

# HIDDEN IN PLAIN SIGHT: ACHIEVING MORE JUST RESULTS IN HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT CASES BY RE-EXAMINING SUPREME COURT PRECEDENT

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## ABSTRACT

Lower federal courts often fail to provide plaintiffs in sexual harassment cases the relief intended by Title VII of the Civil Rights Act of 1964 and mandated by the Supreme Court when it recognized the cause of action twenty years ago. There is little doubt that sexual harassment in the workplace persists. However, lower courts misapply or ignore Supreme Court reasoning that would result in fairer and more consistent dispositions in hostile work environment sexual harassment cases. This article draws directly on reasoning from the Supreme Court cases to explain the sources of the confusion in the lower courts and offers jury instructions and guidelines to judges that reflect what the Supreme Court intended.

A female deputy sheriff alleged that, in violation of Title VII of the Civil Rights Act of 1964, she was sexually harassed by another officer in the County Sheriff's Department where they worked.<sup>1</sup> The co-worker's harassing behavior included, among other acts, his comment to the deputy that "you can just walk into the room and I get an erection;" his calling the deputy a "frigid bitch" on two occasions, once when he tried to kiss her after a department Christmas party, and another time when she refused to join him in a hot tub at a hotel where they both were attending a conference; his telling her that "her ass sure does look fine;" and his descriptions to her and others of a golf tournament where the caddies were strippers and they were directed "to place golf balls into their vaginas and to squirt them onto the green."<sup>2</sup>

The federal district court granted summary judgment for the defendants. In 2006, the Court of Appeals for the Eleventh Circuit affirmed the lower court's

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1. *Mitchell v. Pope*, 189 F.App'x 911, 913 (11th Cir. 2006).

2. *Id.* at 914 n.3.

decision, stating that the conduct was not sufficiently severe or pervasive to constitute actionable sexual harassment.<sup>3</sup>

#### INTRODUCTION

This brief description of a 2006 disposition represents one of many decisions in which courts have unreasonably ruled that plaintiffs could not establish the existence of a hostile work environment caused by sexual harassment.<sup>4</sup> There are numerous examples of cases in which summary judgments for defendants have been improperly granted or verdicts for plaintiffs have been vacated.<sup>5</sup> There is widespread agreement by scholars that even twenty years after the recognition by the Supreme Court of the cause of action for hostile work environment sexual harassment, there is a failure to provide the relief intended under Title VII and mandated by the Court.<sup>6</sup>

“Sexual harassment in American worklife is [common-place] – [affecting] as [many] as 80 percent of women in certain sectors, according to one study. But most women don’t stand a chance of winning a lawsuit.”<sup>7</sup> There seems little doubt that sexual harassment in the workplace persists and has measurable and

3. *Id.* at 914–15.

4. In Part III, three particularly illustrative cases are discussed in depth.

5. See generally Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999); M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN’S STUD. 311 (1999); Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548 (2001) (examining every federal district and appellate court decision involving workplace sexual harassment from 1986–95, determining which plaintiffs were more likely to be successful).

6. See generally DIRECTIONS IN SEXUAL HARASSMENT LAW (Catherine A. MacKinnon & Reva B. Siegel eds., 2004); Vicki Schultz, *Understanding Sexual Law in Action: What Has Gone Wrong and What Can We Do About It*, 29 T. JEFFERSON L. REV. 1 (2006); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683 (2003); Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002); Eric Schnapper, *Some of Them Still Don’t Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277 (1999); Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 MD. L. REV. 85 (2003); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Debra D. Burke, *Workplace Harassment: A Proposal for a Bright-Line Test Consistent with the First Amendment*, 21 HOFSTRA LAB. & EMP. L.J. 591 (2004).

7. BOSTON GLOBE, Feb. 5, 2006, at G1 (the word “pervasive” was replaced in the text with “common-place” in order to minimize confusion in the discussion of the legal standard of “pervasive”). This is just one of many accounts of ongoing or increasing incidents of sexual harassment in the workplace. See, e.g., Yvonne Abraham, *Unappetizing Behavior*, BOSTON GLOBE, July 29, 2007, at B1 (describing a complaint filed with the Massachusetts Commission Against Discrimination by an experienced woman bartender who was fired after complaining that her manager frequently propositioned women at the bar, commented on his sexual needs and practices, and regularly displayed explicit signs and sex toys on her bar, including a mechanical toy that simulated intercourse; this restaurant was managed by a company which three years before initially did not respond but eventually settled a claim against a manager in another restaurant who was charged by four waitresses with, among other things, rubbing up against them, regaling them with detailed reviews of pornographic films, and focusing the restaurant’s hidden camera on customers’ breasts); Liz Kowalczyk, *Woman Details Case Against Haddad*, BOSTON GLOBE, Feb. 1, 2007, at B1 (reporting on the filing of a complaint against the Caritas hospital chain alleging sexual harassment against it and a former chief executive; the former employee stated that the executive had frequently kissed and embraced her over a 15-month period).

immeasurable impacts on those who are victimized by this form of discrimination and on their employers.<sup>8</sup>

In 1986, the Supreme Court of the United States recognized a cause of action for workers subjected to a hostile work environment created by sexual harassment.<sup>9</sup> It held that such conduct, when objectively severe *or* pervasive, violates Title VII of the Civil Rights Act of 1964.<sup>10</sup> However, since then, lower courts have not consistently or rationally applied this standard. This is not the result of a failure of the Supreme Court to establish a workable and fair standard, nor is it due to an absence of scholarly or judicial analysis of those standards. Nevertheless, troubling and confusing precedent is created and followed because too often Supreme Court cases are relied on for only the narrowest propositions. Lower courts ignore or dismiss the Supreme Court's reasoning which would provide the necessary guidance to determine whether harassment is severe or pervasive.<sup>11</sup>

To address the problem of unreasonable and unfair dispositions denying plaintiffs relief, some commentators have suggested solutions requiring a change in the law, through legislation, manipulation or abandonment of Supreme Court standards,<sup>12</sup> or use of social science to determine violations of the

8. See, e.g., THERESA M. BEINER, *GENDER MYTH VERSUS WORKING REALITIES* 1 (2005).

9. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65–67 (1986).

10. *Id.* at 67; 42 U.S.C. § 2000e-2(a)(1) (2003).

11. See BEINER, *supra* note 8, at 20. Popular media also has addressed the problem of confusing application of standards for determining the existence of unlawful sexual harassment. See, e.g., Sacha Pfeiffer, *Gray Areas Complicate Sexual Harassment Cases*, BOSTON GLOBE, May 25, 2006, at A1 (“Although most companies have detailed and similar policies against sexual harassment, employers often find themselves in murky territory when it comes to defining, proving, and disciplining sexual harassment in the workplace.” Among the complications noted in the article are the need for case-by-case evaluation of highly fact-specific charges, often turning on determinations of credibility; the differing perceptions of the alleged perpetrator and complainant; and workplace circumstances, environment, and culture.)

12. See, e.g., e. christi cunningham, *Preserving Normal Heterosexual Male Fantasy: The “Severe or Pervasive” Missed-Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence*, 1999 U. CHI. LEGAL F. 199, 270–72 (1999) (arguing that the severe or pervasive standard is an extension of sexual inequality and a new standard should be implemented); Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should be Curtailed*, 30 CONN. L. REV. 375, 394–99 (1998) (describing that sexual harassment analysis is too vague and advocating a tort law approach); Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers’ Paradox in Responding to Hostile Environment Sexual Harassment – A Proposed Way Out*, 67 FORDHAM L. REV. 1517, 1533–38, 1594–95 (1999) (suggesting that the totality of circumstances test should be dropped and internal arbitration policies instituted to prevent and respond to sexual harassment). Some have proposed substituting the reasonable person standard with a reasonable woman standard. See, e.g., Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 196–97, 208–09 (2001); Barbara A. Gutek, et al., *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: a Multi-Method, Multi-Standard Examination*, 5 PSYCHOL. PUB. POL’Y & L. 596, 625–26 (1999); Nicole Newman, *The Reasonable Woman: Has She Made a Difference?* 27 B. C. THIRD WORLD L.J. 529, 541–42, 555 (2007) (book review). Another proposal suggests that the severe or pervasive standard should be applied as an inverse variance test. See, e.g., Joseph M. Pellicciotti, *Sexual Harassment in the Workplace: A Consideration of Post-Vinson Approaches Designed to Determine Whether Sexual Harassment is Sufficiently Severe or Pervasive*, 5 DEPAUL BUS. L.J. 215, 226 (1993). There has also been the suggestion that a traditional disparate impact analysis should be included within the consideration of whether the conduct was severe or pervasive. See, e.g., Schultz, *supra* note 6, 29 T. JEFFERSON L. REV. at 48–50;

law.<sup>13</sup> However, the inability of plaintiffs to win lawsuits<sup>14</sup> is not the result of unreasonable legal standards set forth by the Supreme Court; rather, it is the result of a failure to apply those standards. Lower courts have ignored the direction and guidance of the Supreme Court cases which explained the cause of action and detailed how facts are to be evaluated in ruling on claims of hostile work environment sexual harassment. The solution is simple: courts need to apply the Supreme Court cases more consistently, providing a fair and workable approach to the standards for determining whether alleged conduct in sexual harassment cases violates Title VII.

