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CIVIL RIGHTS

EVOLUTION OF THE HOSTILE WORKPLACE CLAIM UNDER TITLE VII: ONLY SENSITIVE MEN NEED APPLY.

I. INTRODUCTION:

In *Ellison v. Brady*¹, (*Ellison*), a panel of the Ninth Circuit Court of Appeals considered three questions regarding hostile workplace sexual harassment claims that had not previously been addressed in the Circuit.² The Court first considered the question of what level of conduct was necessary to support a hostile workplace claim, holding that the plaintiff need not have suffered any actual psychological harm, but that it was enough that the complained-of conduct was sufficiently “severe and pervasive” that it had unreasonably altered the terms and conditions of employment.³ The Court then turned to the question of how the severity and pervasiveness of the conduct should be determined. The Court held that in determining whether there was in fact an actionably hostile workplace, courts must review the challenged conduct from the perspective of a reasonable member of the class of persons to which the victim belongs.⁴ In what is the most widely publicized aspect of the opinion,⁵ the Court held that the sued-upon conduct in hostile work environment sexual harassment cases had to be viewed from the perspective of a “reasonable woman.”⁶

The Court also held that the reasonableness of an employer’s response to sexual harassment in the workplace depends

1. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (per Beezer, J., with whom Kozinski, J., joined; Stephens, J., Senior United States District Judge for the Central District of California, sitting by designation, dissenting).

2. *Id.* at 875-76.

3. *Id.* at 876-78.

4. *Id.* at 878.

5. *E.g.*, *Business Week*, Oct. 28, 1991, at 30; *Time*, Oct. 21, 1991, at 52; *U.S. News & World Report*, Nov. 18, 1991, at 30.

6. *Ellison*, 924 F.2d at 878-79.

on the response's ability not just to end the particular harassment, but to assure a workplace free from sexual harassment.⁷ In what may be the part of the case with the most wide-ranging implications for employers and employees alike, the Court specifically held that in order to avoid liability, employers may be required to fire those employees whose mere presence creates a hostile work environment.⁸

II. FACTS

Kerry Ellison ("Ellison") and Sterling Gray ("Gray") were co-workers at the IRS office in San Mateo, California.⁹ Gray invited Ellison to lunch, during which they stopped at Gray's house to retrieve his son's forgotten lunch.¹⁰ Afterwards, Gray began to hang around Ellison's desk unnecessarily.¹¹ Ellison declined his next invitation because she was uncomfortable being alone with him.¹² When she received a strange note from Gray at work,¹³ Ellison became frightened and showed the note to their supervisor, who called the note "sexual harassment."¹⁴ Ellison asked the supervisor not take any action and, in an effort to handle the situation herself, asked a male co-worker to tell Gray to leave her alone.¹⁵

A few days later, Ellison left for a training session in St. Louis. While there, she received a second letter from Gray.¹⁶ On her return to San Mateo, Ellison requested that either she or

7. *Id.* at 882.

8. *Id.* at 883.

9. *Ellison v. Brady*, 924 F.2d 872, 873 (9th Cir. 1991). They were not friends and did not work closely. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 874.

13. The note read: "I cried over you last night and I'm totally drained today. I have never been in such constant term oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day." *Ellison*, 924 F.2d at 874.

14. *Id.*

15. *Id.*

16. This letter read, in part:

"I know that you are worth knowing with or without sex....Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and elan....Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks ... I will [write] another letter in the near future."

Id.

Gray be transferred to another IRS office.¹⁷ The supervisor told Gray not to contact Ellison, and Gray voluntarily transferred to the San Francisco office.¹⁸ Three weeks later, Gray filed a union grievance, seeking to return to San Mateo.¹⁹ When Ellison learned of Gray's efforts to return, she filed a formal complaint with the IRS and obtained permission to temporarily transfer to San Francisco upon Gray's return to San Mateo.²⁰

The IRS employee investigating Ellison's complaint, like Ellison's supervisor, found that Gray's conduct amounted to sexual harassment.²¹ In reviewing that determination, however, the Treasury Department held that Ellison's complaint did not involve a pattern or practice covered by the Equal Employment Opportunity Commission's ("EEOC") regulations.²² On administrative appeal by Ellison, the EEOC affirmed this decision on the alternate ground that the IRS took adequate measures to prevent future harassment.²³

Ellison then sued the Secretary of the Treasury under Title VII of the Civil Rights Act of 1964.²⁴ The District Court granted summary judgment in favor of the Secretary because Ellison failed to state a *prima facie* case of sexual harassment.²⁵ On appeal, the Ninth Circuit conducted a *de novo* review²⁶ and reversed the district court's decision.²⁷

17. *Id.*

18. *Ellison*, 924 F.2d at 874.

19. *Id.* The IRS and the union agreed that Gray could return to San Mateo after a total of six months at the San Francisco office, if he promised to leave Ellison alone. *Id.*

20. *Id.* Meanwhile, Gray sent a third letter, holding the idea that Ellison and Gray had a relationship. It is not clear that Ellison received this letter. *Id.* at 874-75 n.2.

21. *Ellison*, 924 F.2d at 875.

22. *Id.* See 42 U.S.C. § 2000e-4 (1982). The EEOC is the agency charged with enforcing Title VII. *Id.*

23. *Ellison*, 924 F.2d at 875.

24. *Id.* See 42 U.S.C. § 2000e-2(a)(1) (1982), which reads: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."

25. *Ellison*, 924 F.2d at 875.

26. *Id.* at 873 (citing *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988)). The grant of summary judgment is reviewed *de novo*, and the evidence is viewed in the light most favorable to the party opposing summary judgment. *Id.* at 1320).

