverse employment action to successfully hold her employer liable for sexual harassment in the workplace, an affirmative defense may be available to the employer if no tangible employment action was taken.¹²¹ Thus, although the inquiry into whether the plaintiff suffered a tangible job detriment is no longer pivotal, it is still relevant.

2. A Business Justification Existed for the Employment Action

When there is an adverse tangible job action, an employer may rebut a prima facie case of discrimination by showing a valid business reason for the adverse employment action.¹²² In fact, the Second Circuit has admonished district courts that they should “not sit as a super-personnel department that reexamines an entity’s business decisions.”¹²³ The Second Circuit stated in another case that “evidence that an employer made a poor business judgment in discharging an employee generally is insufficient to establish a genuine issue of fact as to the credibility of the employer’s reasons.”¹²⁴ Once the employer meets its

115. See, e.g., *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456-57 (7th Cir. 1994) (finding no adverse action when employee was terminated after turning down offer of lateral transfer with same pay and benefits); *Crady v. Liberty Nat’l Bank & Trust Co.*, 993 F.2d 136 (7th Cir. 1993) (“[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities.”).

116. See, e.g., *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995), cert. denied, 516 U.S. 1011 (1995) (“[I]t takes more than saber rattling alone to impose quid pro quo liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances.”).

117. 118 S. Ct. 2257 (1998).

118. 118 S. Ct. 2275 (1998).

119. See *Ellerth*, 118 S. Ct. at 2264 (“The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.”). The Supreme Court’s determination that the labels of hostile work environment harassment and quid pro quo harassment are relatively unimportant has not been followed by lower courts that continue to label and analyze sexual harassment under separate categories. See, e.g., *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757 (8th Cir. 1998); *Schmitz v. ING Sec., Futures & Options, Inc.*, 10 F. Supp. 2d 982 (N.D. Ill. 1998); *Alverio v. Sam’s Warehouse Club*, 9 F. Supp. 2d 955 (N.D. Ill. 1998).

120. See *Ellerth*, 118 S. Ct. at 2259; see also *Faragher*, 118 S. Ct. at 2278-79.

121. See *Ellerth*, 118 S. Ct. at 2270.

122. See *Scaria v. Rubin*, 117 F.3d 652, 654 (2d Cir. 1997).

123. *Id.* at 655 (quoting *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), cert. denied, 479 U.S. 1066 (1987)).

124. *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988) (citation omitted).

burden of articulating a legitimate, non-discriminatory reason for the challenged employment action, the burden shifts to the plaintiff, who must demonstrate that the proffered reason was a pretext for discrimination.¹²⁵ Accordingly, “to survive a motion for summary judgment, plaintiff must put forth adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not the employee’s sex . . . was the real reason for the discharge [or discipline].”¹²⁶

Examples of legitimate business reasons include: poor work performance,¹²⁷ tardiness¹²⁸ or absenteeism,¹²⁹ lack of qualifications,¹³⁰ failure to follow company policy,¹³¹ employee’s misconduct,¹³² and lack of work.¹³³ It is possible, however,

125. See *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 130 (2d Cir. 1996) (citation omitted), *cert. denied*, 117 S. Ct. 1879 (1997).

126. *Id.* at 132. See also *Rodriguez v. Canyon Club*, No. 95 Civ. 6381, 1997 WL 297056, at *1 (S.D.N.Y. June 4, 1997) (granting employer’s summary judgment motion upon finding that plaintiff failed to offer “actual, specific evidence . . . to prove that defendant’s proffered reason for the discharge is a pretext for illegal discrimination”).

127. See, e.g., *Diggs v. Campbell*, 54 Fair Empl. Prac. Cas. (BNA) 773, 774 (D.D.C. 1990) (granting summary judgment for employer upon demonstration that plaintiff was terminated due to “erratic” performance, removal of corporate materials from premises, and unexplained absences); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F. Supp. 294, 304 (S.D.N.Y. 1987) (granting summary judgment for employer where plaintiff’s poor attitude and substandard work, including acceptance of a non-certified, unapproved check that bounced, were legitimate, nondiscriminatory reasons for firing plaintiff); *Ramsey v. Olin Corp.*, 83 Civ. 1731 (RWS), 1984 U.S. Dist. LEXIS 23156, at *6 (S.D.N.Y. Oct. 1, 1984) (employer successfully demonstrated plaintiff’s failure to keep up with orders, persistent errors, poor attitude, and desire to transfer).

128. See, e.g., *Sheekey v. Nelson*, No. 82-2085, 1986 U.S. Dist. LEXIS 25964, at *14 (D.N.J. May 2, 1986) (finding that plaintiff demonstrated a “horrendous record of absences, tardiness and improper procedures in shift-switching”).

129. See, e.g., *Torriero v. Olin Corp.*, 684 F. Supp. 1165, 1171 (S.D.N.Y. 1988) (holding that termination of employee with many absences was lawful as it burdened other employees); *Hosemann v. Technical Materials, Inc.*, 554 F. Supp. 659, 667 (D.R.I. 1982) (holding that termination was reasonable by employer who held open plaintiff’s position for five weeks and was unable to ascertain when she would return from disability leave).

130. See, e.g., *Freedman v. American Standard, Inc.*, 41 Fair Empl. Prac. Cas. (BNA) 471, 476 (D.N.J. 1986) (holding that plaintiff was discharged not because of sexual harassment, but because of her inability to pass tests necessary for her position as a pilot), *aff’d*, 833 F.2d 304 (3d Cir. 1987); *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 808 (D.C. Cir. 1984) (holding that plaintiff was properly terminated, as she lacked both experience and qualifications essential to her position).

131. See, e.g., *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 182 (3d Cir. 1985) (holding that plaintiff was properly reprimanded for violating employer’s policy with respect to dress in the workplace, workload required of employees, and policy about socializing with customers), *cert. denied*, 475 U.S. 1035 (1986); *Christoforou*, 668 F. Supp. at 302 (holding that reprimand of employee was proper, as she violated the company policy on working on weekends); *Bookman v. Shakespeare Co.*, 442 S.E. 2d 183, 184 (S.C. Ct. App. 1994) (finding that employer properly terminated an employee for violating company policy regarding fighting in the workplace, despite her claim that the incident was the result of sexual harassment that was improperly investigated by the employer).

