License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be “Severe or Pervasive” Discriminates Among “Terms and Conditions of Employment

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LICENSE TO HARASS WOMEN:
REQUIRING HOSTILE ENVIRONMENT SEXUAL HARASSMENT TO BE “SEVERE OR PERVASIVE” DISCRIMINATES AMONG “TERMS AND CONDITIONS” OF EMPLOYMENT

JUDITH J. JOHNSON*

INTRODUCTION

Title VII was intended to remedy discrimination; thus, it is ironic that the courts themselves discriminate among “terms and conditions of employment” by treating hostile environment discrimination less favorably, most commonly in sexual harassment cases. As the Supreme Court said in its first sexual harassment case, hostile environment harassment must be “severe or pervasive” to be actionable.1 However, many lower courts have used this language to excuse harassment against women. This Article suggests that the problem originates in the Court’s continued use of the phrase “severe or pervasive” to describe actionable conduct. This rather dramatic terminology in fact overstates the Supreme Court’s later interpretation of the phrase “severe or pervasive.” In Harris v. Forklift Systems, Inc.,2 the Court held that to be actionable the discriminatory conduct had to “create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.”3 Such conduct falls far short of “severe or pervasive.” Unfortunately, the Supreme Court has continued to use the phrase “severe or pervasive,” and many lower courts have misinterpreted the standard, using it to bar causes of action by employees who have been subjected to

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3. Id. at 21. The holding in Harris affirmed a “middle path” between making actionable any conduct that is “merely offensive” and that which causes a “tangible psychological injury.” Id. The discriminatory conduct must be enough to be subjectively perceived by the plaintiff, but need not be so great that it leads to physical or psychological impairment. Id. at 21-22. In other words, the conduct must produce an environment that “would reasonably be perceived, and is perceived, as hostile or abusive.” Id. at 22.
egregious conduct that, in many cases, would be criminal or at least would outrage any reasonable person.4

Title VII prohibits discrimination on the basis of race, sex, religion, color, and national origin in "compensation, terms, conditions, or privileges of employment."5 Without dispute, harassment that results in a tangible job action, such as discharge or demotion, alters terms and conditions of employment.6 This type of harassment is often called quid pro quo harassment.7 When no tangible employment action exists, however, the question is whether the harassment creates a working environment sufficiently hostile or abusive to alter terms or conditions of employment.8 This is referred to as hostile environment harassment.9 Because Title VII does not distinguish

4. See infra Section II (discussing lower courts' interpretations of "severe or pervasive").
5. Title VII provides:
   It shall be an unlawful employment practice for an employer—
   
   (1) to fail or refuse to hire or 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; or
   
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

8. See Ellerth, 524 U.S. at 753-54 (finding that where threats to change the terms and conditions of employment were not acted upon, the harassment claim required a showing of severe or pervasive conduct under the hostile environment category).
9. In Ellerth, the Supreme Court said that "[t]he terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." Id. at 751. Rather than using the familiar quid pro quo and hostile environment dichotomy for liability purposes, the Court stated:

When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.

Id. at 753-54. The Court defined "tangible employment action" as "a significant change in employment status." Id. at 761. Thus, other less significant employment actions evidently must fall under a hostile environment analysis and must be severe or pervasive to be actionable. See id. at 754. Furthermore, the Court made it clear that threats to carry out tangible employment actions were to be considered as part of a hostile environment, even though such cases "based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." Id. at 751.
among the various terms and conditions of employment, there is no statutory authority for the courts' distinctive treatment of hostile environment harassment cases. In no part of Title VII, and for no other term or condition of employment, is the discriminatory conduct required to be severe or pervasive to be actionable. Title VII's language indicates that the most important issue 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." By requiring that hostile environment harassment be severe or pervasive before it alters a term or condition of employment and thus violates Title VII, the courts basically discriminate against one term or condition of employment by assigning a significantly lower importance to the right to work in an atmosphere free from discrimination.

This distinctive treatment of hostile environment discrimination most commonly occurs in sexual harassment cases. In fact, the unfavorable treatment of sexual harassment is most evident when contrasted with cases of racial harassment.

Recently the Court has complicated this area even further. In Clark County School District v. Breeden, the Court said that no reasonable person would have believed that the harassment alleged was sufficiently severe or pervasive to be actionable; therefore, the plaintiff had no cause of action for alleged retaliation for complaining. 532 U.S. 268, 269-71 (2001) (per curiam) (ruling that a woman's supervisor and another male co-worker laughing over a sexually explicit comment found in an applicant's psychological evaluation did not violate Title VII even when the woman complained and endured subsequent retaliation).
harassment other than sexual harassment until recently, the Court commented in *Faragher v. City of Boca Raton,* that:

Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment. Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.

This statement aside, the Court had not specifically applied the same standard to other types of harassment cases until it decided *National Railroad Passenger Corp. v. Morgan,* in which it apparently assumed that the severe or pervasive standard also applied in all hostile environment cases. Nevertheless, most courts purport to apply the same severe or pervasive standard to assess racial harassment. Intolerable conduct in racial harassment cases, however, is often much less egre-

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15. Justice Thomas complained in his *Ellerth* dissent that the decision had treated employer liability for sexual harassment differently from racial harassment. 524 U.S. 742, 767 (1998) (Thomas, J., dissenting). The Court had not dealt directly with racial harassment at that time. Recently, however, in a race-based harassment case, the Court decided that the continuing violation theory applies to hostile environment harassment cases. Nat'l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061, 2068 (2002). The Court was apparently treating racial harassment the same as sexual harassment because it did not distinguish among the types of hostile environment discrimination and cited the general standard of the sexual harassment cases discussed in *Morgan.* See id. at 2073-74 (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (per curiam); Faragher v. Boca Raton, 524 U.S. 775, 768 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

Prior to Morgan, the Supreme Court in deciding that racial harassment was not actionable under 42 U.S.C. § 1981 in *Patterson v. McLean Credit Union,* said that in *Meritor* it had implicitly approved the concept of racial harassment as discrimination, if the discrimination was "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." 491 U.S. 164, 180 (1989) (citations omitted) (internal quotation marks omitted) (quoting Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986)), overruled in part by the 1991 Civil Rights Act, 42 U.S.C. § 1981a (1994). The Court in *Morgan* also cited the severe or pervasive standard. Morgan, 122 S. Ct. at 2074. See infra Sections I.E.5 and II.C.1 for a more elaborate discussion of the case.

17. Id. at 787 n.1 (internal citations omitted).
18. Morgan, 122 S. Ct. at 2074. In *Harris v. Forklift Systems, Inc.,* the Court did not use the term sexual harassment, but rather purported to define a "discriminatorily abusive work environment." 510 U.S. at 22. In *Harris,* the Court felt that the "very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality." Id.
19. See BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 45-46 (2d prtg. 1993) (describing courts of appeals cases that construe the Title VII threshold for racial harassment in terms of the severity and frequency of offensive conduct).
gious than the conduct tolerated by the courts in sexual harassment cases.\textsuperscript{20}

The concept of harassment causing a hostile employment environment first developed in ethnic and racial harassment cases and was ultimately adopted by analogy in sexual harassment cases.\textsuperscript{21} All of the bases for discrimination under Title VII—race, sex, religion, color, and national origin—are treated the same in the language of the statute,\textsuperscript{22} which compels the conclusion that all types of hostile environment harassment should be treated the same.

Some commentators have expressed the fear that analyzing all types of harassment the same as sexual harassment will make it harder for claimants to prevail in racial harassment cases.\textsuperscript{23} These scholars argue that requiring conduct to be severe or pervasive to be actionable would be inappropriate in other types of harassment cases.\textsuperscript{24} While racial harassment is certainly reprehensible, it is no more degrading or demeaning than the sexual harassment described in this Article,\textsuperscript{25} much of which the courts found not to be actionable.\textsuperscript{26}

In sexual harassment cases, the conduct must be unwelcome.\textsuperscript{27} Once the element of "unwelcomeness" is proven in a sexual harass-

\begin{itemize}
\item \textsuperscript{20} See infra Section II.B for a comparison of sexual and racial harassment cases.
\item \textsuperscript{21} See Faragher, 524 U.S. at 787 n.1 (noting that the standards for racial harassment form an appropriate basis for sexual harassment standards).
\item \textsuperscript{22} The single exception is that the bona fide occupational qualification (BFOQ) defense does not apply to race but only to sex, religion, and national origin. \textsc{Joel W. Friedman & George M. Strickler, Jr., The Law of Employment Discrimination} 173 (5th ed. 2001). This seems to be the result of a failure of congressional foresight. Of course one can imagine such situations. Should not an actor seeking to play Thurgood Marshall be black? \textit{Id.}
\item \textsuperscript{23} E.g., L. Camille Hébert, \textit{Analogizing Race and Sex in Workplace Harassment Claims}, 58 \textsc{Ohio St. L.J.} 819, 820 (1997) [hereinafter Hébert, \textit{Analogizing Race}].
\item \textsuperscript{24} See \textit{id.} at 878 (explaining that the severe or pervasive standard could lead courts to rule that racially motivated behavior did not cross the Title VII threshold, even if the behavior was seriously damaging).
\item \textsuperscript{25} See Robert J. Gregory, \textit{You Can Call Me a "Bitch" Just Don't Use the "N-Word": Some Thoughts on Galloway v. General Motors Service Part Operations and Rodgers v. Western-Southern Life Insurance Co.}, 46 \textsc{DePaul L. Rev.} 741, 775 (1997).
\item Others feel that sexual harassment damages its victims even more than the victims of other types of harassment. Professor Estrich writes:
\begin{quote}
What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely the fact that it is sexual. Not only are men exercising power over women, but they are operating in a realm which is still judged according to a gender double-standard, itself a reflection of the extent to which sexuality is used to penalize women.
\end{quote}
\textsc{Susan Estrich, \textit{Sex at Work}, 43 \textsc{Stan. L. Rev.} 813, 820 (1991)}.
\item \textsuperscript{27} \textit{Id.} For a discussion of the issue of "unwelcomeness," see Mary F. Radford, \textit{By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases}, 72 \textsc{N.C. L. Rev.} 499 (1994).
\end{itemize}
ment case, there is no reason to treat racial and sexual harassment differently. The Supreme Court's severe or pervasive test, along with the lower courts' interpretation of the standard of what constitutes a hostile environment, requires too much for any type of harassment case. Applying the severe or pervasive standard, as it is applied in sexual harassment cases, to cases of racial harassment highlights the inad-

visability of the standard. If racial harassment were analyzed in the same way as many courts analyze sexual harassment, the need for a better-reasoned approach would become evident.

This Article explores the history of employment discrimination and harassment generally in Section I. Section II examines lower court cases decided after the Supreme Court attempted to clarify the "severe or pervasive" standard in Harris v. Forklift Systems, Inc. Finally, Section III provides the analysis.

I. HISTORY

A. Early Decisions Under Title VII

Under Title VII, an aggrieved employee must file a charge of discrimination with the Equal Employment Opportunity Commission (the EEOC). The EEOC then investigates the charge and decides whether there is reasonable cause to believe that the employer discriminated. The earliest discussions of hostile environment as a type of harassment first occurred in reasonable cause findings by the EEOC, which preceded the courts in recognizing that creation of an

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The phrase "term or condition" of employment has been interpreted very broadly under the NLRA, especially under the collective bargaining provisions of the NLRA, that explain when an employer and union have to bargain about an issue. Id. § 158(d). For example, in Ford Motor Co. v. NLRB, the Supreme Court found that changing the price of food in the plant is changing a "term or condition" of employment under the NLRA, so the employer was required to bargain about it. 441 U.S. 448, 490 (1979). The National Labor Relations Board also has held that such things as coffee benefits and free meals may be considered terms and conditions of employment. ABA SECTION OF LABOR & EMPLOYMENT LAW, THE DEVELOPING LABOR LAW 880 (Patrick Hartin et al. eds., 3d ed. 1992). Thus, the Supreme Court and the NLRB have interpreted "terms or conditions" of employment broadly in labor cases. A similar reading of "terms or conditions" of employment would seem to be appropriate under the NLRA's progeny—Title VII.

29. See FRIEDMAN & STRICKER, supra note 22, at 409.
30. Id.
abusive working environment on the basis of race was discriminatory.\textsuperscript{31} These early attempts at defining the area are virtually forgotten.

\textit{Rogers v. EEOC}\textsuperscript{32} was the first case to discuss in detail a cause of action for harassment that created a hostile environment under Title VII.\textsuperscript{33} In the 1971 case of first impression, the Court of Appeals for the Fifth Circuit considered whether the plaintiff could allege discrimination not directed at her, but at her employer's patients.\textsuperscript{34} The plaintiff alleged that because the patients were segregated by national origin, she suffered from discrimination.\textsuperscript{35} The Fifth Circuit recognized the cause of action and said:

\begin{quote}
[E]mployees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of Section 703. But by the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with
\end{quote}

\textsuperscript{31} In 1969, the EEOC issued a reasonable cause finding concerning an employee who was the "object of racial insults by certain members assigned to the same department. . . . Title VII requires an employer to maintain a working environment free of racial intimidation." Case No. YSF 9-108, Employment Practices (CCH) ¶ 6030 (Decision of Equal Employment Opportunity Commission, June 26, 1969). Similarly, in another decision, the charging party alleged that his supervisor regularly referred to Negro employees by using the epithet "nigger." The EEOC explained:

An employer is responsible for the behavior of its agents within the course of their employment. It is also obliged under this Act to maintain a working atmosphere free of racial intimidation or insult. . . . That the racial insults were not directed to Charging Party, but to his fellow employees renders the act no less a violation.


\textsuperscript{32} 454 F.2d 234 (5th Cir. 1971).

\textsuperscript{33} \textit{Id.} at 236. However, the EEOC had issued earlier decisions holding that a hostile environment was actionable under Title VII. See \textit{supra} note 31.

\textsuperscript{34} \textit{Rogers}, 454 F.2d at 236-37.

\textsuperscript{35} \textit{Id.}
discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . 36

Rogers is not only the judicial origin of hostile environment harassment, but this frequently cited dicta also is the origin of the idea that the harassment must be so severe as to pervade the working atmosphere and cause psychological damage to the employee.37 The facts in Rogers were hardly of that magnitude. The plaintiff complained about the effect that discrimination against patients of her national origin had on her employment.38

The dicta in Rogers was one judge's idea that was taken out of context, and has not been seriously reconsidered since, but has merely been adopted as "the law" by the courts.39 The idea that there should have to be a separate genre for hostile environment discrimination also apparently had its origin in the Rogers case and was further reinforced by scholarship and the EEOC guidelines issued in 1980.40

Although the recognition of abusive environment as the violation of a term or condition of employment was revolutionary at the time, the dicta the Rogers court used is still cited as if it were authoritative. The facts of the Rogers case, however, might not be sufficiently severe or pervasive to constitute hostile environment harassment as it is interpreted today, in part because of the dicta the court used to envision a hypothetical egregious hostile environment that did not purport to apply to the facts before the court.41

Despite the Rogers decision and other decisions involving racial and national origin harassment, sexual harassment was not recognized as discrimination on the basis of sex until 1976 in Williams v. Saxbe.42 Prior to this decision, sexual harassment was considered to be unrelated to employment, but rather in the nature of a supervisory frolic and detour.43 Before the Supreme Court dealt with sexual harassment, however, the scholarship, the courts, and the EEOC had in-

36. Id. at 238.
38. Rogers, 454 F.2d at 236-37.
40. See id. at 65-66 (stating that the EEOC's decision to include hostile work environment under Title VII's umbrella evolved from substantial case law and EEOC precedent).
41. See supra notes 35-38 and accompanying text (describing the less psychologically harsh circumstances in Rogers).
42. 413 F. Supp. 654, 661 (D.D.C. 1976); see LINDEMAN & KADUE, supra note 19, at 13.
43. See, e.g., L. Camille Hébert, The Economic Implications of Sexual Harassment for Women, KAN. J.L. & PUB. POL'Y, Spring 1994, at 42, 51 n.19 (describing early cases in which sexual harassment was not found to be actionable).
jected some conceptual problems into the area by treating sexual harassment differently from other types of harassment.

