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# Title VII Quid Pro Quo and Hostile Environment Sexual Harassment Claims: Changing the Legal Framework Courts use to Determine Whether Challenged Conduct is Unwelcome

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# TITLE VII QUID PRO QUO AND HOSTILE ENVIRONMENT SEXUAL HARASSMENT CLAIMS: CHANGING THE LEGAL FRAMEWORK COURTS USE TO DETERMINE WHETHER CHALLENGED CONDUCT IS UNWELCOME

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*In examining the nature of sexual harassment claims, the author challenges the use of the "unwelcomeness" element to distinguish actionable conduct from non-actionable conduct. The author contends that the "unwelcomeness" element demeans women in two ways: (1) it assumes the male perspective and presumes that the plaintiff appreciated the challenged conduct unless she proves otherwise; and (2) it allows the defense to engage in intrusive, irrelevant, and damaging inquiries as it attempts to refute the plaintiff's allegation that the challenged conduct was unwelcome.*

*The author argues for three reforms. First, courts should shift the burden of proving that the challenged behavior was unwelcome from the plaintiff to the defendant, making "unwelcomeness" an affirmative defense rather than an element of the plaintiff's prima facie case. Second, in order to curb the defense's ability to attack, embarrass, or stigmatize the plaintiff, courts should more narrowly define what is "relevant" evidence pursuant to Rules 401 and 402 of the* Federal Rules of Evidence. *Finally, courts should diligently apply the procedural protections contained in the* Federal Rules of Evidence *and the* Federal Rules of Civil Procedure *to avoid admitting embarrassing, prejudicial, and ultimately irrelevant evidence.*

## INTRODUCTION

*[T]he most amazing thing happened. A woman about four feet in front of me suddenly reached around behind her. She was completely calm, but she gripped this guy's arm, held his hand up in the air, and*

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> *in a loud, clear, commanding voice—carried all through the bus—she said, "What was this hand doing on my ass?" She held on to his arm, held his hand right up there.*
>
> *The man who'd harassed her—three-piece suit, looked like some junior executive type—didn't even try to deny it. Everyone knew his hand had been exactly where she said it was. He turned bright red, looked guilty as hell, and jumped off the bus at the first stop.*[1]

Like the woman on the bus, other courageous, strong, and assertive women are coming forward to change the cultural climate, but more needs to be done to stop sexual harassment. After boldly challenging unwelcome sexual conduct, the woman on the bus may return to her home having reclaimed her dignity and having suffered no financial loss. Workers who assert their right to be free from unwanted sexual attention in the workplace, however, face devastating economic and professional repercussions. They risk being fired, being denied a promotion, suffering a reduction in pay, losing a job title crucial to advancement, or being transferred or reassigned to a different department or location with diminished responsibilities or fewer opportunities for professional growth.[2] These risks are substantial because work is critical to financial independence and economic survival.[3] An individual should not have to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living";[4] it is "demeaning and disconcerting."[5]

Title VII of the Civil Rights Act of 1964[6] addresses this issue because it prohibits employers from discriminating against any individual on the basis of sex.[7] The word "sex" has been interpreted to include sexual harassment,[8] which encompasses two claims: a claim of quid pro quo and a claim of hostile environment

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1. MARTHA J. LANGELAN, BACK OFF! HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS 21 (1993).

2. For examples of tangible job detriments, see *infra* notes 79–82 and accompanying text.

3. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 7 (1979).

4. Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

5. *Id.*

6. Pub. L. No. 88-352, 78 Stat. 253 (1964), *amended by* 86 Stat. 103 (1972), 92 Stat. 2076 (1978), 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. §§ 2000e-1 to – 2000e-17 (1994)).

7. For the relevant statutory language, see *infra* note 26 and accompanying text.

8. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 , 66–67 (1986).

sexual harassment.[9] Case law suggests that for either sexual harassment claim, the complainant, as part of her prima facie showing, must prove by a preponderance of the evidence that she[10] has not welcomed the challenged sexual conduct.[11] In other words, she must prove that she found the challenged conduct undesirable or offensive or that she did not solicit, incite, or consent to the sexual advances.[12] Courts, the Equal Employment Opportunity Commission (EEOC), and commentators justify the use of the unwelcomeness element of sexual harassment claims as a tool to distinguish socially useful or non-offensive conduct from actionable sexual harassment.[13] This element and the legal framework courts use to determine what constitutes actionable conduct, however, create two problems. The first problem is that the current legal framework unfairly places the burden of proving that the challenged conduct was unwelcome on the complainant. The second problem is that this framework surrounding the unwelcomeness requirement may facilitate inappropriate defense tactics during discovery and at trial.

First, placing the burden of proof on the complainant is unfair because it invites the courts to inject their own notions of proper sexual behavior in a way that hurts women.[14] It hurts women because it focuses on the woman's conduct as seen from a man's perspective. It perpetuates pernicious and demeaning stereotypes about how women should, should not, or are presumed to behave. It presumes that the plaintiff welcomed the challenged conduct

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9. *Id.* at 65 (1986). For discussion regarding a quid pro quo sexual harassment claim, see *infra* Part I.B.1. For discussion regarding a hostile sexual harassment claim, see *infra* Part I.B.2.

10. The author recognizes that both men and women can be victims of sexual harassment and that both men and women can sexually harass members of either or both genders. For convenience and because sexual harassment is almost exclusively practiced by men against women, the author has chosen to use the pronoun "he" when referring to the alleged harasser and "she" when referring to the complainant. *See* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 5 & n.18 (1992) (citing a study showing that sexual harassment was perpetrated nearly three times as often by men as by women and noting that litigated cases are brought almost exclusively by women complaining of harassment by men); Ann Juliano & Stewart J. Schwab, An Empirical Study of Sexual Harassment Litigation, 1986–1996, at 11 (noting that an empirical study of sexual harassment litigation demonstrated that only six percent of the plaintiffs are men), at 19–20 (noting that a different empirical study of sexual harassment litigation demonstrated that ninety-two percent of the plaintiffs were women) (Jan. 13, 1999) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

11. *See* discussion *infra* Part II.A.

12. *See infra* note 112 and accompanying text.

13. *See infra* notes 139–50 and accompanying text.

14. *See infra* notes 158–61 and accompanying text.

and implies that she is to blame for the harassment. The burden of proof is placed on the plaintiff even though she is a member of the class of persons Title VII was designed to protect, even though she is presumptively less powerful economically and socially than the defendant, and even though psychological and sociological studies demonstrate that women find a broader range of conduct offensive than men do[15], and for that reason, men are more likely to misinterpret female behavior. The burden of proof is placed on the plaintiff even though the alleged harasser is generally the actor versus the acted upon, even though he is in the best position to guard against, to prevent, and to correct misbehavior, and even though studies[16] demonstrate women are not likely to file frivolous claims.

Second, the current requirement that the plaintiff prove unwelcomeness as a part of her prima facie case may enable defendants to engage in intrusive, irrelevant, and damaging[17] inquiries. An inquiry into whether a plaintiff welcomed a defendant's conduct may inflame prejudice or stigmatize the plaintiff as a liar, as a woman scorned, or as a promiscuous woman unworthy of protection.[18]

These two problems needlessly discourage victims from filing legitimate claims,[19] leaving sexual harassment at work widespread and underreported,[20] Title VII's protections underutilized and ineffective, and the victim forced to choose between economic survival and sexual harassment. Part I of this Note provides background information about Title VII's prohibition against sexual discrimination and about the two forms of sexual harassment claims: quid pro quo and hostile environment. Part II outlines the unwelcomeness element of sexual harassment claims, the kind of conduct that courts consider in determining whether challenged conduct is actionable, and the two problems associated with the legal framework courts use to determine unwelcomeness. Finally, Part III discusses three reforms courts may implement to resolve these problems.