132. See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 615 (6th Cir. 1986) (holding that plaintiff was properly discharged for rudeness and failure to follow employer policies), *cert. denied*, 481 U.S. 1041 (1987); *Cooper v. Housing Auth.*, 67 Fair. Empl. Prac. Cas. (BNA) 617, 619 (N.D. Ala. 1995) (holding that termination of employee alleging sexual harassment was lawful as she admitted insubordination and the record supported numerous incidents of misconduct), *aff’d in part, remanded in part*, 79 F.3d 1160 (11th Cir. 1996), *appeal after remand*, 120 F.3d 275 (11th Cir. 1997); *Jones v. Lyng*, 669 F. Supp. 1108, 1122 (D.D.C. 1986) (holding that employee alleging transfer due to his disclosure of sexual harassment of his female co-workers was transferred due to disloyalty, insubordination,

that a court may determine that an otherwise legitimate business reason may be pretextual if a decline in performance or failure to maintain other company standards is the result of harassment.¹³⁴ Additionally, the plaintiff may demonstrate pretext with evidence that other employees with similar work records were not subjected to the same adverse employment actions or that the company's disciplinary policy was not followed.¹³⁵ As a result, employers should document charges of inappropriate behavior that reflect negatively on the employee's performance and any subsequent warnings given to the employee.¹³⁶

B. Hostile Work Environment

1. The Conduct is Not Severe or Pervasive Enough to Constitute a Hostile Work Environment

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of gender with respect to the compensation, terms, conditions or privileges of employment.¹³⁷ The Supreme Court stated in *Meritor Savings Bank*

and inadequate performance on the job); *Grier v. Casey*, 643 F. Supp. 298, 309 (W.D.N.C. 1986) (holding that it was proper for employer to terminate employee for lying: "[P]laintiff has from the time she falsified her application not been honest with her employer."); *Burns v. Terre Haute Reg'l Hosp.*, 581 F. Supp. 1301, 1308 (S.D. Ind. 1983) (holding that termination for poor attitude was lawful). *But see EEOC v. FLC & Bros. Rebel, Inc.*, 663 F. Supp. 864, 869 (W.D. Va. 1987) (holding that personality conflict based on idea of appropriate behavior for women is not adequate as a business justification for termination, and that employer's justification of "unladylike" language used by plaintiff is not appropriate as men and women are held to different standards) *aff'd*, 846 F.2d 70 (4th Cir. 1988).

133. *See, e.g., Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537, 544 (M.D. Ala. 1983) (permitting employer to use lack of work defense, but then finding it pretextual as the employer hired a part-time employee to fill plaintiff's position during decline in business period), *aff'd*, 749 F.2d 732 (11th Cir. 1984).

134. *See, e.g., Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988) (finding that sexual harassment "affected the motivation and work performance of those who found such conduct repugnant and offensive" resulting in plaintiff's alleged work related deficiencies); *Delgado v. Lehman*, 665 F. Supp. 460, 468 (E.D. Va. 1987) (finding that plaintiff's supervisor interfered with the execution of her duties and, therefore, contributed to her declining work performance); *Lamb v. Drilco, Div. of Smith Int'l*, 32 Fair Empl. Prac. Cas. (BNA) 105, 107 (S.D. Tex. 1983) (holding that although plaintiff was discharged following mistakes in measurements and paperwork and demonstrated poor work performance, her termination was pretextual as her decline in productivity was the result of sexual harassment at work).

135. *See, e.g., Jenkins v. Orkin Exterminating Co.*, 646 F. Supp. 1274, 1278 (E.D. Tex. 1986) (holding that pretext was demonstrated where plaintiff was given one corrective interview prior to discharge while the policy required a verbal warning, written warning, and three day suspension prior to termination); *Macey v. World Airways, Inc.*, 14 Fair Empl. Prac. Cas. (BNA) 1426, 1430 (N.D. Cal. 1977) (holding employer liable when supervisor admitted that individuals with a similar number of absences to the plaintiff were not terminated). *But see Juarez v. Ameritech Mobile Communications, Inc.*, 746 F. Supp. 798, 805 (N.D. Ill. 1990) (stating, "[A]lthough reprehensible, sexual harassment does not entitle the victim to [a] lifetime tenure at her place of employment."), *aff'd*, 957 F.2d 317 (7th Cir. 1992).

136. *See Meyers v. I.T.T. Diversified Credit Corp.*, 527 F. Supp. 1064, 1069 (E.D. Mo. 1981) (finding for plaintiff as her excessive absenteeism and disregard of duties were not documented by employer).

137. 42 U.S.C. § 2000e-2(a)(1) (1994).

v. Vinson, and later reaffirmed in *Harris v. Forklift Systems*¹³⁸ and *Faragher v. Boca Raton*¹³⁹, that not all offensive workplace conduct that may be described as “harassment” affects a “term, condition or privilege” of employment within the meaning of Title VII.¹⁴⁰ For sexual harassment to be actionable, the environment created must be “permeated with ‘discriminatory intimidation, ridicule, and insult,’ . . . that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment.’”¹⁴¹ Although a single egregious act can occasionally be enough to create a hostile work environment, repeated incidents create a stronger claim, with “the strength of the claim depending on the number of incidents and the intensity of each incident.”¹⁴² A recurring point in opinions defining a hostile work environment is that “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”¹⁴³ In addition, an environment must be hostile and abusive to both an objective person and to the actual victim in order to be actionable under Title VII.¹⁴⁴ In other words, if the victim finds the environment hostile and abusive but an objective and reasonable person would not, the conduct is not actionable under Title VII.

To determine whether an environment is hostile,¹⁴⁵ the Supreme Court in *Meritor*, quoting the EEOC Guidelines, recommended a “totality of the circumstances” test¹⁴⁶, as later expanded in *Harris v. Forklift Systems*.¹⁴⁷ As a result of

138. 510 U.S. 17.

139. 118 S. Ct. 2275.

140. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

141. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 65). The EEOC has a similarly disjunctive test: conduct creates a hostile environment when it is (1) severe enough to alter the complainant workplace experience, even though the conduct occurred only once or rarely, or (2) pervasive enough to alter the conditions of the workplace. EEOC Policy Guidelines on Sexual Harassment, 8 FEP Man. at 405:6689, 405:6690-91.

142. *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990).

143. *Faragher v. Boca Raton*, 118 S. Ct. 2275, 2283 (1998). See also *Shiflett v. Ge Fanuc Automation Corp.*, 1998 U.S. App. LEXIS 13186, at *11 (4th Cir. 1998) (holding that although remarks about plaintiff’s inattention and hearing problem may have been insensitive, they were not so pervasive or severe and mean that reasonable person would find the workplace abusive); *Turner v. Reynolds Ford, Inc.*, No. 97-6152, 1998 WL 234540, at *5 (10th Cir. May 11, 1998) (finding that atmosphere was not severe or pervasive when plaintiff complained that co-worker followed plaintiff around, tried to talk to her and exchanged harsh words with her).