B. EEOC Guidelines on Sexual Harassment

The EEOC issued guidelines on sexual harassment in 1980. The guidelines were necessary to recognize the cause of action, but ironically may have solidified the conceptual problem of treating sexual harassment differently from other types of harassment by defining sexual harassment as something related only to unwelcome sexual advances and not to other types of gender harassment. The guidelines also recognized a distinction between sexual harassment and other kinds of harassment, and the EEOC has continued to maintain that sexual harassment should be treated separately because sexual harassment "raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus, may warrant separate emphasis." The EEOC guidelines further recognized quid pro quo and hostile environment harassment as separate categories of sexual harassment. Since the EEOC singled out sexual harassment


45. See Schultz, supra note 44, at 1686 (stating that the early development of sexual harassment law was sufficient for quid pro quo harassment but "exclude[d] from legal understanding many of the most common and debilitating forms of harassment"). The EEOC rules reflect the two legal categories of sexual harassment—quid pro quo and offensive working environment—described in Catharine MacKinnon's book on the subject. Martha Chamallas, Writing About Sexual Harassment: A Guide to the Literature, 4 UCLA Women's L.J. 37, 39 (1993) (citing Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979)).

Professor Hébert explained why the EEOC should have defined harassment related to sex in another way:

Gender harassment—hostile and denigrating nonsexual activity directed at women because they are women (or at men because they are men)—differs from sexual harassment—sexual activity directed at women because they are women (or at men because they are men) often motivated by hostility and intended to be denigrating—only in the choice of weapon used. Both types of activity are motivated by the same purpose—to inform women of their place and role in the workforce—and have similar effects—to offend, humiliate, and embarrass.

L. Camille Hébert, Sexual Harassment is Gender Harassment, 43 U. Kan. L. Rev. 565, 567 (1995). The author also points out that different standards are applied to sexual harassment that are not applied to gender and other types of harassment. Id. at 576.


as a separate type of discrimination, the courts followed suit.\textsuperscript{48} The guidelines defined sexual harassment as follows:

Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.\textsuperscript{49}

Shortly after the sexual harassment guidelines were issued, the Commission issued guidelines on national origin discrimination that included guidelines on national origin harassment.\textsuperscript{50} The guidelines on national origin harassment did not create the dichotomy that the EEOC created in sexual harassment between quid pro quo and hostile

answer seems to be that in the 1970s some employers argued—and some courts agreed—that sexually-motivated conduct was 'personal.'" \textit{Id.} at 310. The author argues that separate treatment for quid pro quo harassment is no longer necessary. \textit{Id.} at 313-14; see also Steven H. Aden, "Harm in Asking": A Reply to Eugene Scalia and an Analysis of the Paradigm Shift in the Supreme Court's Title VII Sexual Harassment Jurisprudence, 8 TEMP. POL. & CIV. RTS. L. REV. 477 (1999) (considering the impact of Eugene Scalia's critique of the quid pro quo category).


\textsuperscript{49} Guidelines on Sex Discrimination, 29 C.F.R. § 1604.11(a) (footnote omitted).

\textsuperscript{50} \textit{Id.} § 1606.8. The Commission had issued earlier guidelines on national origin discrimination, but those did not refer to harassment. Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606 (1979). The guidelines proposed in 1993 on all types of harassment would have superseded the national origin guidelines. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. at 51,267.

In the national origin guidelines, the Commission defined national origin discrimination as "the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (2001). The guidelines defined national origin harassment as follows:

Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct:

(1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment;

(2) Has the purpose or effect of unreasonably interfering with an individual's work performance; or

(3) Otherwise adversely affects an individual's employment opportunities.

\textit{Id.} § 1606.8(b).
environment harassment because quid pro quo ethnic harassment is unlikely to occur.\textsuperscript{51} Also, the national origin guidelines did not require proof of unwelcomeness on the assumption that such harassment would always be unwelcome;\textsuperscript{52} however, the guidelines retained the idea that hostile environment harassment is a genre separate from other acts of discrimination.\textsuperscript{53}

\textbf{C. Supreme Court Decisions that Established and Clarified the "Severe or Pervasive" Requirement}

The Supreme Court did not review the sexual harassment guidelines or deal with harassment until it considered \textit{Meritor Savings Bank v. Vinson} in 1986, so the lower courts defined sexual harassment on their own. One lower court decision, \textit{Henson v. City of Dundee},\textsuperscript{54} had a profound impact on the law of sexual harassment.

In \textit{Henson v. Dundee}, the Eleventh Circuit reversed the lower court's holding that the plaintiff's claim for a hostile sexual harassment environment did not violate Title VII.\textsuperscript{55} The court stated:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.\textsuperscript{56}

Unfortunately, the court followed up its recognition of hostile environment sexual harassment with the following:

\textit{The harassment complained of affected a "term, condition, or privilege" of employment. The former [F]ifth [C]ircuit has held that the state of psychological well being is a term, condition, or privilege of employment within the meaning of Title VII. The court in Rogers made it clear, however, that the "mere utterance of an ethnic or racial epithet which engenders of-}

\footnotesize{\textsuperscript{51} Cf. Aden, \textit{supra} note 47, at 486 (suggesting that there is no special favor a supervisor could demand of an employee in a racial context correlative to sexual factors in a gender context).}

\footnotesize{\textsuperscript{52} Cf. Hébert, \textit{Analogizing Race}, \textit{supra} note 23, at 849-53 (comparing the notion of unwelcomeness in sexual and racial discrimination).}

\footnotesize{\textsuperscript{53} 29 C.F.R. § 1606.8(b)(1).}

\footnotesize{\textsuperscript{54} 682 F.2d 897 (11th Cir. 1982).}

\footnotesize{\textsuperscript{55} Id. at 911-13. The Eleventh Circuit had recently been created by splitting the Fifth Circuit, the circuit that decided \textit{Rogers}. \textit{Jack Bass, Unlikely Heroes} 329-31 (1981).}

\footnotesize{\textsuperscript{56} \textit{Henson}, 682 F.2d at 902 (footnote omitted).}
fensive feelings in an employee" does not affect the terms, conditions, or privileges of employment to a sufficiently significant degree to violate Title VII. For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well being of employees is a question to be determined with regard to the totality of circumstances.\(^5\)

Thus, the idea that harassment must be severe or pervasive originated with the *Henson* case.\(^5\) The Supreme Court in *Meritor Savings Bank, F.S.B. v. Vinson*, however, used the disjunctive, "severe or pervasive,"\(^5\) instead of the conjunctive, "severe and persistent," used by *Henson* to describe whether the harassment is "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."\(^6\)

1. *Meritor Savings Bank, F.S.B. v. Vinson.*—In 1986, the Supreme Court recognized hostile environment sexual harassment as a type of discrimination based on sex for the first time.\(^6\) The case involved particularly egregious conduct in which the plaintiff, a female bank teller, was forcibly raped by her supervisor on several occasions.\(^6\) He also fondled her in front of other employees and demanded sex on numerous occasions to which the plaintiff agreed because she was afraid of losing her job.\(^6\) The trial court said that the

\(^{57}\) *Id.* at 904 (footnote omitted) (citations omitted) (second emphasis added).

\(^{58}\) **BARBARA LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW** 487 (Philip J. Pfeiffer et al. eds., 3d ed. 2000 Supp.).

\(^{59}\) *Henson*, 682 F.2d at 904 (emphasis added). *After Henson* and *Meritor*, many courts adopted the requirement that the harassment had to be so severe or pervasive that it damaged the psychological welfare of the employee. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993) (explaining the circuit split that had arisen over this issue). The requirement that the harassment be sufficient to affect the psychological welfare of the employee was also suggested in *Henson*. *Henson*, 682 F.2d at 904 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)). Although the *Harris* Court said that harassment did not have to be so severe or pervasive that it caused psychological damage, the Court retained the requirement that the conduct must be "severe or pervasive" to be actionable. *Harris*, 510 U.S. at 22.

\(^{61}\) *Meritor*, 477 U.S. at 66. This was also the first time the Supreme Court had addressed any form of sexual harassment.

\(^{62}\) *Id.* at 60.

\(^{63}\) *Id.*
relationship, if there was one, was voluntary and had nothing to do with her employment.\(^{64}\)

The defendant argued that an allegation of sexual harassment, that did not result in a tangible economic loss, did not violate Title VII.\(^{65}\) The Supreme Court recognized that “the language of Title VII is not limited to economic or tangible discrimination. The phrase terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.”\(^{66}\) The Court further noted that the EEOC guidelines provided that harassment resulting in non-economic injury also violates Title VII and that the guidelines prohibited quid pro quo harassment, as well as hostile environment harassment.\(^{67}\) In addition, the Court cited Rogers v. EEOC, which first recognized that harassment on the basis of national origin could create a hostile or abusive working environment.\(^{68}\) The Court noted that since Rogers, courts commonly recognized that racial and national origin harassment created a hostile working environment and violated Title VII.\(^{69}\) The Court said that “[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited.”\(^{70}\) However, the Court noted that not all workplace harassment affects a term or condition of employment.\(^{71}\)

The Court, adopting language from Henson, held that to be actionable, the behavior must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”\(^{72}\) Without question, the conduct in the Meritor case was sufficient to be actionable under any standard.\(^{73}\)

Furthermore, the Court quoted Rogers, in which the Fifth Circuit said, “[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and

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64. Id. at 61. Furthermore, the court said that, in any event, the defendant bank could not be held liable because the plaintiff never complained. Id. at 62.
65. Id. at 64.
66. Id. (internal quotation marks omitted).
67. Id. at 65.
68. 454 F.2d 234, 238 (5th Cir. 1971).
70. Id. at 67. The Court also noted that other courts had uniformly agreed that a violation of Title VII may be established by proving that a hostile work environment resulted from discrimination based on sex. Id. at 66.
71. Id. at 67.
72. Id. (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). The Court modified Henson’s holding that behavior must be “sufficiently severe and persistent,” Henson, 682 F.2d at 904, to “sufficiently severe or pervasive.” Meritor, 477 U.S. at 67.
73. Meritor, 477 U.S. at 67.
psychological stability of minority group workers."\textsuperscript{74} After \textit{Meritor}'s characterization that actionable harassment had to be severe or pervasive, along with the quote from \textit{Rogers} regarding psychological damage, many courts adopted the view that sexual harassment does not alter a term or condition of employment unless the employee suffers psychological or physical detriment as a result of the harassment.\textsuperscript{75} The Court felt compelled to attempt to clarify the standard in \textit{Harris v. Forklift Systems, Inc.}\textsuperscript{76}

2. Harris v. Forklift Systems, Inc.—In \textit{Harris v. Forklift Systems, Inc.}, the trial court found that the employer's conduct was not so severe as to seriously affect the plaintiff's psychological well-being.\textsuperscript{77} The Court of Appeals for the Sixth Circuit affirmed.\textsuperscript{78} The Supreme Court granted certiorari to decide whether "abusive work environment harassment" must cause the plaintiff to suffer injury or seriously affect her psychological well-being.\textsuperscript{79} The Court said it was taking a middle view between the latter view that conduct must cause tangible psychological injury and the view that any objectionable conduct is actionable.\textsuperscript{80} To be severe or pervasive enough to alter terms or con-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 66 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).
\item See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993) (noting a split in the circuit courts on whether conduct to be actionable had to seriously affect psychological well-being).
\item Id. For a criticism of \textit{Harris}, see Anne C. Levy, \textit{The United States Supreme Court Opinion in Harris v. Forklift Systems: "Full of Sound and Fury Signifying Nothing,"} 43 U. KAN. L. REV. 275, 275 (1995) (explaining that the Court in \textit{Harris} "abdicated" its responsibility to give guidance to the lower courts in an area in which a variety of vital issues need clarification").
\item Harris, 510 U.S. at 20.
\item Id.
\item Id. (internal quotation marks omitted). The plaintiff in \textit{Harris} was a manager of Forklift Systems, an equipment rental company, of which Hardy was president. \textit{Id.} at 19. The Supreme Court explained the magistrate's findings in the following way: [T]hroughout Harris' time at Forklift, Hardy often insulted her because of her gender and often made her the target of unwanted sexual innuendoes. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was a "dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendoes about Harris' and other women's clothing. \textit{Id.} (citations omitted). Harris complained, and Hardy promised to stop. Shortly thereafter, however, he commented to her in front of others, in reference to a transaction she was arranging, "What did you do, promise the guy . . . some [sex] Saturday night?" \textit{Id.} (internal quotation marks omitted).
\item Id. at 21.
\end{enumerate}
\end{footnotesize}
ditions of employment, the harassment must "create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive," but need not lead to physical or psychological impairment. The Court said that a hostile environment might detract from an employee's work performance and career advancement, but even absent these consequences, the fact that the pervasiveness and severity of the discriminatory conduct exposed the employees to an abusive work environment due to their gender violated Title VII’s clear proscription of workplace inequality. The Court said that the following factors could be considered in making the determination: "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." This list, however, provided a non-exhaustive sampling of types and patterns of behavior that a court might consider in a sexual harassment case.

Justice Ginsburg's concurrence contains the best analysis of the issue. Discrimination depends on "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." In order to prove discrimination in the hostile environment situation, the plaintiff must show that the hostile environment unreasonably interfered with the plaintiff's job. Justice Ginsburg believes that "the plaintiff must only show that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job'" than would a person of the opposite sex. Justice Ginsburg believed that the majority's opinion was not inconsistent with her view.

81. Id. at 21-23. The Court added that the plaintiff must subjectively perceive the environment as abusive. Id. at 21.
82. Id. at 25.
83. Id.
84. Id. at 25 (Ginsburg, J., concurring).
85. Id. (citing Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir.1988)). Justice Scalia also concurred, bemoaning his and the Court's inability to find a more concrete standard. Id. at 24-25 (Scalia, J., concurring).
86. Id. at 26 (Ginsburg, J., concurring). Justice Ginsburg referenced her analysis from a lower court decision involving racial harassment, noting that Title VII treats race and sex discrimination virtually the same. Id. at 25-26 (citing Davis, 858 F.2d at 349). As Justice Ginsburg noted, there is one difference between race and other bases for discrimination under Title VII: the bona fide occupational qualification defense does not apply to race discrimination. Id. at 25-26 (citing UAW v. Johnson Controls, Inc., 499 U.S. 187, 200-207 (1991)).
Because the Court in *Harris* disapproved of the requirement that the employee suffer damage to her psychological welfare, the Court must have intended to disapprove of the high level of harassment the courts were requiring at that time for an actionable claim. The Court explained:

Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.  

Many lower courts apparently did not accept this guidance, and, although they no longer require proof of psychological damage, many courts still require a level of harassment that would be sufficient to cause psychological damage.

Although *Harris* dealt with a case of sexual harassment, the Court appeared to be covering all types of abusive environment harassment, whether based on "race, gender, religion, or national origin." The concurrences focused primarily on sex discrimination, but the majority did not limit its analysis to sexual harassment. After *Harris*, the EEOC attempted to articulate a definition of all kinds of harassment.