27. *Id.* at 883. The case was remanded to the district court for further proceedings. *Id.*

III. BACKGROUND

A. SEXUAL HARASSMENT IN THE WORKPLACE AS DISCRIMINATION UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin.²⁸ The inclusion of sex-based discrimination in Title VII was made at the last minute, and there is, accordingly, little legislative history relating to sex-based discrimination.²⁹ In early cases asserting claims for workplace sexual harassment, the courts did not recognize sexual harassment as a form of discrimination prohibited by Title VII.³⁰ In *Corne and DeVane v. Bausch & Lomb*,³¹ for example, the court held that sexual advances were not discrimination in violation of Title VII because the harasser was satisfying a "personal urge," not serving any employer policy.³² Similar conduct was also held non-actionable in *Miller v. Bank of America*³³ because the court found the harassment was "isolated" and not the result of a company policy imposing or permitting consistent sex-based discrimination.³⁴

Sexual harassment was first recognized as discrimination prohibited under Title VII in *Williams v. Saxbe*.³⁵ *Williams* held that a supervisor's retaliation against a female employee for refusing sexual advances is prohibited sex discrimination.³⁶ The Fourth Circuit later held that a supervisor's sexual advances, along with the existence of a practice so pervasive as to constitute a de facto company policy of compelling

28. 42 U.S.C. § 2000e-2(a)(1) (1982). See *infra* note 24 for the text of this statute.

29. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986) (citing 110 CONG. REC. 2,577-84 (1964)).

30. *E.g.*, *Corne and DeVane v. Bausch & Lomb*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

31. 390 F. Supp. at 162. (Alleging repeated verbal and physical sexual advances by male supervisor).

32. *Id.* at 163.

33. 418 F. Supp. at 234. (Alleging male supervisor dismissed female employee for refusing sexual advances).

34. *Id.* at 236.

35. 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978). On remand, the trial court held that submission to supervisor's advances was a term of employment in violation of Title VII. *Williams v. Civiletti*, 487 F. Supp. 1387, 1389 (D.D.C. 1980).

36. *Williams*, 413 F. Supp. at 662-63.

employees to submit to sexual advances, violated Title VII in *Garber v. Saxon Business Products*.³⁷ Shortly thereafter, in *Tomkins v. Public Service Electric & Gas*,³⁸ the Third Circuit held that a supervisor's conditioning further employment on submission to his sexual demands violated Title VII.³⁹ In these cases, the courts recognized that harassment keyed to continuing employment and/or promotion fell within the definition of sex discrimination, but did not consider whether other forms of sexual harassment might also violate Title VII.

In 1980, the EEOC promulgated regulations ("the Guidelines") recognizing that sexual harassment falls within the definition of sex discrimination prohibited by Title VII.⁴⁰ The Guidelines define sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."⁴¹ The guidelines recognize two categories of sexual harassment.⁴² The first, *quid pro quo* harassment, occurs when terms of employment are conditioned on submission to sexual harassment.⁴³ The second, hostile work environment harassment, occurs where unwelcome sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."⁴⁴ After the promulgation of the EEOC Guidelines, courts began to recognize hostile work environment harassment as actionable sex discrimination.

In 1981, the Court of Appeals for the District of Columbia Circuit held in *Bundy v. Jackson*⁴⁵ that under the Guidelines, constant sexual propositions, without direct threat of adverse job-related consequences for refusal, was prohibited sex discrimination.⁴⁶ The *Bundy* court extended Title VII protection

37. 552 F.2d 1032 (4th Cir. 1977). (Alleging discharge for refusing male supervisor's sexual advances).

38. 568 F.2d 1044 (3d Cir. 1977). (Alleging employment conditioned on submission to sexual advances).

39. *Id.* at 1048-49.

40. 29 C.F.R. § 1604.11(a) (1990).

41. *Id.*

42. See generally C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 32-47 (1979) for a discussion of *quid pro quo* and hostile work environment sexual harassment.

43. 29 C.F.R. § 1604.11(a) (1), (2) (1990).

44. 29 C.F.R. § 1604.11(a) (3) (1990).

45. 641 F.2d 934 (D.C. Cir. 1981).

46. *Id.* at 946.

to harassment victims who suffer no economic harm in connection with the harassment in order to prevent employers from allowing sexual harassment and yet avoiding Title VII liability by "carefully stopping short of" taking steps to cause the employee economic detriment.⁴⁷ The Eleventh Circuit relied on *Bundy* and the Guidelines in *Henson v. City of Dundee*.⁴⁸ The court held that sexual harassment creating a hostile work environment violates Title VII where the plaintiff proves that she belongs to a protected group and was subject to unwelcome sex-based harassment which affected a "term, condition, or privilege of employment."⁴⁹ The Fourth Circuit also recognized the viability of hostile environment claims in *Katz v. Dole*.⁵⁰

In *Meritor Savings Bank, FSB v. Vinson*⁵¹ the United States Supreme Court held that hostile work environment sexual harassment can amount to sex discrimination in violation of Title VII.⁵² In so holding, the Court looked to race and national origin cases which found that actions by the employer which create a hostile work environment are prohibited under Title VII.⁵³ The Court also found persuasive the statement in the Guidelines that harassment resulting in noneconomic injury can violate Title VII.⁵⁴ Further, the Court held that sexual harassment "must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."⁵⁵ The Court quickly concluded, without elaboration, that in the case before it the harasser's alleged conduct, which included rape, met the "sufficiently severe or pervasive" test.⁵⁶ While the Court did not provide specific guidance on how a hostile work environment claim was to be proven, it nonetheless held definitively that once such a

47. *Id.* at 945.

48. 682 F.2d 897 (11th Cir. 1982).

49. *Id.* at 903-04.

50. 709 F.2d 251, 256 (4th Cir. 1983). (Alleging co-worker sexual harassment created hostile work environment).

51. 477 U.S. 57 (1986).

52. *Id.* at 67.

53. *Id.* at 66. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 975 (1972) (Discriminatory services to Hispanic clientele); *Firefighters Inst. for Racial Equality v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977), *cert. denied sub nom.*, *Banta v. United States*, 434 U.S. 819 (1977) (Prohibiting racially segregated supper clubs).

54. *Meritor*, 477 U.S. at 65. See 29 C.F.R. § 1604.11(a) (3) (1990).