144. See *Harris*, 510 U.S. at 21-22. See also *Cowan v. Prudential Ins. Co. of Am.*, 141 F.3d 751, 756 (7th Cir. 1998) (quoting *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989) (stating that conduct must “adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action . . .”).

145. See *Shiflett*, 1998 U.S. App. LEXIS 13186, at *10 (stating that the question of whether harassment is severe or pervasive enough is quintessentially a question of fact, but “[W]here the conduct is neither sufficiently severe nor pervasive to create an environment that a reasonable person would find hostile or abusive, summary judgment is appropriate.” (citing *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753 (4th Cir. 1996)).

146. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986).

147. Circumstances to be considered in determining whether an environment is hostile “may include frequency of discriminatory conduct, its severity, whether the conduct is humiliating or physically threatening or is merely offensive, and whether the conduct unreasonably interferes with employee’s work performance.” In addition, the effect of the employee’s psychological well-being is relevant in determining whether the victim actually found the work environment to be hostile and abusive. 510 U.S. at 22-33.

Harris, courts are instructed by the Supreme Court to evaluate the “frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”¹⁴⁸ The use of these standards prevents Title VII from evolving into a general civility code¹⁴⁹ and filters out all claims that do not involve extreme conduct that amounts to a change in the terms and conditions of the employment.¹⁵⁰

Using the totality of the circumstances standard, the federal circuits and district courts have developed the parameters of what constitutes severe or pervasive behavior, and typically use the severe or pervasive standard as a single measure.¹⁵¹ Although distinct elements, severity and pervasiveness must be considered in tandem; the more severe the incidents become, the less pervasive they need to be create a hostile environment.¹⁵² Harassing behavior, although offensive, is often held not severe or pervasive enough to be actionable under Title VII.¹⁵³

148. *Faragher*, 118 S. Ct. at 2283 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

149. Because Title VII is not a “general civility code”, it does not cover conduct that is merely tinged with offensive sexual connotation and ordinary tribulations of the workplace, such as occasional abusive language, gender-related jokes and teasing. *Id.* at 2283-84 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002 (1998)).

150. See *Oncale*, 118 S. Ct. at 1002.

151. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

152. See *id.*

153. “When 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.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986)). To determine if the alleged harassment is actionable under Title VII, courts analyze the frequency and the offensiveness of the allegedly sexually harassing comments and actions. See *Hadrosek v. Paging Network, Inc.*, No. 96-2453, 1998 U.S. App. LEXIS 13698, at *12 (4th Cir. June 26, 1998) (holding that sporadic comments and actions like superior’s chastising of plaintiff for leaving a baseball game early and telling plaintiff she should put on some makeup, and plaintiff hearing crude comments regarding women’s attractiveness were not sufficiently severe or pervasive to constitute Title VII sexual harassment); *Harrington v. Boyssville of Mich., Inc.*, No. 97-1862, 1998 U.S. App. Lexis 9796, at *12-14 (6th Cir. May 13, 1998) (finding supervisor’s reference to plaintiff as “dumb broad” and a “bitch” coupled with alleged denials and delays in plaintiff’s bathroom breaks is insufficiently severe or pervasive to create a hostile work environment); *Cowan v. Prudential Ins. Co.*, 141 F.3d 751, 757 (7th Cir. 1998) (taking all incidents together, like plaintiff’s receipt of the cold shoulder from co-workers, not inviting plaintiff to go fishing, sporadic derogatory name-calling not directed at plaintiff and occasional remarks about strip clubs, the atmosphere was still not severe or pervasive enough to create an objectively hostile work environment); *Clay v. California Empl. Dev. Dep’t*, No. 96-17247, 1997 U.S. App. LEXIS 30561 (9th Cir. Nov. 6, 1997) (touching plaintiff’s partially unbuttoned blouse and asking what she was wearing under the blouse is not so severe or pervasive that an objectively reasonable woman under the same circumstance would find the workplace hostile or abusive); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997) (finding that sexually suggestive comments about females generally, that were repeated with frequency and disruptive at weekly meetings, were merely offensive and were not pervasive or severe enough to create a hostile work environment), *cert. denied*, 118 S. Ct. 172 (1997); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (holding that there was no actionable harassment where plaintiff’s supervisor asked plaintiff out on dates, called her a “dumb blonde,” placed his hand on her shoulder several times, placed “I love you” signs in her work area, and attempted to kiss her on one or more occasions); *Jones v. Clinton*, 990 F. Supp. 657, 675-76 (E.D. Ark. 1998) (“boorish and offensive” behavior on one occasion does not con-

The Supreme Court recently noted in *Faragher* that it has followed the lead of earlier discriminatory harassment cases based on race and national origin in attempting to define the severity of the offensive conditions required to constitute actionable sexual discrimination under Title VII.¹⁵⁴ Courts have repeatedly held that with respect to verbal utterances, “[a] mere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII.”¹⁵⁵ It is theoretically possible that a single incident of sexual assault is severe enough to sufficiently alter the conditions of the victim’s employment; harassment need not rise to the level of battery or rape to be actionable.¹⁵⁶ Rather, the multiplicity of factors must be considered to determine if the harassing conduct is severe enough to have altered the complainant’s workplace experience.¹⁵⁷ To be deemed pervasive and therefore actionable, on the other hand, the allegedly harassing incidents must be repeated, continuous and concerted; isolated incidents¹⁵⁸ or occasional episodes will not merit relief.¹⁵⁹ Fleeting hostility or abusiveness does not affect the

stitute hostile environment where conduct plaintiff subjected to not frequent, severe or threatening); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F. Supp. 294, 303 (S.D.N.Y. 1987) (finding that plaintiff must allege more than relatively innocuous incidences of overbearing or provocative behavior for acts to be severe).

154. Discourtesy or rudeness should not be confused with racial harassment. See *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) (holding isolated instances, like nooses hanging over a black employee’s desk, were sufficiently severe to allow Title VII liability), *cert. denied*, 513 U.S. 1155 (1995). See also *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987) (determining that racially hostile work environment was not established when plaintiff alleged that supervisor berated him and used degrading terms and obscenities, as the incidents were episodic and were not sufficiently continuous).