First, the Court should shift the burden of proving that the harassing behavior was unwelcome from the plaintiff to the defendant. Rather than serving as an element of the plaintiff's

15. *See infra* note 173 and accompanying text.

16. *See infra* note 163 and accompanying text.

17. *See infra* notes 178–92 and accompanying text.

18. *See infra* notes 162, 178–86 and accompanying text.

19. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 833 (1991); Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621, 621 (1997).

20. *See infra* notes 193–95 and accompanying text.

prima facie case, "unwelcomeness" should be treated as an affirmative defense available to the defendant only after a prima facie case has been established. Such a shift would stop demeaning and pernicious stereotyping, recognize that sexual harassment victims are almost always less powerful socio-economically than their aggressors, and account for perceptual differences between men and women. Such a shift would place the burden on the actor, the person most likely to misinterpret conduct, and the entity, the employer, who is in the best position to curb abuses. Instead of requiring the complainants to prove that they did not welcome the challenged conduct, the Court should presume that the conduct was unwelcome. If the defendant claims that the harassing conduct was welcome, then a court should require the defendant to prove by objective evidence, as part of an affirmative defense, that the plaintiff, by affirmative acts, clearly consented to or solicited the challenged conduct or that the plaintiff's affirmative acts objectively justified the perpetrator's conclusion that the plaintiff welcomed his advances. Silence, a polite "no," or evasive behavior would not be considered an affirmative act objectively indicating consent to sexual advances. Clear, affirmative consent from the object of advances would be required. The defendant would not be able to assume that his conduct was welcome, and he would not be privileged to ignore a woman's words.

Second, to curb the defendant's ability to use the current legal framework to prove that the challenged conduct was unwelcome to attack, embarrass, or stigmatize the plaintiff, the legal framework should be reformed in two other ways, one substantive and one procedural. Substantively, courts should more narrowly define what is "relevant" evidence pursuant to Rules 401 and 402 of the *Federal Rules of Evidence.* Courts should redefine relevance to include evidence that is narrowly tailored to the specific purpose for which it was proposed. Evidence of the plaintiff's sexual conduct would be relevant if it involved the challenged conduct and the alleged harasser, but only if the evidence was linked temporally to the challenged conduct and was reciprocal in kind and degree. Evidence of a previous but presently non-existing relationship between the parties would not be considered temporally relevant, nor would insignificant conduct on the plaintiff's part if the defendant's response was much more substantial. Evidence of sexual conduct with third parties at work would not be admissible unless it involved the harasser's sexual conduct toward other employees and that conduct corroborated the plaintiff's claim. Evidence of

sexual conduct between the plaintiff and the harasser outside of work would be relevant, but evidence of sexual conduct on the part of either party outside of the work environment that was unrelated to the challenged conduct would not be. If evidence tending to embarrass, shame, or invade the plaintiff's privacy would be technically admissible pursuant to Rules 403 and 404, then courts should use Rule 412 to exclude such evidence.

Procedurally, courts should diligently apply the protections provided by the *Federal Rules of Evidence* and the *Federal Rules of Civil Procedure.* Courts, without exception, should make admissibility determinations *in camera* when the proffered evidence tends to embarrass, stereotype, or invade the plaintiff's privacy. Courts should require that all motions related to those admissibility determinations be filed under seal and that the motions describe the evidence to be admitted and its proffered purpose in great detail so that the court may make an informed decision about the admissibility of the evidence. Finally, courts should presumptively issue confidentiality and protective orders barring discovery of evidence that tends to embarrass, stereotype, or invade the plaintiff's privacy unless the party seeking discovery can demonstrate that the evidence is relevant and cannot be obtained in any other way.

These three reforms are consistent with the notion that Title VII should be construed liberally and interpreted in a way that prevents violations and broadens Title VII's humanitarian and remedial purposes,[21] encouraging victims to prosecute sexual harassers, increasing the filing of legitimate sexual harassment claims and, in turn, reducing workplace harassment.

## I. BACKGROUND

### *A. Title VII of the Civil Rights Act of 1964 and Its Prohibitions*

Title VII of the Civil Rights Act of 1964[22] prohibits sex discrimination by employers when making decisions involving employment.[23]

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21. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (citing with approval the EEOC's regulations, 29 CFR § 1604.11(f)(1997), and the EEOC's policy statement, EEOC Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6699 (Mar. 19, 1990)); *id.* (recognizing the importance of implementing the policy underlying the enactment of Title VII and of complementing the government's Title VII enforcement efforts); Barnes v. Costle, 561 F.2d 983, 994 (D.C. Cir. 1997).

22. *See supra* note 6.

23. *See* 42 U.S.C. § 2000e-2(a)(1) (1994).

Title VII states that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of[24] such individual's . . . sex[25]."[26]

There is a widely held belief that the prohibition against sex discrimination "was offered as an addition to other proscriptions [such as race, color, religion, or national origin] by opponents in a last-minute attempt to block the bill which became the Act"[27] and "that the term *sex* was included in Title VII as a joke, by a fluke, or in an attempt to overload the legislation."[28] With the addition of the term "sex," however, the bill passed quickly.[29] For an eight-year period following the enactment of Title VII, there was no legislative history to clarify what Congress meant by including the term "sex discrimination" or to contradict the belief that "sex" had been included as a joke.[30] Subsequent amendments to the Act, however, affirm Congress's intent to combat sex discrimination.[31] It is now firmly established that Title VII invalidates all "artificial, arbitrary

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24. For a definition of "because of" in this context, see Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) ("In proving a claim for a hostile work environment due to sexual harassment, therefore, a plaintiff must show that but for the fact of her sex, she would not have been the object of harassment.") (citations omitted); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("[T]he question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender?"); Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (noting that sexual harassment involves "the exaction of a condition which, but for his or her sex, the employee would not have faced").

25. Title VII's prohibition of discrimination based on sex protects men and women, regardless of whether the person is heterosexual, homosexual, or transsexual, because gender and sexual orientation are not relevant to the inquiry of whether discrimination was sex based. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (holding that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex"); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463–64 (9th Cir. 1994) (noting that both men and women may have a viable sex discrimination claim against the same harasser, regardless of gender); Miles v. N.Y. Univ., 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997) (noting that sex-based harassment of a transsexual is actionable under Title VII because it is discrimination based on sex, male or female).

26. 42 U.S.C. § 2000e-2(a)(1) (1994).

27. *Barnes*, 561 F.2d at 987 (citing the remarks of Rep. Smith and Rep. Green that are found at 110 CONG. REC. 2,577–82 (1964)).

28. MACKINNON, *supra* note 3, at 288 n.105.

29. *See Barnes*, 561 F.2d at 987 (citing 110 CONG. REC. 2,804–05, 14,511, 15,897 (1964)).