**D. Proposed Guidelines on All Types of Harassment**

In 1993, the EEOC proposed guidelines governing all types of harassment, other than sexual harassment. These guidelines were subsequently withdrawn because of unfavorable comments, especially with regard to religious harassment. The proposed guidelines covered race, color, religion, gender, national origin, age, and disability harassment, and defined such harassment as "verbal or physical con-

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87. *Harris*, 510 U.S. at 22 (citation omitted).
88. See, e.g., Crenshaw v. Delray Farms, Inc. 968 F. Supp. 1300 (N.D. Ill. 1997) (providing a particularly egregious example of a work environment heavily tainted by sexually explicit harassment in which the court did not find a violation of Title VII).
89. 510 U.S. at 22.
90. Id. at 24 (Scalia, J., concurring); id. at 25-26 (Ginsburg, J., concurring).
91. See *Harris*, 510 U.S. at 21-23 (referring to *Harris* as a case of abusive environment harassment rather than sexual harassment).
93. Id. at 51,267.
94. See *Lindeman & Grossman*, *supra* note 58, at 475-79 (discussing religious, age, and disability harassment).
duct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates.\textsuperscript{95} Furthermore, the guidelines would have required that the conduct have "the purpose or effect of creating an intimidating, hostile, or offensive work environment; of unreasonably interfering with an individual's work performance; . . . [or] [o]therwise adversely affect[ing] an individual's employment opportunities."\textsuperscript{96}

In addressing the issue of how severe or pervasive the conduct had to be to constitute harassment, the guidelines restated the standard articulated in \textit{Harris}, that the conduct must be so sufficiently severe or pervasive that "a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive."\textsuperscript{97} The guidelines added the following: "The 'reasonable person' standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability. It is not necessary to make an additional showing of psychological harm."\textsuperscript{98}

In a footnote, the guidelines gave examples of offending conduct, such as dressing a Hispanic prisoner in a straw hat with a sign saying "spic."\textsuperscript{99} Another footnote gave examples of sporadic conduct that could be considered severe enough to constitute harassment: a supervisor's infrequent use of the word "nigger" and a supervisor's

\textsuperscript{95} Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. at 51,269. The proposed guidelines also provided that: Harassment on the basis of race, color, religion, gender, national origin, age or disability constitutes discrimination in the terms, conditions, and privileges of employment and, as such, violates title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e \textit{et seq.} (title VII); the Age Discrimination in Employment Act, as amended, 29 U.S.C. 621 \textit{et seq.} (ADEA); the Americans with Disabilities Act, 42 U.S.C. 12101 \textit{et seq.} (ADA); or the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 \textit{et seq.}, as applicable.

\textit{Id.} at 51,268-69 (a).

\textsuperscript{96} \textit{Id.} at 51,269. The guidelines also included the following examples of proscribed conduct:

(i) Epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to race, color, religion, gender, national origin, age, or disability; and

(ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age, or disability and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.

\textit{Id.} (footnote omitted).

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} \textit{Id.} at n.3.
comment that “you Black guys are too f***ing dumb to be insurance agents,” as well as a single performance of a Ku Klux Klan ritual.

The guidelines were intended to supersede the Guidelines on Discrimination Because of National Origin, but not the guidelines on sexual harassment because sexual harassment involves inherently unique issues relating to human interaction that may warrant respectively unique treatment. The guidelines also indicated in a footnote that they covered “forms of harassment that are gender-based but non-sexual in nature.” After the EEOC withdrew the guidelines on all types of harassment, it did not attempt to define “severe or pervasive” further. The Supreme Court did not deal with the subject again until 1998.

E. Other Supreme Court Cases that Impact the Determination of Hostile Environment

In 1998, the Court issued three opinions that impacted the definition of hostile environment. In Oncale v. Sundowner Offshore Services, Inc., the Court said that under certain circumstances, the employer could be liable for same-sex harassment. In Burlington Industries, Inc. v. Ellerth and in Faragher v. City of Boca Raton, the Supreme Court defined the standard for employer liability for supervisory harassment. In discussing these issues, the Court shed some light on what conduct is sufficiently severe or pervasive to be actionable. Two other

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100. Id. n.4 (citing Rodgers v. W.-S. Life Ins. Co., 792 F. Supp. 628, 631 (E.D. Wis. 1992)).
101. Id. (citing Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 n.4 (7th Cir. 1991)).
102. Id. at 51,267.
103. Id. at 51,267 n.2. EEOC provided two cases to support its gender versus sexual harassment distinction: (1) Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (providing that “harassment that is not of a sexual nature but would not have occurred but for the sex of the victim is actionable under Title VII”); and (2) Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (explaining that “harassing behavior lacking sexually explicit content but directed at women and motivated by animus against women [is sex discrimination]”). Id.
105. However, the EEOC issued enforcement guidance after Harris, indicating that the case was consistent with its present policy. EEOC, No. 915.002, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT GUIDANCE: ENFORCEMENT GUIDANCE ON HARRIS v. FORKLIFT SYS., INC. (1994), 1994 WL 1747814, at *3.
107. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (holding that employers are "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with intermediate (or successively higher) authority over the employee"); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
recently decided cases, Clark County School District v. Breeden\(^{108}\) and National Railroad Passenger Corp. v. Morgan,\(^{109}\) will also have a significant impact on hostile environment cases because of the severe or pervasive requirement.

1. Oncale v. Sundowner Offshore Services, Inc.—In Oncale v. Sundowner Offshore Services, Inc., the Supreme Court was faced with a situation in which a male plaintiff had allegedly been the target of sex-related, humiliating conduct by other male employees, and was physically assaulted by two male employees in a sexual manner, one of the men threatening to rape the plaintiff.\(^{110}\) The Court of Appeals for the Fifth Circuit held that same-sex harassment was not actionable.\(^{111}\) The Supreme Court disagreed, adopting Justice Ginsburg's view in Harris 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."\(^{112}\) To be actionable, the Court said, sexual harassment must be because of the plaintiff's sex.\(^{113}\) Although in a same-sex harassment case the inference may be harder to draw than in most female-male harassment cases, it is still possible.

The question in Oncale concerned the viability of a claim of same-sex harassment; however, the Court also commented on the nature of the conduct that would constitute harassment.\(^{114}\) The Court noted that the harassment must be severe or pervasive "to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory conditions of employment."\(^{115}\) The Court again reiterated that the reasonable plaintiff standard must be used to judge the harassment.\(^{116}\) The Court went on to explain that:

\(^{109}\) 122 S. Ct. 2061 (2002).
\(^{110}\) Oncale, 523 U.S. at 77.
\(^{111}\) Id.
\(^{112}\) Id. at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).
\(^{113}\) Id. at 80-81. One author explains that the Oncale decision expands the universe of sexual harassment claims to include gender-motivated harassment. Henry L. Chambers, Jr., A Unifying Theory of Sex Discrimination, 34 Ga. L. Rev. 1591, 1592-93 (2000). He argues that sexual harassment claims and disparate treatment claims may no longer be "doctrinally distinct." Id. at 1593.
\(^{114}\) Oncale, 523 U.S. at 80-81.
\(^{115}\) Id. at 81 (internal quotation marks omitted).
\(^{116}\) Id. Much has been written about who the reasonable person should be. There is a good argument that, in the case of sexual harassment of a woman, the standard should be a reasonable woman. See Levy, supra note 76, at 295 (inquiring "[h]ow are plaintiffs to
In same-sex (as in all) harassment cases, that [reasonable person] inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office.  

As in the other Supreme Court decisions on sexual harassment, it does not appear that the court had in mind harassment that is as severe or pervasive as the term suggests, at least not to the extent that many lower courts require.

2. Burlington Industries, Inc. v. Ellerth.—Ellerth and its companion case, Faragher, defined the scope of supervisory liability. That definition had an important impact on hostile environment sexual harassment. In Ellerth, the Court was principally concerned with defining employer liability for supervisory conduct. However, the prove that the environment makes it more difficult for them to do their jobs without necessarily producing evidence of the psychological harm such environments have on people of this gender?"

The view I prefer is that the standard should be a reasonable person in the plaintiff's situation taking into account fundamental characteristics, like race and sex. See Nichols v. Frank, 42 F.3d 509, 511-12 (9th Cir. 1994) (explaining that the "reasonable person" can be defined by sex, or by other immutable traits possessed by the person making the harassment charge); Tam B. Tran, *Title VII Hostile Work Environment: A Different Perspective*, 9 *J. Contemp. Legal Issues* 357, 367 (1998) (noting that a minority of courts have also used a reasonable person standard that takes into account the characteristics of the victim). Tran suggests even the reasonable woman standard is inadequate because it is based on the white woman's experience. *Id.* at 366. Her view is supported by the statement in *Oncale* that conduct should be that "which a reasonable person in the plaintiff's position would find severely hostile or abusive." 523 U.S. 75, 82 (1998) (emphasis added).

Others have analyzed the issue as well. See Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 123-24 (1992) (discussing the ongoing debate over the reasonable person perspective used when evaluating harassment claims); Hébert, *Analogizing Race*, supra note 23, at 853-62 (discussing the different perspectives from which an actionable claim of harassment should be judged); George Rutherford, *Sexual Harassment: Ideology or Law?*, 18 HARV. J.L. & PUB. POL'y 487, 497 (1995) (citing empirical evidence that men and women react differently to sexual advances and arguing that some account should be taken of a person's gender when evaluating severe or pervasive).

117. *Oncale*, 523 U.S. at 81; see, e.g., Blough v. Hawkins Mkt., Inc., 51 F. Supp. 2d 858, 862-64 (N.D. Ohio 1999) (finding that when a male co-worker touched the female plaintiff on the buttocks and crotch and another male co-worker made several sexual advances over several months, although the court said this behavior could be offensive to a reasonable person, it was not severe or pervasive enough to give rise to a hostile work environment).

118. See infra Section II.

Court discussed the two types of sexual harassment, quid pro quo and hostile environment,\textsuperscript{120} broadening the scope of the latter.\textsuperscript{121} The Court said that if the plaintiff can prove that a tangible employment action occurred as a result of her refusal to submit to her supervisor's sexual demands, she has proven an actionable change in a term or condition of employment. However, for any action that precedes a tangible employment action, the plaintiff must prove that the conduct was severe or pervasive.

The Court defined "tangible employment action" as one that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."\textsuperscript{122} Any other type of employment action or threatened employment action would be treated the same as hostile environment discrimination, if it is actionable at all.\textsuperscript{123}

In terms of liability, the Court decided that an employer would be strictly liable for tangible employment actions taken by a supervisor, as opposed to hostile environment claims, for which the employer would be liable unless he can prove an affirmative defense.\textsuperscript{124} The employer must prove "[first,] that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and [second,] that the plaintiff employee unreasonably failed to take ad-

\textsuperscript{120} Id. at 751-54.

\textsuperscript{121} Id. at 754. The question was whether the supervisor's unfulfilled threats of not promoting the plaintiff constituted hostile environment or quid pro quo harassment. Id. at 751.

\textsuperscript{122} Id. at 761 (emphasis added). The Court cited the following as examples of significant tangible employment actions: termination, pay cuts, demotion, significant loss of benefits, significant removal of job responsibilities, as well as others. Id. (citing Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993)). The following were cited as examples of insignificant employment actions: a "bruised ego," demotion without change in pay, benefits, duties, or prestige; and reassignment to less convenient job. Id. (citations omitted). The Court also said that a tangible employment action will usually cause direct economic harm. Id. at 762.

The Court said that the employer is liable for sexual harassment by its supervisors when an agency relationship assists the supervisor in his or her harassment. Id. at 759. When the supervisory action involves a tangible employment action, the supervisor's employer-employee relationship with the company automatically helps the supervisor commit harassment because the supervisor has the power to take tangible employment action. Id. at 760-62. However, the Court felt it is more difficult to detect agency relationships that aid a supervisor in harassment that do not end in a tangible employment action. Id. at 763.

\textsuperscript{123} Id. at 753-54. Whether it is actionable or not would depend on whether it is sufficiently severe or pervasive. Id. at 754.

\textsuperscript{124} Id. at 765.
vantage of any preventive or corrective opportunities provided by the employer to avoid the harm otherwise.125

The principal impact of Ellerth, for the purposes of defining hostile environment, is that the Court expanded hostile environment to include threats to take tangible action and tangible action that is not "significant," which had generally been classified as quid pro quo and automatically actionable without assessing whether the conduct was severe or pervasive.126 Also, the Court again selected hostile environment discrimination for distinctive treatment by establishing that the employer has an affirmative defense to supervisory liability for hostile environment harassment if the employer can show that the employee unreasonably failed to complain about the conduct.127 This puts the burden on the employee to assess whether she is being subjected to actionable sexual harassment, which, as we will see, is often not clear.128 Furthermore, the employee must overcome the understandable reticence and embarrassment that victims of sexual harassment feel, as well as the usual fear any complaining employee has of suffering detrimental consequences.129

3. Faragher v. City of Boca Raton.—Faragher v. City of Boca Raton was a companion case to Ellerth and reiterated its principles regarding employer liability.130 The Court also discussed what constitutes a hostile environment and stated that despite certain differences between "racial and sexual harassment, and although standards may not be entirely interchangeable, . . . there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment."131 The Court further explained that if the standards for hos-

125. Id.
126. See id. at 754-60.
127. Id. at 765.
128. See infra Section II (providing cases involving egregious conduct in which the courts found the conduct unactionable).
129. See, e.g., Hébert, Analogizing Race, supra note 23, at 849. Professor Hébert explains that, in most sexual harassment cases, women are relatively powerless and that complaining about sexual harassment takes a gift of assertiveness that they often do not possess. Furthermore, they are aware that if they complain about sexual harassment, they may be disciplined or discharged. Id. at 852. In addition, "'[o]ne can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities which she has suffered in private, as well as the anticipated claims that she has 'consented,' and attempts to trivialize her concerns."' Id. at 856 n.167 (quoting Mitchell v. OsAir, 629 F. Supp. 636, 643 (N.D. Ohio 1986)).
130. 524 U.S. 775, 780 (1998). The Court held 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 the victim." Id.
131. Id. at 787 n.1 (citations omitted). The Court recently cited the severe or pervasive standard as the standard in a racial harassment case under Title VII. Nat'l R.R. Passenger
tile environment are properly applied they will filter out cases involving the type of poor behavior that occur sporadically in typical workplaces.\textsuperscript{132}

It is clear in reading the foregoing that the Supreme Court never intended to condone the level of conduct tolerated by many lower courts.\textsuperscript{133} The Court's mistake was in not changing the wording of the standard. The term "severe or pervasive" connotes more serious conduct than the Court intended. Some of the language in the \textit{Faragher} case illustrates this. The Court described as non-actionable, conduct "such as the sporadic use of abusive language, gender-related jokes, and occasional teasing," and then said, "[w]e have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals [sic] have heeded this view."\textsuperscript{134} As an example of extreme conduct the Court cited two lower court cases.\textsuperscript{135} In one of the cases, \textit{Carrero v. New York City Housing Authority},\textsuperscript{136} the defendant characterized the harassment as trivial, consisting of "'two kisses, three arm strokes,' several degrading epithets, and other objectionable—but ultimately harmless—conduct."\textsuperscript{137} However, the Court of Appeals for the Second Circuit rejected this argument, stating that an employee is entitled to seek Title VII remedies without subjecting herself to an "extended period of demeaning and degrading provocation."\textsuperscript{138} Unfortunately, many courts do not follow the Second Circuit's view and require instead that a woman must be subjected to an extended period of often severe abuse to be entitled to seek a remedy.

The inference in \textit{Faragher} is that "severe or pervasive" lies just beyond sporadic language, jokes, and occasional teasing. However, the

\begin{itemize}
\item \textsuperscript{132} \textit{Faragher}, 524 U.S. at 788.
\item \textsuperscript{133} See infra Section II (discussing lower courts' interpretations of "severe or pervasive" compared to the Supreme Court's view and how in effect lower courts require conduct to be severe and pervasive).
\item \textsuperscript{134} \textit{Faragher}, 524 U.S. at 788.
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} 890 F.2d 569, 577-78 (2d Cir. 1989).
\item \textsuperscript{137} \textit{Id.} at 578. The supervisor had touched the plaintiff's knee and kissed her neck twice, referred to her as a "scarecrow," and attempted to kiss her on two other occasions. \textit{Id.} at 573. In the other case cited by the Court, \textit{Moylan v. Maries County}, 792 F.2d 746 (8th Cir. 1986), the Eighth Circuit reversed the district court's determination that hostile environment sexual harassment does not state a cause of action. \textit{Id.} at 749-50. The \textit{Faragher} Court also cited \textsc{Lindemann} & \textsc{Grossman}, supra note 58, at 805-07 n.290 (collecting cases in which summary judgment was approved by the courts of appeals because the conduct was not sufficiently severe or pervasive). \textit{Faragher}, 524 U.S. at 788.
\item \textsuperscript{138} \textit{Carrero}, 890 F.2d at 578.
\end{itemize}
conduct that many courts find not to be sufficiently severe or pervasive is clearly much more egregious than jokes, teasing, or sporadic language.\textsuperscript{139} To make matters worse, the Court has recently further disadvantaged the plaintiff who makes a mistake and complains about such behavior.