Part I of this article explores the development of the standards for the establishment of a hostile work environment based on sexual harassment, particularly the requirement that the conduct be severe or pervasive. Part II identifies several reasons for the confusing and inconsistent application of this severe or pervasive standard. Part III examines three recently litigated cases to demonstrate how greater reliance on Supreme Court analysis would have resulted in fairer and more reasonable dispositions. Part IV provides a clear and precise approach to the severe or pervasive standard based on an analysis synthesizing the reasoning of the Supreme Court. We suggest the use of this approach as model jury instructions or as guidance for judges when considering motions for summary judgment. The proposed analysis should be applied in evaluating facts and making case analogies, so that more consistent and rational outcomes can be obtained in sexual harassment hostile work environment cases. This article's goal is to offer courts and litigators a practical solution to the challenge of interpreting and applying the rather abstract standards of severe or pervasive.<sup>15</sup> Our analysis would more successfully differentiate "ordinary socializing in the workplace"<sup>16</sup> from "discriminatory intimidation, ridicule, and insult."<sup>17</sup>

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Schultz, *supra* note 6, 107 YALE L. J. at 1714–16, 1799–1801; Jamie Lynn Cook, Comment, *Bitch v. Whore: the Current Trend to Define the Requirements of an Actionable Hostile Environment Claim in Verbal Sexual Harassment Cases*, 33 J. MARSHALL L. REV. 465, 492–94 (2000); Laura D. Francis, Note, *What Part of "Hostile Environment" Don't You Understand? The Need for an Entire-Environment Approach in Sexual Harassment Cases*, 72 GEO. WASH. L. REV. 815, 824–29 (2004).

13. BEINER, *supra* note 8, at 29–45.

14. See generally BEINER, *supra* note 5.

15. See Adam Liptak, *When Rendering Decisions, Judges are Finding Law Reviews Irrelevant*, N. Y. TIMES, Mar. 19, 2007, at A8 (reporting on a presentation at Benjamin N. Cardozo School of Law in which seven judges of the Court of Appeals for the Second Circuit discussed the decline in reliance on law review articles due in part to the failure of such articles to address actual statutes, cases and doctrines (Judge Jacobs is quoted as saying "I haven't opened a law review in years. . . . No one speaks of them. No one relies on them." And, to the extent law reviews are cited, Judge Stack stated that they are used "more for support than for illumination."); Stephen I. Vladeck, *The Law Reviews vs. the Courts: Two Thoughts from the Ivory Tower*, 39 CONN. L. REV. CONNtemplations 1, 2 (Spring 2007) (supporting the suggestion that at least some legal scholarship should aspire to be useful to judges).

16. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

17. *Id.* at 78.

## PART I

In its decision in *Meritor Savings Bank v. Vinson*,<sup>18</sup> in 1986, the Supreme Court held that Title VII [of the Civil Rights Act of 1964]<sup>19</sup>, which prohibits, *inter alia*, discrimination based on sex, encompasses a cause of action for sexual harassment resulting in the creation of a hostile or abusive work environment.<sup>20</sup> The statute does not prohibit sexual harassment; rather, it prohibits discrimination “against any individual with respect to his compensation, terms, conditions or privileges of employment. . . .”<sup>21</sup> The Court stated that sexual harassment is prohibited by Title VII, noting that the statute evinced “a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”<sup>22</sup> The Court quoted from Guidelines issued in 1980 by the Equal Employment Opportunity Commission<sup>23</sup> which specified that sexual harassment is a form of sex discrimination prohibited by Title VII.<sup>24</sup> The Court also stated that the EEOC Guidelines drew on a substantial body of lower court opinions which had already ruled that Title VII encompasses claims of a hostile environment based on sexual harassment, just as it recognizes such claims based on racial harassment.<sup>25</sup>

However, the Court stated that “not all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment within the meaning of Title VII.”<sup>26</sup> The Court then declared that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment.’”<sup>27</sup>

18. 477 U.S. 57 (1986).

19. 42 U.S.C.A. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer – (1) 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.”)

20. *Meritor*, 477 U.S. at 65–66 (distinguishing hostile environment sexual harassment from a cause of action based on *quid pro quo* discrimination, which conditions concrete employment benefits on sexual favors, and also holding that a plaintiff in a hostile work environment claim need not establish economic or tangible harm in order to prevail).

21. 42 U.S.C.A. § 2000e-2(a)(1).

22. *Meritor*, 477 U.S. at 64 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

23. *Id.* at 65. The Equal Employment Opportunity Commission is charged under Title VII with the responsibility for the administration of the Act and a variety of duties associated with its implementation. See 42 U.S.C. A. § 2000e-4.

24. *Meritor*, 477 U.S. at 65. The Guidelines enumerate certain types of workplace conduct which might be actionable: “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature[.]” 29 CFR § 1604.11(a) (1985).

25. *Meritor*, 477 U.S. at 66–67; See *Johnson*, *supra* note 6, at 122 (noting that the severe or pervasive standard is applied in racial harassment cases less stringently than in sexual harassment cases). See generally Robert J. Gregory, *You Can Call Me a “Bitch” – Just Don’t Use the “N-Word”*: Some Thoughts on *Galloway v. General Motors Service Parts Operations* and *Rodgers v. Western Southern Life Insurance Co.*, 46 DE PAUL L. REV. 741 (Spring 1997).

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

27. *Id.* (quoting *Henson v. Dundee*, 682 F. 2d 897, 904 (8th Cir. 1982)).

After concluding that the conduct in *Meritor* was not only pervasive, but “criminal conduct of the most serious nature,” and therefore “plainly sufficient to state a claim for ‘hostile environment’ sexual harassment”,<sup>28</sup> the Court provided somewhat limited additional guidance about how courts should determine if conduct was severe or pervasive.<sup>29</sup> Again relying on the EEOC Guidelines, the Court declared that “the trier of fact must determine the existence of sexual harassment in light of the ‘record as a whole’ and ‘the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.’”<sup>30</sup> The Court stated that “‘mere utterance of an . . . epithet which engenders offensive feelings in an employee’ would not affect the conditions of employment to a significant degree to violate Title VII.”<sup>31</sup>

Seven years later, in *Harris v. Forklift Systems, Inc.*,<sup>32</sup> the Court again considered this cause of action. The Court affirmed the standard in *Meritor*, stating: “When the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ . . . (internal citation omitted). . . that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment’, . . . (internal citation omitted). . . Title VII is violated.”<sup>33</sup> In *Harris*, the Court resolved a conflict among the circuits concerning the necessity for proving psychological harm or actual injury, declaring that it was taking a “middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.”<sup>34</sup> It then refined the standard for establishing a hostile work environment, holding that conduct must be considered both *objectively* hostile or abusive (if a reasonable person would find it so) and *subjectively* abusive (as experienced by the victim) to prove that the conduct actually altered the conditions of the victim’s employment.<sup>35</sup>

The Court then stated that the objective test is not and cannot be mathematically precise, and affirmed that the totality of circumstances must be

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28. *Id.* at 60. The Court stated that respondent testified that the bank manager: forcibly raped her on several occasions, had sexual intercourse with her 40 to 50 times, and fondled her; made verbal sexual advances towards her, including invitations for sexual relations and demands for sexual favors; and followed her into the restroom when she went there alone, and exposed himself to her.

29. *Id.* at 68 (noting that the “gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome’” (citing 29 CFR § 1604.11(a) (1985) and distinguishing this from the question of whether the victim’s actual participation was voluntary). *And see* Theresa M. Beiner, *Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases*, 14 DUKE J. GENDER L & POL’Y 125, 135–38 (2007) (considering the role of women’s attire in determining whether the conduct is considered unwelcome).

30. *Id.* at 69 (quoting 29 CFR § 1604.11(b) (1985)).

31. *Id.* at 67 (quoting *Rogers*, 454 F.2d at 238, in which the court discussed “an ethnic or racial epithet.”).

32. 510 U.S. 17 (1993).

33. *Id.* at 21 (quoting *Meritor*, 477 U.S. at 65).

34. *Id.*

35. *Id.* As noted, the focus of this article is on the objective test requirement that the conduct be severe or pervasive; therefore, discussion of the *standard* for satisfying the subjective test is not discussed.

considered.<sup>36</sup> The Court declared: “These [circumstances] may include the frequency of the 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.”<sup>37</sup> The Court held that “no single factor is required.”<sup>38</sup>

Justice Scalia’s concurrence in *Harris* was prescient. He was concerned that the Court did not create a clear standard.<sup>39</sup> He commented that although the Court listed some factors that contribute to abusiveness, “since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude.”<sup>40</sup> “As a practical matter, today’s holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages. . . . Be that as it may, I know of no alternative to the course the Court has taken. . . .”<sup>41</sup>

It would not be until 1998 that the Court again addressed the standards to be applied to a sexual harassment claim under Title VII. In *Oncale v Sundowner Offshore Services, Inc.*,<sup>42</sup> the Court held that there may be a violation of Title VII’s prohibition against discrimination because of sex when the harasser and the victim are of the same sex.<sup>43</sup> The Court affirmed its earlier ruling that in order to establish a violation of Title VII, the conduct must be objectively severe or pervasive to alter the conditions of employment.<sup>44</sup>

The Court, in the opinion authored by Justice Scalia, then provided analysis directed at the determination of whether conduct could be considered severe, expanding on the explanation in *Harris* of what is to be considered when objectively viewing the totality of circumstances.<sup>45</sup> The determination should include careful consideration of the social context in which the behavior occurs,

36. *Id.* at 22–23.

37. *Id.* at 23.

38. 510 U.S. at 23. The Court relied in its ruling on facts found by the Magistrate, noting that the company president often insulted the employee because of her gender and often made her the target of unwanted sexual innuendos; occasionally asked her and other employees to get coins from his front pocket; and threw objects on the ground in front of her and other women and asked them to pick them up. *Id.* at 19–20. The Court stated that the district court had adopted the Magistrate’s report and recommendations and found that this was a “close case.” *Id.* at 20.

39. *See id.* at 24.

40. *Id.*

41. *Id.* at 24–25. Justice Ginsburg in her concurrence stated 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.” *Id.* at 25.

42. 523 U.S. 75 (1998).

43. *Id.* at 77, 79.

44. *Id.* at 78 (quoting *Meritor*, 477 U.S. at 64; *Harris*, 510 U.S. at 21). In advocating this interpretation of Title VII to include same-sex harassment, Justice Scalia noted that “. . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Id.* at 79.

45. *See id.* at 81 (citing *Harris*, 510 U.S. at 23). In *Oncale*, Justice Scalia seems to be responding to his concern about the vagueness of the standard which he expressed in *Harris*.