55. *Meritor*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

56. *Id.*

claim was proven, the plaintiff had a cause of action under Title VII, and that no economic loss need be shown by the plaintiff.⁵⁷

B. DETERMINING WHEN CONDUCT CREATES A HOSTILE WORK ENVIRONMENT

Not all sexual harassment creates an actionable hostile work environment.⁵⁸ The Court in *Meritor* held that a hostile work environment claim has three elements: (1) the plaintiff must have been subjected to "sexual advances, requests for sexual favors, [or] other verbal or physical conduct of a sexual nature;"⁵⁹ (2) the conduct must have been unwelcome;⁶⁰ and (3) the conduct must have been sufficiently severe or pervasive to alter employment conditions and create an abusive work environment.⁶¹ The focus of the courts in most hostile environment claims has been on the third element, specifically, how to determine whether conduct is "sufficiently severe or pervasive" to create a hostile work environment. A primary point of contention in this regard has been over whose perspective courts should consider in measuring the severity and pervasiveness of the complained-of conduct.⁶²

According to the EEOC, no single factor determines whether conduct is sufficiently severe or pervasive as to violate Title VII. Rather, the EEOC looks to the totality of the circumstances in making this determination.⁶³ A pattern of harassment generally creates a stronger hostile environment claim than an isolated incident.⁶⁴ However, because employees need not subject themselves to extended periods of harassment to receive Title VII protection, courts should, according to the EEOC, consider the conduct's degree of offensiveness.⁶⁵ The EEOC suggests that the challenged conduct be evaluated from the objective

57. *Id.* at 67-68.

58. *See Id.* at 67; *Rogers*, 454 F.2d at 238 (Mere utterance of racial epithet not violation).

59. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a) (1990)).

60. *Id.* at 68. Whether the plaintiff voluntarily submitted to sexual advances is irrelevant; courts must focus on whether the plaintiff indicated that sexual advances were unwelcome. *Id.* However, a plaintiff's provocative speech and dress are relevant in determining whether she found the alleged conduct unwelcome. *Id.* at 69.

61. *Id.* at 67.

62. *See infra* notes 73-85 and accompanying text for discussion.

63. 29 C.F.R. § 1604.11(b) (1990).

64. EEOC: Policy Guidance on Sexual Harassment, 8 Fair Employment Practices Manual (BNA) 405:6681, 6690 (March 19, 1990).

65. *Id.*

perspective of a reasonable person to avoid employer liability for the complaints of hyper-sensitive employees.⁶⁶ The EEOC also notes that because seemingly harmless conduct may nevertheless create a hostile work environment, the "reasonableness" standard should consider the victim's perspective and ignore "stereotyped notions of acceptable behavior."⁶⁷

Prior to *Ellison*, the Ninth Circuit had not had to consider the standard for evaluating the nature or extent of the conduct necessary to support a hostile work environment claim. Hostile work environment cases had only been before the Ninth Circuit on three occasions. In *Jordan v. Clark*⁶⁸ and *Vasconcelos v. Meese*,⁶⁹ the only issue before the Court was whether the District Court's factual findings against the plaintiff were clearly erroneous and, in both cases, the Ninth Circuit held that the trial court's findings were not clearly erroneous because the plaintiff's testimony was properly disbelieved; thus, the Courts had no occasion to reach the issue of what was actionable conduct.⁷⁰ In *Equal Employment Opportunity Commission v. Hacienda Hotel*,⁷¹ the Ninth Circuit held, without discussion, that a hostile work environment existed where women employees were repeatedly subjected to sexual vulgarities and requests for sexual favors.⁷²

The question of what kind of conduct was actionable had, however, been addressed in several other Circuits prior to *Ellison*. In *Rabidue v. Osceola Refining Co.*⁷³, the Sixth Circuit held that conduct creates a hostile work environment where it would interfere with a reasonable person's work performance AND seriously affect the reasonable person's psychological well-being.⁷⁴ Additionally, the Court held that a plaintiff must prove that she was actually offended and injured by the alleged conduct.⁷⁵ The existence of a hostile work environment depends,

66. *Id.* at 6689.

67. *Id.* at 6690.

68. 847 F.2d 1368 (9th Cir. 1988), *cert. denied sub nom.*, *Jordan v. Hodel*, 488 U.S. 1066 (1989).

69. 907 F.2d 111 (9th Cir. 1990).

70. *Jordan*, 847 F.2d at 1375; *Vasconcelos*, 907 F.2d at 112.

71. 881 F.2d 1504 (9th Cir. 1989).

72. *Id.* at 1515.

73. 805 F.2d 611 (6th Cir. 1986) *cert. denied*, 481 U.S. 1041 (1987).

74. *Id.* at 620. However, Justice Keith's dissent urged adoption of the reasonable woman perspective. *Id.* at 626.

75. *Id.* at 620.

the Sixth Circuit held, on the objective and subjective circumstances of each case, including the nature of the harassment, the backgrounds of the plaintiff and her co-workers and supervisors, the physical environment of the workplace, the level of obscenity in the workplace and plaintiff's reasonable expectations in accepting employment.⁷⁶

In *Brooms v. Regal Tube Co.*,⁷⁷ the Seventh Circuit also used a standard which considered both objective and subjective factors, but did not require *Rabidue's* strict finding of a serious effect on the plaintiff's psychological well-being. *Brooms* held that harassment was actionably severe or pervasive when it would "adversely affect both a reasonable person and the particular plaintiff."⁷⁸ The Seventh Circuit applied an objective "reasonable person" test and, at the same time, considered the harassment's actual effect on the plaintiff.

While accepting the objective/subjective test generally, the Third Circuit modified the objective aspect of that test in *Andrews v. City of Philadelphia*.⁷⁹ Rather than judging alleged harassment from the perspective of the apparently gender neutral "reasonable person" used in *Rabidue* and *Brooms*, the court held that sexual harassment which would "detrimentially affect a reasonable person of the same sex in that position" creates a hostile work environment.⁸⁰ In adopting this victim-oriented perspective, the court focused first on Congressional intent in enacting Title VII, which it found to be "the removal of artificial, arbitrary, and unnecessary barriers to employment. . . ."⁸¹ The court found that the principle

76. *Id.* at 620-21

[I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to-or can-change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

Id. (quoting *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

77. 881 F.2d 412 (7th Cir. 1989).

78. *Id.* at 419. *Accord* *King v. Board of Regents of Univ. of Wis. System*, 898 F.2d 533, 537 (7th Cir. 1990).

79. 895 F.2d 1469, 1482 (3rd Cir. 1990).