4. Clark County School District v. Breeden.—In \textit{Clark County School District v. Breeden}, the plaintiff was allegedly retaliated against for complaining about sexual harassment.\textsuperscript{140} The plaintiff's job required her to screen job applicants.\textsuperscript{141} In the course of her job duties, she reviewed a report on an application that disclosed the applicant had once said that “making love to you is like making love to the Grand Canyon.”\textsuperscript{142} When the plaintiff's male supervisor met with her and another male employee about the applicant, the supervisor looked at the plaintiff and said he did not know what the comment meant.\textsuperscript{143} The other male employee said he would tell the supervisor later, and both men laughed. The plaintiff complained about this incident and alleged that she was subsequently retaliated against as a result of her complaint.\textsuperscript{144}

The lower court had employed the formula generally used by the courts, that Title VII protects the plaintiff from retaliation for opposition to conduct that an employee could reasonably believe was illegal under Title VII.\textsuperscript{145} In the \textit{Breeden} case, the Supreme Court noted that Title VII forbids sexual harassment that is sufficiently severe or pervasive to create an abusive environment, and no one could reasonably believe the single incident brought forward by the plaintiff violated Title VII.\textsuperscript{146} While the holding has superficial appeal under the circumstances of the case, the Court has imputed to the plaintiff knowledge of the legal standard, “severe or pervasive.” Thus, if she makes an incorrect assessment pursuant to the court's reasoning, she may be exposing herself to retaliation with impunity by the employer. Combining this case with \textit{Ellerth}'s requirement that, to hold the employer liable for hostile environment harassment, the plaintiff must com-

\textsuperscript{139} \textit{Id.}
\textsuperscript{140} 532 U.S. 268, 269-70 (2001) (per curiam).
\textsuperscript{141} \textit{Id.} at 269.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.} at 269-70.
\textsuperscript{145} \textit{Id.} at 270. The lower court interpreted this to mean that the plaintiff must in good faith believe the practices crossed the line of illegal sexual harassment. \textit{Id.} The Court otherwise declined to review the lower court's reasonable person standard for deciding whether retaliation is actionable. \textit{Id.}
\textsuperscript{146} \textit{Id.} at 271.
plain,\textsuperscript{147} puts the plaintiff in an untenable position. In its most recent decision on hostile environment harassment, \textit{National Railroad Passenger Corp. v. Morgan}, the Court improved the plaintiff's position somewhat.

5. \textit{National Railroad Passenger Corp. v. Morgan}.—In \textit{Morgan}, the Court of Appeals for the Ninth Circuit had granted the defendant's motion for summary judgment, holding that the defendant could not be liable for any act that occurred outside the limitations period, including acts that allegedly constituted hostile environment racial harassment, even though it continued into the limitations period.\textsuperscript{148} The Supreme Court decided that the continuing violation theory\textsuperscript{149} applies to hostile environment claims, but not to other types of discrimination claims involving discrete acts of discrimination, such as discharge.\textsuperscript{150}

It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as have some of the Circuits, that the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct.\textsuperscript{151}

The Court said that, to determine whether a hostile environment exists, courts must look at "all the circumstances," including the factors announced in a previous gender discrimination case: \textit{Harris v. Forklift}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{147} Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); \textit{see also} David Sherwyn et al., \textit{Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges}, 69 \textit{Fordham L. Rev.} 1265, 1266 (2001) (indicating that courts have held that if the employee does not complain within a month of commencement of the harassment, she is acting unreasonably).
\item \textsuperscript{148} \textit{See} Nat'l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061, 2068 (2002) (describing the appeals court's decision).
\item \textsuperscript{149} The continuing violation theory posits that some acts of discrimination have discriminatory effects that extend the statute of limitations as long as the discriminatory effects last so that the violation "continues" until the discriminatory effect ceases. The courts have recognized the continuing violation theory in only limited situations. \textit{See Friedman & Strickler}, supra note 22, at 448-49; \textit{Lindemann & Kadue}, supra note 19, at 449.
\item \textsuperscript{150} \textit{Morgan}, 122 S. Ct. at 2077. Morgan complained of numerous discriminatory and retaliatory acts that began shortly after he was hired. \textit{Id.} at 2068. The Court also said that the continuing violation theory would not apply to discrete acts of discrimination, such as failure to promote or discharge, even if such acts are related to acts alleged in a timely fashion. \textit{Id.} at 2071-72. The Court did note, however, that there is nothing in the statute that bars evidence of such acts as background information. \textit{Id.} at 2072.
\item \textsuperscript{151} \textit{Id.} at 2075.
\end{enumerate}
\end{footnotesize}
Systems, Inc.\textsuperscript{152} The courts, therefore, must also consider acts that occur outside the filing period. However, the Court explained that the defendant is not defenseless, stating that if the employee unreasonably delays filing a charge, then waiver, estoppel, equitable tolling, and laches may apply.\textsuperscript{153} The Court also noted other limitations: if the claims are unrelated or no longer form part of the claim because of "certain intervening action by the employer."\textsuperscript{154}

\textit{Morgan} is significant for two reasons. First, it marks the first time the Court has decided a racial harassment case under Title VII, and, while most courts assumed the same standard applied, this was the first time the Court applied to a case of racial harassment the same standard it had been applying to sexual harassment cases. Second, many courts were refusing to apply the continuing violation theory to cases of hostile environment discrimination, and the Court made it clear that the continuing violation theory applies.\textsuperscript{155}

II. \textsc{Lower Courts' Interpretations of "Severe or Pervasive" After the Harris Case}

The objective of this Article is to demonstrate that the continued use of the "severe or pervasive" standard can lead to anomalous results. For purposes of illustrating this point, this part cites some particularly egregious decisions, although there are other cases that apply the standard more sensibly.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{152} Id. at 2074 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (internal quotation marks omitted)).
\item \textsuperscript{153} Id. at 2076.
\item \textsuperscript{154} Id. at 2075. The Court agreed with the appellate court in holding that the plaintiff's claims in this case were related because "the pre- and post-limitations period incidents involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers." Id. at 2076 (quoting Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008, 1017 (9th Cir. 2000)).
\item \textsuperscript{155} Id. at 2075.
\item \textsuperscript{156} See Williams v. City of Kansas City, 223 F.3d 749, 752, 756 (8th Cir. 2000) (illustrating that repeated requests to "visit" in supervisor's office as well as several sexual comments resulted in hostile work environment despite evidentiary errors at trial); Howley v. Town of Stratford, 217 F.3d 141, 148, 156 (2d Cir. 2000) (noting that several abusive comments made over the course of a meeting were enough to prevent summary judgment of a hostile environment claim); O'Shea v. Yellow Tech. Servs., Inc., 185 F.3d 1093, 1098-99, 1102 (10th Cir. 1999) (illustrating that a supervisor making repeated derogatory generalizations about women could lead a jury to find sexual harassment); Leopold v. Baccarat, Inc., 174 F.3d 261, 268-69 (2d Cir. 1999) (using the word "sexy" during threats of termination could constitute hostile environment harassment); Durham Life Ins. Co. v. Evans, 166 F.3d 139, 143-44 (3d Cir. 1999) (demonstrating that undermining, humiliating, and removing support from a successful female employee because she was a woman constituted a hostile work environment); Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 852, 860 (1st Cir. 1998) (firing employee for failing to accompany a client to his motel room); Gallagher
A. Courts Are Requiring that the Conduct Be Severe and Pervasive

In *Harris v. Forklift Systems, Inc.*, the Court said that to determine whether the conduct has been severe or pervasive, any one of the following factors *may* be considered: frequency and severity of the conduct, "whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Many courts, however, are requiring that the conduct be severe, frequent, and physically threatening. In effect, these courts are requiring that the conduct be severe and pervasive, and some courts also require that the plaintiff show that her job was tangibly affected. This is contrary to the Court's prior assertion that severe or pervasive discriminatory conduct violated Title VII broad workplace protections even without considering tangible effects. Despite these explicit directives, in virtually all of the following decisions the courts have granted the defendant's motion for summary judgment on the basis that, as a matter of law, the plaintiff did not allege sufficiently severe or pervasive conduct to constitute hostile environment sexual harassment.

1. Courts Are Tolerating Conduct that Would Be Considered Sexual Assault or Attempted Sexual Assault Under the Criminal Law.—Courts have properly held that a few off-color jokes, and teasing, especially when not directed at the plaintiff, do not constitute sexual harassment. Many courts have, however, gone too far in finding that very offensive conduct—conduct that would amount to sexual assault under criminal statutes—does not constitute actionable sexual harassment because it is insufficiently severe or pervasive. In *Blough v. Hawkins Market, Inc.*, for example, the plaintiff's co-worker patted her on the

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v. Delaney, 139 F.3d 338, 343-50 (2d Cir. 1998) (making comments, buying gifts, repeated requests for dates and subsequent reassignment after employee complaint); Morrison v. Carleton Woollen Mills, Inc., 108 F.3d 429, 442-43 (1st Cir. 1997) (explaining the trial court could reasonably conclude that the plaintiff had been barred from returning to employment as the result of gender discrimination).


158. Id. at 22.


160. *See, e.g.*, Terhune v. Frank, No. 2:92-CV-00087, 1995 WL 316006, at *4 (W.D. Mich. Apr. 23, 1995) (noting that although the aggressor's jokes may have been inappropriate and annoying to the plaintiff, because the plaintiff did not establish that the jokes were sexually explicit nor directed toward her, the conduct complained of did not warrant a finding of hostile environment harassment). *See infra* notes 313-318 and accompanying text for a more thorough discussion of the case.
buttocks. She complained to her supervisor, and, several months later, the same co-worker grabbed at her crotch. Another co-worker tried to kiss her and apparently engaged in self-stimulation while the plaintiff was looking. The court said that, because the incidents took place over a nine-month period, they were isolated and insufficiently severe or pervasive to constitute sexual harassment.

Similarly, in Hannigan-Haas v. Bankers Life and Casualty Co., the court said that the following incident was insufficient as a matter of law to constitute hostile environment sexual harassment because it was only one act. A senior vice president of the company, Good, asked the plaintiff, Hannigan-Haas, to accompany him to an office.

Once there, Good closed the door and, unbeknownst to Hannigan-Haas, locked it. Good then stood up, pushed Hannigan-Haas against a wall, leaned his chest against hers, and said "open your mouth". He attempted to avoid the kiss. Good then attempted to touch Hannigan-Haas' breasts and to place his hands under Hannigan-Haas' pantyhose. Hannigan-Haas was able to break away from Good and run from the room.

The incidents in these two cases would have been sufficiently severe to constitute sexual assault. Nevertheless, the courts in both cases indicated that the incidents were insufficiently severe or perva-

161. 51 F. Supp. 2d 858, 862 (N.D. Ohio 1999).
162. Id. at 862.
163. Id. at 864. The Model Penal Code defines sexual assault as follows:

A person who has sexual contact with another not his spouse, or causes such other to have sexual conduct with him, is guilty of sexual assault, a misdemeanor, if:

(1) he knows that the contact is offensive to the other person.

Sexual contact is any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire. Model Penal Code § 213.4 (Official Draft 1962).

165. Id. at *5.
166. Id. at *1 (citations omitted).
167. This incident would have been criminal because it would at least have been attempted sexual assault. The Model Penal Code defines attempt as follows:

Definition of attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. Model Penal Code § 5.01(1) (Official Draft 1962).
sive to constitute sexual harassment. Surely the Supreme Court did not contemplate conduct more serious than sexual assault in order to pass the "severe" prong of the test. Many of the cases that follow also involve sexual assault, along with other conduct, but the courts require that, in addition, the conduct recur to be sufficient to constitute sexual harassment.\(^{168}\) In other words, many courts require offensive conduct to be severe and pervasive. For example, in \textit{Garcia v. ANR Freight System, Inc.},\(^ {169}\) the plaintiff alleged that during her training period, the man who was assigned to train her grabbed the back of her head, "guid[ed] it toward his lap, ask[ed] to spend the night in the plaintiff’s motel room, and brush[ed] his hand against the plaintiff’s breast."\(^ {170}\) The plaintiff left the job after a few months, because of headaches and general nervousness.\(^ {171}\) The court concluded that the three incidents were "random, isolated, and brief."\(^ {172}\) The court said that \textit{even if the incidents interfered with her ability to perform the job}, it cannot be said that her terms and conditions of employment had been altered or that she had been subjected to an abusive working environment.\(^ {173}\)

\textit{Crenshaw v. Delray Farms, Inc.}\(^ {174}\) presented an even more egregious case that exemplified an atmosphere heavy with discrimination. The court did not view the situation in that way, but held that the following conduct was insufficiently severe or pervasive: (1) a co-worker, Altman, grabbed Crenshaw’s left breast; (2) the next week Altman told Crenshaw he needed someone small like her to have sex with; and (3) soon after, Altman “grabbed and squeezed her buttocks” and called her an “ignorant ass bitch.” After she complained about these incidents, the supervisor was transferred and the plaintiff was suspended without pay.\(^ {175}\) Two months later, another co-worker, Aeyers, “came up behind [the plaintiff], rubbed his penis on her back and said ‘Oh, mamasita.’”\(^ {176}\) Two months after this incident, another

\begin{itemize}
  \item \(^ {168}\) \textit{But see Aden, supra} note 47, at 510-12 (contending that one severe act of harassment should be enough). In \textit{National Railroad Passenger Corp. v. Morgan}, the Court said that hostile environment cases involve a series of acts. 122 S. Ct. 2061, 2073 (2002). Because the case did not directly interpret the meaning of “severe or pervasive,” it is not conclusive on the issue of whether one act can constitute a hostile environment. \textit{See supra} Section I.E.5 and \textit{infra} Section II.C.1 (discussing \textit{Morgan}).
  \item \(^ {169}\) 942 F. Supp. 351 (N.D. Ohio 1996).
  \item \(^ {170}\) \textit{Id.} at 354.
  \item \(^ {171}\) \textit{Id.} at 355.
  \item \(^ {172}\) \textit{Id.} at 356.
  \item \(^ {173}\) \textit{Id.}
  \item \(^ {174}\) 968 F. Supp. 1300 (N.D. Ill. 1997).
  \item \(^ {175}\) \textit{Id.} at 1301-02.
  \item \(^ {176}\) \textit{Id.} at 1302.
\end{itemize}
co-worker, Porter, asked the plaintiff if she cheated on her husband and offered her money if she would "be with him."\(^{177}\) Several days after she reported the incident with Porter, Porter grabbed her and tried to kiss her.\(^{178}\) She again reported him, and Porter invaded the women's bathroom by prying the lock open.\(^{179}\) He attempted to grab Crenshaw, who ran away. Porter was reprimanded and stopped harassing her.\(^{180}\) Two months after these incidents, the plaintiff was told by yet another co-worker "that the pants she was wearing 'made his groins growl,'" and the plaintiff said that he wanted to take her to a hotel, "'eat [her] out' and 'do all types of tricks with [her].'"\(^{181}\) The court found that because the offending conduct was not persistent, it did not constitute a hostile work environment in violation of Title VII.\(^{182}\) It is difficult to imagine how much more pervasive the offensive conduct could have been. The *Crenshaw* court must have been comprehending a meaning for "persistent" that is beyond pervasive. *Crenshaw* clearly illustrates an atmosphere "permeated with 'discriminatory intimidation, ridicule, and insult.'"\(^{183}\)

The problem with the analyses of the courts cited in this section, is that, although each court purported to have assessed the decision according to the guidelines of *Harris*, the authority cited for the decision was in fact other lower court cases that misapplied the *Harris* standard. For example, in *Robbins v. South Bend Public Transportation Corp.*,\(^{184}\) the court discussed the severe or pervasive standard at length.