[because] the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitation of words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.<sup>46</sup>

Also significant in *Oncale* are the specific references to conduct which could and could not be considered severe.<sup>47</sup> Explicit or implicit proposals of sexual activity could be considered severe; conduct which could be considered severe need not be motivated by sexual desire, but instead could be motivated by general hostility toward the presence of the victim in the workplace based on gender.<sup>48</sup> Conduct will not be considered severe "merely because the words used have sexual content or connotations."<sup>49</sup> The Court affirmed that requiring the conduct to be objectively severe or pervasive would "ensure that courts and juries do not mistake ordinary socializing in the workplace - such as . . . intersexual flirtation - for discriminatory 'conditions of employment.'"<sup>50</sup> Justice Scalia explicitly warned against expanding Title VII into "a general civility code."<sup>51</sup>

[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.<sup>52</sup>

In *Faragher v. City of Boca Raton*<sup>53</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>54</sup> both decided in 1998, the Court focused on how courts should determine when

46. *Id.* at 81–82. See generally Rebecca K. Lee, *Pink, White, and Blue: Class Assumptions in the Judicial Interpretations of Title VII Hostile Environment Sex Harassment*, 70 BROOK. L. REV. 677 (2005) (discussing class assumptions in examining the social context effecting a determination of what is offensive conduct, but noting that vulgarity is common within white collar environments); see also Melissa R. Null, Note, *Disrespectful, Offensive, Boorish & Decidedly Immature Behavior is Not Sufficient to Meet the Requirement of Title VII: Duncan v. General Motors Corp.*, 69 MO. L. REV. 255, 271–73 (2004) (suggesting that the Supreme Court did not adequately clarify the social context factor under the totality of circumstances test, resulting in different applications of severe or pervasive based on the economic status of the worker); *Duncan*, *infra* Part III.

47. 532 U.S. at 78–80 (quoting *Harris*, 510 U.S. at 25). The *Oncale* opinion provides no guidance about what might constitute pervasive conduct.

48. See *Oncale*, 523 U.S. at 80.

49. *Id.*

50. *Id.* at 81.

51. *Id.* But see Katherine M. Franke, *What's Wrong with Sexual Harassment*, in MACKINNON & SIEGEL, *supra* note 6, at 176. ". . . *Oncale's* admonition that Title VII does not impose a civility code on the workplace has had the effect of kicking open the door to a new 'horseplay defense' to sexual harassment claims"; the author lists conduct that has been dismissed as "mere" teasing and horseplay as improperly being characterized as within the genuine but innocuous differences in the way men and women interact.

52. *Oncale*, 523 U.S. at 81.

53. 524 U.S. 775 (1998).

54. 524 U.S. 742 (1998).

employers are liable for workplace harassment in violation of Title VII based on acts of supervisors and subordinates.<sup>55</sup> In *Faragher*, the Court reiterated its commitment to the contours of this cause of action set forth in its precedent,<sup>56</sup> describing these standards as “sufficiently demanding to ensure that Title VII does not become a ‘general civility code.’”<sup>57</sup> The Court also offered additional guidance about conduct which could and could not be considered severe: the conduct must be extreme to alter the terms and conditions of employment;<sup>58</sup> “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to [such] changes in the terms and conditions of employment”;<sup>59</sup> proper application of the standards “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.’”<sup>60</sup>

Thus, in this way, between 1986 and 1998, the Supreme Court set out the cause of action for hostile work environment sexual harassment and developed standards for its adjudication.

## PART II

We do not transform Title VII into a workplace “civility code,” [citation omitted] when we condemn conduct less severe than that which shocks our conscience. And when we raise the bar . . . [so]. . . high . . . [,] it becomes more likely that we will miss the more subtle forms of sex discrimination that may still infest the

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55. “We hold that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer’s conduct as well as that of a plaintiff victim.” *Faragher*, 524 U.S. at 780; and see *Burlington*, 524 U.S. at 746–47, 754–55.

56. See 524 U.S. at 786–88.

57. *Id.* at 788 (quoting *Oncale*, 523 U.S. at 80).

58. See *id.*

59. *Id.* (omitting quotation marks indicating reliance on *Oncale*, 523 U.S. at 82).

60. *Id.* (quoting B. LINDEMANN & D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW*, 175 (1992)). The Court revisited the standard for establishing a violation of Title VII based on the creation of a hostile work environment in *Clark Co. School Dist. v. Breeden*, 532 U.S. 268 (2001) and *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). The Court in *Clark*, relying explicitly on its prior rulings, reiterated that conduct must be severe or pervasive, and that this is determined by looking at all the circumstances, including the *Harris* factors; the Court restated “that simple teasing, offhand comments, and isolated incidents (unless extremely serious) [would] not . . . [constitute] changes in the ‘terms or conditions of employment.’” 532 U.S. at 271. It concluded that the single incident in the record was “at worst an ‘isolated incident’ that cannot remotely be considered ‘extremely serious’ as our cases require,” and therefore, could not have been considered by a reasonable person to have violated Title VII. See *id.* 270–71 (citations omitted).

In a claim of a racially hostile work environment, the Court in *Morgan*, without explicitly undermining its suggestion in *Clark* that a single extremely serious incident could create a hostile work environment, recognized that “[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.” 536 U.S. at 115 (citation omitted). Therefore, the challenged conduct “occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. . . . Such claims are based on the cumulative affect of individual acts.” *Id.* (citations omitted).

workplace, and make it more difficult for women, especially, to participate on terms of equality with their male counterparts.<sup>61</sup>

Perhaps the major reason for the landscape of confusing and inconsistent outcomes in cases involving sexual harassment hostile work environment claims is the failure of courts to follow the standards articulated by the Supreme Court to determine whether conduct is severe or pervasive. Courts have unnecessarily struggled to define when there is liability because conduct was severe – somewhere on the spectrum between innocuous flirtation and assault – or because the conduct was pervasive – somewhere on the spectrum between isolated and constant.<sup>62</sup> The needless discomfort with how to evaluate conduct has also led to an unjustified number of summary dispositions for defendants and vacated jury determinations for plaintiffs.<sup>63</sup>

The difficulty courts have in applying the severe or pervasive standard has been to some degree due to confusion about the reasoning and the significance of the Supreme Court cases. The reasons behind the analytical errors committed by lower courts are explored in this section.

#### A. Narrow application of Supreme Court precedent.

Too often Supreme Court cases are relied on for only the narrowest of rulings. *Meritor* is primarily recognized for establishing the cause of action for hostile work environment, requiring that the conduct be severe or pervasive based on the totality of circumstances, and holding that the victim need not have endured economic harm.<sup>64</sup> The *Harris* case is most cited for the proposition that there need not be psychological harm to establish the creation of a hostile work environment, and that plaintiff must satisfy both a subjective and an objective

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61. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1268 (11th Cir. 1999) (Tjoflat, J. concurring in part and dissenting in part).

62. See RAYMOND F. GREGORY, UNWELCOME AND UNLAWFUL: SEXUAL HARASSMENT IN THE AMERICAN WORKPLACE 58–59 (2004).

63. See, e.g., authorities cited, *supra* note 5; Beiner, *supra* note 6; Schnapper, *supra* note 6, at 294–307 (discussing the appropriate role for juries in sexual harassment hostile work environment cases), 344 (“The appropriate response of the legal system to less severe forms of harassment should be the same response to less severe physical assaults – lower damages. Judicial efforts to delineate a safe harbor for lower level harassment seek to impose an all-or-nothing rule to cases involving differences in degree; damages, on the other hand, can be calibrated to take into account just those types of differences.”) Contributing to the analytical uncertainty is the fact that even in 2008, many judges assigned to these cases, in both district and appellate courts, have an aversion to such cases, perhaps because of their gender and/or life experiences. See BEINER, *supra* note 8, at 30 (noting that the demographics of the federal judiciary suggest leaving this fact-specific inquiry to juries because the severe or pervasive standard depends on community standards which are best imposed by a jury, rather than a judge); Gregory, *supra* note 25, at 775–76 (addressing judicial discomfort with sexual harassment cases as opposed to racial harassment cases); Schnapper, *supra* note 6, at 325 (noting that evaluation of conduct to determine if it was severe or pervasive is complex and fact specific, ordinarily appropriate for a jury). In a genuine effort to try to heed the warning of the Supreme Court, trial judges have wanted to avoid turning Title VII into a “general civility code;” perhaps this has made them more inclined to view the complained-of conduct as petty or trivial, i.e., the vicissitudes of the workplace with which workers should cope.

64. See 477 U.S. at 67–68.

test.<sup>65</sup> In addition, the *Harris* factors often are cited.<sup>66</sup> *Oncale* is most frequently thought of as the case which recognized a claim for same-sex harassment.<sup>67</sup> *Faragher* is relied on when determining employer liability.<sup>68</sup> However, these cases provide explicit guidance as to what constitutes objectively severe or pervasive harassment, and when courts limit the application of these Supreme Court decisions to such narrow holdings, it results in inconsistent and irrational decisions.

#### B. Failure to differentiate the subjective and objective tests.

*Harris* and subsequent Supreme Court cases require that in order to prevail the plaintiff in a Title VII sexual harassment hostile work environment case must satisfy two tests – the subjective (whether the victim experienced the environment as hostile or abusive) and the objective (whether a reasonable person would have found the environment to have been hostile or abusive).<sup>69</sup> However, lower courts have not adequately separated the evaluation of evidence needed to satisfy each test. Consequently, many courts have not addressed the facts before them in terms of two independent tests, but instead have confused or melded what the victim experienced with what a reasonable person might conclude objectively about the workplace.<sup>70</sup> When courts confuse the subjective and objective test, the conclusion that a plaintiff was not threatened or bothered by the conduct, and therefore the conduct was not objectively severe, leads future courts to rely on that decision to rule that similar conduct could not be viewed by the reasonable person as severe.<sup>71</sup>

Additionally, when Justice O'Connor in *Harris* declared that the Court was taking a “middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury,” she may have contributed to the confusion which lower courts have encountered.<sup>72</sup> The problem with Justice O'Connor’s reasoning is that “merely offensive” refers to the nature of the behavior, and presumably therefore would be an aspect of the objective test, and “tangible psychological injury” refers to the victim’s reaction to the conduct, and therefore would logically be part of the subjective test.<sup>73</sup> It is thus unclear whether finding the “middle path” entails objectively examining the conduct of the harasser or examining the subjective reaction of the victim. There also is uncertainty about whether and how this search for the middle path relates to the severe or pervasive standard. Justice

65. See 510 U.S. at 21–23.

66. *Id.* at 23.