30. *See id.*

31. *See id.* (noting that when "the 1964 Act was amended by the Equal Employment Opportunity Act of 1972 . . . it became clear that Congress was deeply concerned about employment discrimination founded on gender and intended to combat it as vigorously as any other type of forbidden discrimination").

and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the bases of . . . impermissible classification[s]" such as sex.[32] One sex may not be exposed to disadvantageous terms or conditions of employment to which members of the opposite sex are not exposed.[33] These protections, however, are limited. Title VII only prohibits *unwelcome* sexual conduct in the workplace; it does not "prohibit all verbal or physical harassment."[34] It allows for "genuine but innocuous differences in the ways men and women routinely interact with members of

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32. *Barnes*, 561 F.2d at 987 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (internal quotation marks omitted)). *See* Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982) ("Title VII prohibits employment discrimination on the basis of gender, and seeks to remove arbitrary barriers to sexual equality at the workplace. . . .") (citing *Griggs*, 401 U.S. at 431). *See also* MACKINNON, *supra* note 3, at 288–89 n.105 (noting, first, that since the original enactment, courts have taken Congress at its word: sex discrimination is prohibited; second, that Title VII's legislative history and amendments make it apparent that the addition of "sex" to Title VII was not a joke; and third, that Congress has had numerous opportunities to eliminate the term "sex" from the Act but instead has chosen to strengthen and extend its provisions in this regard); Bessie Margolin, Associate General Counsel for the Department of Labor, Equal Pay and Equal Opportunities for Women, Remarks at the 19th Conference on Labor at N.Y.U. (1967), *in* MACKINNON, *supra* note 3, at 297, 301, 306:

> The most illuminating measure of the significance of both the Equal Pay Act and the "sex" amendment requires particular emphasis because the mistaken idea has been circulating that, in contrast to race, color and creed discrimination, there is little or no legislative history or documentation bearing on the legislative intent or objectives of the "sex" amendment to Title VII. Anyone who asserts that the case against sex discrimination has not been documented prior to the inclusion of sex discrimination in Title VII, or that "the legislative history was virtually blank" and "the intent and reach of the amendment were shrouded in doubt" has manifestly overlooked the overwhelmingly impressive documentation presented at the hearings on the Equal Pay bills. . . . The chronology of the enactment of the Equal Pay Act and the Civil Rights Act, and the extensively documented facts and statistics emphasized at the hearings and in the debates on the Equal Pay bills can leave no doubt, I submit, of the direct relevance of this legislative history of the "sex" amendment of Title VII of the Civil Rights Act. . . . It seems fair to say, therefore, that only ignorance or thoughtless oversight of the pertinent legislative background, if not simply "entrenched prejudice" rooted in a psychological downgrading of women generally, can explain the view that the inclusion of sex discrimination in Title VII was no more than a "fluke" not to be taken seriously . . . . Commissioner Graham in his speech to the Personnel Conference of the American Management Association of February 9, 1966, specifically denounced the "fluke" charge and warned against the negative approach implicit in that characterization. He also made clear that the Commission is quite aware of the impressive legislative background underlying the Equal Pay Act and its manifest pertinence to the "sex" amendment of Title VII.

33. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (citation and quotation marks omitted).

34. *Id.*; *see also* LINDEMANN & KADUE, *supra* note 10, at 135 ("[I]t is essential to distinguish welcome from unwelcome conduct, because consensual sexual relationships do not violate Title VII.") (citing Walker v. Sullair Corp., 736 F. Supp. 94, 99 (W.D.N.C. 1990) as support for the proposition that a consensual sexual relationship will not give rise to a sex discrimination claim).

the same sex and of the opposite sex,"[35] for "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing,"[36] and for "offhand comments, and isolated incidents."[37] Title VII requires "neither asexuality nor androgyny."[38] To be actionable, conduct must be "extreme"[39] and "objectively offensive."[40] Title VII's standards are sufficiently demanding to insure that Title VII does not become a general civility code[41] and to ensure that courts and juries do not mistake innocent socializing such as horseplay or sexual flirtation with discriminatory conditions of employment.[42] Title VII prohibits sex discrimination, and coupled with the concept of sexual harassment, it is "designed to protect working women from the kind of male attentions that can make the workplace hellish. . . ."[43]

*1. Sexual Harassment Prohibited as a Form of Sex Discrimination*— To accomplish Title VII's purpose, Congress created the EEOC,[44] an independent administrative agency charged with enforcing Title VII's prohibitions by investigating charges of unlawful employment practices and attempting conciliation of meritorious charges.[45] As part of its responsibility, the EEOC promulgates its own regulations[46] and publishes them in the *Code of Federal Regulations (CFR).*[47]

The EEOC has stated that sexual harassment is a form of sex discrimination.[48] It recognizes two forms of sexual harassment claims: quid pro quo and hostile environment. Section 1604.11(a) of the CFR defines quid pro quo harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute

35. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (internal quotations and citation omitted).
36. *Id.* (internal quotations and citation omitted).
37. *Id.*
38. *Oncale*, 523 U.S. at 81.
39. *Faragher*, 524 U.S. at 788 (internal quotations and citation omitted).
40. *Oncale*, 523 U.S. at 81.
41. *See Faragher*, 524 U.S. at 788 (internal quotations and citation omitted).
42. *Oncale*, 523 U.S. at 81.
43. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (1995).
44. *See* 42 U.S.C. § 2000e-4 (1994).
45. *See id.* §§ 2000e-4, 5.
46. *See id.* § 2000e-12.
47. *E.g.*, 29 C.F.R. § 1604.11 (1998).
48. *See id.* § 1604.11(a) ("Harassment on the basis of sex is a violation of Sec. 703 of Title VII.").

> sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [and when] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.[49]

Section 1604.11(a) of the CFR defines hostile environment harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment . . . [when] 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.[50]

The courts are not bound by the EEOC regulations,[51] but the Supreme Court has suggested that the agency be given substantial deference in sexual harassment cases.[52] The first Supreme Court case to recognize sexual harassment as a form of sex discrimination pursuant to Title VII was *Meritor Savings Bank v. Vinson*.[53] In *Vinson*, the Court adopted the EEOC's interpretation of Title VII[54] and recognized the two forms of sexual harassment:[55] quid pro quo[56] and hostile environment.[57] The terms "'quid pro quo' and 'hostile work environment' do not appear in the statutory text" of Title VII nor in the text of the CFR.[58] These terms first appeared in

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49. *Id.*

50. *Id.*

51. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

52. *See id.* (noting that "while [the EEOC's regulations are] not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976)).

53. *See id.* at 73.

54. *See id.* at 66.

55. *See id.* at 65–66.

56. For a discussion regarding a quid pro quo sexual harassment claim, see discussion *infra* Part I.B.1.

57. For a discussion regarding a hostile environment sexual harassment claim, see discussion *infra* Part I.B.2.

58. *See id.* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998).

academic literature,[59] then in courts of appeals decisions[60] and finally in United States Supreme Court decisions.[61]

### *B. Title VII's Two Sexual Harassment Claims*

The two sexual harassment claims recognized by the Court pursuant to Title VII, quid pro quo and hostile environment sexual harassment, will be discussed in turn.

*1. Quid Pro Quo Sexual Harassment*—Quid pro quo literally means the exchange of "something for something."[62] The Court has defined a quid pro quo claim as one in which an employer demands the exchange of sexual favors from an employee in return for job benefits.[63]

To maintain a Title VII claim based on quid pro quo sexual harassment, the complainant must prove the following by a preponderance of the evidence:

1. the plaintiff was a member of a protected class;[64]
2. the plaintiff was subject to unwelcome[65] sexual harassment in the form of sexual advances or sexual favors;
3. the harassment complained of was based on sex;[66]
4. the plaintiff's reaction to the harassment affected tangible aspects of the terms and conditions of the

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59. *See id.* (citing MACKINNON, *supra* note 3, at 32–47).