155. *Harris*, 510 U.S. at 21. See also *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 435 (E.D. Mich. 1984) (finding no Title VII violation even though plaintiff worked with a very crude and vulgar person who made obscene comments about plaintiff and women generally), *aff’d*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

156. See *Meritor*, 477 U.S. at 68 (holding that where supervisor insisted that plaintiff have sex with him on work premises, followed plaintiff into ladies’ room, fondled her in public and actually raped her, court held actions were not only pervasive harassment, but also serious criminal conduct, clearly sufficient for a claim of hostile environment sexual harassment); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997) (determining that evidence that plaintiff was exposed to frequent and regular harassment by supervisor, had been hospitalized twice for a disputable reason and suffered depression because of the alleged harassment, could be found by a jury to be sufficiently severe or pervasive to meet the *Harris* standard); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (finding that when plaintiff was raped by two supervisors and one coworker after enduring eighteen months of verbal harassment, the “incident of sexual assault sufficiently alters the conditions of the victims’s employment and clearly creates an abusive work environment for purposes of Title VII liability”).

157. See *Harris*, 510 U.S. at 23.

158. “Isolated incident” is a phrase used throughout the sexual harassment analysis and case law and is usually used to convey that the act or harassment was not actionable under Title VII. However, “isolated incident” does not only mean one incident. Rather, it connotes “some number too low to impress the court.” Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 446, 499 n.331 (1997).

159. See *Tomka*, 66 F.3d at 1305 (holding that verbal harassment standing alone is not enough to create an abusive working environment; rather, incidents of harassment must occur in concert or with a regularity that can be reasonably termed pervasive); see also *Vigil v. City of Las Cruces*, No. 96-2059, 1997 U.S. App. LEXIS 11808, at *5 (10th Cir. May 20, 1997) (finding that plaintiff’s “single encounter with pornographic material left inside a folder by a previous worker and her supervisor’s

workplace environment enough to alter the conditions of the victims employment and merit Title VII liability.¹⁶⁰ While a plaintiff need not prove that the harassment persisted for an extended period of time, he or she must at least show a pattern of harassment for the acts to be pervasive.¹⁶¹ Pervasiveness is more likely to be found if the harassment is caused by more than one person¹⁶² and the effect of the harassing incidents is cumulative.¹⁶³ The requirement for repeated exposure varies inversely with the severity of the offensiveness of the incidents. The more severe the incidents become, the less pervasive they need to be to create a hostile work environment.¹⁶⁴ If the conduct is not unusually severe, the incidents must be repeated and continuous, not isolated acts or occa-

single attempt to give her pornographic software” do not rise to an abusive environment); *Barnes v. Montgomery County Bd. of Educ.*, No. 95-6121 1997 U.S. App. LEXIS 11539 (6th Cir. May 14, 1997) (holding that plaintiff’s allegations that supervisor made sexual advances towards her on three occasions were isolated occurrences that were not severe or pervasive enough to support claim of hostile work environment sexual harassment), *cert. denied*, 118 S. Ct. 626 (1997); *Lam v. Curators of the Univ. of Mo.*, 122 F.3d 654, 656 (8th Cir. 1997) (single exposure to a distasteful videotape is not severe or pervasive); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753 (4th Cir. 1996) (holding that temporally diffuse and ambiguous behavior, like positioning a magnifying glass over plaintiff’s “crotch,” flipping over a tie to see the label and staring at plaintiff in the bathroom, that was intermittent over a seven-year period was not sufficiently pervasive to create a sufficiently hostile environment), *cert. denied*, 117 S. Ct. 70 (1996); *DiCenso v. Cisneros*, 96 F.3d 1004, 1009 (7th Cir. 1996) (finding that one vague comment inviting plaintiff to exchange sex for rent, while caressing plaintiff’s arm and back, may be unwelcome but does not create an objectively hostile environment); *Harris v. Clyburn*, No. 94-1009, 1995 U.S. App. LEXIS 2819, at *8 (4th Cir. Feb. 3, 1995) (finding that occasional tickling, coupled with suspicions of superior’s sexual desires, may be uncomfortable or embarrassing to plaintiff, but does not qualify as “sufficiently severe or pervasive to alter the conditions of the [victim’s] employment and create an abusive working environment” (citation omitted)); *Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992) (“[I]ncidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief.”); *Clinton v. Jones*, 990 F. Supp. 657, 673 (E.D. Ark. 1998) (holding that one sexual advance was not so severe or pervasive to have altered the conditions of plaintiff’s employment).

160. See *supra* note 153 (citations omitted).

161. See *Sousa v. Bay Shore Dev. Corp.*, No. 93-8107-Civ-RYSKAMP, 1994 U.S. Dist. LEXIS 10984, at *15 (S.D. Fla. June 24, 1994) (holding that although a plaintiff need not show that the illegal conduct persisted for an extended period of time, she must at least demonstrate a pattern of sexual harassment to prove that it was pervasive).

162. See *Waltman v. International Paper Co.*, 875 F.2d 468, 471 (5th Cir. 1989) (holding that evidence that several different employees touched plaintiff in a sexual manner is enough to raise a triable issue of fact).

163. See *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 961 (8th Cir. 1993) (stating that courts must evaluate the totality of the employee’s experiences and not evaluate one incident at a time).

164. A single episode of harassment, if severe enough, can establish a hostile work environment. See *Hathaway v. Runyon*, 132 F.3d 1214, 1222-23 (8th Cir. 1997) (finding that being forced to work in close proximity to harasser’s sexual comments and physical advances was sufficiently severe and pervasive, even if harassment was not continuous); *Smith v. Pathmark Stores, Inc.*, No. 97-1561, 1998 U.S. Dist. LEXIS 8631, at *12 (E.D. Penn. June 1, 1998) (determining that supervisory comments that included “let’s get naked,” and “you need a man,” as well as touching of plaintiff’s buttocks that occurred in a two month span may arguably be characterized as frequent and establish a genuine issue of material fact as to whether there was a hostile work environment); *Crisonino v. New York City Hous. Auth.*, 985 F. Supp. 385, 389-90 (S.D.N.Y. 1997) (holding that a single incident of assault, including touch above plaintiff’s breast when assaulter pushed victim, and an earlier reference to plaintiff as a “dumb bitch,” may form the basis for a hostile work environment charge because the stray remark may link the plaintiff’s gender to the complained-of action).

sional episodes.¹⁶⁵ Thus, relatively isolated instances of non-severe misconduct will not support a hostile work environment claim.¹⁶⁶

In addition, harassing conduct can be severe or pervasive enough to create an unlawful hostile work environment even if it has no tangible effects on job performance or psychological well-being.¹⁶⁷ When a discriminatory abusive work environment does not seriously affect an employee's psychological well-being, it can still detract from "employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."¹⁶⁸ As long as the work environment "would reasonably be perceived, and is perceived, as hostile or abusive, there is no need [for the environment] to be psychologically injurious."¹⁶⁹ Thus, in order to determine whether conduct was sufficiently severe or pervasive, it is important to look at the situation from the perspective of a reasonable person.