\(^{177}\) *Id.*

\(^{178}\) *Id.*

\(^{179}\) *Id.* at 1303.

\(^{180}\) *Id.*

\(^{181}\) *Id.*


Even persistent conduct was insufficient in *Baker v. Starwood Hotel and Resort Worldwide, Inc.*, No. Civ. A. 98-2076, 1999 WL 397405 (E.D. La. June 15, 1999). In that case, the plaintiff alleged that her supervisor made "unsolicited sexual advances that continued daily until the date of her termination approximately one month later." *Baker*, 1999 WL 397405, at *1. The inference was that this was sufficiently severe or pervasive, but even so, the court found the defendant to be not liable. *Id.* at *4.

\(^{184}\) No. 3:95-CV-541RP, 1996 WL 698023 (N.D. Ind. Oct. 3, 1996). The author uses several unreported cases such as this one to illustrate the point that courts do not take sexual harassment very seriously. The fact that some of the most egregious cases of harassment are unreported illustrates how lightly the courts treat these cases.
The court reached the decision that the conduct alleged was not sufficiently severe or pervasive by citing circuit precedent. Some cases the court relied on exemplified reasonable conclusions of what was not severe or pervasive, such as "a handful of general comments over two years," or "one off color joke and a conversation about a strip bar not directed at the employee." However, the court also cited more questionable holdings, such as "incidents of unwanted touching, attempted kissing, and placing 'I love you' signs in the work area and asking for dates did not create a hostile work environment," and an "incident where [her] temporary supervisor called plaintiff a 'whore' and 'bitch,' grabbed her from behind, and shoved her against a soft drink machine [that] did not constitute sexual harassment." The mistake this court and others make is requiring the conduct to be as egregious as the worst cases presented to the courts. As the Supreme Court explained in *Harris*, harassing behavior need not be psychologically injurious to be actionable under Title VII. If the *Robbins* court was genuinely assessing whether a reasonable person would perceive the conduct as hostile or abusive, the alleged conduct would clearly be sufficiently severe or pervasive. Rather than applying a res ipsa loquitur standard, however, some courts require that, in addition to proving that the conduct was severe and/or pervasive, the conduct must tangibly affect the plaintiff's job performance, as well.

2. Some Courts Require Proof that the Conduct Tangibly Affected the Plaintiff's Job Performance.—In *Kenyon v. Western Extrusions Corp.*, the

185. *Id.* at *4-5.
186. *Id.* at *5 (citing *Kantar v. Baldwin Cooke Co.*, No. 93C 6299, 1995 WL 692022, at *4 (N.D. Ill. Nov. 20, 1995)).
187. *Id.* (citing *Rennie v. Dalton*, 3 F.3d 1100, 1106-07 (7th Cir. 1993)).
188. *Id.* (citing *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993)).
189. *Id.* (citing *Ripberger v. Western Ohio Pizza, Inc.*, 908 F. Supp. 614, 616 (S.D. Ind. 1995)). The court noted that it was considering the factors enunciated in *Harris*—frequency, severity, physical contact or mere offensive speech, and interference with work performance. *Id.* The court also said that it was evaluating the conduct from both the objective and subjective perspectives. *Id.* The court explained the fuzzy line between objective sexual harassment and mere offensive conduct in this way:

On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations, intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.

*Id.* at *6 (quoting *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995)) (internal citations omitted). In assessing precedent, the court looked at conduct that constituted sexual harassment. *Id.*

plaintiff contended that her supervisor, Weable, sexually harassed her by rubbing his genitals on her, staring at her breasts, and touching various parts of her body in a sexual manner. \(^{192}\) On another occasion, Weable asked her if she was wearing panties. \(^{193}\) At another time, he told her to "hike up [her] dress." \(^{194}\) In all, the plaintiff alleged fifty instances of harassment. \(^{195}\) The court said that, although the conduct was sufficiently severe or pervasive, she failed to show in addition that the conduct "undermined her workplace competence." \(^{196}\)

Similarly, in *McGraw v. Wyeth-Ayerst Laboratories, Inc.*, \(^{197}\) the court said that the plaintiff, McGraw, did not show that she was subjected to pervasive harassment. Indeed, courts have required a plaintiff to show that she has been "subjected to continued explicit propositions or sexual epithets or persistent offensive touchings." \(^{198}\) The plaintiff alleged that her supervisor, Maggio, forced her to kiss him once and asked her out constantly until she announced her engagement, at which point Maggio told her that she should have gone out with him. \(^{199}\) After that, the plaintiff alleged that Maggio retaliated against her and on one occasion screamed at her. \(^{200}\) The court decided that McGraw failed to demonstrate that Maggio's behavior was persistent enough to change the terms and conditions of her work. \(^{201}\) Furthermore, the court explained that McGraw never alleged that Maggio's behavior interfered with her job performance. \(^{202}\)

Finally in a particularly strict interpretation, or misinterpretation, of the *Harris* factors, *Mendoza v. Borden, Inc.*, \(^{203}\) the Eleventh Circuit

\(^{192}\) *Id.* at *4.*  
\(^{193}\) *Id.*  
\(^{194}\) *Id.*  
\(^{195}\) *Id.* at *6.*  
\(^{196}\) *Id.*  
\(^{198}\) *Id.* at *5* (citations omitted). The court said that the incidents alleged by the plaintiff were insufficient to meet this standard, in part, because she did not tie them down specifically to time and frequency. *Id.* at *6.* However, in the court's own recitation of the facts, it was clear that in the relevant time period, the plaintiff, McGraw, alleged that her supervisor, Maggio, repeatedly asked her out. *Id.* at *1.* Maggio also inappropriately touched her, kissed her without her consent, and continued to ask her for dates. *Id.*  
\(^{199}\) *Id.*  
\(^{200}\) *Id.* at *2.*  
\(^{201}\) *Id.* at *6.*  
\(^{202}\) *Id.* McGraw filed a complaint with the human resources department alleging sexual harassment. *Id.* at *2.* The department found the complaint to be unsubstantiated, and a few months later, McGraw was fired for poor work performance. The court granted summary judgment on hostile environment discrimination, but denied the summary judgment on quid pro quo harassment because it was possible that her supervisor was retaliating against her for complaining about him. *Id.* at *6-8.*  
\(^{203}\) 195 F.3d 1238 (11th Cir. 1999) (en banc).
sitting en banc affirmed a grant of summary judgment in favor of the defendant on the basis that, as a matter of law, the conduct alleged was insufficiently severe or pervasive.\textsuperscript{204} The plaintiff alleged that Page, who had supervisory authority over her and was the highest ranking employee in the facility, constantly watched her and followed her around.\textsuperscript{205} The plaintiff also testified that there were two instances in which he "looked [her] up and down, and stopped at [her] groin area and made a . . . sniffing motion."\textsuperscript{206} Page never made any physical contact with her except on one occasion when he "rubbed his right hip up against [her] left hip while touching her shoulder and smiling."\textsuperscript{207}

The court said that three out of the four factors of \textit{Harris} were missing.\textsuperscript{208} First, the plaintiff failed to show that the conduct physically threatened or humiliated her or that his conduct interfered with her ability to do her job.\textsuperscript{209} Second, the conduct was not sufficiently severe.\textsuperscript{210} Finally, the court said that, other than being followed and stared at, the conduct was not frequent.\textsuperscript{211} Because the plaintiff did not allege that the supervisor was "stalking, leering, intimidating, or threatening,"\textsuperscript{212} the court said it did not want to set a baseline for sexual harassment that would trivialize it and cited several cases of more severe conduct.\textsuperscript{213}

In \textit{Harris}, the Court made it clear that "no single factor is required" to demonstrate hostile environment harassment.\textsuperscript{214} Nevertheless, some courts require that all of the factors be met in order to avoid summary judgment; many more require that most of the factors be met.\textsuperscript{215}

\textsuperscript{204} Id. at 1252-53.
\textsuperscript{205} Id. at 1242.
\textsuperscript{206} Id. at 1243 (internal quotation marks omitted).
\textsuperscript{207} Id. (internal quotation marks omitted).
\textsuperscript{208} Id. at 1248.
\textsuperscript{209} Id.
\textsuperscript{210} Id. at 1249.
\textsuperscript{211} Id.
\textsuperscript{212} Id. (internal quotation marks omitted).
\textsuperscript{213} Id. at 1252-53 n.10.
\textsuperscript{214} Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
\textsuperscript{215} In addition, at least one court has alluded to another factor in addition to the \textit{Harris} factors that also must be met. Hines v. Sherwin-Williams Co., No. 96 C 4889, 1999 WL 1267697, at *6 (N.D. Ill. Mar. 31, 1999) (requiring the plaintiff to complain about the conduct in order to demonstrate a subjective perception of hostility within the work environment). See infra notes 217-220 (considering \textit{Hines} in greater detail).

Another tactic some courts employ to limit the evidence of hostile environment is exemplified by \textit{Guidry v. Zale Corp.}, in which the court decided that because the allegedly harassing incidents were not spelled out in the plaintiff's EEOC charge, the events could
Applying the *Harris* factors too strictly is only one method the courts use to avoid a trial on the merits in sexual harassment cases. In *Harris*, the Court said that two determinations had to be made: the conduct had to be offensive to a reasonable person and also had to be subjectively offensive to the plaintiff. At least one court has used the plaintiff's failure to complain about the conduct to show that it was not sufficiently severe or pervasive to be subjectively offensive.

In *Hines v. Sherwin Williams Co.*, the court used the plaintiff's failure to complain to demonstrate that the conduct was not subjectively offensive, despite the fact that she told a supervisor about the harassment after the supervisor approached her about it. The harassment resumed, but the plaintiff failed to complain because she was fearful that the consequence of naming her harasser would exacerbate her situation, or even that she might be killed. The court said that the behavior was objectively serious enough to constitute sexual harassment, but it evidently did not bother her enough to complain about it. The court made this decision despite the fact that the plaintiff

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217. See *Hines*, 1999 WL 1267697. The court in *Hines* granted summary judgment for the defendant because the plaintiff had not complained. Hines, the only female in the department, alleged that she was sexually harassed throughout her employment by her coworkers starting in September 1992. *Id. at* *2*. After a manager approached the plaintiff and discussed the initial incidents, the conduct stopped temporarily. *Id.* One month later, her coworkers started harassing her and continued the harassment for over a year. *Id. at* *2-3.* She alleged the following:

[a co-worker] grabbed her on almost a daily basis and tried to kiss her perhaps once a week. Pruitt and Ferrer [other employees] also "ganged up on" Hines [the plaintiff] three or four times, with Ferrer holding Hines while Pruitt tried to kiss her . . . [Other coworkers] rubbed her from behind and addressed certain statements of a sexual nature to her. Hines also claims she was threatened by Hill once, found a sexually explicit drawing of which she was the subject once, and was slapped on the buttocks by Ferrer once.

*Id. at* *2* (citations omitted). She did not report the incidents because she was afraid that she would be killed if someone got fired. *Id. at* *3.* She started experiencing health problems that she believed were related to the harassment and finally resigned. *Id. at* *3-4.*

In *Ellerth*, the Supreme Court said that the plaintiff's unreasonable failure to complain can be an affirmative defense for the employer to avoid liability when no tangible employment action is taken. 524 U.S. 742, 765 (1998). However, as applied here, the defense puts the burden of proof on the plaintiff to show that her failure to complain was not unreasonable as part of the proof that the conduct was sufficiently severe or pervasive.


219. *Id. at* *6.*
presented uncontested evidence that she had complained once, the harassment did not stop, and she was too afraid to complain again.\textsuperscript{220}

The ultimate question, as Justice Ginsburg suggested in her concurrence to \textit{Harris}, should be whether a reasonable person would find it more difficult to do the job or,\textsuperscript{221} as the majority said in \textit{Harris}, whether a reasonable person would believe that the environment was abusive.\textsuperscript{222} There is absolutely no question that in cases such as \textit{Robbins}, \textit{McGraw}, and \textit{Mendoza}, both standards were met. Many courts, however, require victims of sexual harassment to submit to outrageous behavior that would not be tolerated in any other context. Although the standard is purportedly the same, the courts treat victims of racial harassment much more reasonably.

\textbf{B. Courts Tolerate Conduct in Sexual Harassment Cases that Would Not Be Tolerated in Racial Harassment Cases}\textsuperscript{223}

When courts are faced with cases of racial harassment, they articulate the standard set out in \textit{Harris};\textsuperscript{224} however, the threshold for severe or pervasive conduct in racial harassment cases is frequently much lower.\textsuperscript{225} For example, in \textit{Baxter v. Hartford Fire Insurance Co.},\textsuperscript{226} a case of racial harassment, the court refused to grant summary judgment for the defendant on the issue of hostile work environment.\textsuperscript{227} The plaintiff alleged the following three incidents, none of which was directed at her: (1) A supervisor called one of her co-workers, a native of Trinidad, as "a crazy island girl";\textsuperscript{228} (2) at another time, the same supervisor said that African-Americans like to eat watermelon; and (3) he allegedly "made derogatory comments about an African-American

\textsuperscript{220} \textit{Id.} The fact that issues of material fact are clearly present in many of these cases is beyond the scope of this Article, but that was the case in \textit{Hines} and in many of the cases cited in this section. \textit{See} Beiner, supra note 159 (discussing the misuse of summary judgment in sexual harassment cases).

\textsuperscript{221} \textit{Harris}, 510 U.S. at 25 (Ginsberg, J., concurring).

\textsuperscript{222} \textit{Harris}, 510 U.S. at 21.

\textsuperscript{223} Cases of ethnic harassment have been included as well. Racial and ethnic harassment are generally treated the same. \textit{See}, e.g., \textit{Chaboya v. Am. Nat'l Red Cross}, 72 F. Supp. 2d 1081, 1082, 1091 (D. Ariz. 1999) (referring to Hispanic employee's alleged harassment as racial harassment).

\textsuperscript{224} The Court recently cited the severe or pervasive standard as the standard in a racial harassment case under Title VII. \textit{Nat'l R.R. Passenger Corp. v. Morgan}, 122 S. Ct. 2061, 2074 (2002). \textit{See} supra Section I.E.5 and infra Section II.C.1 for a discussion of the case.

\textsuperscript{225} \textit{See} Gregory, supra note 25 (comparing standards for racial and sexual harassment in more detail). \textit{But see} Hébert, \textit{Analogizing Race}, supra note 23 (explaining why different standards should exist for racial and sexual harassment).

\textsuperscript{226} No. 94-02738SS, 1996 WL 684448 (D.D.C. Nov. 18, 1996).

\textsuperscript{227} \textit{Id.} at *4.

\textsuperscript{228} \textit{Id.} at *3.
employee's 'afro' hairstyle, asking whether 'bugs fly in [her] hair.' 229 None of these incidents was reported. 230 If this case were re-cast as a sexual harassment case, it would receive short shrift from the courts that decided the cases described in the preceding sections.

In another case of racial harassment, Qualls v. Radix Group International, Inc., 231 the court found the conduct of the plaintiff's supervisor calling her a "nigger [to be] severely offensive." 232 The court noted that the Court of Appeals for the Seventh Circuit finds the word "nigger" unquestionably racist and that use of the term, even a few times, sufficiently affects the terms and conditions of employment to support a hostile work environment claim. 233

When the same circuit dealt with an analogously offensive term for women, however, the outcome was quite different. In Galloway v. General Motors Service Parts Operations, 234 the plaintiff was repeatedly called a "bitch." 235 The court said:

the word "bitch" does not necessarily connote some specific female characteristic, whether true, false, or stereotypical; it does not draw attention to the woman's sexual or maternal characteristics or other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect. In its normal usage, it is simply a pejorative term for "woman." 236

The court said that one use of the word "bitch" would certainly not be sexual harassment; moreover, the use of the term repeated daily for a period of years would not necessarily constitute sexual harassment. 237 In other words, in the Seventh Circuit, using the term "bitch" constantly towards a woman may not be sufficient to form the basis of a Title VII claim, but the occasional use of the word "nigger" to an African-American would be sufficient.