67. See generally 523 U.S. 75 (1998).

68. See 524 U.S. at 786–88.

69. See *Harris*, 510 U.S. at 21; *Faragher*, 524 U.S. at 787.

70. See generally, Elizabeth Monroe Shaffer, Comment, *Defining the “Environment” in Title VII Hostile Work Environment Claims: Appellate Courts, Classism, and Sexual Harassment*, 71 U. CIN. L. REV. 695 (2002) (asserting that the objective test is sometimes used to discount the plaintiff’s subjective reaction). See also, discussion of *Mitchell v. Pope*, 189 F.App’x 911 (11th Cir. 2006), *infra* Part III.

71. See BEINER, *supra* note 8, at 28 (discussing how “bad precedent leads to bad precedent”); Beiner, *supra* note 6, at 817–19; Johnson, *supra* note 6, at 114–15.

72. 510 U.S. at 21.

73. *Id.*

O'Connor appears to be referring to the subjective test when discussing the "middle path," but her use of a spectrum that seems to involve both subjective and objective factors muddled the separation of these tests.<sup>74</sup> Instead, courts should consider the claim based on whether the plaintiff can satisfy the subjective test, on the one hand, and the objective test on the other.<sup>75</sup>

### C. Confusion in applying the totality test.

The Court in *Harris* affirmed its statement in *Meritor* that the facts in each case must be examined based on the totality of circumstances, and declared that this is not a mathematically precise evaluation and that no single factor is required.<sup>76</sup> Justice O'Connor listed factors which *may* be considered within the totality test: "... the frequency of the 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."<sup>77</sup>

The list of *Harris* factors created confusion in how conduct was to be evaluated to determine whether it could be considered severe or pervasive. The list has offered the lower courts, which have an affinity for numbered tests, with a seemingly concrete set of standards which have achieved a prominence that could not have been intended by Justice O'Connor. These courts have used the factors as requirements for proving hostile work environment rather than as considerations within a totality test. This has led to reading the severity and frequency factors as requiring that the conduct be *both* severe and pervasive.<sup>78</sup> Other courts facially recognize the *Harris* factors in setting up the analysis, but do not utilize them in any meaningful way.<sup>79</sup> The Supreme Court stated in

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74. Under the subjective test the Court in *Harris* seemed to be primarily interested in whether there was some evidence that the harassment was upsetting to the plaintiff *at the time it occurred* and thus affected a term or condition of the plaintiff's employment. *See id.* at 21–22. The Court stated that evidence of the plaintiff's psychological harm is not determinative, *id.* at 20–22, rejecting the requirement imposed in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986).

75. For an example of a court's clear delineation of these tests, *see, e.g.*, *Crowley v. L.L. Bean, Co.*, 303 F.3d 387, 397 (1st Cir. 2002) (rejecting the employer's argument that in order to prevail on the subjective test, the victim must have believed that the conduct met the legal definition of unlawful sexual harassment; and ruling that the victim had presented sufficient evidence for the jury to conclude that she did satisfy the subjective test because she perceived the perpetrator's conduct as hostile and abusive and the jury reasonably credited plaintiff's testimony that she was frightened, feared for her safety, was shaking, breaking down and upset, and felt as though she was going to be hurt).

76. 510 U.S. at 23.

77. *Id.*

78. *See generally* Heather L. Kleinschmidt, Note, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L. J. 1119 (2005) (noting that the Seventh Circuit seems to apply a severe *and* pervasive standard).

79. *See, e.g.*, BEINER *supra* note 8, at 26 (noting that courts conclude that conduct was not sufficiently severe or pervasive without considering the totality of circumstances, engaging in a "divide and conquer approach" to the facts); Vivien Toomey Montz, *Shifting Parameters: An Examination of Recent Changes in the Baseline of Actionable Conduct for Hostile Working Environment Sexual Harassment*, 3 GEO. J. GENDER & L. 809, 842 (2002) (stating that when courts "disaggregate" conduct it "robs the incidents of their cumulative effect and nullifies both the pattern and harassing nature of the conduct.").

*Meritor*, and reiterated in *Harris* and in each subsequent case, that conduct need only be severe or pervasive.<sup>80</sup>

The misapplication of the *Harris* factors has allowed courts to ignore the more nuanced standards which emerge from the Supreme Court cases and from Justice O'Connor's opinion in *Harris*. Synthesizing the *Harris* factors with the rest of the analysis in that case, and with the discussions and rulings in the other Supreme Court cases, would result in a more sensible analytical standard. Although the *Harris* factors could be explicitly referred to as a broad explanation of relevant considerations, each one needs to be placed within the analysis of whether conduct could be considered severe or pervasive.

The "frequency of the discriminatory conduct" should logically be considered as one of the factors in the determination of whether conduct could be considered pervasive.<sup>81</sup> However, frequency is not the only relevant consideration for the pervasive standard. Courts look at the cumulative effect and pattern of the conduct, the setting and whether the conduct is easily escaped, the number of co-workers participating in the conduct, and the duration of the behavior.<sup>82</sup> All of these considerations aid a fact-finder in determining whether the conduct "permeate[s] [the environment] with 'discriminatory intimidation, ridicule, and insult.'"<sup>83</sup>

The inclusion of "severity" as one of the factors in the totality test offered no guidance, since the totality test is imposed to determine whether the conduct was severe (or pervasive).<sup>84</sup> Further describing the totality test, Justice O'Connor considered "whether [the conduct was] physically threatening or humiliating, or a mere offensive utterance[.]"<sup>85</sup> This suggests a method for determining if the conduct was severe. She further proposed examining "... whether [the conduct] unreasonably interferes with an employee's work performance."<sup>86</sup> However, this appears to relate both to the subjective and objective tests, since interference with work performance is one of the indicators that the plaintiff was subjectively harmed, and can also be an indicator of whether a reasonable person could find that the conduct was severe enough to create a hostile work environment.<sup>87</sup> As described below in Part IV, we offer a useful framework for understanding the *Harris* factors that is consistent with the intention of those factors and provides a rational approach to determining whether conduct was severe on the one hand, or pervasive on the other.

80. See, e.g., Johnson, *supra* note 6, at 117–18 (extensively reviewing decisions in which courts misapplied the *Harris* factors by requiring satisfaction of all of them). Sometimes courts do not cite to *Harris* when they enumerate the *Harris* factors, failing to acknowledge the Supreme Court as the source, which suggests that litigators and/or judges are not reading the Supreme Court cases. See, e.g., Mitchell v. Pape, 189 F.App'x 911, 913 (11th Cir. 2006); Pomales v. Celulares Telefonica, Inc., 447 F.3d 79, 83 (1st Cir. 2006); Cowen v. Prudential Ins. Co. of Am., 141 F.3d 751, 758 (7th Cir. 1998).

81. *Harris*, 510 U.S. at 23.

82. See, e.g., Schnapper, *supra* note 6, at 327–32 (discussing various approaches to the pervasive standard in response to its being "vague and manipulable").

83. See *Harris*, 510 U.S. at 21 (citing *Meritor*, 477 U.S. at 65).

84. See *id.*

85. *Id.* at 23.

86. *Id.*

87. See DISCUSSION, *supra* Part IIB.

#### D. Imposition of original standards.

Some courts have ignored the Supreme Court language and reasoning in favor of an entirely different and original analysis.<sup>88</sup> A leading example which has had substantial impact beyond the Seventh Circuit is *Baskerville v. Culligan International Co*.<sup>89</sup> In *Baskerville*, Judge Posner reversed a jury verdict for the plaintiff, declaring that “[t]he concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women.”<sup>90</sup> The court held that this was not a “hellish” work environment.<sup>91</sup> Judge Posner also stated: “It is no doubt distasteful to a sensitive woman to have such a silly man as one’s boss, but only a woman of Victorian delicacy – a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity . . .” would find the conduct offensive.<sup>92</sup> He stated this even though the jury apparently shared the plaintiff’s sensibilities.

At no time has the Supreme Court articulated a requirement that the workplace must be “hellish.” In fact, most of the Court’s explanation of what constitutes severe conduct has focused on the opposite end of the spectrum, stating that actionable conduct was somewhere beyond “ordinary socializing” and “flirtation.”<sup>93</sup> Justice O’Connor stated in *Harris* that to be actionable, conduct did not have to be as reprehensible as the conduct in *Meritor*.<sup>94</sup> Judge Posner’s requirement that the workplace be “hellish” set the threshold for determining whether conduct is actionable higher than was intended by the Supreme Court. This has influenced other courts to set the bar too high. Judge Posner correctly stated in the opinion that Title VII “. . . is not designed to purge the workplace of vulgarity.”<sup>95</sup> However, imposing the requirement that a workplace be “hellish” is an excessive response to the concern that Title VII should not be imposed as a civility code.<sup>96</sup>

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88. See, e.g., cases, *infra* Part III.

89. 50 F.3d 428, 430 (7th Cir. 1995) (conduct included among other acts, the plaintiff’s boss making grunting sounds to the plaintiff when she wore a leather skirt; announcing on the PA system that “all pretty girls run around naked;” making a hand gesture intended to suggest masturbation; and telling the plaintiff that he had better clean up his act and he should think of her as “Miss Anita Hill”).