60. *See id.* (citing Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982) as an example). *See also* Bundy v. Jackson, 641 F.2d 934, 943–47 (D.C. App. 1981) (recognizing that a violation of Title VII may be predicated on harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment).

61. *See id.* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998) (citing *Vinson* as an example and generally referring to E. Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J. L. & PUB. POL'Y 307 (1998)).

62. Jansen v. Packaging Corp. of Am., 123 F.3d 490, 532 (7th Cir. 1997) (internal quotation marks omitted).

63. *Burlington*, 524 U.S. at 752.

64. This requirement is satisfied if there is a stipulation between the parties that the complainant is either a woman or a man. *See Henson*, 682 F.2d at 903; Trotta v. Mobil Oil Corp., 788 F. Supp. 1336, 1348 (S.D.N.Y. 1992); *see also* Radtke v. Everett, 501 N.W.2d 155, 162 (Mich. 1993) (noting that "all employees are inherently members of a protected class in hostile work environment cases because all persons may be discriminated against on the basis of sex").

65. *See* discussion *infra* Parts II. A-B.

66. *See supra* note 25.

plaintiff's employment, with the plaintiff's acceptance or rejection of the harassment being either an express or implied condition[67] to receipt of a benefit or the cause of a tangible adverse effect[68] on the terms or conditions of the plaintiff's employment; and

5. the employer[69] has responsibility[70] for the acts of sexual harassment in the workplace[71] to which the plaintiff was subjected.[72]

In order to state a claim of quid pro quo harassment, the complainant must prove that the harasser is "a supervisor with immediate (or successively higher) authority over the employee"[73] and that the demands made by the harasser were an express or implied condition of employment.[74] An express condition may be as direct as the harasser saying, "I will fire you unless you sleep with me."[75] An implicit condition may be as subtle as the harasser broaching the subject of sexual favors while discussing actual or potential job benefits or detriments.[76] The closer the nexus between the discussion about job benefits and the sexual advance,

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67. *See infra* notes 74–77 and accompanying text.

68. *See infra* notes 78–84 and accompanying text.

69. Title VII applies to employers. *See* Tomka v. Seiler Corp., 66 F.3d 1295, 1314–15 (2d Cir. 1995) (finding that individual defendants with supervisory control over a plaintiff may not be held personally liable under Title VII). *See also* Gary v. Long, 59 F.3d 1391, 1397–99 (D.C. Cir. 1995). Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. § 2000e(b) (1994).

70. In order for the employer to be held liable, the employer must have placed the harasser in a position of authority over the employee. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). Employer liability is guided, but not completely governed, by common law agency principles. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (holding that traditional agency principles are relevant for determining employer liability but cautioning that common law agency principles might not be transferred in all particulars). For a more detailed explanation of the application of common law agency principles pursuant to Title VII, see *Burlington*, 524 U.S. at 754–65, and *Faragher*, 524 U.S. at 785–808.

71. An employer can be held vicariously liable for quid pro quo harassment. *See Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08 (both holding that "[a]n employer is subject to vicarious liability to a victimized employee . . . when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment").

72. 5 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS, Instruction 88-45A, at 88–237 (1999) (citing cases generally).

73. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

74. *See Nichols*, 42 F.3d at 513.

75. *Id.* at 512.

76. *See id.* at 513.

the more likely the case involves actionable quid pro quo harassment.[77]

The complainant must also prove that the acceptance or rejection of the unwelcome sexual conduct resulted in tangible and detrimental employment action.[78] This would include "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."[79] In most cases, a tangible employment action inflicts direct economic harm and requires an official act that in most cases is documented in official company records and may be subject to review by higher level supervisors.[80] Unfulfilled threats[81] of job-related harm or benefits for sexual favors without some causally related, tangible job detriment[82] do not constitute quid pro quo harassment.[83] The

77. *See id.* ("[W]e conclude that a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo sexual harassment.")

78. *See Burlington*, 524 U.S. at 753–54.

79. *Id.* at 761.

80. *See id.* at 762.

81. Threats must be fulfilled to be actionable as quid pro quo harassment. *See Burlington*, 524 U.S. at 753–54; Cram v. Lamson & Sessions Co., 49 F.3d 466, 474 (8th Cir. 1995) (noting that plaintiff's subjective belief that defendant had threatened job retaliation did not state a claim of quid pro quo sexual harassment); Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (finding a supervisor's mere threat or promise of job-related harm or benefits is insufficient to constitute quid pro quo harassment).

82. The tangible employment action must be detrimental. *See Burlington*, 524 U.S. at 761–62; Bryson v. Chi. State Univ., 96 F.3d 912, 916 (7th Cir. 1996) (requiring "a materially adverse employment action"); Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (requiring "adverse job consequences"); Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989) (noting that "[t]he gravamen of a quid pro quo claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual blackmail and that adverse consequences follow from the employee's refusal"); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987) (noting that a plaintiff who sues under a quid pro quo claim must establish that "tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from the employee's refusal to submit to the conduct"); Highlander v. K.F.C. Nat'l Mgmt. Co., 805 F.2d 644, 649 (6th Cir. 1986) (holding no cause of action for quid pro quo sexual harassment where "the record [is] totally devoid of any evidence tending to demonstrate that plaintiff was denied a job benefit or suffered a job detriment as a result of her failure to engage in the activity suggested by [defendant]"); Jones v. Clinton, 990 F. Supp. 657, 669–71, 673 (E.D. Ark. 1998) (noting that a tangible job detriment is an essential element of a quid pro quo sexual harassment claim, and that the plaintiff must demonstrate some negative change in employment status in form or substance such as a reduction in pay or benefits or a negative change in job classification or title; that minor changes in duties or working conditions with no materially significant disadvantage are insufficient to establish the adverse conduct required to make a prima facie case because otherwise every trivial personnel action that an irritable employee resented would form the basis of a discrimination suit) (citing cases from almost every circuit for support).

83. *See Burlington*, 524 U.S. at 753–54.

complainant must pursue those claims under the theory of hostile work environment sexual harassment.[84]

*2. Hostile Environment Sexual Harassment*—The second sexual harassment claim recognized by the Court pursuant to Title VII is hostile environment sexual harassment. The complainant in a hostile environment case need not show that the acceptance or rejection of the harassment was an express or implied condition to receipt of a benefit or the cause of a tangible adverse effect on the terms of employment.[85] To maintain a Title VII claim based on hostile work environment sexual harassment, the complainant must prove the following by a preponderance of the evidence:

1. the plaintiff was a member of a protected class;[86]
2. the plaintiff was subject to unwelcome[87] sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature;
3. the harassment complained of was based on sex;[88]
4. the charged sexual harassment had the effect of unreasonably interfering with plaintiff's work

84. *See id.* at 754 (noting that claims involving unfulfilled threats should be categorized as hostile work environment claims); J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 280 n.15 (1995) (A quid pro quo claim "requires that the victim either actually refuse the advances and suffer tangible job detriment or submit and retain a tangible job benefit. Quid pro quo theory appears not to encompass cases in which the supervisor threatens a job detriment but fails to carry through on this threat after the victim refuses to submit. There is thus no doctrine of attempted quid pro quo harassment; such unwelcome advances could only be challenged under the hostile work environment theory.") (citation omitted). *See infra* Part I.B.2 for a discussion of hostile work environment claims.