2. Conduct Was Not Offensive to a Reasonable Person

The Supreme Court in *Harris* confirmed that to be actionable under Title VII, an environment must be both objectively and subjectively hostile or abusive: one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be hostile or abusive.¹⁷⁰ A plaintiff must overcome both hurdles to avoid rejection of her claims.¹⁷¹ The plaintiff loses if the conduct at issue, viewed objectively, fails to meet either the "severe or pervasive" test,¹⁷² or if he or she personally did not find the environment to be hostile or abusive.¹⁷³

Unfortunately, *Harris* did not resolve the significant issue of who is to be

165. See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (holding that requisite showing of severity varies inversely with the pervasiveness of the harassing conduct).

166. See *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 533-34 (7th Cir. 1993) (finding relatively limited instances of supervisor's uninvited and unwelcome advances, impatience, inaccessibility and teasing may be uncomfortable and offensive to plaintiff, but were not so severe or pervasive as to create an objectively hostile work environment).

167. See *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 22 (1993).

168. *Id.* (citation omitted).

169. *Saxton*, 10 F.3d at 533 (quoting *Harris*, 510 U.S. at 22).

170. See *Harris*, 510 U.S. at 21-22. See also *Torres v. Pisano*, 116 F.3d 625, 632 (2d Cir. 1997) (holding that if "harassment is of such a quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse, it is actionable under Title VII, so long as the employee subjectively experienced a hostile work environment"), *cert. denied*, 118 S. Ct. 563 (1997).

171. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990) (holding that "[T]he subjective factor is crucial because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief. The objective factor, however, is the more critical for it is here that the finder of fact must actually determine whether the work environment is sexually hostile. . . . The objective standard protects the employer from the 'hypersensitive' employee, but still serves the goal of equal opportunity by removing the walls of discrimination that deprive women of self-respecting employment.").

172. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (referring to the "idiosyncratic concerns of the rare hyper-sensitive employee").

173. See *Koster v. Chase Manhattan Bank*, 687 F. Supp. 848, 862 (S.D.N.Y. 1988) (requiring plaintiff must prove actual injury and offense); *Saxton*, 10 F.3d at 534 (holding the court should consider "not only the effect the discriminatory conduct actually had on the plaintiff, but also the impact it likely would have had on a reasonable employee in her position") (citing *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21-22 (1993)).

the arbiter of the objective standard, the reasonable person or the reasonable woman. In a leading Court of Appeals case, *Ellison v. Brady*, the Ninth Circuit held that it adopted the reasonable woman standard “primarily because . . . a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”¹⁷⁴ The Court in *Harris* used language that some perceived as rejecting the “reasonable woman” standard: “[c]onduct that is not severe or pervasive enough to create an *objectively* hostile or abusive work environment— an environment that a *reasonable person* would find hostile or abusive— is beyond Title VII’s purview.”¹⁷⁵ Alternatively, some courts have adopted a “reasonable person in [plaintiff]’s position” standard.¹⁷⁶ Although it is unclear what the proper objective perspective is, the Supreme Court emphasized again in *Faragher* that having the objective and subjective measures is critical to a hostile work environment analysis.¹⁷⁷

3. Prevailing Work Environment

Some courts have allowed employers to defend against hostile work environment harassment claims using a prevailing work environment or customary business practice defense.¹⁷⁸ This defense is frequently asserted to justify the use of vulgar language in the workplace.¹⁷⁹ At least one court, however, has determined that an assumption of the risk defense is not appropriate in precluding a finding of liability against an employer in a case alleging both sexual harassment and rape.¹⁸⁰

In the controversial case of *Rabidue v. Osceola Refining Company*, the court stated that

a proper assessment or evaluation of a [plaintiff’s] employment environment

174. 924 F.2d at 879.

175. *Harris*, 510 U.S. at 21.

176. See, e.g., *Ellison*, 924 F.2d at 879 (using a “reasonable woman” standard); *Andrews*, 895 F.2d at 1483 (incorporating an “objective factor” into the determination of whether a work environment is hostile); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (explaining that the person standing in the shoes of the employee is the “reasonable woman”); *Trotta v. Mobil Oil Corp.*, 788 F. Supp. 1336, 1350 n.1 (S.D.N.Y. 1992) (courts can incorporate gender differences into a reasonable person standard to avoid “trivializ[ing] the effects of sexual harassment upon a woman [and clinging] to ingrained notions of what male offenders may consider reasonable behavior”).

177. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998).

178. See, e.g., *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (to determine the viability of a sexual harassment claim, court should look at several objective and subjective factors, including prevailing work environment, i.e., “the lexicon of obscenity 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 upon voluntarily entering that environment”); *Blankenship v. Parke Care Ctrs., Inc.*, 913 F. Supp. 1045, 1051 (S.D. Ohio 1995) (holding that the atmosphere of workplace and plaintiff’s reasonable expectations regarding entering that workplace are two of several factors for the court to consider in evaluating hostile environment claim).

179. See, e.g., *Brown v. General Motors Corp.*, No. 88-0568-CV-W-9, 1991 U.S. Dist. LEXIS 14779, at *21 (W.D. Mo. Oct. 9, 1991) (“It appears that the use of profanity may have been a part of the work environment at the Leeds plant.”); *Halpert v. Wertheim & Co.*, No. 77 Civ. 6021, 1980 U.S. Dist. LEXIS 13298, at *6-7 (S.D.N.Y. Aug. 26, 1980) (“The language of this market place was coarse . . . referred to at the trial as “truck driver” language.”).