90. 50 F.3d at 430. Judge Posner cites no authority for this proposition. See Cheryl L. Anderson, “Thinking Within the Box”: How Proof Models Are Used to Limit the Scope of Sexual Harassment Law, 19 HOFSTRA LAB. & EMP. L. J. 125, 145–48 (2001) (describing the *Baskerville* characterization as a “yardstick” by which subsequent hostile work environment claims were measured in that Circuit). In addition, a WestLaw Keycite of the headnote in which Judge Posner stated that Title VII was designed to protect women from the kind of male attentions that make a workplace “hellish” produced over 255 citing cases, the overwhelming majority of which cited this favorably. (August 3, 2007).

91. *Id.*

92. *Id.* at 431.

93. See *Oncale*, 523 U.S. at 81.

94. 510 U.S. at 22. See *Meritor*, *supra* note 29.

95. *Baskerville*, 50 F.3d at 430.

96. See also, *Montz*, *supra* note 79, at 841 (discussing *Shepherd v. The Comptroller of Public Accountants of Texas*, 168 F.3d 871, 874 (5th Cir. 1999), which stated that “Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected class member’s opportunity

## PART III

In the following cases, the courts disposed of plaintiff's Title VII claims of hostile work environment sexual harassment by reversing a jury verdict for the plaintiff or by granting summary judgment for the defendant.<sup>97</sup> We discuss how the court's treatment of the facts in each case demonstrates some or all of the errors we described in Part II, resulting in decisions which are contrary to what a reasonable fact-finder could have determined. We then apply a more rational analysis based on the Supreme Court's explanation of the severe or pervasive standard, to describe how an appropriate outcome could have been reached.

A. *Mitchell v. Pope*, 189 F.App'x 911 (11th Cir. 2006)

A female Deputy Sheriff, Donya Mitchell, alleged that in the County Sheriff's Department where she worked she was sexually harassed by another officer, Major Michael Overbey, in violation of Title VII.<sup>98</sup> The district court granted summary judgment for the defendants<sup>99</sup> and the Eleventh Circuit affirmed the lower court's decision, stating the conduct was not sufficiently severe or pervasive to be actionable.

Ms. Mitchell described sixteen incidents of harassment that occurred from 1999 to 2002.<sup>100</sup> One incident involved Mr. Overbey telling Ms. Mitchell that "you can just walk into the room and I get an erection."<sup>101</sup> He also called the plaintiff a "frigid bitch" on two occasions: once when he tried to kiss her after a Sheriff's department Christmas party and another time when she refused to join him in a hot tub at a hotel where they were attending a conference.<sup>102</sup> On a separate occasion, he told her that "her ass sure does look fine" and suggested she wear certain jeans.<sup>103</sup> Mr. Overbey chased plaintiff around the office, and also appeared several times in her driveway during one month.<sup>104</sup> One of those times he was drunk and told Ms Mitchell's son that he loved the plaintiff.<sup>105</sup> He touched or attempted to touch her three times: he attempted to kiss her; he rubbed up against and reached across her chest; and, he lifted her over his head.<sup>106</sup> On some occasions he directed sexualized comments to Ms. Mitchell and

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to succeed in the workplace." The author points out that this standard is far harsher than the Supreme Court's requirements.)

97. *Mitchell v. Pope*, 189 F.App'x 911 (11th Cir. 2006); *Moser v. MCC Outdoor, LLC*, 459 F. Supp. 2d 415 (M.D.N.C. 2006); *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002); *See also*, *Brooks v. City of San Mateo*, 214 F.3d 1082 (9th Cir. 2000) (failing to properly evaluate the conduct, which included what the court described as an "assault" or "attack" by an employee who fondled the plaintiff's stomach and bare breast, but also confusing the severe or pervasive standard with the separate consideration of employer liability); *see supra* note 5 for articles discussing examples of additional cases.

98. 189 F.App'x at 913.

99. The defendants were the Sheriff, Major Overbey, and the Sheriff's Department.

100. *Id.* at 913, n. 3 (describing the sixteen incidents only in a footnote in the opinion).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. 189 F.App'x at 913, n.3.

106. *Id.*

other officers.<sup>107</sup> One such incident occurred at a golf tournament where Ms. Mitchell was working a security detail.<sup>108</sup> Mr. Overbey told a group of officers, including the plaintiff, that at another golf tournament strippers were the caddies and the strippers were directed “. . .to place golf balls into their vaginas and to squirt them onto the green.”<sup>109</sup>

In rejecting Ms. Mitchell's hostile work environment claim, the Eleventh Circuit misconstrued the *Harris* totality test and ignored or misapplied the synthesis of the reasoning in the Supreme Court cases in reaching the decision that a jury could not reasonably find that Ms. Mitchell was the victim of severe or pervasive sexual harassment.<sup>110</sup> Without citing the *Harris* case, the court imposed a four-part analysis based on the *Harris* factors: frequency; severity; physically threatening and humiliating or mere offensive utterance; and unreasonable interference with job performance.<sup>111</sup> The court appeared to treat these factors as prongs of a test, each needing to be satisfied separately, rather than as factors within a totality test. The court stated that sixteen incidents in four years was not frequent enough. The court later stated “. . .that this behavior –given its relative infrequency- is not the kind of ‘severe’ harassment necessary for liability to attach under Title VII.”<sup>112</sup> Here, the court used frequency as a threshold test that must be satisfied when determining whether the conduct is severe, rather than discussing the pervasive standard independently and providing an explanation of why sixteen incidents did not contribute to a finding of *pervasive* harassment.<sup>113</sup>

The court went on to explain that there were only three incidents of physical conduct and that Ms. Mitchell did not assert that she felt threatened by the physical conduct.<sup>114</sup> The court seemed to confuse the subjective test with the objective test. The victim's reaction to the conduct is a separate inquiry from whether a reasonable person would have found the conduct threatening.<sup>115</sup> There may have been grounds to find that the subjective test was not met in this case and therefore that there was no violation of Title VII, but the court never addressed the subjective test separately to determine whether the plaintiff found the circumstances intolerable and unreasonably interfered with her job performance.<sup>116</sup> If the court had concluded that Ms. Mitchell did not feel threatened or humiliated by Mr. Overbey's actions and did not complain to supervisors in a timely manner, then the court should have determined that the

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107. *Id.*

108. *Mitchell*, 189 F.App'x at 913.

109. *Id.*

110. *Id.* at 912.

111. *Id.* at 913.

112. *Id.* at 913–14.

113. See DISCUSSION, *supra* Part II C. that the test should be applied as the Court intended, in the alternative: severe or pervasive.

114. 189 F.App'x at 913.

115. See DISCUSSION, *supra* Part II B. that the objective and subjective tests should be applied independently, also as the Court intended.

116. *Id.* at 914 (concluding that health problems on the part of plaintiff were the greatest hindrance to her job performance and led to the confrontation with the sheriff and ultimately to her resignation).

subjective test was not satisfied.<sup>117</sup> The court's conclusion that the plaintiff did not feel threatened by the conduct, and therefore that the conduct was not severe, gives future courts the opportunity to rely on these facts as an example of the type of harassment that should not be viewed as objectively hostile *even in* cases where the plaintiff clearly satisfies the subjective test.

In its brief discussion of the nature of the conduct, the court stated that the conduct was "reprehensible" and "crass and juvenile," but also stated that much of the conduct was "horseplay."<sup>118</sup> Not only did the court fail to identify which incidents should be classified as "horseplay," but it also did not state what constitutes "horseplay."<sup>119</sup> "Horseplay" was used by the Supreme Court in *Oncale* to describe conduct that would not be actionable.<sup>120</sup> The term the Court used, however, was "male on male horseplay," which in the context of the *Oncale* case, was relevant because it was a same-sex harassment case and the egregious conduct in that case was not considered horseplay.<sup>121</sup> Even if "horseplay" were applied to male-female interactions, the only behavior that conceivably might be considered horseplay was Mr. Overbey's turning the bathroom lights on and off.<sup>122</sup> However, this incident would have to be viewed in isolation from all the other highly sexualized conduct to simply dismiss this incident as "horseplay."

The court offered no meaningful case comparisons to support its conclusion that the conduct was not actionable. The court never discussed what conduct would be considered severe. It compared, without explanation, this case to two Eleventh Circuit cases in which the court concluded that the conduct was not objectively severe or pervasive.<sup>123</sup> However, in *Mendoza*, there were no sexually explicit comments and most of the conduct consisted of plaintiff feeling as though she was being stared at by her co-worker when he looked at her groin area and made sniffing sounds.<sup>124</sup> The conduct in the *Mitchell* case was more sexually explicit than in *Mendoza*.<sup>125</sup> The *Mitchell* court also cited to *Gupta*,<sup>126</sup>

117. See *Harris*, 510 U.S. at 21–22 (stating that "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.") The court also could have made an independent conclusion regarding employer liability as the basis for its disposition.

118. 189 F.App'x at 913.

119. *Id.*

120. See *Oncale*, 523 U.S. at 81.

121. The plaintiff in *Oncale* was subjected to forcible sex-related, humiliating actions on multiple occasions, sexual physical assault, and a threat of rape. See 523 U.S. at 77. The Court declined to detail the incidents in the interest of "both brevity and dignity." *Id.*

The Court's characterization of "male on male horseplay" suggests that this is not a category best used to describe male-female interactions in the workplace, and that the terms the Supreme Court used in the same section of *Oncale*, "intersexual flirtation" and "ordinary socializing," are better suited for describing the types of male-female interactions that are not actionable. See *id.* at 81.

122. 189 F.App'x at 913.

123. *Id.* at 914; *Mendoza v. Borden*, 195 F.3d 1238 (11th Cir. 1999).

124. See 195 F.3d at 1243 (addressing the cumulative effect and the totality test in determining that the conduct was very mild). In *Mitchell*, the court seemed to ignore the totality test and isolated the incidents.