85. Evidence of tangible adverse employment action, however, may affect employer liability. See *Burlington*, 524 U.S. at 765 and Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998), both holding as follows:

> [a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defendant employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence .... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise.... No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

86. *See supra* note 64.
87. *See supra* note 65.
88. *See supra* note 25.

performance and creating an intimidating, hostile or offensive work environment;[89] and

5. the employer[90] has responsibility[91] for the acts of sexual harassment in the workplace[92] to which the plaintiff was subjected.[93]

To be actionable under a hostile environment theory, the sexual harassment must be so severe or pervasive[94] as "'to alter the conditions of [the complainant's] employment and create an abusive working environment.'"[95] To determine whether the challenged sexual conduct is sufficiently severe and pervasive to create a hostile or offensive work environment, the court will look at "the totality of the circumstances,"[96] "including the frequency of the discriminatory conduct;[97] its severity;[98] whether it is physically

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89. *See* Meritor v. Vinson, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a)(3)(1985)); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989); *Hicks*, 833 F.2d at 1413; Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

90. *See supra* note 69.

91. *See supra* note 70.

92. *See supra* note 71.

93. 5 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS, Instruction 88-45, at 88-233–88-34 (1999) (citing cases generally).

94. Note that it is the harassment, not the alteration of the conditions of employment, which must be severe or pervasive. *See* Muench v. Township of Haddon, 255 N.J. Super. 288, 288 (N.J. Super. Ct. App. Div. 1992); *see also infra* note 102 and accompanying text.

95. *Faragher*, 524 U.S. at 786 (quoting *Vinson*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904)) (bracketed words in original); Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (citations omitted); Reed v. Shephard, 939 F.2d 484, 491 (7th Cir. 1991) (citations omitted); *Hicks*, 833 F.2d at 1413 (citations omitted).

96. *Hicks*, 833 F.2d at 1413 (citing *Henson*, 682 F.2d at 904 and 29 C.F.R. § 1604.11(b) (1986)).

97. *Compare* Lam v. Curators of the Univ. of Mo., 122 F.3d 654, 656–57 (8th Cir. 1997) (noting that a single exposure to a distasteful videotape was not enough to create a hostile environment); Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1365–66 (10th Cir. 1997) (noting that five sexually-oriented incidents spread out over the course of 16 months were not sufficiently severe or pervasive to create a hostile environment); Rennie v. Dalton, 3 F.3d 1100, 1103, 1106–07 (7th Cir. 1993) (holding that one off-color joke and a conversation about a strip bar not directed personally at the employee did not sustain a cause of action); Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526, 533–34 (7th Cir. 1993) (holding that two incidents of misconduct by a supervisor, each involving several remarks and impermissible touching, were insufficient to sustain liability), *and* Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 337 (7th Cir. 1993) (holding that several incidents of unwanted touching, attempts to kiss, placing "I love you" signs in the work area, and asking the worker for dates did not amount to a hostile work environment), *with* Downes v. Fed. Aviation Admin., 775 F.2d 288, 294 (D.C. Cir. 1985) (noting that only conduct that is "routine" and that "becomes a 'condition' of anyone's employment" is actionable) (citations omitted).

98. *See Harris*, 510 U.S. at 21 (finding that a workplace *permeated* with "discriminatory intimidation, ridicule, and insult" is sufficiently severe or pervasive to alter employment conditions and create a hostile environment) (citing *Vinson*, 477 U.S. at 65); Carr v. Allison Gas Turbine Div., GMC, 32 F.3d 1007, 1010–11 (7th Cir. 1994) (noting that there are gradations

threatening or humiliating,[99] or [whether it is] mere[ly an] offensive utterance;[100] and whether it unreasonably interferes with an employee's work performance."[101] The challenged conduct need not impair the employee's productivity or work performance; the plaintiff need only prove that the challenged conduct discriminatorily *altered* working conditions by creating an abusive working environment.[102] In addition, to be actionable under the statute, "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim [or employee] in fact

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of shop talk and finding that targeting a female tinsmith directly, defacing her property, and mutilating her clothes crossed the line from being merely vulgar and mildly offensive to being deeply offensive and sexually harassing where the plaintiff was one woman among many men and where her use of vulgar terms could not be deeply threatening, nor her placing a hand on the thigh of one of her co-workers intimidating); Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992) (noting that "[t]he incidents must be repeated and continuous" to be severe and pervasive) (citations omitted); Carrero v. New York City Hous. Auth., 890 F.2d 569, 577 (2d Cir. 1989) ("The incidents must be . . . sufficiently continuous and concerted in order to be deemed pervasive."); Henson v. City of Dundee, 682 F.2d 897, 899 (11th Cir. 1982) (finding a hostile environment where the employer had subjected the plaintiff "to numerous harangues of demeaning sexual inquiries and vulgarities . . . [and] repeatedly requested that she have sexual relations with him"); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 883 (D. Minn. 1993) (finding that the harasser had used language and epithets in an "intensely degrading" manner and that the words used derived "their power to wound not only from their meaning but also for 'the disgust and violence they express phonetically'") (internal quotation marks omitted) (citing Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (quoting C. MILLER & K. SWIFT, WORDS AND WOMEN 109 (1977)); Cuesta v. Texas Dept. of Criminal Justice, 805 F. Supp. 451, 457 (W.D. Tex. 1991) (noting that the employer's conduct went "beyond inoffensive, friendly exchanges" and was "clearly beyond what is socially acceptable for a supervisor" where he used vulgar language to ask whether the plaintiff preferred vaginal or anal sex and continued to ask her to have an affair with him, despite her clear intentions to remain faithful to her husband).

99. *See* King v. Bd. of Regents of Univ. of Wis. Sys., 898 F.2d 533, 534–35, 538 (7th Cir. 1993) (finding repeated verbal assaults and physical harassment actionable); Crisonino v. New York City Hous. Auth., 985 F. Supp. 385, 389–90 (S.D.N.Y. 1997) (finding a supervisor's comment that the plaintiff was a "dumb bitch" and the fact that he "touched her 'above the breast' when he pushed her" were actionable).

100. A "mere utterance . . . which engenders offensive feelings in an employee" does not give rise to a Title VII claim because it would not sufficiently affect the terms and conditions of the employee's employment. *Harris*, 510 U.S. at 21 (citing *Vinson*, 477 U.S. at 67); *Henson*, 682 F.2d at 904.

101. *Faragher*, 524 U.S. at 787–88 (citing *Harris*, 510 U.S. at 23) (internal quotation marks omitted).

102. *See Harris*, 510 U.S. at 25 (Scalia, J., concurring) (noting that "the test is not whether work has been impaired, but whether working conditions have been discriminatorily *altered*") (emphasis added); *id.* (Ginsburg, J., concurring) (noting that ". . . 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' 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 'ma[k]e it more difficult to do the job.'") (citing Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).

perceived to be so."[103] Case law suggests that the objective severity of harassment "should be judged from the perspective of a reasonable person in the employee's position, considering 'all the circumstances'... [including] careful consideration of the social context in which particular behavior occurs and is experienced by its target."[104] To show that she subjectively perceived her working

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103. *Faragher*, 524 U.S. at 787 (citing *Harris*, 510 U.S. at 21–22).

104. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (citation omitted). Commentators and the courts disagree as to whether the traditional objective reasonable person standard or a more contextualized objective standard such as that of the reasonable woman or the reasonable victim better serves the purposes of Title VII. Although the Court has discussed the issue in dicta, the issue has not been explicitly decided.