Similarly, in Chaboya v. American National Red Cross, 238 the plaintiff's co-worker had "verbally accosted and physically threatened" the

229. Id.
230. Id.
232. Id. at *7 (internal quotation marks omitted).
233. Id. (citing Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993)).
234. 78 F.3d 1164 (7th Cir. 1996), overruled in part by Nat'l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002). See infra note 270 (discussing Galloway); Gregory, supra note 25, at 756-72 (comparing the Rogers and Galloway decisions).
235. 78 F.3d at 1168.
236. Id.
237. Id. at 1167-68.
plaintiff, calling him names such as "'spic,' 'dumb Mexican' and 'dumb-ass Mexican.'" A defaced photograph of the plaintiff and a co-worker was posted on the bulletin board and captioned "'racist fagot' and 'but why does he like white women.'" In a bench trial, the court said that this was sufficient to constitute racial harassment.

Chaboya can be compared to Grayson v. Linnc Futures Group, in which the plaintiff referred to more than sixty incidents of sexual harassment, covering a period of two-and-one-half years. Many of the incidents involved derogatory comments made by a floor manager, who did not have supervisory authority over the plaintiff. The plaintiff complained to her supervisor. The floor manager called her a “tramp,” a “whore” a “bitch” and a “fat ass.” On several occasions, he made lewd comments about the physical attributes of women. In addition, he made insulting or threatening comments concerning the plaintiff’s daughter. He also threw objects at the plaintiff and made other rude remarks to her. The plaintiff was too upset to work on more than one occasion because of the manager’s behavior. She was finally discharged for excessive absenteeism or abandonment of employment. The court said that the incidents were insufficiently severe or pervasive to constitute sexual harassment.

In a final case of racial harassment, Reid v. O’Leary, the plaintiff found in her desk “a framed certificate with her name printed on it, entitled Temporary Coon Ass Certificate.” The certificate was signed by a white employee and was given to at least four other employees, two of whom were white. The certificate further said “You

239. Id. at 1083.
240. Id. at 1084.
241. Id. at 1091.
243. Id. at *3.
244. Id. at *5.
245. Id. at *4.
246. Id. at *3.
247. Id.
248. Id. at *4.
249. Id. at *5. For other situations of sexual harassment that were analogous to the racial harassment in Chaboya, but in which the courts determined the conduct was not sufficient to constitute a hostile environment, see Weiss v. Coca-Cola Bottling Co., 990 F.2d 333 (7th Cir. 1993); Sechrist v. Unified Gov’t of Wyandotte County/Kansas City, No. Civ. A. 98-2219-KHV, 1999 WL 450947, at *4 (D. Kan. June 22, 1999).
251. Id. at *1 (internal quotation marks omitted).
252. Id.
are to learn to sing, dance and tell jokes and eat boudin, cracklins, gumbo, crawfish etouffee and just about everything else.”

The white employee later explained in a letter of apology that the term ‘Coon-Ass’ is a slang expression meaning Cajun as ethnic to south Louisiana and has nothing to do with race. The court, however, denied the defendant’s motion for summary judgment, deciding that it was a triable issue whether “the alleged conduct [was] unreasonably abusive or offensive in the workplace environment or adversely affected the reasonable employee’s ability to function in his or her job.” The court also acknowledged that although a single incident alone does not necessarily create a hostile work environment, the term ‘Coon-Ass’ may be on its own racially derogatory or sufficiently severe to form a hostile work environment.

These cases illustrate the phenomenon that, although courts give lip service to the requirement that racial harassment be severe or pervasive before it is actionable, the standard is, in fact, applied less stringently than some courts apply the standard to sexual harassment. If any of the sexual harassment cases cited so far were re-cast as racial harassment, it would become clear that the plaintiffs in all of these cases were subjected to less favorable terms and conditions of employment.

The standard as it was applied to these racial harassment cases is the correct standard. The conduct in the cases cited above was sufficient to offend a reasonable person and make his job more difficult. That is all that should be required, rather than the egregious conduct...

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253. Id.
254. Id. at *2.
255. Id. at *3. In yet another case of racial harassment, Roberts v. Wal-Mart Stores, Inc., the court found the following sufficient to survive summary judgment, when added to other allegations of disparate treatment (discriminatory discipline, for example): the plaintiff allegedly overheard two co-workers using the term “nigger,” not directed at him. No. 95-0059-H, 1996 WL 403790, at *1 (W.D. Va. July 1, 1996). In addition, “another co-worker told the plaintiff ‘all you black guys think somebody is scared of you.’” Id. A store manager opined that “all blacks bring discrimination charges.” Id. Finally, the plaintiff contended that white employees thought he was lazy and refused to work with him. Id.

See also Curtis v. Airborne Freight Corp., No. Civ. 40621 (SAS), 1998 WL 883297, at *5 (S.D.N.Y. Dec. 17, 1998) (denying the defendant’s motion for summary judgment despite plaintiffs’ complaints about two comments made by a supervisor); Schwapp v. Town of Avon, 118 F. 3d 106, 108 (2d Cir. 1997) (reversing the lower court’s grant of summary judgment for the defendant based on the plaintiff police officer’s allegations that a co-worker said that a “nigger bitch” was beating her children; another co-worker asked why the players did a “jungle dance” when they scored; a superior officer gave the plaintiff a copy of a racially offensive joke featuring the word “nigger”; and a superior officer said that the plaintiff should not expect his fellow officers to be as courteous to him as he was to them and that he should not be so sensitive).

required in the sexual harassment cases. The only rational difference between racial and sexual harassment is that some sexual advances may be welcome, while racial harassment would never be welcome.257 Once the determination is made that the harassment is unwelcome, there is no reason to apply a different standard to sexual harassment cases. Some courts, not content with adopting an unconscionably high threshold for sexual harassment to be actionable, have developed other similarly inappropriately applied mechanisms that limit evidence of what is severe or pervasive.

C. Courts Parse the Evidence to Avoid a Finding of Severe or Pervasive Sexual Harassment

In addition to finding that harassing conduct was sufficiently severe or pervasive, courts ignore other evidence of harassment and refuse to consider evidence of conduct that occurred before the employer took remedial action, even when the remedial action did not end the harassment. Furthermore, until recently, some courts limited the evidence that could be presented by refusing to apply the continuing violation theory in sexual harassment cases.

1. Refusing to Apply the Continuing Violation Theory.—Recently, in National Railroad Passenger Corp. v. Morgan, a race-based harassment case, the Court decided that the continuing violation theory applies to hostile environment harassment cases.258 Prior to this time, some courts refused to allow the plaintiff to use the continuing violation theory to establish sexual harassment and limited actionable incidents to the 180-300 days before the charge was filed.259 Obviously, as exemplified by the Morgan case, the courts also were refusing to apply the continuing violation theory in racial harassment cases. However, because many courts require more serious continuing conduct in sexual harassment cases, as discussed in the previous section, failure to apply the continuing violation theory impacted sexual harassment cases more adversely.

The continuing violation theory posits that some acts of discrimination have discriminatory effects that extend the statute of limitations as long as the discriminatory effects last, so that the violation

257. See Hébert, Analogizing Race, supra note 23, at 824, 848.
258. 122 S. Ct. 2061, 2077 (2002). See supra Section I.E.5 and infra Section II.C.1 for a further discussion of this case.
259. See, e.g., Alvey v. Rayovac Corp., 922 F. Supp. 1315, 1327 (W.D. Wis. 1996) (limiting plaintiff's suit to conduct that occurred within 300 days of filing a charge). Title VII requires a charge to be filed within 180 days of the occurrence of discrimination or within 300 days if the state has a deferral agency. 42 U.S.C. § 2000e-5(e)(1) (2000).
"continues" until the discriminatory effects cease.\textsuperscript{260} The courts have recognized the continuing violation theory in limited situations, however.\textsuperscript{261} For example, in \textit{United Airlines, Inc. v. Evans},\textsuperscript{262} the plaintiff was an airline stewardess fired for violating the airline's policy that stewardesses could not be married.\textsuperscript{263} She did not file a timely charge of discrimination.\textsuperscript{264} The no-marriage rule was later changed by a collective bargaining agreement by which the plaintiff was not covered.\textsuperscript{265} Thereafter, the plaintiff sought reinstatement and was rehired but not given the seniority she would have had but for the discharge. The Court held that the original violation—the discharge—was not a continuing violation, even though the past discrimination had present effects—less seniority.\textsuperscript{266}

These types of cases are not comparable to sexual harassment cases, where the conduct must occur over a period of time in order to support a determination that it was sufficiently severe or pervasive.\textsuperscript{267} Nevertheless, many lower courts were refusing to allow evidence of sexual harassment that occurred before the period covered by the statute of limitations.\textsuperscript{268} It should be noted that the statute of limitations under Title VII is very short, 180 days in jurisdictions that do not have

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Dudley v. Metro-Dade County, 989 F. Supp. 1192, 1198 (S.D. Fla. 1997) (defining continuing violation exception as applying when there is evidence of ongoing discrimination continuing as unremedied so that it amounts to a practice or policy).
\item See \textit{Friedman \& Strickler}, supra note 22, at 448-49 (recognizing that courts may apply the continuing violation theory when the discriminatory conduct is part of a policy that continues into the limiting period, the date of discrimination is difficult to pinpoint, or when seemingly benign acts are later discovered to be cumulatively discriminatory).
\item 431 U.S. 553 (1977).
\item \textit{Id.} at 554.
\item \textit{Id.} at 554-55.
\item \textit{Id.} at 555.
\item \textit{Id.} at 558.
\item In \textit{Meritor}, the plaintiff complained about sexual harassment that started in 1974 and ended after 1977. 477 U.S. 57, 59-60 (1986). She was fired for excessive leave in November 1978. \textit{Id.} at 60. She had never reported any of the incidents because she was afraid of the perpetrator. \textit{Id.} at 61. Whether this was a continuing violation was not at issue, but the Court obviously assumed that all of the incidents were relevant to the issue of harassment.
\item In \textit{Harris v. Forklift Systems, Inc.}, the president of the company harassed the plaintiff throughout her employment beginning in April 1985, and ending in October 1987. 510 U.S. 17, 19 (1993). The president insulted her "because of her gender and often made her the target of unwanted sexual innuendos." \textit{Id.} The question was whether the standard for severe or pervasive, which the lower court articulated, was correct—that the conduct must be sufficient to seriously affect the plaintiff's psychological well-being. \textit{Id.} at 20. As in \textit{Meritor}, the Court apparently assumed that all of the incidents were relevant to that determination.
\end{enumerate}
\end{footnotesize}
a state deferral agency or 300 days in states that do. These courts were inappropriately basing their decisions on Title VII law that defined a continuing violation in cases in which there were discrete violations that had subsequent consequences.

For example, in *Vargas-Harrison v. Waukegan Community Unit School District #60*, the plaintiff complained that her supervisor, Ali, had asked her out for drinks, made comments about her lips, tried to kiss her, and told her "he thought Hispanic women were 'hot sexually.'" In addition, he "would look at her in a 'sexual way' by looking her up and down or looking at her breasts." He also "tried to touch her vagina and buttocks, hugged her from behind, and pulled her close for a kiss[,] and . . . repeatedly attempted to kiss her, make sexual advances towards her, and ask her out for dates." The court said that the plaintiff's problem was that only five of the twenty-seven alleged instances of sexual harassment occurred within 300 days before the charge was filed, such as the sexual assault that had occurred six months before the limitations date. The court failed to

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270. The problem is fully discussed in *Galloway v. General Motors Service Parts Operations*, in which the court applied the continuing violation theory properly, and provided some guidelines in dicta. *Galloway*, 78 F.3d at 1166-68. In *Galloway*, the plaintiff previously had a romantic relationship with a co-worker, Bullock. The relationship ended in 1987, after which Bullock repeatedly called Galloway a "sick bitch." *Id.* In addition, on one occasion, Bullock made an obscene gesture and said "'suck this, bitch.'" The lower court excluded evidence of all incidents that occurred more than 300 days before the plaintiff filed her charge. *Id.* at 1166-67. The appellate court disagreed, recognizing that sexual harassment is a cumulative process and may not have gone on long enough to be considered severe or pervasive. The court articulated respective guidelines that were ultimately rejected by the Supreme Court in *National Railroad Passenger Corp. v. Morgan*. 122 S. Ct. 2061, 2074 n.11 (2002).

The court, however, agreed with the lower court that the use of the term "sick bitch" was not a sex or gender-related term. *Galloway*, 78 F.3d at 1167-68. Bullock's use of the term was motivated by personal dislike unrelated to gender. *Id.* at 1168. The court was, of course, ignoring the fact that the origin of the dislike was an affair that had soured, a classic situation for sexual harassment. *Id.* at 1165. In addition, it is pure sophistry to refuse to connect the term "bitch" to discrimination against women. In this case, the plaintiff was allowed to bring suit based on the continuing violation theory. *Id.*

272. *Id.* at *1*.
273. *Id.*
274. *Id.* at *1-2.
275. *Id.* at *6. The court said that the only claims that were timely were claims that he had asked her out for drinks on two occasions and that he said on another occasion he was "still waiting for a kiss." *Id.* At another time, he made a remark about her hair and eyes and said that "there was 'still time for us to get together.'" *Id.* Finally, on another occasion, he told her she "looked great and they should go out." *Id.* The court said that the events that occurred within the statute were not sufficiently severe or pervasive and that the continuing violation theory did not apply. *Id.* The court said that the plaintiff should have
take into account that the plaintiff complained constantly about the harassment and could have reasonably believed that it had been or would be alleviated. Taking this view of the continuing violation theory put too much pressure on plaintiffs to make an early assessment of what constitutes actionable harassment and that complaining to the employer will not remedy it.

Similarly, in *Dudley v. Metro-Dade County*, the court refused to allow evidence of harassment that occurred outside of the statute of limitations although it was perpetrated by a management official. The harassment stopped and started again several times, but extended throughout the plaintiff's employment. In 1985 when the plaintiff, Dudley, was hired, her supervisor, Hood, made her uncomfortable by asking her for dates, telling her he missed her when he was out of the office, was thinking of her and could not wait to see her. In 1987, Hood allegedly "exposed his penis to Dudley," and said "Girl, you just don't know what you do to me. You don't know what you are missing." She complained to the company of this incident. The company took no action, but Hood desisted for two years, until 1990, when Hood started asking her out again. He also "would come to her office and ‘bounce[ ] his genital area’ against her." He showed up unexpectedly at her house on one occasion, "constantly asked her out for dates, and he sometimes touched her." She confronted Hood, as did another co-worker Hood had allegedly harassed. After this confrontation, which took place in 1993, Hood did not speak to Dudley unless necessary for business. In 1994, the harassment began again. Hood told Dudley she "was the one he wanted," and that

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276. *Id.*
277. The Vargas-Harrison approach to the continuing violating theory was further exacerbated by the Court's decision in *Clark County School District v. Breeden*, in which the Court said that if the jury would find the plaintiff to be unreasonable in her belief that she has been subjected to sexual harassment, she has no claim for retaliation if she is disciplined for complaining. 532 U.S. 268 (2001) (per curiam).
279. *Id.* at 1198-99.
280. *Id.* at 1199.
281. *Id.* at 1195.
282. *Id.* (internal quotation marks omitted).
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
he "'just [couldn't] shake the way' he felt" about her and that he wanted to go out with her.\textsuperscript{287} Among other things, he "'tried to caress' her hand."\textsuperscript{288} She threatened to report him if he ever touched her again. Shortly after this incident, Hood told Dudley that she would "'see what wicked is.'"\textsuperscript{289} Two weeks later, he gave her a bad evaluation. The court considered evidence only of the incidents that occurred in 1994 and said that they were insufficient to establish a hostile environment.\textsuperscript{290}

The court said that she should have complained about the earlier violations.\textsuperscript{291} In fact, she either did complain or thought the situation was remedied.\textsuperscript{292} It was only after the third resumption of the harassment and the retaliatory evaluation that she finally filed suit. The court said there was an insufficient nexus between the time-barred claims and the current claims, although the same harasser was involved.\textsuperscript{293} The court noted the long intervals between incidents and concluded that the violations were not temporally related.\textsuperscript{294} It appears that the plaintiff acted very reasonably, but was punished by the court for doing so.