180. See *Perkins v. Spivey*, 911 F.2d 22, 31 (8th Cir. 1990), *sub nom.* *Perkins v. General Motors Corp.*, 449 U.S. 920 (1991).

that gives rise to a sexual harassment claim would invite consideration of such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her co-workers, and supervisors, the totality of the physical environment of plaintiff's work area, the lexicon of obscenity 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 upon voluntarily entering that environment.¹⁸¹

Citing to the opinion of the District Court, the Court of Appeals concluded that Title VII was not meant to alter work environments where "humor and language are rough hewn and vulgar" or "sexual conversations and girly magazines may abound."¹⁸² This conclusion of the court is buttressed by the language of the EEOC Guidelines, which emphasize that an evaluation of any environment must be based on the totality of the circumstances of each individual case.¹⁸³

This case has drawn criticism, with one commentator stating that the view taken by the court in *Rabidue* undermines the effectiveness of Title VII and "thwarts the ability of the statute to make workplaces more open to women: Any workplace that is currently obscene appears to have the right to stay that way, or at least no woman who chooses to work there with knowledge of the prevailing work environment has the right to complain about it."¹⁸⁴ The response by the EEOC was explicitly against the majority opinion of *Rabidue*. The EEOC Compliance manual states that:

In general, a woman does not forfeit her right to be free from sexual harassment by choosing to work in an environment that has traditionally included vulgar, anti-female language The Commission . . . agrees with the dissent in *Rabidue* that a woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment.¹⁸⁵

Thus, the EEOC outright rejects the prevailing work environment defense as a legitimate defense to a claim of sexual harassment. In addition, advocates of the defense assert that it should only be used in suits that arise against non-employees or where "sex appeal is a substantial part of [the plaintiff's] employer's business and of their job in particular."¹⁸⁶

During the 1993 sexual harassment suit against Hooters Restaurant, the viability of this defense also evoked substantial controversy.¹⁸⁷ Though some cases

181. *Rabidue*, 805 F.2d at 620.

182. *Id.* at 620-21 (stating that Title VII was not "designed to bring about a magical transformation in the social mores of American workers").

183. See 29 C.F.R. § 1604.11(b) (1997).

184. Kelly A. Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1135 (1995).

185. EEOC Compl. Man. (CCH) § 615, 3233 (1998).

186. Cahill, *supra* note 184, at 1138 (arguing that if this defense is not permitted, the risk of liability will prevent employers from promoting sex appeal in their business). She also argues that this limitation of the assumption of risk defense was suggested by the court in *Wilson v. Southwest Airlines Co.* *Id.* at 1139 (citing *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (narrowing the bona fide occupational qualification defense to situations in which sex appeal is the essence of the employer's business)).

187. See Cahill, *supra* note 184, at 1130-33 (arguing that waitress plaintiffs may have knowingly

have held that requiring female employees to wear provocative uniforms while at work could violate Title VII¹⁸⁸ and that employers may be held liable for harassment of employees by non-employees,¹⁸⁹ one author asserted that an employer may be able to escape liability through the affirmative defense of assumption of risk.¹⁹⁰ Assumption of risk has been explained in one employment case as

a phrase commonly used to describe a term or condition in the contract of employment . . . by which the employee agrees that certain dangers of injury, while he is engaged in the service for which he is hired, shall be at the risk of the employee. Assumption of risk generally bars recovery by an employee who knows of the danger in a situation but nevertheless voluntarily exposes himself to that danger.¹⁹¹

The assumption of the risk defense, like the prevailing work environment defense, is based on voluntariness, consent, and knowledge, similar to the application of the defense in the tort arena.¹⁹² For instance, in the *Hooters* case it seemed improbable that the waitresses were unaware of the nature of the restaurant when they applied for their positions and then began work.¹⁹³

Some courts have declined to accept the justification of prevailing work environment or customary business practice because of policy implications and the acknowledgment of "the unique effect of such language on the morale and self-esteem of women workers."¹⁹⁴ Despite this, use of this defense may not be completely eliminated as numerous other courts have acknowledged that "the presence of actionable sexual harassment would be different depending upon the personality of the plaintiff and the prevailing work environment and must be considered and evaluated upon an ad hoc basis."¹⁹⁵ This defense does have some advocates because it promotes the ability of women to make voluntary decisions and it allows women to choose to market their sexuality if they would

assumed the risk of verbal harassment by customers, but did not assume the risk of verbal or physical harassment by supervisors and fellow employees).

188. See, e.g., *EEOC v. Newtown Inn Assocs.*, 647 F. Supp. 957 (E.D. Va. 1986).

189. See, e.g., *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1028 (D. Nev. 1992).

190. See Cahill, *supra* note 184, at 1116.

191. *Perkins v. Spivey*, 911 F.2d 22, 31-32 (8th Cir. 1990).

192. See generally Cahill, *supra* note 184, at 1117-21.

193. See Cahill, *supra* note 184, at 1131 n.136 (stating that employees are required to sign a copy of Hooters' sexual harassment policy which states that "female sex appeal is an essential ingredient of the Hooters concept").

194. 1 ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE* 359 (2d ed. 1994). Cahill, in her article advocating use of the assumption of risk defense, acknowledges that "[a]ssumption of risk has fallen into disfavor and Title VII has flourished because of the beliefs that workers need the protection of the state and that the market operating alone does not sufficiently protect the interests of workers." Cahill, *supra* note 184, at 1121. She also notes the historical abuse of the assumption of risk defense, especially during the Industrial Revolution. *Id.*

195. *Eiland v. Detroit Bd. of Educ.*, 92-CV-76328-DT, 1997 U.S. Dist. LEXIS 18404, at *19-20 (E.D. Mich. Sept. 30, 1997) (quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986)); see also *Blackenship v. Parke Care Ctrs., Inc.*, 913 F. Supp. 1045, 1051 (S.D. Ohio 1995) (quoting *Rabidue*, 805 F.2d at 620), *aff'd*, 123 F.3d 868 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1039 (1998); *Brown v. General Motors Corp.*, No. 88-0568-CV-W-9, 1991 U.S. Dist. LEXIS 14779, at *17-18 (W.D. Mo. Oct. 9, 1991) (quoting *Rabidue*, 805 F.2d at 620).

like.¹⁹⁶

4. Prompt and Effective Remedial Action

Courts have also found that prompt and effective remedial action will preclude liability for claims of hostile work environment.¹⁹⁷ While there is no bright line definition of “prompt” regarding the time allowed to start an investigation that precedes the remedial action, thirty-six hours has been considered sufficiently prompt to initiate an investigation,¹⁹⁸ but waiting three months before beginning an investigation was untimely.¹⁹⁹ As to the promptness of the remedial action, courts have found that termination within six to ten days of the report of harassment was prompt.²⁰⁰