For cases suggesting that *Harris* did not explicitly address the reasonableness standard because it was dictum and not necessary for the holding, see, for example, Torres v. Pisano, 116 F.3d 625, 632 n.6 (2d Cir. 1997)("[G]iven that the Supreme Court refused to consider the [reasonableness] issue in *Harris*, we do not see how that decision can be taken to have foreclosed the use of a more contextualized objective standard.") (citing *Harris*, 510 U.S. at 22–23 (noting that the Court need not address the EEOC's proposed harassment regulations, which require a more contextualized objective standard)) (citing 58 Fed. Reg. 51,266, 51,269 (1993) (proposed 29 C.F.R. § 1609.1(c)) ("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."); Crowe v. Wiltel Communications Sys., 103 F.3d 897, 900 (9th Cir. 1996) (explaining that there is no conflict between a standard that takes into account "the perspective of a reasonable person . . . *with the same fundamental characteristics as the plaintiff*" and the Supreme Court's decision in *Harris*) (emphasis added); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 540 (1st Cir. 1995) ("[T]he court must consider not only the actual effect of the harassment on the plaintiff, but also the effect such conduct would have on a reasonable person *in the plaintiff's position*.") (emphasis added); Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) ("Whether a workplace should be viewed as hostile or abusive—from both a reasonable person's standpoint as well as the victim's subjective perception—can only be determined by considering the totality of the circumstances."); Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1131 (4th Cir. 1995); Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537 (10th Cir. 1995); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1454 (7th Cir. 1994) (citing *Harris* but noting that the court must look to the reasonable person *in the plaintiff's position*) (emphasis added) (citing Saxton v. AT&T, 10 F.3d 526, 534 (7th Cir. 1993)); Daniels v. Essex Group, Inc., 937 F.2d 1264, 1271–72 (7th Cir. 1991).

For commentary regarding the same, see Juliano & Schwab, *supra* note 10, at 22, n.51 (citing Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After* Harris v. Forklift Systems, Inc.?, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 360 (1994–95) (suggesting that *Harris* resolves only the question of proof of psychological injury and doesn't address the reasonableness standard)); Laura Hoffman Roppe, Case Note, Harris v. Forklift Systems, Inc.: *Victory or Defeat?*, 32 SAN DIEGO L. REV. 321, 336 (1995) (proposing that the discussion of the reasonable person in *Harris* should not be read to do away with the reasonable woman standard); Susan Collins, Note, Harris v. Forklift Systems: *A Modest Clarification of the Inquiry in Hostile Environment Sexual Harassment Cases*, 1994 WIS. L. REV. 1515, 154–48 (1994) (noting that *Harris* clarified the issue of psychological injury but not the issues surrounding the reasonable woman test).

For cases supporting the use of the traditional objective reasonable person standard, see, for example, Black v. Zaring Homes, Inc., 104 F.3d 822 (6th Cir. 1997) (citing *Harris* and applying the objective reasonable person standard); Watkins v. Bowden, 105 F.3d 1344, 1356 & n.22 (11th Cir. 1997)(same); Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir.

1996) (noting that although the court had previously adopted the reasonable woman standard, "[g]iven the Supreme Court's use of the 'reasonable person' standard [in *Harris*], we cannot find that the district court abused its discretion in using th[e objective reasonable person] standard in its jury instruction"); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995) ("The test is an objective one, not a standard of offense to a 'reasonable woman.'"); Doe v. R.R. Donnelley & Sons Co., 42 F.3d 439, 444 (7th Cir. 1994) (applying the reasonable person standard); King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994) (same).

For commentary arguing that the traditional objective reasonable person standard is best because the reasonable woman standard is contrary to equality principles, ambiguous, and unfair to men, see Juliano & Schwab, *supra* note 10, at 24 n.57 (citing Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 621 (1993)) ("[C]ourts that have embraced the new [reasonable woman] standard have done so primarily as a declaration of political faith, not because the standard was of any real value in deciding the case."); Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993) (arguing that it is unfair to hold men to a standard that, because they are men, they may be unable to understand or appreciate fully); Kathleen A. Kenealy, *Sexual Harassment and the Reasonable Woman Standard*, 8 LAB. L.J. 203 (Spring 1992) (suggesting that the reasonable woman standard sends a message that women are inherently unreasonable and the standard is a legal setback for women); Walter Christopher Arbery, Note, *A Step Backwards for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims*, 27 GA. L. REV. 503 (1993) (rejecting the reasonable woman standard because it abandons the ideal of shared values between men and women).

For cases supporting a more contextualized standard, see, for example, Torres v. Pisano, 116 F.3d 625, 632 (2d Cir. 1997) (using the "reasonable woman" standard and citing support for a more contextualized reasonable woman or reasonable employee in the [plaintiff's] shoes standard); Newton v. Dep't of the Air Force, 85 F.3d 595, 599 (Fed. Cir. 1996) (citing and parenthetically quoting Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) ("Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment.")); Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995) ("Whether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics."); West v. Phila. Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995) (noting that a relevant question is whether "the discrimination would have detrimentally affected a reasonable person of the same protected class in that position"); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1456 (7th Cir. 1994) ("[T]he incident on the elevator . . . would no doubt be even more frightening to a reasonable woman in [the plaintiff's] position who, prior to that incident, had endured more than two years of verbal harassment."); Burns v. McGregor Elec. Indus., 989 F.2d 959, 962 n.3 (8th Cir. 1993) ("[I]n hostile environment litigation under Title VII, the appropriate standard is that of a reasonable woman under similar circumstances."); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) ("In a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be 'the reasonable woman' since the plaintiff in this type of case is required to be a member of a protected class and is by definition female.").

For commentary urging the adoption of a more contextualized reasonable victim or reasonable woman standard, see Juliano & Schwab, *supra* note 10, at 23 n.56 (citing Gillian K. Hadfield, *Rational Woman: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151 (1995) (advocating the use of a "rational woman" standard)); Sarah A. DeCosse, *Simply Unbelievable: Reasonable Women and Hostile Environment Sexual Harassment*, 10 LAW & INEQ. 285 (1992) (arguing that the reasonable woman standard challenges stereotyped roles and permits a

conditions as hostile or abusive, the complainant must show that the environment adversely affected her.[105] If the conduct is objectively perceived as severe and pervasive, and the complainant presents evidence that she subjectively perceived it as such, there is no need to demonstrate psychological injury.[106] The effect on the complainant's psychological well being would only be "relevant to determining whether the plaintiff [subjectively] found the environment abusive."[107]

If the complainant proves all of the elements of either a quid pro quo or a hostile environment claim, the complainant has established a violation of Title VII's prohibition against sex discrimination. This Note focuses on one element shared by both claims. In order to maintain either claim, the complainant must prove that the challenged conduct was unwelcome.