In National Railroad Passenger Corp. \textit{v.} Morgan,\textsuperscript{295} the Supreme Court put an end to the courts' ability to limit evidence, and indeed liability, for a course of conduct that constitutes a hostile environment.\textsuperscript{296} The Court used none of the tests relied on by the lower

\textsuperscript{287} Id. at 1195-96.
\textsuperscript{288} Id. at 1196.
\textsuperscript{289} Id.
\textsuperscript{290} Id. at 1200. The court said the test for whether the alleged harassment was a continuing violation was whether "the claims are related in subject matter and frequency and whether the alleged violations were permanent in the sense that they served to trigger the employee's awareness that her civil rights had been violated." \textit{Id.} at 1198.
\textsuperscript{291} Id. at 1199.
\textsuperscript{292} Id.
\textsuperscript{293} Id.
\textsuperscript{294} Id. In another case involving a single perpetrator, \textit{LaRose v. Philadelphia Newspapers, Inc.}, the conduct complained of began in 1983 and continued for 13 years. 21 F. Supp. 2d 492, 494-95 (E.D. Pa. 1998), \textit{aff'd mem.}, 205 F.3d 1329 (3d Cir. 1999). The most serious incident occurred in 1983 when Schrager came up behind the plaintiff, "groped her breasts, and made grinding, 'humping' motions behind her." \textit{Id.} at 495. When the plaintiff complained to the union about Schrager's behavior, he called her a "'lying bitch'" and had to be restrained. \textit{Id.} The plaintiff took sick leave because of emotional stress in 1996 because of the harassment by Schrager. \textit{Id.} at 496-97. The court said that much of Schrager's conduct occurred in the mid-1980s, and the plaintiff should have known that her rights were violated and sued at that time. \textit{Id.} at 499. With regard to the events that occurred after the statutory period—Schrager's following the plaintiff, standing too close to her and treating her less favorably in work matters—the court said they were insufficient to constitute a hostile environment. \textit{Id.} at 500.
\textsuperscript{295} 122 S. Ct. 2061 (2002). See \textit{supra} Section I.E.5 for a further discussion of the case.
\textsuperscript{296} \textit{Id.} at 2077.
courts to determine whether incidents that allegedly constitute a part of a hostile environment would be actionable; rather, it simply said that all such incidents are part of a continuing violation.297

One point that the Supreme Court did not make in Morgan was that the courts themselves have difficulty deciding whether conduct is sufficiently severe or pervasive to constitute a hostile environment. If courts, which are knowledgeable in the law, have difficulty making the determination of the point at which harassment becomes actionable, it is absurd to require the plaintiff to do so. Furthermore, the lower courts have also ignored the difficulty plaintiffs have in reporting the incidents in the first place. Even Ellerth recognized that there are reasons why employees do not promptly complain and provided an exception.298 In Hines v. Sherwin-Williams Co.,299 discussed earlier, after the plaintiff had complained, the harassing behavior escalated, and she contended she was afraid that she would be killed if she complained again and got someone fired.300 The court refused to apply the continuing violation theory and denied the motion for summary judgment.301 Even if employees do report the conduct, often the court's answer is that there is insufficient evidence.302 The harassment continues, and the plaintiffs are often discharged for poor work performance, either because the supervisor is retaliating against them303 or because the harassment has adversely affected their work performance.304 With Ellerth's requirement that employees must not

297. Id. at 2073. For a discussion of the limitations of the continuing violation theory, see supra notes 149-155 and accompanying text.

298. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). The employer must prove that the employee unreasonably failed to complain. Id. As the Court said in Faragher v. Boca Raton,

[a]n employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.


300. Id. at *3; see supra notes 217-220 and accompanying text (discussing the facts of Hines).


304. Estrich, supra note 25, at 834.
unreasonably fail to complain to the employer, plaintiffs already had a very limited window of opportunity to pursue their claims without having to be concerned with the short statute of limitations. However, the Court in Morgan noted that the statute of limitations should never have entered into the determination of whether the conduct is actionable as long as the harassment continues into the statutory period.

The cases in this section illustrate the extent to which courts were going to grant summary judgment in favor of the defendant, despite very serious allegations of sexual harassment. While the Supreme Court has substantially removed the ability of courts to limit evidence of hostile environment harassment because of the statute of limitations, the lower courts employ other tactics to limit claims.

2. Other Tactics the Courts Use to Prevent the Plaintiff from Establishing that the Harassment Was Severe or Pervasive.—If the plaintiff complains, and the supervisor takes action against her in retaliation, the retaliation itself is part of the sexual harassment and should be considered with the other evidence to determine whether the conduct was severe or pervasive. Instead, many courts treat the evidence of retaliation separately, which makes it more likely that the courts can avoid a finding that the harassment was severe or pervasive enough to go to the jury.

306. 122 S. Ct. 2061, 2075-77 (2002). The Court noted that states that have their own remedial schemes have a 300-day limitation, while states that do not have a 180-day limitation, and said "we cannot import such a limiting principle into the provision where its effect would be to make the reviewable time period for liability dependent upon whether an employee lives in a State that has its own remedial scheme." Id. at 2076.

While the Court did not acknowledge the reluctance of some courts to admit evidence of acts outside the limitations period as background to determine whether the severe or pervasive requirement has been met, the Court did note that the statute does not prohibit evidence of related acts as background. Id. at 2072.

307. For example, in Polimeni v. American Airlines, Inc., the plaintiff was a flight attendant. She had to work on occasion with a man, Villareal, whom she claimed sexually harassed her. No. CV 92 5702 (RJD), 1996 WL 743351, at *1 (E.D.N.Y. Dec, 18, 1996). He "told me I need to be fucking and touched while he shook me by the arm" and later brushed against her breast. Id. (internal quotation marks omitted). She complained. Ten months later, Villareal pulled her behind a curtain and asked if she was still afraid of him, called her a bitch and blew in her hair. She complained again. Villareal was counseled about encountering the plaintiff in the future. Id. The next year, Villareal walked by the plaintiff and struck her in the buttocks with his bag. Id. at *2. The court granted the defendant's motion for summary judgment based on the fact that the incidents were few in number and were "relatively minor." Id. Furthermore, they were spread over two years, and she had limited contact with Villareal. The court concluded that no reasonable person would find a hostile environment. Id.

308. Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791 (6th Cir. 2000).
For example, in *McGraw v. Wyeth-Ayerst Laboratories, Inc.*, the court granted the defendant's motion for summary judgment on the issue of hostile environment harassment, but denied summary judgment on the issue of quid pro quo harassment because it was possible that the plaintiff's supervisor, Maggio, was retaliating against her for complaining about him.\(^{309}\) The court decided that the plaintiff failed to show that Maggio's conduct was sufficiently "pervasive, regular, or severe as to alter the conditions of her work, nor did she allege that Maggio's actions interfered with her ability to do her job."\(^{310}\)

If, as the court determined, it was possible that the supervisor was retaliating against her for complaining about him, this should also be considered evidence of sexual harassment. If a supervisor is willing to give an employee poor evaluations and recommend her termination because of complaints of sexual harassment,\(^{311}\) this constitutes important evidence of hostile environment that the court must consider in evaluating whether the conduct is "severe or pervasive." The effect of the judge's ruling is to effectively limit the jury to finding that the plaintiff was fired for complaining about non-actionable sexual harassment. If, however, she was not fired for complaining, but rather, her discharge was justified because the harassing conduct caused her job performance to suffer, she has no recourse.

In addition to ignoring evidence of retaliatory conduct for purposes of whether the conduct is severe or pervasive, the courts often ignore evidence of gender harassment that is not sexualized.\(^{312}\) For example, in *Robbins v. South Bend Public Transportation Corporation*, the court discussed the severe or pervasive standard at length.\(^{313}\) The plaintiff, Robbins, complained that she had been sexually harassed by her supervisor, Wise.\(^{314}\) The court, although acknowledging that harassment does not have to be of a sexual nature to constitute sexual harassment, recounted numerous problems that the plaintiff allegedly experienced with Wise: "he had pressed his body against hers; he said 'ugly things' to her; and on two occasions, he pulled or tugged on her

\(^{310}\) Id. at *6.
\(^{314}\) Id. at *2.
hair." After Robbins complained, Wise engaged in additional conduct which Robbins claimed was sexually harassing and discriminatory. Among other things, Wise refused to speak to her, and he treated her differently from other operators. The court admitted that the plaintiff had been subjected to "unpleasantness" by Mr. Wise. However, because he did not direct obscene language or gestures at her, show her pornographic pictures, expose himself, solicit sexual relations with her, or sexually assault her, "there was insufficient evidence to support a finding or reasonable inference that, from an objective standpoint, her work environment was sufficiently hostile or abusive." The court affirmed the entry of summary judgment in favor of the defendant. The foregoing cases illustrate situations in which the courts have determined that the harassment was not actionable by failing to recognize that conduct that is not sexualized can also constitute harassment. Harassment based on the plaintiff's gender and retaliatory harassment are two types of harassment that some courts ignore in determining whether the conduct is sufficiently severe or pervasive.

Some courts use another tactic to parse the evidence of harassment: they reject evidence of harassment that occurred before the employer took some remedial action even though it does not stop the

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315. Id. at *4, *7.

316. Id. at *7. The other conduct she complained of consisted of the following:

[The supervisor also discriminated against her] by having the dispatcher give her the paperwork, by once bringing another operator along to pick her up at the garage; if she would call on the radio, he would "take his time coming;" if she needed a bus change, he would tell her to "write it up;" he was arrogant; he refused her request that he pick up her work; he once told other Transpo employees that she was a troublemaker; he yelled at her on one occasion; he once told an off-color joke about Mexican women; on one occasion he failed to hold the door open for her; and he drove a van very close to her in Transpo's lot. Ms. Robbins felt that the other drivers were "picking sides" between her and Wise. In addition, Mr. Wise sexually and verbally harassed another female employee and had once fondled her breasts. On at least one occasion, Mr. Wise was rude to other female operators.

Id.

317. Id. (emphasis added).

318. Id. Similarly, in Hyde v. Graebel/New Orleans Movers, Inc., the plaintiff complained that a manager had made mildly inappropriate comments to her and had touched her arms and hair several times in a way that made her feel uncomfortable. No. 98-3126, 1999 WL 335385, at *3-7 (E.D. La. May 25, 1999). The court was probably correct that this behavior did not amount to sexual harassment. After the plaintiff complained about the conduct, however, the plaintiff contended that the manager retaliated against her. Id. at *2. She was required to take a position she did not want and was constructively discharged. Id. The court separately analyzed this as retaliation rather than as part of the conduct that caused the conduct to amount to sexual harassment. Id. at *3-6.
harassment. The following case illustrates this, along with the tactic of not considering retaliation as part of the severe or pervasive requirement.

In Hodoh-Drummond v. Summit County, the plaintiff complained about sexual and racial harassment. The principle act of sexual harassment occurred when the plaintiff's co-worker, John Croghan, unzipped the plaintiff's blouse, "exposing her breasts." Croghan's supervisor, Kinzel, observed the incident, and both walked away laughing at the plaintiff. The court said that, "assuming that the incident with John Croghan was severe enough to create a hostile environment," the plaintiff did not show that the employer did not take corrective action. The supervisor was put on unpaid leave for thirty days, pending investigation. The court, however, denied the defendant's motion for summary judgment on the issue of retaliation for complaining about sexual harassment. If it is possible that the plaintiff was retaliated against for complaining about sexual harassment, then the corrective action taken by the defendant was not effective. Furthermore, any retaliation should be considered part of the sexual harassment and dismissing that part of the complaint was inappropriate.

Similarly, in Caudillo v. Continental Bank/Bank of America Illinois, the district court decided that the employer had sufficiently remedied the plaintiff's complaints of sexual harassment. Among other things, the plaintiff's co-worker, Mabry, asked the plaintiff for a date, which she declined; he stared at her in a "sexual" manner, and

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319. In order to establish an affirmative defense under Ellerth, the defendant must show that it took reasonable care to prevent future acts of harassment. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). There is no justification to use the same standard to cut off evidence of whether the conduct is sufficiently severe or pervasive.

320. 84 F. Supp. 2d 874 (N.D. Ohio 2000).

321. Id. at 879.

322. Id.

323. Id. at 880.

324. Id. at 881.

325. Id. at 885. The court also denied the defendant's motion for summary judgment based on retaliation for complaining about racial harassment. Id. at 884.

326. No. 97 C 884, 1998 WL 409406 (N.D. Ill. July 16, 1998) [hereinafter Caudillo I], aff'd, No. 98-3032, 1999 WL 542899 (7th Cir. July 26, 1996). Here, the court did apply the continuing violation theory, but decided that the incidents that occurred after the statutory period were insufficient to constitute actionable harassment. Id. at *4. The appellate court expressed "grave reservations" with regard to the lower court's holding that the conduct before the remedial action was not sexual harassment, but agreed that the employer had taken sufficient action to remedy the situation. Caudillo v. Continental Bank/Bank of Am., No. 98-3032, 1999 WL 542899 at *4 (7th Cir. July 26, 1999) [hereinafter Caudillo II].

“touched her hair and shoulder,” after which she told him not to touch her. Three months later, he grabbed her arm and brushed her breast. On another occasion, he “brushed the front part of his body against the back of her body.” After the plaintiff complained about these incidents and others involving comments, not touching, the employer instructed Mabry to have no further contact with the plaintiff. Thereafter, Mabry did not make any further comments to the plaintiff or touch her. The plaintiff, however, alleged that Mabry continued to stare at her in an intimidating manner. Neither the lower court nor the appellate court seemed bothered by this allegation and considered the employer to have remedied the situation. The lower court said that staring alone did not constitute sexual harassment, as if the staring had occurred in a vacuum. What the Caudillo court, and others, fail to appreciate is the fact that, once an employee has been sexually harassed, even the slightest hint of resumption of bad conduct would make a reasonable woman feel threatened.

328. Id. at *1.
329. Id.
330. Id.
331. Id. at *2.
332. Id.
333. Id. *5.
335. Caudillo I, 1998 WL 409406, at *5. The appellate court apparently agreed in saying that the situation had been remedied: “These efforts, we conclude, were reasonably calculated under the circumstances to prevent further harassment.” Caudillo II, 1999 WL 542899, at *4.
336. Stephen Aden takes issue with the idea that:
the harassing threat or promise is insufficient standing alone to accomplish conditioning [of a job benefit based on sex]. To the contrary, “conditioning” occurs in this instance. For the employee who resists, the threat continues to hang over her like a sword of Damocles, and may cause repeated and pervasive stress arising out of her inability to predict his response to her resistance. A supervisor brutal enough to impose an unconscionable sexual term of employment must reasonably be perceived as brutal enough to exact the consequences for non-compliance. Aden, supra note 47, at 498.

In Crenshaw v. Detray Farms, Inc., the plaintiff complained each time she was harassed, and the company moved her into another area each time. However, she was harassed by different people in each area of the plant in which she worked. 968 F. Supp. 1300, 1301-03 (N.D. Ill. 1997). The court held that the conduct was insufficiently severe or pervasive, but even if it was persistent, the employer appropriately dealt with it. Id. at 1306. In Crenshaw, the harassment did not stop, and it was carried on by a number of people. Id. at 1301-03. A reasonable jury could interpret this to mean that the conduct was widespread and that the employer had not taken effective steps to insure that the environment was free from harassment. The court instead rewarded the employer for tolerating an environment in
The cases cited in this section illustrate the point that courts faced with cumulative evidence of severe or pervasive harassment parse the evidence by various methods to avoid allowing the issue to go to a jury. The courts frequently fail to consider evidence of gender harassment and retaliation as part of the evidence of whether a reasonable person would perceive the environment as abusive.\(^3\) The courts also often fail to consider harassment that occurred before the short statute of limitations period as a continuing violation or even as background before the Supreme Court limited their ability to do so in the Morgan case.\(^3\) Finally, some courts ignore evidence that occurred after the employer took remedial measures, even if the measures were insufficient to stop the harassment. The problem with all of these tactics is that the plaintiff is caught in a "Catch 22." To be considered severe or pervasive, the courts require the harassment to continue for a considerable period. Therefore, if the plaintiff complains too soon, the conduct is not sufficiently severe or pervasive, and according to the Supreme Court in Clark County School District v. Breeden,\(^3\) the plaintiff may be retaliated against with impunity for complaining. If she waits too long, the courts may not consider some of the acts of harassment.\(^3\) Furthermore, she may be considered to have failed to avoid the harm, thus losing her remedy under Ellerth.