80. *Id.*

81. *Id.* at 1483 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

barrier facing women was the fact that the mere existence of harassment deters women from "joining the work force or accepting certain jobs."⁸² Adjudging the impropriety of the allegedly harassing conduct from a woman's perspective ensures that the barriers are removed and that women are allowed to engage in "self-respecting employment."⁸³ The Court also stated that the "reasonableness" element of the test protects employers from liability for the reactions of hyper-sensitive employees.⁸⁴ The gender-specific aspect of the test recognizes that men and women have different perceptions of what type of conduct may amount to sexual harassment.⁸⁵

Ellison was the first case in the Ninth Circuit to consider the standard by which to determine whether conduct was sufficiently severe or pervasive to create a hostile work environment, and had the divergent views of other circuits, discussed above, from which to choose.

C. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

Meritor touched briefly on the question of employer liability, but noted that its discussion had "a rather abstract quality about it given the state of the record."⁸⁶ Although the issue had been extensively briefed by the parties, as well as the EEOC as *amicus curiae*, the Court expressly declined to set out any definite rules on employer liability in hostile work environment cases.⁸⁷ However, the Court did give some indications of its thoughts on the matter in dicta.

In *Meritor*, where the harasser was a supervisor, the Court distinguished between *quid pro quo* harassment and hostile workplace harassment for purposes of employer liability. In *quid pro quo* cases, the Court stated that liability should be determined under traditional agency principals,⁸⁸ and that if

82. *Id.*

83. *Id.*

84. *Andrews*, 895 F.2d at 1483.

85. *Id.* at 1485-86 (quoting *Bennett v. Coroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988) *cert. denied*, 489 U.S. 1020 (1988) and citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449 (1984). Women often perceive workplace conduct as sexually harassing, while men perceive the same conduct as harmless and innocent. *Id.* at 1451).

86. *Meritor*, 477 U.S. at 72.

87. *Id.*

88. *Id.* at 70 (quoting brief for United States and EEOC as *Amici Curiae* 22).

the offending supervisor exercised actual or apparent authority granted by the employer in making or threatening to make employment decisions depend on or relating to the supervisor's sexual harassment, then the employer would be held liable even if the employer had neither actual nor constructive notice of the wrongful conduct.⁸⁹

In contrast, the Court stated that the employer's liability was not to be determined by agency principles in hostile workplace cases.⁹⁰ Instead, the inquiry would focus first on whether the employer had "an expressed policy against sexual harassment and had implemented a procedure specifically designed to resolve sexual harassment claims."⁹¹ If such a program is in place and the employee fails to avail herself of the remedies provided, then, the Court indicated, the employer would be "shielded from liability absent actual knowledge [by the employer] of the sexually hostile environment. . . ."⁹² However, the Court promptly disclaimed the notion that the existence of an expressed policy against sexual harassment and a grievance procedure was, without more, enough for an employer to avoid liability. Instead, the Court said that if the grievance procedure was not reasonably "calculated to encourage victims of harassment to come forward,"⁹³ then the employee's failure to avail herself of those procedures would not bar her claim.⁹⁴

Again, it should be noted that *Meritor* involved harassment by a supervisor, not a co-worker.⁹⁵ Generally, the EEOC and courts hold that employers are liable for sexual harassment among co-workers "where the employer . . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."⁹⁶ An employer's knowledge of sexual harassment is shown where complaints are made to the employer or where the harassment is particularly pervasive, the employer may be charged with constructive knowledge.⁹⁷ Additionally, liability has been imputed where

89. *Id.*

90. *Id.* at 71 (quoting brief for United States and EEOC as *Amici Curiae* 26).

91. *Meritor*, 477 U.S. at 71.

92. *Id.*

93. *Id.* at 73.

94. *Id.* at 72.

95. *Id.* at 59.

96. 29 C.F.R. § 1604.11(d) (1990).

97. *Katz*, 709 F.2d 251, 255 (4th Cir. 1983).

employers anticipated or should have reasonably anticipated sexual harassment and failed to take actions reasonably calculated to prevent its occurrence.⁹⁸

Courts have also addressed an issue not mentioned at all in *Meritor*: the circumstances under which an employer is liable for its response to complaints of sexual harassment when an employee makes a complaint of sexual harassment and/or when the employer is charged with constructive notice of particularly pervasive harassment. The rule that evolved in that connection was that upon actual or constructive notice of sexual harassment, employers must take prompt remedial action to avoid Title VII liability.⁹⁹ Remedies must be proportionate to the seriousness of the offense.¹⁰⁰ One court rejected the argument that the complained-of incidents of sexual harassment warranted dismissal of the offender.¹⁰¹ Another court held that if an employer's response to sexual harassment was "reasonably calculated to end the harassment," liability should generally not be imposed, even though the employer's response was unsuccessful.¹⁰² *Swentek v. USAIR Inc.*¹⁰³ provides an example of "immediate and appropriate corrective action" where, following a complaint, the harasser was given a written warning to refrain from using foul language and informed that any further complaint would lead to suspension.¹⁰⁴ Also, where an employee had previously engaged in severe sexual harassment, thereafter, his mere presence in the workplace may create a hostile work environment.¹⁰⁵

98. *Paroline v. UNISYS Corp.*, 879 F.2d 100, 107 (4th Cir. 1989) *rehearing en banc granted, vacated in part on other grounds* 900 F.2d 27 (4th Cir. 1990) (Employer liability from knowledge of previous harassment).

99. 29 C.F.R. § 1604.11(d) (1990). *See also Katz*, 709 F.2d at 256.

100. *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987). The employer's remedial action was "unusually prompt" where the harassment occurred for two days before the company president assured the plaintiff that she would not work with the offender after the following day. *Id.* at 309.

101. *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984). Reprimanding, placing on 90 days probation and warning the offender that further sexual harassment would result in discharge was sufficient remedial action. *Id.* at 427.

102. *Katz*, 709 F.2d at 256 (Policy against sexual harassment, including seminars on the subject for supervisors, insufficient response to sexual harassment). *See also Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989). (Look at success and reasonableness of response).

103. *Swentek v. USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987).

104. *Id.* at 558.

105. *See Paroline v. UNISYS Corp.*, 879 F.2d 100, 106-07 (4th Cir. 1989), *rehearing en banc granted, vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990).