125. The conduct in *Mendoza* perhaps also could have been found to have violated Title VII under the test the authors apply here.

which involved no explicit or crude sexual comments or actions; rather, the conduct consisted of persistent uncomfortable attention by a male co-worker toward the plaintiff.<sup>127</sup> Leaving aside whether *Gupta* or *Mendoza* were properly decided, neither of these cases which were relied on by the court contain the overt sexual comments and unambiguous sexual behavior that occurred here.

The Supreme Court in *Oncale* stated that intersexual flirtation and ordinary socializing do not create discriminatory conditions in the workplace.<sup>128</sup> A male coworker telling a female coworker that she gives him an erection could be found by a reasonable person to go beyond ordinary socializing and intersexual flirtation. This comment when viewed in the context of the other humiliating incidents shows a workplace permeated with sexually offensive conduct rather than an example of innocuous differences in the way men and women routinely interact. Had the court considered the cumulative effect of the sixteen incidents, the court may have had more difficulty concluding the conduct was not objectively severe or pervasive.<sup>129</sup> These were not isolated offensive utterances, but a pattern of explicit verbal and physical conduct of a sexual nature. These were not examples of the ordinary tribulations of the workplace.

B. *Moser v. MCC Outdoor, LLC*, 459 F. Supp. 2d 415 (M.D.N.C. 2006)

Plaintiff ██████ Moser was a Sales Representative for a company that sold outdoor advertising spaces.<sup>130</sup> Throughout her twelve months of employment, Ms. Moser was repeatedly harassed by Eddie Jones, her sales manager, and by three other male sales representatives: George Wilkes, Kelly Phipps, and Tom Poe.<sup>131</sup> The court granted summary judgment for the defendant, and, in its opinion, divided the conduct into touching incidents, statements, and various other acts toward the plaintiff.<sup>132</sup> When the court applied the severe or pervasive standard to the facts, ruling that the allegations were not sufficiently frequent or serious, it summarized the numerous incidents as follows:

Plaintiff experienced mild touching like . . . attempted kisses and touches, including Wilkes's popping [her buttocks] with a plastic water bottle, fellow employees twice trying to lift, or engaging in conduct that might lead to a lifting of, Plaintiff's skirt, and Jones's infrequent side hugs during the year-long employment, leg touches on one car trip, or kisses at a local restaurant.<sup>133</sup>

Within this recitation of facts, the court failed to mention that the plaintiff had thwarted an attempt by Phipps to touch her breasts.<sup>134</sup> The court only mentioned this incident at the beginning of the case and not when analyzing the

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126. *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571 (11th Cir. 2000).

127. 109 F.App'x at 914.

128. 523 U.S. at 81.

129. See *Mitchell*, 189 F.App'x at 913–14.

130. *Moser*, 459 F. Supp. 2d at 418.

131. *Id.*

132. *Id.* at 418–19.

133. *Id.* at 421.

134. *Id.* at 418.

facts to determine if the conduct was severe or pervasive.<sup>135</sup> The court continued its summary of the harassment:

Additionally, . . . Plaintiff experienced mild and infrequent verbal abuse. For example, Wilkes once told Plaintiff to slow down in her stride because she was bouncing, commented that he could see Plaintiff's underwear, called Plaintiff a "dingbat" and "dumb blonde," and told her he knew she would have an affair with someone in the office. Phipps once told Plaintiff that he wished to have sexual intercourse with her, and Poe once stated that he would consider having sexual intercourse with Plaintiff. Poe also once asked Plaintiff if she were wearing a thong and shared personal information about his love life. Poe stopped describing acts with his wife after Plaintiff told him to stop several times. . . . Jones stated he loved Plaintiff, stated he wished to have sexual intercourse with Plaintiff, suggested Plaintiff was familiar with directions to his house because of her frequent visits there, said he would "do her," and suggested it was a good thing she worked out because she did not have sexual intercourse as an outlet for her energy. Jones also stated his desire to engage in sexual intercourse with women, commented on women's breasts and buttocks, told Plaintiff he favored small breasts, and commented to another employee, in Plaintiff's presence, that they should ask Plaintiff about various sexual techniques.<sup>136</sup>

Plaintiff witnessed or experienced several acts of similar frequency and severity. A fellow employee took a picture of Plaintiff's behind without Plaintiff's prior knowledge. Jones showed Plaintiff a picture of a little boy with a large phallus superimposed upon him saying that this was he when he was young.<sup>137</sup>

The court also noted that the plaintiff's conduct at the company was not "model either."<sup>138</sup> Fellow employees complained about plaintiff's loud and abrasive tone.<sup>139</sup> Plaintiff had nicknames for the fellow employees, such as "baldy," "chubby" and "Lucifer."<sup>140</sup>

The court explained that the plaintiff had complained about some of the conduct to her General Manager who, after attempting once to mediate the problem, threatened to fire the plaintiff and one of the harassers.<sup>141</sup> Eventually Ms. Moser was fired after loudly arguing with another employee.<sup>142</sup> Plaintiff then filed her lawsuit claiming violations of Title VII.<sup>143</sup>

The court determined that the conduct was "not sufficiently frequent and serious."<sup>144</sup> It described the *Harris* factors and then stated that the totality of facts

135. *Id.*

136. *Moser*, 459 F. Supp. 2d at 419.

137. *Id.* at 421-22.

138. *Id.* at 419.

139. *Id.*

140. *Id.* This description of plaintiff's behavior would only be relevant in an evaluation of the subjective test, and concluding that she was abrasive, loud, and gave some employees non-sexualized nicknames was improper as further justification for denying plaintiff relief within the objective test.

141. *Id.*

142. *Moser*, 459 F. Supp. 2d at 419.

143. *Id.*

144. *Id.* at 421.

must show more than unpleasantness, cruelty, or vulgarity,<sup>145</sup> citing a 1997 Fourth Circuit case, *Hartsell v. Cuplex Prods. Inc.*<sup>146</sup> The court then relied on *Baskerville*<sup>147</sup> for the proposition that the workplace must be “hellish”.<sup>148</sup> Even in 2006, the *Moser* court relied on the *Baskerville* “hellish” standard from 1995 and a Fourth Circuit case from 1997, failing to follow the Supreme Court guidance on what is severe or pervasive.<sup>149</sup>

Evaluating the explicit conduct in *Moser*, the court relied primarily on a comparison to the conduct in *Weiss v. Coca-Cola Bottling Co. of Chicago*,<sup>150</sup> decided by the Seventh Circuit in 1993.<sup>151</sup> The court tried to show similarities to the *Moser* facts in order to conclude that the harassment in *Moser* did not reach an actionable level.<sup>152</sup> The court in *Weiss* summarized its facts as follows:<sup>153</sup>

Weiss describes a number of incidents of employment-related sexual harassment. By her second week, Lawrence, who was warehouse manager and one of Weiss’ supervisors, began asking Weiss about her personal life and complimenting her, telling her how beautiful she was. By her fourth week, Lawrence began asking her for dates. Weiss told Lawrence that she would not have a sexual or dating relationship with a co-worker. Lawrence said he understood and went on about his business. Several weeks later, however, Lawrence asked Weiss to a wedding. Weiss also complains that Lawrence would jokingly call her a “dumb blond” when errors in her inventory counts would come out. She treated these statements as jokes, but stated that it bothered her when he called her that in front of other employees.

When Weiss had difficulties with a month-end inventory, she called Lawrence at home for assistance. Lawrence then called later from a bar to check on how the inventory was proceeding. He invited her to come to the bar when she was finished. Weiss went there with a friend and another co-worker. Lawrence bought them a drink, discussed their inventory problem, and they played darts. Lawrence later put his arm around Weiss’ chair and tried to kiss her, but she pulled back, said she was leaving and went home. The next week, Lawrence placed “I love you” signs in Weiss’ work area. Weiss threatened to report it to their supervisors if it ever happened again, but it did not. Weiss testified that Lawrence put his hand on her shoulder at least six times during her employment. On one occasion she objected, and he took his hand off of her shoulder. Finally, after having testified that Lawrence avoided her in June, Weiss later stated that Lawrence had approached her twice in the front office at

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145. *Id.*

146. 123 F.3d 766 (4th Cir. 1997).

147. *Baskerville*, *supra* note 89; see DISCUSSION, *supra* Part II D.

148. *Moser*, 459 F. Supp. 2d at 421.

149. In a subsequent Title VII sexual harassment case, the Eleventh Circuit seems to have reached a reasonable conclusion that summary judgment for defendant was inappropriate, in light of plaintiff’s having advanced evidence which would support satisfaction of both the subjective and objective tests. However, it applied the *Harris* factors as prongs of a test, even as it cautioned against fixating on any single factor. See *Meyers v. Cent. Fla. Investments, Inc.*, 2007 WL 1667212, at 3 (11th Cir. 2007).

150. 990 F.2d 333 (7th Cir. 1993).

151. *Moser*, 459 F. Supp. 2d at 421.

152. *Id.* at 421–22.

153. 990 F.2d at 334–35.

Coca-Cola and tried to kiss her. She responded by pulling away and asking him to leave her alone.

Leaving aside the issue of whether *Weiss* was correctly decided, it is hard to conceive that these two cases would be seen as similar. There was no conduct in *Weiss* that was as explicitly sexual as in *Moser*: there was no attempt to grab her breasts; the plaintiff's co-worker never explicitly stated that he was interested in having sexual intercourse; there were no comments about the plaintiff's and others' body parts and/or inquiries into the plaintiff's and other's sex lives. All of these were present in *Moser*.<sup>154</sup> Although the court acknowledged that the conduct in *Moser* "was over a longer span and included more instances" than in *Weiss*, it nevertheless concluded that "neither case presented a hellish environment akin to daily vulgar and offensive acts."<sup>155</sup> The court implicitly supported its decision by considering the conduct as "isolated incidents of minor seriousness."<sup>156</sup>

When three of the four male co-workers whom plaintiff accused of harassment in *Moser* explicitly expressed their interest in having sexual intercourse with her, this reasonably could be interpreted as more than mere intersexual flirtation and ordinary socializing.<sup>157</sup> Indeed, this is precisely the kind of conduct identified by *Meritor* and the subsequent Supreme Court cases as possible examples of severe conduct.<sup>158</sup> Moreover, the plaintiff here endured this offensive conduct regularly for twelve months,<sup>159</sup> and the court failed to address the pattern and frequency of this behavior, its cumulative effect, or the likelihood of repetition or inescapability. The court thereby failed to evaluate the potential for a reasonable conclusion that the behavior was pervasive. It merely drew a parenthetical comparison<sup>160</sup> to *Smith v. First Union National Bank*,<sup>161</sup> where the plaintiff endured a barrage of harassment over thirty times during the first few weeks of her employment - clearly an extreme situation and an outlier case improperly relied on to define a threshold for considering conduct pervasive.