### III. Analysis

Courts have dealt poorly with sexual harassment in part because of conceptual problems that originated in the history of sexual harassment guidelines and law.\(^3\) At the time the EEOC issued its guidelines, most courts did not recognize that sexual harassment was discriminatory. Therefore, the EEOC guidelines were necessary to create the cause of action. Ironically, perhaps because the definition adopted by the EEOC was underinclusive—covering only harassment based on sexual conduct—and overinclusive—describing two manifes-

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\(^3\) This is the standard for hostile environment articulated by the Harris case. See supra Section I.C.2.


\(^3\) 532 U.S. 268 (2001) (per curiam).

\(^3\) While this is much less likely after the Morgan case for purposes of the continuing violation theory, the Court said that if the plaintiff waits too long, laches, estoppel, or waiver may apply. Morgan, 122 S. Ct. at 2072. Similarly, if a court decides that the conduct is unrelated or if the employer intervened, the plaintiff may still lose her claim. Id. at 2075.

\(^3\) See supra Section I.E for a discussion of the early development of sexual harassment law.
tations of sexual harassment, hostile environment and quid pro quo—the courts accepted the idea that sexual harassment was “different” and could be treated differently from other types of discrimination.\textsuperscript{342}

The EEOC defined sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, . . . when submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment” and is used as the basis for an employment decision or creates an offensive working environment.\textsuperscript{343} This type of sexual harassment is based on sexual conduct. The other type of sexual harassment does not involve sexual conduct, but rather would cover such conduct as derogatory comments about a person’s gender.\textsuperscript{344} There can be no real dispute that Title VII was intended to cover the pure gender-type sexual harassment;\textsuperscript{345} however, some courts tend to dismiss sex-based harassment that does not involve sexual advances.\textsuperscript{346}

In addition, because the EEOC accepted the idea of two manifestations of sexual harassment, quid pro quo and hostile environment,\textsuperscript{347} hostile environment sexual harassment has been treated differently, and, ultimately, unfavorably.\textsuperscript{348} Quid pro quo harassment would generally not arise in other types of harassment, other than sexual conduct harassment. Quid pro quo harassment involves requests for sexual favors that, if declined, lead to retaliation in the form of a tangible employment consequence, such as discharge or failure to

\begin{itemize}
\item \textsuperscript{342} See supra notes 45-50 and accompanying text (citing and discussing the EEOC’s definition of sexual harassment).
\item \textsuperscript{345} See Colker, supra note 312, at 195 n.3 (citing the language of Title VII and equating the word “sex” with “gender”).
\item \textsuperscript{346} This is exemplified by the cases cited above in which the courts did not consider the employer’s acts of retaliation as part of the evidence of sexual harassment, as well as the cases in which gender-related harassment was ignored. See supra Section I.D. The EEOC tried to rectify this problem with the proposed guidelines on all types of harassment issued in 1993, but withdrew them for reasons set forth above. The Supreme Court in Oncale v. Sundowner Offshore Services, Inc., made it clear that harassing conduct need not be based on sexual desire to be actionable. 523 U.S. 75, 80-81 (1998).
\item \textsuperscript{347} See Guidelines on Sex Discrimination, 29 C.F.R. § 1604.11 (2001).
\item \textsuperscript{348} See supra Section II.C (describing the difference in treatment between hostile environment sexual harassment claims and racial harassment claims).
\end{itemize}
promote. \(^{349}\) Properly analyzed, however, if the plaintiff suffers a tangible job consequence as a result of sexual harassment, it is analytically indistinguishable from any other type of discrimination and need not be analyzed as a harassment case. \(^{350}\)

Unfortunately, the Supreme Court apparently has chosen not only to maintain two separate types of sexual harassment cases, \(^{351}\) but has further complicated the genre. In Ellerth, the Supreme Court decided that the employer will be strictly liable only for significant tangible employment actions; less significant tangible employment action and threats of such action will be treated the same as hostile environment harassment for which the employer has an affirmative defense. \(^{352}\)

In short, the courts have discriminated against hostile environment harassment. It has been singled out as the only term or condition of employment for which the employer has an affirmative defense to liability, and it is the only term or condition of employment that is required to be severe or pervasive to be actionable. While this discriminatory treatment has affected other types of harassment, \(^{353}\) not just sexual harassment, the problem has been most acute in the area of sexual harassment. \(^{354}\) If the usual test for discrimination—"whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed" \(^{355}\)—were applied to the conduct described in the lower court cases discussed above, it would be clear that women employees in those cases were being subjected to conditions of employment to which men were not.

Because the Supreme Court has followed the lead of the EEOC and the lower courts in treating hostile environment harassment as a separate genre of discrimination, results have been anomalous. The most glaring anomaly has been the level of opprobrious conduct tolerated by many lower courts, especially in sexual harassment cases. The origin of this tolerance is language derived from an early harassment


\(^{350}\) See Scalia, supra note 47, at 309-24 for a discussion of the necessity vel non of a separate category for quid pro quo sexual harassment.

\(^{351}\) See supra Section I.C (describing the Supreme Court's handling of hostile environment sexual harassment claims).


\(^{353}\) See supra Section II.C.

\(^{354}\) See supra Section II.B (describing the uniqueness of the dichotomy in sexual harassment claims).

case, *Henson v. Dundee*, that opined that, to be actionable, harassment must be severe and persistent. This language was suggested by *Rogers v. EEOC*, the earliest harassment case to recognize that the worker's "psychological as well as economic fringes are statutorily entitled to protection from employer abuse." The *Rogers* court said in dicta that it was unwilling to condemn "an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings" but was equally unwilling "to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." This quote illustrates exactly the inadequate guidance that courts, including the Supreme Court, have continued to offer. There is an indisputably wide gap between, on the one hand, the single utterance of an epithet and, on the other, conduct that is so egregious that it causes the employee psychological damage. Consequently, there is little or no guidance to distinguish between very serious conduct that would obviously constitute a hostile environment and inconsequential conduct that would obviously not constitute a hostile environment. However, what the courts, including the Supreme Court, utterly fail to do is identify at what point between these two extreme opposites, the conduct becomes sufficiently severe or pervasive to be actionable.

In *Harris v. Forklift Systems, Inc.*, the Court finally clarified that the harassment did not have to be so extreme as to damage the employee's psychological well-being. Unfortunately, while declaring that the level of conduct did not have to be as extreme as the lower courts were requiring, the Court continued to employ the "severe or pervasive," terminology which connotes a high level of offensive conduct. The Court's retention of the phrase has encouraged the lower courts to continue to require the same level of conduct, without requiring actual proof of psychological damage.

356. 682 F.2d 897, 904 (11th Cir. 1982).
357. 454 F.2d 234, 238 (5th Cir. 1971).
358. Id.
360. Id. at 21-23.
361. See *supra* Section II (discussing lower courts' decisions); see also Beiner, *supra* note 159, at 101-19 (discussing the misuse of summary judgments in employment discrimination cases). Beiner reported the results from various judicial task forces on gender bias. Id. at 127. For example, in one circuit, close to 50 percent of judges did not disagree with the statement that the issues in sex discrimination cases were not deserving of the court's time because the issues were trivial. Id.
One could argue that some courts seem particularly averse to hostile environment sexual harassment cases and take every opportunity to relieve the defendant of the burden of going to court. In most of the cases discussed above, the court granted the defendant's motion for summary judgment under very questionable circumstances. In Harris, the Court said that the harassment had to be severe or pervasive enough to be reasonably perceived as hostile or abusive. To determine whether the conduct has been severe or pervasive, the Court said, the following factors may be considered: frequency and severity of the conduct, "whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. . . . [N]o single factor is required." Many courts, however, require that at least one and usually more than one, or that even all, of the factors be present. In effect, these courts require that the conduct be severe and pervasive. Under any standard, some of the conduct tolerated by the courts in these cases would outrage any reasonable person. Much of the conduct would be criminal. Nevertheless, courts basically say that the employer may legally condone such conduct because it is not severe or pervasive enough to be actionable harassment. Therefore, the employee has no recourse if she complains that a co-worker or supervisor frequently called her a "bitch" or patted her buttocks or pinned her to the wall and forced her to kiss him or grabbed her breast or engaged in any of the other conduct found not to be actionable as a matter of law in the cases cited above. In addition, she is in very real danger of being retaliated against for making the complaint. In fact, some courts require the plaintiff to promptly complain, not only for purposes of employer liability, but to show that the harassment was sufficiently severe or pervasive to subjectively offend the plaintiff.

363. Id. at 23.
369. See the cases cited in Section II.C.2.
370. See Sherwyn et al., supra note 147, at 1266 (indicating that courts are holding that if the employee does not complain within a month of commencement of the harassment, she loses her defense against retaliation).
Furthermore, when courts are faced with a course of conduct that is undeniably legally sufficient, they have parsed the evidence to avoid finding that the conduct was sufficiently severe or pervasive. Prior to the Morgan case, some courts strictly limited the evidence of sexual harassment to the short 180 day statutory period under Title VII, despite the requirement that to be pervasive discrimination the harassment must occur over a significant period of time. Still other courts refuse to consider evidence of other types of gender harassment (harassment not involving sexual advances) as part of the evidence of severe or pervasive harassment. Still other courts separately assess evidence of retaliation rather than include it as part of the proof of hostile environment.

The Supreme Court has recently exacerbated the problem of retaliation by its holding in Clark County School District v. Breeden. The Breeden Court held that if the plaintiff complains about harassment and is disciplined for complaining, she has no recourse if a court later decides that she was unreasonably mistaken about whether the conduct was sufficiently severe or pervasive to be actionable. The lower courts that decided the cases described above will undoubtedly use this case to find that the plaintiffs have unreasonably complained about intolerable behavior and will bar the retaliation actions as well.

In most of the lower court cases cited above, the plaintiff was harassed by her supervisor, which exacerbates the hostility of the environment. These courts do not appear to recognize the difference between being harassed by a supervisor and being harassed by a stranger. As Professor Susan Estrich explained, supervisors have a substantial amount of power over their employees. Unlike a situation in which a woman is harassed by another employee or a stranger, her supervisor is not only there everyday, responsible for her work, but also he has the power to hire, fire, and decide work schedules and pay rates. His power to supervise "does not disappear, except perhaps in the eye of the . . . court, when he chooses to harass through insults.

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372. See supra Section II.C.1 (describing courts' application of the continuing violation theory).
373. See supra Section II.C.2 (examining cases where courts have distinguished evidence of retaliation from harassment).
374. Id.
376. Id. at 269-71.
and offensive gestures rather than directly with threats of firing or promises of promotion."

The discrimination against hostile environment sexual harassment cases is particularly evident when these cases are compared to racial and ethnic harassment cases. The *Harris* and *Faragher* cases indicated that the same severe or pervasive standard should apply to all types of hostile environment harassment cases, but in fact the standard is not applied in the same way. Courts seem to be rather callous in their regard towards sexual harassment but much more sympathetic toward racial and ethnic harassment. The standard should be the same, and it should be applied in the more sympathetic manner in sexual harassment cases as well. As Robert Gregory pointed out in his article on this subject, that some courts are "unable to see the parallel history of subjugation conjured up by the co-worker’s sexually abusive conduct." Gregory believes that judges are uncomfortable patrolling the workplace for sexual harassment, as if it were more acceptable than racial harassment. Title VII requires that judges transform the workplace to eliminate societal prejudices, according to Gregory, and judges must learn to be as empathetic to victims of sexual harassment as they are to victims of racial harassment.

Another author, Professor Camille Hébert, pointed out that "[m]uch of the workplace behavior prohibited by Title VII, whether of a sexual or racial nature, had been socially accepted before the enactment of the statute." Thus, the refusal to equate sexual harassment with racial harassment, because the former has been more socially acceptable, is inconsistent with Title VII and its antidiscrimination purpose.

The psychological and physical reaction of women and racial minorities to harassment may also be similar.

What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely the fact that it is


380. Id. at 768.

381. Id. at 773.

382. Id. at 776-77.


384. Id.

385. Id. at 839-40; see *supra* note 25 (quoting Susan Estrich discussing the magnitude of injury sexual harassment imposes upon its victims).
sexual. Not only are men exercising power over women, but they are operating in a realm which is still judged according to a gender double standard, itself a reflection of the extent to which sexuality is used to penalize women. 386

Furthermore, women are more often victims of rape or sexual assault than men, so that women are more sensitive to sexual misconduct. 387 After a review of the cases described in this article in which verbal sexual harassment has become physical and has even culminated in sexual assault, 388 it is obvious that "this fear on the part of women is not groundless or the result of hysteria." 389

The only reason to distinguish between sexual and racial harassment is that racial harassment could never be welcome, and sexual harassment could be. Once the element of unwelcomeness is shown for sexual harassment, there is no reason to treat the two genres differently.

The question remains of what standard to apply. Justice Ginsburg provided the answer in her concurrence in Harris:

The 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. . . . It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to "make it more difficult to do the job." 390

Many courts do not agree with this standard. For example, the Fifth Circuit has said that "[a] hostile environment claim embodies a series of criteria that express extremely insensitive conduct against women, conduct so egregious as to alter the conditions of employment and destroy their equal opportunity in the workplace." 391 The court thought that only the most opprobrious conduct should be proscribed because "a less onerous standard of liability would attempt to insulate women

386. Estrich, supra note 25, at 820.
387. Hébert, supra note 23, at 841-42.
388. See, e.g., Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); supra cases cited in Section II.B.
389. Hébert, supra note 23, at 841-42 (quoting Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991)).
391. DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F. 3d 591, 593 (5th Cir. 1995) (emphasis added) (finding that a column in the police association newsletter critical of women police officers was insufficiently severe or pervasive).
from everyday insults as if they remained models of Victorian reticence."\textsuperscript{392}

Courts that agree with the Fifth Circuit require that severe or pervasive conduct must be "so egregious as to alter the conditions of employment and destroy [a woman's] equal opportunity in the workplace."\textsuperscript{393} Perhaps no other statement expresses so clearly how wrong these courts are in their interpretation of Title VII.

\section*{CONCLUSION}

Title VII forbids discrimination in "compensation, terms, conditions or privileges of employment."\textsuperscript{394} No justification exists for discriminating among the various terms and conditions of employment. Because of the early treatment of sexual harassment, the term or condition of employment of maintaining a non-hostile environment has been treated differently from other terms or conditions of employment. The single biggest obstacle to treating hostile environment the same as other terms or conditions of employment is the requirement that the harassment be "severe or pervasive." The requirement overstates what is required to prove the case. The Supreme Court has made it clear that "severe or pervasive" means conduct that "a reasonable person would find hostile or abusive."\textsuperscript{395} The Supreme Court should admit that the "severe or pervasive" terminology has caused much mischief, cease to use the phrase, and rely on the reasonable person standard, taking into account that the reasonable person is a usually a woman.

\begin{small}
\textsuperscript{392} Id.
\textsuperscript{393} Id. (emphasis added).
\textsuperscript{395} Harris, 510 U.S. at 21. The conduct also must subjectively offend the plaintiff and be sufficient to offend a reasonable person but need not lead to physical or psychological impairment. \textit{Id.} at 21-22. In other words, the "environment would reasonably be perceived, and is perceived, as hostile or abusive." \textit{Id.} at 22.
\end{small}