IV. THE ELLISON COURT'S ANALYSIS

A. THE LEVEL OF CONDUCT THAT CREATES A CAUSE OF ACTION

Ellison represented the first occasion for the Ninth Circuit to consider several aspects of hostile workplace claims.¹⁰⁶ The first of these was what conduct would give rise to a hostile workplace claim.¹⁰⁷ Specifically, the *Ellison* court had to give definition to an element of sexual harassment claims that had been stated in broad terms by *Meritor*: the requirement that the challenged conduct be sufficiently "severe and pervasive" to either unreasonably interfere with an individual's work performance or create a hostile employment environment.¹⁰⁸ The severity and pervasiveness test on its face requires looking to both the quality and the quantity of the conduct involved. In formulating its analytical framework, the Ninth Circuit noted that the required showing of severity varies inversely with the pervasiveness.¹⁰⁹ It also noted that the trial court had made its decision without any controlling precedent concerning conduct such as Gray's, which fell "somewhere between forcible rape and the mere utterance of an epithet."¹¹⁰

The District Court had found that Gray's conduct was "isolated and genuinely trivial."¹¹¹ The Secretary of the Treasury urged the Ninth Circuit to affirm that result, and in doing so to adopt the analysis in two cases which found no Title VII violation on behavior more egregious than Gray's.¹¹² *Scott v. Sears, Roebuck & Co.* held that a plaintiff must feel "anxiety and debilitation" sufficient to "poison" her working environment to support a claim.¹¹³ *Rabidue* required a showing that the

106. *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991).

107. *Id.* at 877-78.

108. *Id.* at 878-81.

109. *Id.* at 878 (citing *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) (Hostile work environment where noose hung over employee's work station twice)).

110. *Id.* at 877 (citing *Meritor*, 477 U.S. at 60, 67).

111. *Ellison*, 924 F.2d at 880.

112. *Id.* See *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986) (No hostile work environment where repeatedly propositioned, winked at, offered a rub-down, asked "what will I get for it?" in response to requests for advice, slapped on the buttocks, and told probably moans and groans during sex); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 622 (6th Cir. 1986) *cert. denied*, 481 U.S. 1041 (1987) (No hostile work environment where routine sexual vulgarities and pictures of scantily clad women throughout office).

113. *Scott*, 798 F.2d at 619.

reasonable person's psychological well-being would have been seriously and adversely affected by the alleged conduct.¹¹⁴

The Ninth Circuit rejected both *Scott* and *Rabidue* and reversed the trial court's finding in the case before it for two reasons.¹¹⁵ First, the court found that Title VII provides employees with protection before their psychological well-being is actually harmed by sex discrimination.¹¹⁶ More important, the standards used in *Scott* and *Rabidue* concentrate on the severity of the effect on the victim, but it is the conduct itself, not its effect, that is the focus of Title VII.¹¹⁷

B. THE GAUGE BY WHICH TO MEASURE CONDUCT

Having defined the kind of conduct that was actionable, the court then had to decide the standard by which to measure the conduct involved. Some cases had stated that the conduct had to be assessed using the classic "reasonable person" approach of tort law.¹¹⁸ Another court had held that the conduct should be measured from the perspective of a "reasonable member of the same sex."¹¹⁹ The *Ellison* court adopted the latter view, holding that the severity and pervasiveness of the harassment must be determined from the perspective of the victim.¹²⁰ *Ellison* reasoned that courts must acknowledge that the perspectives held by men and women concerning appropriate sexual conduct are disparate.¹²¹ Women share concerns about sexual conduct not generally held by men¹²² and may find conduct offensive which men generally find appropriate.¹²³

114. *Rabidue*, 805 F.2d at 619.

115. *Ellison*, 924 F.2d at 877-78.

116. *Id.* See EEOC: Policy Guidance on Sexual Harassment, 8 Fair Employment Practices Manual (BNA) 405:6681, 6690, n.20 (March, 19 1990).

117. *Ellison*, 924 F.2d at 877-78.

118. *E.g.*, *Rabidue*, 805 F.2d at 620; *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989).

119. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3rd Cir. 1990).

120. *Ellison*, 924 F.2d at 878. The reasonable person standard may reinforce discriminatory conduct considered acceptable by some. *Id.*

121. *Id.*

122. *Id.* at 879. See Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989). Vulnerability to sexual coercion can make women wary of sexual encounters. Women tend to have more restrictive views on the appropriateness of sexual conduct. *Id.* at 1205; Federal Bureau of Investigation, *Uniform Crime Reports for 1988* at 16 (1989) (73 of every 100,000 females reported rape victims, 1988).

123. *Ellison*, 924 F.2d at 878-79 (citing *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1988)). "[T]he man may not realize his conduct is offensive and the woman may

Therefore, the court must look solely to the perspective of a person of the victim's gender; a female plaintiff¹²⁴ states a viable hostile environment claim if she proves that a "reasonable woman" would consider the alleged conduct sufficiently severe or pervasive to alter work conditions and create an abusive working environment.¹²⁵ The Court held that a reasonable woman could find Gray's conduct sufficiently severe and pervasive to create an abusive work environment and remanded the case for trial under that standard.¹²⁶

C. EMPLOYER LIABILITY FOR INADEQUATE RESPONSES TO CHARGES OF HARASSMENT

Finally, the Court turned to the question of liability arising from the employer's response to claims of sexual harassment. The *Ellison* court agreed with the Fourth Circuit's holding that an employer's response must be reasonably calculated to end the harassment.¹²⁷ However, *Ellison* went further and stated that the reasonableness of an employer's response is dependent not just on actually stopping the particular harassment; employer penalties must also ultimately be geared towards assuring a workplace free from sexual harassment.¹²⁸ In evaluating employer responses, courts must also consider the remedy's ability to deter others from engaging in similar conduct.¹²⁹ In failing to discipline Gray, the court inferred that the IRS sent a message to potential harassers that they would not be disciplined.¹³⁰

be fearful of criticizing her supervisor." *Id.* at 898). See *Yates v. AVCO Corp.*, 819 F.2d 630 (6th Cir. 1987). "We recognize that men and women are vulnerable in different ways and offended by different behavior." *Id.* at 637 n.2; Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law* 99 *YALE L.J.* 1177 (1990). Men "tend to view 'milder' forms of harassment, such as suggestive looks, repeated requests for dates, and sexist jokes, as harmless social interactions" *Id.* at 1207-08.