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broader scope of actionable claims); Kim L. Kirn, *The "Reasonable Woman" Standard in Sexual Harassment Cases*, 81 ILL. B.J. 404 (1993) (encouraging the adoption of the reasonable woman test); Robert J. Shoop, *The Reasonable Woman in a Hostile Work Environment*, 72 EDUC. L. REP. 703 (1992) (arguing that the reasonable woman standard makes the legal system more responsive to women); Angela Baker, Comment, *Employment Law—The "Reasonable Woman" Standard under* Ellison v. Brady*: Implications for Assessing the Severity of Sexual Harassment and the Adequacy of Employer Response*, 17 J. CORP. L. 691 (1992) (noting that *Ellison* advocated that the reasonable woman standard allows courts to examine the differences in the societal power of men and women); Deborah S. Brenneman, Comment, *From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281 (1992) (advocating the reasonable woman standard because it neutralizes the divergent perceptions between men and women of what constitutes appropriate sexual behavior); Cheryl L. Dragel, Note and Comment, *Hostile Environment Sexual Harassment: Should the Ninth Circuit's "Reasonable Woman" Standard Be Adopted?*, 11 J.L. & COM. 237 (1992) (arguing that the reasonable woman standard appears to ease burdens on female plaintiffs seeking to establish hostile environment claims); Deborah B. Goldberg, Note, *The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases*, 2 CARDOZO WOMEN'S L.J. 195 (1995) (advocating adoption of the reasonable woman standard and arguing that the traditional reasonable person standard hurts women), and also Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151 (1994) (criticizing both the objective reasonable person and the reasonable woman standard and urging the adoption of the contextualized reasonable victim standard because it is gender-neutral and allows recognition of a male-dominated workplace that exists in a society that subordinates women while screening out frivolous claims from hypersensitive plaintiffs).

105. *See Harris*, 510 U.S. at 21–22 ("[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

106. *See id.* at 23 ("The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.").

107. *Id.*

## II. PROVING THAT THE CHALLENGED CONDUCT WAS UNWELCOME

### *A. The Burden of Proof*

Although the United States Supreme Court has not addressed the issue directly, case law suggests that in order to maintain a Title VII claim of sexual discrimination for either quid pro quo or hostile environment harassment, the complainant must prove as part of her prima facie case that her conduct indicated that she did not welcome the challenged sexual conduct.[108] Case law suggests that the complainant has the burden of proving that the challenged conduct was unwelcome by a preponderance of the evidence.[109] The "[p]reponderance of the evidence" means "the greater weight of evidence," or "the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate."[110] Note that if the evidence is equally balanced or of equal probative value, the complainant loses because the burden of production and persuasion fall upon the plaintiff.[111] To meet her burden, the plaintiff must demonstrate that she did not solicit or incite the defendant's advances or that she found his advances undesirable or offensive.[112]

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108. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) (emphasizing that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were '*unwelcome*' ") (emphasis added); 29 C.F.R. § 1604.11(a) (1998) ("Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment.").

109. *See* Perkins v. General Motors Corp., 709 F. Supp. 1487, 1499 (W.D. Mo. 1989) ("Plaintiff bears the burden of persuasion as to each essential element of her claim; she must establish the existence of each element by a preponderance of the credible evidence."). *See also* Weiner, *supra* note 19, at 625 n.18 (noting Professor Radford's argument that although the Court has not directly addressed the allocation of the burden of proof in sexual harassment cases, its language in other cases has indicated that there is an "actual affirmative requirement that the plaintiff prove at trial" that her conduct put her harasser on notice that he was unwelcome, and noting the Professor's observation that the combination of the *Vinson* decision and the EEOC's guidelines has led to the general adoption of this formulation of the plaintiff's burden) (citing Radford, *infra* note 139, at 510).

110. *Perkins*, 709 F. Supp. at 1499 (internal quotation marks and citation omitted).

111. *See* Smith v. United States, 726 F.2d 428, 430 (8th Cir. 1984).

112. *See* Burns v. McGregor Elec. Ind. Inc., 989 F.2d 959, 962 (8th Cir. 1993) (noting that "[w]hether the behavior is unwelcome is to be determined by weighing whether the conduct was uninvited and offensive"); Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (noting that the challenged conduct "must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive"); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 883 (D. Minn. 1993) ("The threshold for determining that conduct is unwelcome is that the em-

### *B. The Victim's Conduct as the Measure*

In determining whether the plaintiff has met her burden of proof, the court will examine "the plaintiff's words, deed, and deportment."[113] The court will look at "'the record as a whole' and 'the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'"[114] Specifically, the court will examine the following facts:

a) Whether plaintiff by her own conduct indicated that the alleged sexual advances were unwelcome.

b) Whether the plaintiff substantially contributed to the alleged distasteful atmosphere by her own "profane and sexually suggestive conduct."

c) Whether the plaintiff in response to evidence that at various times she had willingly participated in the conduct now complained of can "identify with some precision a point at which she made known to her co-workers or superiors that such conduct would [henceforth] be considered offensive."

d) Whether and, if so, when, plaintiff reported or complained about any of the incidents at issue.

e) Whether plaintiff's account of the "unwelcome" sexual conduct is sufficiently detailed and internally consistent so as to be plausible.[115]

Note that the focus of the unwelcomeness inquiry is on "whether [the complainant] by *her conduct indicated* that the alleged sexual advances were unwelcome,"[116] not on whether the

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ployee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive.") (internal quotation and citations omitted).

113. *Vinson*, 477 U.S. at 69, *cited in Jenson*, 824 F. Supp. at 883 ("Women's actions and use of language is relevant evidence in determining whether women found particular conduct unwelcome.").

114. 29 C.F.R. § 1604.11(b) (2000). The courts are not bound by the EEOC regulations, but the Supreme Court has suggested the administrative agency be given substantial deference in sexual harassment cases. *See Vinson*, 477 U.S. at 65 (noting that "while [the EEOC's regulations are] not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

115. *Perkins*, 709 F. Supp. at 1499 (internal citations omitted).

116. *Vinson*, 477 U.S. at 68 (emphasis added).

complainant had previously voluntarily engaged in sexual relations with the defendant.[117]

On the one hand, voluntary participation in occasional sexual banter, use of sexually explicit language, or sexual conduct by an employee with co-workers will not preclude a sexual harassment claim.[118] Willing participation in private and consensual sexual activities does not constitute a waiver of legal protections against unwelcome and unsolicited sexual harassment in the workplace.[119] Voluntary participation in these kinds of suggestive activities will not bar a claim if the employee can "show that at some point she clearly made her co-workers and supervisors aware that in the future such conduct would be considered 'unwelcome.'"[120] Complaining or reporting the offensive conduct can constitute such notification.[121] However, because the focus of the inquiry is on whether the complainant's *conduct* indicated that the sexual advances were unwelcome, notification that the challenged conduct was unwelcome need not be expressed verbally or by formal complaint. An employee can effectively communicate unwelcomeness

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117. *See Vinson*, 477 U.S. at 60 (finding that the fact that the plaintiff had had sexual intercourse with the defendant forty to fifty times did not preclude a sexual harassment claim); Shrout v. Black Clawson Co., 689 F. Supp. 774, 779–80 (S.D. Ohio 1988) (holding that the plaintiff was subject to unwelcome sexual harassment regardless of having maintained a voluntary, consensual sexual relationship with the defendant for several years).

118. *See* Burns v. McGregor Elec. Indus., 989 F.2d 959, 963–64 (8th Cir. 1993) (finding that the plaintiff's decision to pose nude for a national magazine outside of working hours did not preclude a finding that she did not welcome sexual harassment at work); Swentek v. USAIR Inc., 830 F.2d 552, 557 (4th Cir. 1987) (stating that "[p]laintiff's use of foul language and sexual innuendo in a consensual setting d[id] not waive her legal protections against unwelcome harassment").

119. *See Swentek*, 830 F.2d at 557 (citing Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983) ("A person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment.")).

120. Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1564 & n.12 (M.D. Fla. 1990) (holding that plaintiff's willing and frequent participation in the challenged conduct coupled with her failure to "report [the conduct] to management until months later and then only by an off-hand reference during informal conversation in a back stairwell with her supervisor" precluded a finding that she had clearly indicated by her conduct that the objectionable actions were unwelcome), *aff'd*, 949 F.2d 1162 (11th Cir. 1991)). *See also* Kennedy v. GN Danavox, 928 F. Supp. 866, 871–72 (D. Minn. 1996) (holding there was no evidence conduct was unwelcome where the plaintiff failed to verbally or nonverbally communicate his discomfort when his supervisor used the word "love" in a letter to him and where she gave him expensive, personal gifts).