Generally, the test to determine whether the remedial action was effective is whether the action was: (i) reasonably calculated to end the harassment; (ii) proportionate to the seriousness of the conduct; and (iii) appropriately severe to send the message that such conduct will not be tolerated at any level.²⁰¹ Forms of effective remedial action include firing the harasser or forcing him to resign,²⁰² suspending, demoting or transferring the harasser,²⁰³ giving a written reprimand,²⁰⁴ and removing offensive objects or pictures.²⁰⁵ But a five-month tempo-

196. See Cahill, *supra* note 184, at 1145.

197. See, e.g., Perry v. Ethan Allen, Inc., 115 F.3d 143, 153-54 (2d Cir. 1997) (prompt and appropriate action in response to harassment complaint barred liability); Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 110 (3d Cir. 1994) (employer not liable for supervisor harassment where, in response to complaint, employer took effective action to halt alleged harassment); Perkins v. General Motors Corp., 709 F. Supp. 1487 (W.D. Mo. 1989), *aff'd*, 911 F.2d 22 (8th Cir. 1990) (no liability where, in response to complaint, employer took appropriate corrective action and the harassment ceased immediately).

198. See Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 715 (2d Cir. 1996) (holding no liability where employer investigated harassment complaint and notified harasser of investigation within thirty-six hours).

199. See Dortz v. City of New York, 904 F. Supp. 127, 154 (S.D.N.Y. 1995) (holding that waiting three months to take action on employee’s sexual harassment complaint violated company policy and was sufficient to establish employer liability).

200. See Van Zant, 80 F.3d at 715 (holding it was sufficient that the offender was reprimanded and instructed in writing to limit his contact with the plaintiff within four days and was terminated within ten); Walsh v. National Westminster Bancorp, Inc., 921 F. Supp. 168, 173 (S.D.N.Y. 1995) (holding the remedial action was prompt and effective when the harasser was fired six days after his behavior was reported).

201. See generally 29 C.F.R. § 1604.11(d) (1998); *cf.* McCoy v. Macon Water Auth., 966 F. Supp. 1209, 1219 (M.D. Ga. 1997) (“It is not necessary for an employer to fire, suspend, or demote a supervisor whenever a complaint of sexual harassment is made In some situations, particularly when there is some doubt as to the seriousness or the veracity of the charge or when the complainant is unwilling to state a formal charge,” a warning or reiteration of the policy on sexual harassment may be sufficient).

202. See Walsh, 921 F. Supp. at 173 (finding no liability for employer who investigated harassment complaint and fired harasser within six days); Torres v. New York Univ., No. 95 Civ. 4106 (L.L.S.), 1996 WL 393565, at *2 (S.D.N.Y. July 15, 1996), *aff'd*, 116 F.3d 625 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 563 (1997) (holding employer “adequately responded” when promptly investigated the complaint and fired harasser).

203. See Babcock v. Frank, 783 F. Supp. 800, 807 (S.D.N.Y. 1992) (finding no liability when employer acted swiftly in investigating the harassment complaint and transferred harasser).

204. See Johnson v. Johnston Tombigbee Furniture Mfg. Co., 73 Fair Empl. Prac. Cas. (BNA) 639, 640 (N.D. Miss. 1996) (finding that a reprimand was appropriate to the circumstances); see also Hop-

rary demotion and transfer in one case and instructions to the harasser to speak to the complaining employee only in the presence of others in another case have been called “shams” and were therefore insufficient to preclude liability.²⁰⁶

IV. RECENT AND YET TO BE TESTED DEFENSES

Heretofore, the previous defenses to sexual harassment have embodied various permutations of the proposition that the conduct was not sexual harassment. In contrast, the new defenses stemming from the 1998 Supreme Court cases enable employers to defend themselves in cases where the previous legal construct would have found sexual harassment.

The danger for any employer in using new or untested defenses to a claim of sexual harassment is that the courts have not fully formulated specific criteria to use to undermine the viability of the defense. This is in contrast to the defenses previously discussed where an employer can point to cases with similar factual scenarios or to specific criteria for the court to consider. Accordingly, employers must tread carefully when using these recent or untested defenses.

A. The *Faragher* And *Ellerth* Affirmative Defenses

On the last day of the 1997-1998 term, the Supreme Court issued two opinions that radically changed the law of sexual harassment. In *Faragher v. City of Boca Raton*, the Court held that the employer was liable for sexual harassment, despite the plaintiff's failure to avail herself of the ineffectively disseminated complaint procedure provided in the company sexual harassment policy.²⁰⁷ In *Burlington Industries v. Ellerth*, the Court determined that the employer would be liable for sexual harassment although the plaintiff suffered no tangible employment action if an affirmative defense was not successfully proven on remand.²⁰⁸ Read together, as intended by the Court, these two cases modified the standards currently used to determine employer liability for sexual harassment.

The Supreme Court, using identical language in both cases, instituted a new affirmative defense for employers against claims of harassment by the immediate or successively higher supervisor in which no tangible adverse employment action was taken. The Court stated:

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponder-

kins v. Nationwide Recovery Sys., Ltd., 1997 WL 42527, at *2 (N.D. Tex. 1997); Swentek v. USAir, Inc., 830 F.2d 552, 558 (4th Cir. 1987).

205. See *Tunis v. Corning Glass Works*, 747 F. Supp. 951, 958-59 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 910 (2d Cir. 1991) (holding hostile environment claim failed when employer promptly removed offensive photographs).

206. See *Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 64-65 (2d Cir. 1992) (finding district court did not adequately address factual circumstances surrounding the harasser's five month demotion and transfer, which plaintiff contends was a “sham” response to sexual harassment complaint); *Dortz v. City of New York*, 904 F. Supp. 127, 154 (S.D.N.Y. 1995) (holding employer's remedial action of instructing harasser to speak to the plaintiff only in the presence of others “did not effectively cleanse the hostile environment caused by the sexual harassment”).

207. 118 S. Ct. 2275, 2293 (1998).

208. 118 S. Ct. 2257, 2270 (1998).

ance of the evidence The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.²⁰⁹

These decisions also reaffirmed previous rulings holding employers vicariously liable for supervisory harassment when conduct culminates in some form of tangible employment action such as discharge or demotion.²¹⁰

As of the writing of this paper, a number of cases have already begun to apply the recent holdings of the Supreme Court. A few of the cases have merely required that the sexual harassment issues be remanded in light of the affirmative defense.²¹¹ Others have focused on the reasonableness of the employee's failure to use the employee's complaint procedure.²¹² And, one court has refused to allow the affirmative defense where the alleged harasser was not the immediate or successively higher supervisor.²¹³ Future litigation over the affirmative de-

209. *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

210. *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

211. See, e.g., *Eddy Potash, Inc. v. Harrison*, 118 S. Ct. 2364 (1998); *Reynolds v. CSX Transp., Inc.*, 118 S. Ct. 2364 (1998); *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 762 (8th Cir. 1998); *Alverio v. Sam's Warehouse Club*, 9 F. Supp. 2d 955, 961 (N.D. Ill. 1998).