124. The court noted that in cases where a man is the sexual harassment victim, a reasonable man standard applies. *Ellison*, 924 F.2d at 879 n.11.

125. *Id.* at 879. The court explained that the reasonable woman standard does not give women more protection than men. Instead, it counterbalances the regular failure to acknowledge the experiences of women. *Id.* Cf. *State v. Wanrow*, Wash.2d 221, 239-241, 559 P.2d 548, 558-59 (1977) (*en banc*) (reasonable woman standard for self defense).

126. *Ellison*, 924 F.2d at 879.

127. *Ellison*, 924 F.2d at 882 (citing *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983)).

128. *Id.*

129. *Id.*

130. *Id.* at 882. See also 29 C.F.R. §1604.11(f) (1990) "Prevention is the best tool for the elimination of sexual harassment." *Id.*

The *Ellison* court also held that employers may well have to do more than simply ask offenders to refrain from further harassment.¹³¹ Instead, employers may have to remove from the workplace, either by transfer or if necessary, termination, those employees whose mere presence would create a hostile work environment for the reasonable woman;¹³² otherwise, the harassment has not been eliminated, and the message that the employer is serious about eliminating sexual harassment is not effective.¹³³ The Court stated that the IRS did not sufficiently consider Ellison's interest in failing to try and determine the impact of Gray's presence at the office on Ellison.¹³⁴ Further, a six month separation may have been minimal punishment in relation to the nature of Gray's conduct.¹³⁵

V. CRITIQUE

A. *ELLISON'S* FOCUS ON CONDUCT, RATHER THAN THE DEGREE OF INJURY CAUSED BY THE CONDUCT, COMPORTS WITH THE INTENT UNDERLYING TITLE VII.

In considering the level of severity and pervasiveness necessary to state a sexual harassment claim under a hostile work environment theory, the *Ellison* court expressly rejected the reasoning of two cases which had required the plaintiff to show that the conduct was of a kind and degree that it would cause a reasonable person either such severe "anxiety and debilitation" that the workplace was "poisoned" or that the conduct would "affect seriously the psychological well-being" of a reasonable person.¹³⁶ *Ellison's* rejection of that reasoning was well-taken. The flaw in *Scott* and *Rabidue* is that they focus on the injury caused, not the conduct itself. *Rabidue* directly enunciates what is implicit in both decisions: the supposition

131. *Ellison*, 924 F.2d at 882. The IRS did not express strong disapproval of Gray's conduct, reprimand, put him on probation, or inform him that further harassment would result in suspension or termination. *Id.*

132. *Id.* at 883. An employee would have likely engaged in particularly egregious conduct for his mere presence to create a hostile work environment. *Id.*

133. *Id.* at n.19.

134. *Id.* On remand, the district court was instructed to determine whether Gray's mere presence would create a hostile environment for a reasonable woman. *Ellison*, 924 F.2d at 883.

135. *Id.* at 883. The district court was instructed to explore the facts surrounding the government's decision to return Gray to San Mateo. *Id.*

136. *Ellison v. Brady*, 924 F.2d 872, 877 (9th Cir. 1991). See *Scott*, 798 F.2d at 213; *Rabidue*, 805 F.2d at 619.

that Title VII was not intended to bring about a “transformation of social mores....”¹³⁷ In fact, that is exactly what Congress intended in enacting Title VII, which is a remedial statute that is to be interpreted broadly to effectuate a fundamental change in the manner in which people interact in the workplace and, hopefully by extension, how they relate outside the workplace.¹³⁸

There is, as well, another flaw in *Scott* and *Rabidue* which was not directly noted in *Ellison*. Both cases require a far higher showing of severity and pervasiveness than the EEOC Guidelines.¹³⁹ Indeed, *Rabidue* itself states that while courts may give “favorable consideration” to the Guidelines, they “are intra-agency suggested interpretative regulations that are not binding on the courts.”¹⁴⁰ While it may be that the Guidelines are not binding, *Meritor* makes plain that in sexual harassment cases, the Guidelines are to be accorded considerable weight, not the mere cursory review afforded them by *Rabidue*.¹⁴¹

B. THE REASONABLE WOMAN STANDARD IS CONSONANT WITH CONGRESS’ INTENT TO OPEN THE WORKPLACE BY ELIMINATING BARRIERS TO EMPLOYMENT CAUSED BY SEXUAL HARASSMENT.

The Ninth Circuit’s reasonable woman standard is not the radical departure that it might seem to be at first blush; it is instead, consonant with the development of hostile work environment law in other circuits. In 1986, the Sixth Circuit analyzed whether alleged sexual conduct would cause serious psychological damage from the perspective of the “reasonable person” in *Rabidue*.¹⁴² However, for the first time in a judicial opinion,¹⁴³ Justice Keith suggested in dissent that the courts adopt the reasonable woman standard to analyze the severity

137. *Rabidue*, 805 F.2d at 621.

138. *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234, 238 (5th Cir. 1971).

139. 29 C.F.R. § 1604.11(a)(3). Sexual conduct violates Title VII when it “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment”. *Id.*

140. *Rabidue*, 805 F.2d at 619 n.4.

141. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

142. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) *cert. denied* 481 U.S. 1041 (1987).

143. See Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984) (Suggesting the adoption of the reasonable woman standard).

and pervasiveness of sexual harassment.¹⁴⁴ Justice Keith explained that the reasonable woman standard appropriately accounts for the gender-based divergence in views on appropriate sexual conduct.¹⁴⁵

One year later, the Sixth Circuit used the "reasonable woman" standard in *Yates v. AVCO Corporation*.¹⁴⁶ The Court held that in the context of a constructive discharge claim¹⁴⁷ based on the sexual harassment of a female subordinate by a male supervisor, the facts must establish that the reasonable woman would have felt compelled to resign to state an actionable claim.¹⁴⁸ In a footnote, the court cited Justice Keith's dissent and acknowledged that "men and women are vulnerable in different ways and offended by different behavior."¹⁴⁹ While the Sixth Circuit has not yet recognized the reasonable woman standard in the context of co-worker hostile environment claims, it has now recognized the reasonable woman's perspective in a related area of sexual harassment law.