### C. *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002)

In August 1994, through an arrangement with the Junior College District of St. Louis, Diana Duncan began work as a technical training clerk providing in-house support at a General Motors Corporation (GMC) manufacturing facility.<sup>162</sup> Throughout her tenure, from 1994-1997, Ms. Duncan was subjected to

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154. 459 F. Supp.2d at 418-19.

155. *Id.* at 422.

156. *Id.* at 421.

157. *See* 523 U.S. at 81.

158. *See* DISCUSSION, *supra* Part I, noting the Court's reliance on the EEOC Guidelines, 29 CFR § 1604.11(a)(1985); these Guidelines enumerated types of workplace conduct which might be actionable: "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."

159. *Moser*, 459 F. Supp. 2d at 418.

160. *Id.* at 422.

161. 202 F.3d 234 (4th Cir. 2000).

162. *Duncan*, 300 F.3d at 931.

unwelcome attention by a GMC employee which culminated in her resignation.<sup>163</sup>

Two weeks after she began working at GMC, this employee requested an off-site meeting with her at a restaurant and propositioned her, requesting a relationship.<sup>164</sup> Ms. Duncan rebuffed him and left the restaurant; he later apologized for his behavior and made no further propositions.<sup>165</sup> However, Ms. Duncan stated that thereafter his behavior towards her became hostile and he was more critical of her work.<sup>166</sup> She also testified about numerous incidents of inappropriate behavior: the employee asked Ms. Duncan to use his computer to create a training document, and had a picture of a naked woman on his screen-saver; on four or five occasions, he unnecessarily touched her hand when she gave him the telephone; in 1995, in response to a request for a pay raise and consideration for an illustrator's position (even though other applicants for the position had been required to draw automotive parts), he required her to draw a planter he kept in his office which was shaped like a slouched man wearing a sombrero, with a hole in the front of the man's pants that allowed a cactus to protrude;<sup>167</sup> also in 1995, he and a college employee posted on a bulletin board in the high-tech area a "recruitment" poster portraying Ms. Duncan as the president and CEO of the Man Hater's Club of America;<sup>168</sup> in April, 1996, he and a college employee arranged to have Ms. Duncan "arrested" at the company as part of a charity event, but once the employee paid for her "release," and despite her protestations, the employee took Ms. Duncan to a bar; and, in May, 1997, he asked Ms. Duncan to type a draft of the beliefs of the "He-Men Women Hater's Club,"<sup>169</sup> but she refused and resigned two days later.<sup>170</sup>

A jury found for Ms. Duncan on her claims of sexual harassment and constructive discharge.<sup>171</sup> The Eighth Circuit reversed.<sup>172</sup> The court cited the *Harris* factors, but failed to apply them or synthesize them with the guidance from the other Supreme Court cases to meaningfully evaluate the conduct.<sup>173</sup>

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163. *Id.* at 930.

164. *Id.* at 931.

165. *Id.*

166. *Id.* Ms. Duncan admitted that the employee often directed criticisms at others as well, including her male co-workers.

167. *Id.* at 932. Ms. Duncan later learned that she was not qualified for the position because she did not have a college degree.

168. *Id.* (summarizing evidence that the poster listed the membership qualifications as: "Must always be in control of: (1) Checking, Savings, all loose change, etc.; (2) (Ugh) Sex; (3) Raising children our way!; (4) Men must always do household chores; (5) Consider T.V. Dinners a gourmet meal").

169. *Id.* Plaintiff was asked to type the beliefs of this club, quoted by the court as including: "Constitutional Amendment, the 19<sup>th</sup>, giving women [the] right to vote should be repealed. Real He-Men indulge in a lifestyle of cursing, using tools, handling guns, driving trucks, hunting and of course, drinking beer. Women really do have coodies [sic] and they can spread. Women [are] the cause of 99.9 per cent of stress in men. Sperm has a right to live. All great chiefs of the world are men. Prostitution should be legalized."

170. *Id.*

171. *Id.* at 933.

172. *Id.* at 931.

173. *Id.* at 934.

The court stated that “Title VII is ‘not designed to purge the workplace of vulgarity,’” quoting from *Baskerville v. Culligan Int’l Co*, a Seventh Circuit case,<sup>174</sup> but *Baskerville* was decided before *Oncale* and *Faragher*, and those cases do not make as sweeping a statement about the purpose of Title VII. Rather, the Supreme Court cautioned that Title VII is not to be imposed as a general civility code,<sup>175</sup> which is narrower than the characterization in *Baskerville*.

Earlier in the opinion, the court had stated that the conduct was not so severe or pervasive as to alter a term, condition, or privilege of the plaintiff’s employment; “[t]o clear the high threshold of actionable harm” plaintiff had to show that the workplace was permeated with discriminatory intimidation, ridicule, and insult,” citing *Harris*.<sup>176</sup> In order to explain this conclusion, the court attempted to compare these facts to those in other cases, primarily from other circuits.<sup>177</sup> However, it did so by merely stating that “[n]umerous cases have rejected hostile work environment claims premised upon facts equally or more egregious than the conduct at issue here.”<sup>178</sup>

The court concluded its discussion by imposing standards of its own, with no citation or reference to any Supreme Court or other court language.<sup>179</sup> It stated that the employee’s actions were “boorish, chauvinistic, and decidedly immature,” but did not create an objectively hostile work environment permeated with sexual harassment.<sup>180</sup> The court selectively related “four categories” of conduct presented by plaintiff’s evidence, omitting, without explanation, the charity arrest incident and the evidence of hostility and criticism following the rebuffed request for a relationship.<sup>181</sup> The court then dismissively characterized the other incidents as: “a single request for a relationship, which was not repeated when she rebuffed it, four or five isolated incidents of [the employee] briefly touching her hand, a request to draw a planter, and teasing in the form of a poster and beliefs for an imaginary club.”<sup>182</sup>

The court returned to the subjective test, stating that it was apparent that the conduct made the plaintiff uncomfortable, before concluding that the conduct “did not meet the standard necessary for actionable sexual harassment.”<sup>183</sup>

The dissent skillfully identified some of these shortcomings of the majority opinion’s disposition of this case.<sup>184</sup> Judge Arnold found the jury’s determination reasonable and supported by ample evidence; throughout his discussion he recognized appropriate inferences that the jury could have drawn

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174. *Duncan*, 300 F.3d at 934.

175. *Oncale*, 523 U.S. at 81; *Faragher*, 524 U.S. at 788.

176. *Duncan*, 300 F.3d at 934.

177. *Id.*

178. *Id.*

179. *Id.* at 935.

180. *Id.*

181. Earlier the court stated that GMC conceded that “these ten incidents could arguably be based on sex,” citing all but the charity event. *Id.* at 933–34.

182. *Duncan*, 300 F.3d at 935.

183. *Id.*

184. *Id.* at 936–37.

to support its verdict,<sup>185</sup> and noted, quoting circuit precedent, that because there “is no bright line between sexual harassment and merely unpleasant conduct, . . . a jury’s decision must generally stand unless there is trial error.”<sup>186</sup>

This conduct was not ordinary socializing, reflecting genuine but innocuous ways in which men and women routinely interact with members of the opposite sex; the conduct, as recognized by Judge Arnold, went far beyond gender related jokes and occasional teasing.<sup>187</sup>

A more meaningful evaluation of the conduct to determine if the jury properly could have considered it severe would have applied the Supreme Court analysis. Doing so could have led to a conclusion that it was severe because it consisted of a request for a sexual relationship, and hostility based on sex. Judge Arnold characterized the proposition as a “sexual advance by her supervisor within days of beginning her job,” occurring during work hours and constituting a direct request for a sexual relationship.<sup>188</sup> He further recognized that in the following months, the supervisor’s conduct became hostile, consisting of increased criticism of plaintiff’s work and degradation of her professional capabilities in front of her peers.<sup>189</sup> He stated that there also were other forms of inappropriate behavior, including physical contacts; social humiliation; emotional intimidation (citing the touching of her hand, public humiliation, the requirement to draw a vulgar planter or not be considered for promotion); and specific tasks of a sexual nature (such as typing the club minutes).<sup>190</sup>

Similarly, an application of the Supreme Court analysis to these facts logically would have supported the conclusion that a jury properly could have found that the conduct was pervasive. Judge Arnold stated that Ms. Duncan was subjected to “a long series” of incidents of sexual harassment,<sup>191</sup> and that the sexual overture was not an isolated one, but was the beginning of a string of degrading actions.<sup>192</sup> From this evidence, the jury could have reasonably

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185. *Id.* at 937. Again, proper respect for a jury’s determination in these cases is a clear way to avoid inconsistent and confusing rulings by courts of appeals.

186. *Id.* at 938 (additional citation omitted). He further quoted additional precedent that the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury (citation omitted).

187. *Id.*, quoting *Faragher* and *Oncale*.

188. *Duncan*, 300 F.3d at 937.

189. *Id.*

190. *Id.*

191. *Id.* at 936.