212. See *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 492-493 (S.D.N.Y. 1998) (finding that because the plaintiff failed to (i) specify the repercussions he feared other than his general statement that it would lead to unpleasantness if he complained; (ii) cite to other employees who were subjected to retaliation because they availed themselves of the complaint procedures; (iii) mention the alleged harassment to his wife; or (iv) make any mention of it when informed that he was about to be terminated, it confirmed that "any perceived harassment during [the plaintiff's] employment was so only by reason of its potential utility for this litigation" and observing that "to allow an employee to circumvent the reasonable complaint requirements of *Faragher* and [*Ellerth*], by making conclusory allegations of feared repercussions would effectively eviscerate an affirmative defense which the Supreme Court clearly went to great effort to craft in order to stem the tide of unwarranted lawsuits."); *Sonce v. Tandy Corp.*, 9 F. Supp. 2d 773, 778 (W.D. Ky. 1998) (observing that the plaintiff admitted that she knew of the policy against sexual harassment and knew where to report the misconduct, but that she decided not to report it because her "supervisor threatened her with termination"; and therefore, finding "[p]erhaps plaintiff feared retaliation or further humiliation because the procedures would not have been administered fairly. However, no evidence suggests that Defendant's procedures were inadequate. . . . It follows that a threat of termination, without more, is not enough to excuse an employee from following procedures adopted for her protection. To hold otherwise would render the affirmative defense meaningless. Evidence that procedures are administered fairly and that an employee is not required to report the misconduct to her harasser demonstrates the unreasonableness of the employee's conduct."); *Booker v. Budget Rent-A-Car Sys.*, No. 3:94-0048, 1998 U.S. Dist. LEXIS 12962, at *36 (M.D. Tenn. July 10, 1998) (finding that the employer had not proved that the plaintiff unreasonably failed to utilize the opportunities it provided to report and seek to correct his situation. "Budget has not asserted that it gave [the plaintiff] a copy of the "harassment" policy, or that anyone spoke to him regarding this policy. Furthermore, [another employee] testified that he had been afraid to speak to anyone about [the supervisor's] behavior because he feared retaliation. Given the atmosphere at Budget, it has not been established by a preponderance of the evidence that [the plaintiff] was unreasonable in not reporting the harassment given other employees' fears about retribution."); *Montero v. AGCO Corp.*, 1998 U.S. Dist. LEXIS 13956, at *4 (E.D. Cal. Aug. 14, 1998) (finding that plaintiff's fear of retaliation was not a reasonable excuse for the failure to file a complaint where the policy called for confidentiality "within the necessary boundaries of the fact-finding process" and for non-relation against complainants).

213. See *Alverio*, 9 F. Supp. 2d at 961 (finding that the *Faragher* analysis should apply even though the harasser was not the plaintiff's immediate supervisor).

fense will likely focus on whether or not there was a tangible employment action. In situations when a tangible employment action can be established by the employee, employers will be forced to rely on defenses that existed before the 1998 Supreme Court decisions.

B. The Horseplay or Mild Flirtation Defense

A third Supreme Court opinion of import to the law of sexual harassment from the employer's perspective is *Oncale v. Sundowner Offshore Services, Inc.*²¹⁴ As discussed previously, *Oncale* held that same sex sexual harassment was actionable under Title VII.²¹⁵ Perhaps unintentionally, *Oncale* may have created a new avenue of defense against claims of sexual harassment.²¹⁶ The Court announced that, despite the contentions of amici,²¹⁷ recognizing liability for same sex harassment will not transform Title VII into a general code of civility in the workplace.²¹⁸ The Court explained:

Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discrimination . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual context or connotations.²¹⁹

The Court continued:

[T]he statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory "conditions of employment."²²⁰

Based on the Court's language, employers may begin to argue that conduct complained of by the plaintiff was merely social interaction and is therefore outside the scope of Title VII. In application, *Oncale* has yet to generate an increase in the regulation of ordinary interaction in the workplace.²²¹ The reiteration of

214. 118 S. Ct. 998 (1998).

215. See *supra* Part III.

216. 118 S. Ct. 998 (1998).

217. Brief of Amicus Curiae for Respondents, *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998).

218. See *Oncale*, 118 S. Ct. at 1002.

219. *Id.* (citation omitted).

220. *Id.* at 1002-03 (citation omitted).

221. See, e.g., *White v. Midwest Office Tech., Inc.*, No. 96-4116-DES 1998 U.S. Dist. LEXIS 6890 at *21 (D. Kan. Apr. 28, 1998) (holding that the comments at issue were not demonstrative of gender bias on the part of the employer; citing *Oncale* for the proposition that plaintiff must provide evidence "that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination . . . because of . . . sex'") (citations omitted).

these enunciated standards in *Faragher*²²² may create a whole new wave of judicial pronouncements based on this horseplay or mild flirtation type of defense.

Latching onto the Court's disavowal of a general civility code, plaintiff's attorneys may try to broaden the definition of "male-on-male horseplay or intersexual flirtation" to cover the fact patterns of their particular clients. Without more guidance from the Court concerning the interpretation of this language, the court system will be part of an increasing number of debates over whether recognizing specific conduct in certain contexts as sexual harassment would be tantamount to accepting a general civility code at the expense of employers.

V. CONCLUSION

After only two previous Supreme Court decisions on sexual harassment (*Meritor* and *Harris*), the three cases from the 1997-98 term (*Oncale*, *Faragher* and *Ellerth*) have provided a glass that is both half-full and half-empty. In the wake of these decisions, it is clear that there is still a great deal of maneuvering room within the language of the Court. Attorneys on both sides of the issue have claimed victory, extracting language from the Court's latest opinions to assert an advantage in the midst of this evolving construct of sexual harassment law. Whether we now have more clarity or more unanswered questions on employer defenses is an untold story, the proof of which shall be in the tasting.

222. See 118 S. Ct. at 2283-84. A recurring point in [recent] opinions is that "simple teasing," off-hand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." It has been made clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view. *Id.* (citations omitted).