The following year, the First Circuit, in *Lipsett v. University of Puerto Rico*,¹⁵⁰ cited Justice Keith's dissent in holding that in determining whether sexual conduct is unwelcome, as required by *Meritor*,¹⁵¹ courts must look to both the man's and woman's perspective.¹⁵² The *Lipsett* court stated that only when courts consider both perspectives can they avoid "sustain[ing] ingrained notions of reasonable behavior fashioned by the offenders. . . ."¹⁵³ Although *Lipsett* did not mandate the use of the reasonable woman perspective in determining whether harassment is severe or pervasive enough to create a

144. *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting).

145. *Id.*

146. 819 F.2d 630 (6th Cir. 1987).

147. "A constructive discharge exists if 'working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign'." *Id.* at 636-37 (quoting *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982)).

148. *Id.* at 637.

149. *Id.* at n.2 (citing *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting)).

150. 864 F.2d 881 (1st Cir. 1988).

151. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986).

152. *Lipsett*, 864 F.2d at 898. *But see Morgan v. Massachusetts General Hosp.*, 901 F.2d 186 (1st Cir. 1990). The reasonable person standard determines whether conduct is actionably unwelcome and pervasive. *Id.* at 192-93.

153. *Lipsett*, 864 F.2d at 898 (quoting *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting)).

hostile work environment, *Lipsett* recognized the importance of the woman's perspective within hostile environment cases.

In 1990, the Third Circuit mandated the use of a "reasonable person of the same sex in that position" standard to determine whether alleged conduct is sufficiently severe or pervasive to state a claim under Title VII.¹⁵⁴ The Court explained that the gender-based standard protects employers from undue liability at the hands of hyper-sensitive employees, while "removing the walls of discrimination that deprive women of self-respecting employment."¹⁵⁵ The Third Circuit's standard is directly analogous to *Ellison's* reasonable woman standard in that it is gender-based, objective and recognizes the impact of the disparate perspectives held by men and women concerning appropriate sexual conduct.¹⁵⁶

Several other courts have recently adopted the victim oriented standard. In a case decided less than two months after *Ellison*, the district court in *Robinson v. Jacksonville Shipyards, Inc.*¹⁵⁷ mandated the use of the reasonable woman standard in determining whether conduct supports a hostile work environment claim.¹⁵⁸ The Court reasoned that the "standard assessing the psychological harm resulting from harassment must begin to reflect women's sensitivity to behavior once condoned as acceptable."¹⁵⁹ On the same day, another district court decided *Austen v. State of Hawaii*,¹⁶⁰ which followed *Ellison* in finding that the plaintiff's supervisor referred to her in a manner that a reasonable woman would find typical of males who consider women inferior.¹⁶¹ A few weeks later, another district court cited *Ellison* in *Harris v. International Paper Co.*¹⁶² The *Harris* court held that the appropriate standard to

154. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990).

155. *Id.*

156. *Id.* See also *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

157. 760 F. Supp. 1486, (M.D. Fla. 1991).

158. *Id.* at 1524. A reasonable woman would find that a hostile work environment existed where sexual jokes and sexually oriented pictures of women were common and where co-workers rejected women in a non-sexual manner simply because they were women. *Id.*

159. *Id.* at 1526 (quoting Note, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1737-38 (1989)).

160. 759 F. Supp. 612 (D. Haw. 1991).

161. *Id.* at 628. Austen showed impermissible sex discrimination and retaliation against her for her support of women's issues and for filing an EEOC complaint. *Id.* at 629.

162. 765 F. Supp. 1509, 1515 (D. Me. 1991).

apply in determining whether harassment on the basis of race is sufficiently severe and pervasive to violate Title VII is that of a reasonable black person.¹⁶³ The Court held that "[t]he different social experiences of men and women in the case of sexual harassment, and of white Americans and black Americans in the case of racial harassment" must be considered to give "full force" to Title VII's concern with the consequences of discrimination.¹⁶⁴ The legal evolution of hostile work environment claims displays the movement toward a solidification of the reasonable woman's perspective in determining the viability of hostile workplace sexual harassment claims; *Ellison* is in accord with this trend.

These cases reflect the fact that Congress intended Title VII to remove "artificial, arbitrary and unnecessary barriers to employment."¹⁶⁵ The principal barrier to employment for a woman is the knowledge that she will or may be subjected to an unpleasant or degrading atmosphere in the workplace. The point of Title VII is to allow women to obtain "self-respecting employment."¹⁶⁶ In order to ensure that goal is reached, the perspective of the person whose self-respect is at issue must logically be the focus.

Again, however, and as every court that has enunciated the standard has stated, it is not just any woman's perspective, but the "reasonable" woman's perspective that must be applied. This is necessary to prevent employers from being subjected to liability for claims by "hyper-sensitive" employees.¹⁶⁷ However, in considering the "hyper-sensitive" person defense, courts should take care to avoid the presumption indulged in by some that any woman entering a certain type of workplace should expect the atmosphere to be "rough hewn" and the workplace to be filled with "sexual jokes, sexual conversations and girlie magazines."¹⁶⁸ Indeed, correcting that attitude may well be the most important effect of adopting the "reasonable woman" standard.

163. *Id.* at 1516. "The appropriate standard to be applied in hostile environment harassment cases is that of a reasonable person from the protected group of which the alleged victim is a member." *Id.* at n.12.

164. *Id.* at 1515.

165. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

166. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990).

167. *Ellison*, 924 F.2d at 879.

168. *Rabidue*, 805 F.2d at 621-22.

Even well-intentioned comments made to members of the opposite sex may amount to sex discrimination because Title VII is not concerned with the motivation behind conduct, but is instead “aimed at the consequences or effects of an employment practice.”¹⁶⁹ Employers and employees alike must be sensitized to the reasonable woman’s view of appropriate sexual conduct in the workplace.¹⁷⁰ The Ninth Circuit’s use of the reasonable woman standard to determine whether sexual conduct supports an actionable hostile work environment claim promotes a sensitization of the work force and encourages an understanding of “what conduct offends reasonable members of the other sex”¹⁷¹ in line with the intent behind Title VII.