192. Judge Arnold criticized the majority as minimizing the effect of the sexual proposition on Ms. Duncan’s working conditions by characterizing it as a “single request.” He also criticized the majority’s faulty reliance on other circuit court cases, declaring that the behavior to which Ms. Duncan was subjected was not “less severe” than conduct in some of the cases and he distinguished it from conduct in some other cases. *Id.* at 937–38. He noted, for example, that Ms. Duncan was given specific tasks of a sexually-charged nature; that she was subjected to conduct which would prevent her from succeeding in the workplace; that she was sexually propositioned; and that she was singled out – the conduct was directed specifically at her. *Id.* With regard to comparisons to cases within the Eighth Circuit, Judge Arnold asked: “Is it clear that the women in these cases suffered harassment greater than Ms. Duncan?” He answered: “I think not.” *Id.* at 938.

decided that the conduct was sufficiently persistent and regular, creating a cumulative effect and an expectation of repetition.<sup>193</sup>

Thus, rather than applying the analytical guidance provided by the Supreme Court for the evaluation of conduct in these cases, and rather than properly deferring to the jury's determination, the Eighth Circuit irrationally reversed.

#### PART IV

As demonstrated in Part III, a correct understanding and application of the Supreme Court reasoning and analysis would result in more consistent and appropriate outcomes in lower court decisions. This would enable courts to distinguish “ordinary socializing” from “discriminatory conditions of employment.”<sup>194</sup>

In this section we present the totality of circumstances test for determining whether conduct could be considered objectively severe or pervasive, based on a synthesis of the Supreme Court opinions. This provides both a guide for judges in ruling on dispositive motions and model jury instructions.<sup>195</sup>

##### A. General instructions regarding totality of circumstances test to determine if conduct could be considered severe or pervasive.

Conduct which is *either* objectively severe *or* objectively pervasive, such that it alters the conditions of employment, creates a hostile work environment and violates Title VII.<sup>196</sup>

Within the objective test to determine whether conduct was severe or pervasive, examine the record as a whole and the totality of circumstances, guided by common sense and sensitivity to social context in which the incidents occurred.<sup>197</sup>

Consider the surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.<sup>198</sup>

No single factor is required and this is not a mathematically precise test.<sup>199</sup>

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193. See *Morgan*, 536 U.S. at 115.

194. *Oncale*, 523 U.S. at 81.

195. Current model jury instructions may provide some guidance but fall into the same trap as the cases in terms of over-reliance on the *Harris* factors and/or misstatement of the law, including meshing of the subjective and objective tests. See, e.g., 3C Fed. Jury Prac. & Instr. § 171.40 (5th Ed.),

196. See *Meritor*, 477 U.S. at 67; *Harris*, 510 U.S. at 21; *Oncale*, 523 U.S. at 78; *Faragher*, 524 U.S. at 787; *Clark*, 536 U.S. at 270.

197. *Oncale*, 523 U.S. at 81. This does not mandate different analyses depending on whether the conduct occurs in a blue or white collar environment. See generally *Shaffer*, *supra* note 70 (appropriately criticizing such a two-standard approach).

198. *Id.* at 81–82.

199. *Harris*, 510 U.S. at 23.

## B. Whether conduct could be considered severe.

The nature of all the conduct should be analyzed to determine whether it *contributed* to an environment which reasonably could be considered hostile or abusive.<sup>200</sup>

Most commonly, the claim of hostile work environment involves a number of acts and the claim is based on the cumulative effect of these individual acts,<sup>201</sup> although an extreme single act might be considered severe.

There is no hierarchy of behavior, such that physical acts are to be considered more extreme than verbal conduct.<sup>202</sup>

Conduct may be considered severe whether motivated by sexual desire and/or by hostility based on gender.<sup>203</sup>

Conduct need not be criminal to be considered severe.<sup>204</sup>

Conduct may be considered severe if it was either physically threatening or humiliating.<sup>205</sup>

Conduct may be considered severe if it included: requests for sexual relations (explicit or implicit proposals for sexual activity<sup>206</sup>); actual sexual relations; fondling; pursuit;<sup>207</sup> and/or unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature.<sup>208</sup>

Conduct which is objectively regarded as ordinary socializing in the workplace, such as intersexual flirtation, is not considered severe.<sup>209</sup>

Conduct which objectively reflects innocuous differences in the ways men and women routinely interact with members of the opposite sex is not considered severe.<sup>210</sup>

Conduct would not be considered severe if it consisted of a mere utterance of an offensive epithet;<sup>211</sup> and/or merely if words used have sexual content or connotations.<sup>212</sup>

Conduct would not be considered severe if it consisted merely of simple teasing, offhand comments and [isolated] incidents (unless extremely serious).<sup>213</sup>

Ordinary tribulations of the workplace, such as [sporadic] use of abusive language, gender-related jokes, and [occasional] teasing<sup>214</sup> are not to be considered severe.

200. *Id.* at 22–23.

201. *See Clark*, 536 U.S. at 271, and *Morgan*, 536 U.S. at 115.

202. *See Oncale*, 523 U.S. at 81–82.

203. *Id.* at 80.

204. *See Meritor*, 477 U.S. at 67.

205. This is one of the *Harris* factors, 510 U.S. at 23.

206. *See Oncale*, 530 U.S. at 80.

207. *See facts in Meritor*, *supra* note 28, which the Court held were plainly sufficient to state a claim for hostile environment sexual harassment.

208. EEOC Guidelines (1980), cited in *Meritor*, 477 U.S. at 65.

209. *Oncale*, 523 U.S. at 81.

210. *Id.*

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

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

213. *Faragher*, 524 U.S. at 788; *Clark*, 532 U.S. at 271.

214. *Faragher*, 524 U.S. at 788.

### C. Whether conduct could be considered pervasive.

Conduct which permeated the workplace with discriminatory intimidation, ridicule, and insult is pervasive and creates a hostile work environment in violation of Title VII.<sup>215</sup>

Offensive conduct which is frequent<sup>216</sup> may be considered pervasive. Frequency may be determined by examining how many times the acts occurred,<sup>217</sup> as well as the regularity, repetition or pattern of the offensive conduct within the duration of the victim's employment.<sup>218</sup>

It is appropriate to consider where and when conduct occurred, within and/or outside the workplace,<sup>219</sup> because conduct which was inescapable, or unavoidable, and/or occurring in various locations, can contribute to a finding that it was pervasive.<sup>220</sup>

It also is appropriate to consider how long the conduct persisted and with what degree of regularity or repetition, to decide if it created an expectation and/or a cumulative effect.<sup>221 222</sup>

Conduct which is merely "isolated, sporadic, or occasional,"<sup>223</sup> such that it did not permeate the workplace with discriminatory intimidation, ridicule and insult, is not pervasive.

### CONCLUSION

The reasoning provided by the Supreme Court in the sexual harassment cases offers more guidance to lower courts than they have recognized. Instead, federal district courts and circuit courts of appeals frequently rely on other lower court decisions that have ignored the Supreme Court reasoning; and, to a large extent, the lower courts have applied their own notions of acceptable workplace behavior. This has resulted in unjust and inconsistent dispositions.

All parties in these lawsuits deserve adjudications in which the legal standards are applied consistently, which could be achieved by more direct and

215. See *Harris*, 519 U.S. at 21.

216. The definition of frequent: "happening at short intervals, often repeated or occurring", Merriam-Webster Online Dictionary, [www.m-w.com/dictionary/frequent](http://www.m-w.com/dictionary/frequent) (last visited Dec. 29, 2007).

217. See Schnapper, discussed *supra* note 82.

218. The Court noted that the offensive conduct continued for four years in *Meritor*, 477 U.S. at 60, and that the objectionable behavior occurred repeatedly and frequently for the part-time and summer employees from 1985–1990 in *Faragher*, 524 U.S. at 780–84; See *Harris*, 510 U.S. at 19.

219. See *Meritor*, 477 U.S. at 60–61.

220. See Schnapper, discussed *supra* note 82.

221. See *Morgan*, 536 U.S. at 115.

222. The level of offensiveness of the conduct needs to be considered when determining if the conduct was *pervasive*, but the threshold may be lower than that imposed when the court is analyzing whether the conduct was *severe*, as suggested by commentators discussing the inverse analysis. See Pellicotti, *supra* note 12. However, the determination of whether conduct was severe or pervasive requires independent inquiries; conduct does not have to be severe to be pervasive nor pervasive to be severe; both inquiries require a review of the totality of circumstances. This approach is derived from the reasoning of the Supreme Court cases and a synthesis of the *Harris* factors with that reasoning.

223. See *Faragher*, 524 U.S. at 788; *Clark*, 532 U.S. at 271.

explicit application of the Supreme Court's analysis. The failure to do so has resulted in courts' lack of appreciation for the vast array of discriminatory and hostile conduct that lies just beyond the genuine differences in the ways men and women routinely interact with members of the opposite sex.<sup>224</sup>

Repeated warnings throughout the Supreme Court cases that isolated incidents of offensive conduct, sporadic use of gender-related jokes, or occasional teasing does not result in Title VII liability, provide sufficient guidance to prevent the statute from being used as a federally imposed civility code.<sup>225</sup> Attempting to grab a co-workers breast; explicitly propositioning the plaintiff for sex; forcing a plaintiff as part of her job assignment to draw a phallus; commenting on explicit intimate parts of the plaintiff's body; a steady stream of sexualized comments and acts directed at the plaintiff throughout her employment<sup>226</sup>—such conduct should be presented to a fact-finder for a reasonable determination of its severity or pervasiveness. The fact-finder should apply the synthesis of the Supreme Court's reasoning to the conduct to determine if it violates Title VII, and appellate courts should exercise restraint in respecting the fact-finders' determinations. Such a process is necessary as these cases are fact intensive, and require an evaluation of the totality of circumstances and the cumulative effect of individual acts.<sup>227</sup> Proper application of the Supreme Court's analysis would ensure that courts uphold "Title VII's broad rule of workplace equality."<sup>228</sup>

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224. See *Oncale*, 523 U.S. at 81.

225. See *id.*; *Faragher*, 524 U.S. at 788.

226. See facts in cases discussed in Part III.

227. See *Morgan*, 536 U.S. at 115.

228. *Harris*, 510 U.S. at 22.