C. *ELLISON’S* EMPLOYER LIABILITY STANDARDS ENCOURAGE SENSITIZATION OF THE WORK FORCE

Like the reasonable woman standard, *Ellison’s* employer liability standards are not radical departures from existing law and also encourage a sensitization of the work force. Employers on notice of co-worker sexual harassment must take prompt and appropriate remedial action to avoid Title VII liability.¹⁷² The Ninth Circuit agreed with the standard announced by the Fourth Circuit in *Katz* that employer remedies must be “reasonably calculated to end the harassment.”¹⁷³ This standard has been widely accepted¹⁷⁴ and also supports Title VII’s goal of providing a discrimination-free workplace.

Ellison added to the standard announced in *Katz* by requiring employers to “impose sufficient penalties to assure a workplace free from sexual harassment.”¹⁷⁵ To reach this goal, an employer’s response must not just correct the specific problem, but it must do so in a way that deters others from engaging in such conduct.¹⁷⁶ Even in this respect, *Ellison* is not a significant

169. *Rogers v. EEOC*, 454 F.2d 234, 239 (5th Cir. 1971) (citing *Griggs*, 401 U.S. at 431). Additionally, 29 C.F.R. § 1604.11(a)(3) prohibits conduct that “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” (emphasis added).

170. *Ellison*, 924 F.2d at 880.

171. *Id.* at 881.

172. *See infra* note 97.

173. *Ellison*, 924 F.2d at 882 (quoting *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983)).

174. *E.g.*, *Paroline v. UNISYS Corp.*, 879 F.2d 100, 106 (4th Cir. 1989); *Barrett v. Omaha Nat’l Bank*, 726 F.2d 424, 427 (8th Cir. 1984).

175. *Ellison*, 924 F.2d at 882.

176. *Id.*

departure from existing case law. It has been held that "Title VII requires more than a mere request to refrain from discriminatory conduct."¹⁷⁷ Further, the courts have also supported employer responses to sexual harassment, even though they may go beyond that necessary to simply end the harassment by the person engaging in it.¹⁷⁸ Title VII's goal of discrimination-free working environments is greatly furthered by *Ellison's* requirement that employer responses to sexual harassment assure a harassment-free workplace through both ending the particular harassment and preventing future harassment through deterrent penalties.

D. ELLISON'S MERE PRESENCE STANDARD AND TRADITIONAL WRONGFUL TERMINATION LAW

Ellison's requirement that employers remove from the workplace an employee whose mere presence would create a hostile work environment to the reasonable woman is the holding with potentially the greatest import for both employers and employees. Again, however, it is not a significant change in existing law so much as a clarification of it. Firings were often upheld in pre-*Ellison* wrongful termination suits brought against employers who discharged employees for engaging in sexual harassment. At common law, such terminations were usually upheld where the offender repeatedly and severely harassed other employees.¹⁷⁹ In labor arbitration suits,¹⁸⁰ repeated incidents of sexual harassment usually warranted termination of the harasser.¹⁸¹ Also at common law, employers were not required to tolerate a hostile work

177. *DeGrace v. Rumsfeld*, 614 F.2d 796, 805 n.5 (1st Cir. 1980). See *Ellison*, 924 F.2d at 882.

178. *E.g.*, *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984).

179. See, *e.g.*, *Carosella v. United States Postal Serv.*, 806 F.2d 638, 643 (Fed. Cir. 1987) (Termination proper where offender repeatedly asked out and engaged in offensive touching); *Williams v. Secretary of State, Merit Comm'n*, 502 N.E.2d 770, 774-75 (4th Dist. 1987) (Termination upheld where offender used vulgar language, made suggestive noises and tried to touch employee's breast and buttocks).

180. See generally CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE*, 417-20 (1990) for discussion of labor arbitration suits against employers for the termination of harassers.

181. See, *e.g.*, *United Elec. Supply Co. and Int'l Bhd. of Elec. Workers Local I*, 82 Lab. Arb. (BNA) 921 (1984) (Termination proper where harasser warned and several later testified against him); *IBP, Inc. and United Food Workers Int'l Union Local 222*, 89 Lab. Arb. (BNA) 411 (1987) (Termination upheld where harasser repeatedly harassed co-worker at work and home and did not obtain employer-ordered counseling).

environment; the employee's conduct only needed to be likely to adversely affect the functioning of the workplace.¹⁸²

The significance of *Ellison* is that it appears to require removal, as opposed to merely allowing that as an option, if the offender's mere presence would be an ongoing source of discomfort for a reasonable woman who had previously suffered at the hands of the offender. Again, by incorporating the reasonable woman standard, *Ellison* does more than just encourage sensitization of employers to the problems faced by women in the workplace. That goal is balanced with the need to assure employers that they will not be forced to remove otherwise valuable employees because of problems that reflect personality conflicts arising from individual idiosyncracies rather than the kind of gender directed hostility with which Title VII is concerned.

VI. CONCLUSION

Ellison is not, in the final analysis, a radical departure in Title VII law. It is but the clearest statement yet of the evolving approach to sexual harassment claims and Title VII cases generally. In *Meritor*, the Supreme Court recognized hostile work environment cases which do not require the direct, adverse economic impact on the plaintiff found in *quid pro quo* cases. From this decision, it is a short and logical step to *Ellison's* conclusion that the plaintiff in a hostile workplace case need not have suffered direct, adverse and severe psychological injury to state a claim.

The *Ellison* court's adoption of the 'reasonable victim' test is likewise a sound step in Title VII case law. It recognizes that such standards are necessary to effectuate the Congressional intent behind Title VII, which was and is the elimination of not just blatant discrimination but of the subtle yet daunting barriers that have prevented whole classes of persons from even trying to enter the workplace. It is only by viewing the workplace environment from the victim's perspective that employers can understand and begin to correct those problems. Such employer sensitization is the necessary first step in eliminating the conduct that has kept women and other minorities

182. *Carosella*, 816 F.2d at 643 (quoting *Mings v. Department of Justice*, 813 F.2d 384, 389 (Fed. Cir. 1987)).

from fully participating in, and contributing to, the economic life of the nation.

Finally, Ellison's standards for employer liability are simply recognition that a sensitized employer alone is not enough; employees, too, need to understand the impact that their behavior has, and that what they perceive as innocent fun can in fact be emotionally damaging. Ellison requires employers to use the tools available to them, education and discipline, to the fullest extent necessary to carry out the mission of Title VII: a transformation in the way that individuals deal with each other in the workplace.

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