121. *See* Carr v. Allison Gas Turbine Div., GM Corp., 32 F.3d 1007, 1010–12 (7th Cir. 1994) (indicating conduct was unwelcome due to plaintiff's violent resentment of her co-workers' conduct and although "[a]t first she disregarded the harassment," she eventually complained repeatedly to her immediate supervisor and eventually resigned); Martin v. City of Youngstown, No. 91-3335, 91-3336, 1992 WL 91977, at **3-4 (6th Cir. Apr. 28, 1992) (finding that the employee's report of harassing behavior to supervisor rebutted allegation that she welcomed conduct despite the fact that she participated in similar activities).

by withdrawing from physical contact and changing the subject of a sexualized conversation,[122] by pushing the alleged harasser away and leaving the room,[123] or by making diverting comments and sarcastic remarks.[124] Contemporaneous[125] protest in some form is strongly advised because it may stop the harassment before it becomes more serious. Furthermore, it will provide objective evidence that the sexual harassment actually occurred and demonstrate the reasonableness of the employee's conduct in seeking to avoid the harm, which may assist the victim should an employer assert an affirmative defense to vicarious liability.[126]

Similarly, the complainant's voluntary contribution "to the sexualization of the workplace" will not preclude a sexual harassment

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122. *See* Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990) (finding that employee effectively communicated unwelcomeness by withdrawing her hands when cupped by the defendant's and changing the subject of an objectionable conversation; "evidence that employee consistently demonstrated her unalterable resistance to all sexual advances is enough to establish their unwelcomeness").

123. *See* Jones v. Wesco Investments, Inc., 846 F.2d 1154, 1155 (8th Cir. 1988) (finding that pushing supervisor away, informing him she was uninterested, and leaving the room was sufficient protest).

124. EEOC Dec. 84-1, 33 F.E.P. Cases 1887, 1888, 1890 (1983) (finding that diverting comments, "tone of voice, disgusted looks, short, brief" and/or sarcastic remarks were sufficient to indicate to the defendant that his conduct was unwelcome).

125. "For a complaint to be 'contemporaneous,' it should be made while the harassment is ongoing or shortly after it has ceased." E.E.O.C. Policy Guidance on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6685 n.7 (March 19, 1990).

126. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998) (holding that there needs to be some objective proof that the conduct was undesirable or offensive; the victim has an affirmative duty to use reasonable means under the circumstances to avoid an ongoing violation); Hartsell v. Duplex Products, Inc., 123 F.3d 766, 774 n.7 (4th Cir. 1997) (noting that female sales assistant's failure to complain to her husband or to alleged harassers about alleged sexual harassment until after confrontation weakened her claim that harassment was unwelcome); Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1564 (M.D. Fla. 1990) (finding that conduct was not "unwelcome" where the plaintiff did not report offensive behavior until months after it happened and, even then, only in the course of casual conversation with her supervisor), *aff'd*, 949 F.2d 1162 (11th Cir. 1991); Spencer v. Gen. Elec. Co., 697 F. Supp. 204, 210 (E.D. Va. 1988) (noting that the plaintiff's failure to complain for more than two years was "particularly telling"); E.E.O.C. Policy Guidance, *infra* note 142, at 7–8 (noting that "victims are well-advised to assert their right to a workplace free from sexual harassment" because this "may stop the harassment before it becomes more serious;" noting that a contemporaneous complaint is not a necessary element to a sexual harassment claim, but it may provide "persuasive evidence that the sexual harassment in fact occurred as alleged," particularly if "there is some indication of welcomeness or if the credibility of the parties is at issue; and noting that if a complaint was not made, "the investigation must ascertain why"); Jane E. Larson & Jonathan A. Knee, *We* Can *Do Something About Sexual Harassment*, WASH. POST, Oct. 22, 1991, at A21 (noting "senators repeatedly cited Prof. Anita Hill's failure to file a sexual harassment complaint against [Clarence Thomas] as a reason not to believe her"). *See also* Juliano & Schwab, *supra* note 10, at 29 (noting that plaintiffs who had not reported the sexual harassment to a supervisor lost their cases in court 76.2% of the time).

claim if the complainant's behavior is qualitatively different from the challenged conduct.[127] A complainant's use of foul language and sexual innuendo would not, in turn, welcome sexual graffiti, photographs, cartoons, and coarse language reflecting an anti-female attitude, nor would it welcome physical acts reflecting a sexual motive, if she exhibited her disdain for such actions by removing the pornographic pictures, erasing the graffiti, complaining about the verbal comments, and telling her co-workers that their actions were improper.[128] Foul language and sexual innuendo is different in kind and degree from sexually motivated physical acts, misogynistic language, and pornographic pictures, and thus, the co-worker's response to the complainant's conduct would not be considered reciprocal.

On the other hand, if the complainant participated in the challenged sexual conduct by *significantly* contributing to the offensive environment or *regularly* instigating sexual conversations or activities with co-workers, the court may find, based on the totality of the circumstances, that the challenged conduct was welcome.[129] Examples of voluntary sexual behavior which would preclude a claim that challenged sexual conduct was unwelcome include using offensive language while engaging in exhibitionist behav-

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127. *See* LINDEMANN & KADUE, *supra* note 10, at 50.

128. *See* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 883 (D. Minn. 1993) (finding that the defendant's conduct was unwelcome because although the plaintiffs cursed and used coarse language, their conduct was qualitatively different in kind and degree).

129. *See* Reed v. Shepard, 939 F.2d 484, 486–88, 491–92 (7th Cir. 1991) (holding plaintiff's admitted toleration of her atrocious work environment and her willing participation in the crude shenanigans prevented her from claiming conduct reciprocated in kind was unwelcome); Perkins v. Gen. Motors Corp., 709 F. Supp. at 1497–98 (W.D. Mo. 1989) (holding no hostile work environment where men in shop made catcalls, touched the plaintiff's breasts, made comments about the plaintiff's genitals, placed a hot dog in a condom on the plaintiff's desk, made "humping" and masturbation motions in front of the plaintiff, told sexual jokes, shook their genitals at each other and used profanity, because the plaintiff encouraged the conduct by using "shop talk," "goosing" men, referring to their genitals as "pickles," and on the few occasions that she did complain, the conduct was dealt with appropriately), *aff'd in part and rev'd in part sub nom.*, Perkins v. Spivey, 911 F.2d 22 (8th Cir. 1990); Hicks v. Baltimore Gas, 829 F. Supp. 791, 796 (D. Md. 1992) (noting that plaintiff's sexual harassment claim failed because she admitted calling co-workers names, subjecting them to offensive language, and behaving erratically and angrily herself), *aff'd*, 998 F.2d 1009 (4th Cir. 1993); *Weinsheimer*, 754 F. Supp. at 1564 (finding that the "plaintiff's willing and frequent involvement in the sexual innuendo prevalent in her work area indicate[d] that she did not find the majority of such conduct truly 'unwelcome' or 'hostile'"); McLean v. Satellite Tech. Serv., Inc., 673 F. Supp. 1458, 1459–60 (E.D. Mo. 1987) (finding plaintiff's "lusty libido" and failure of virtue indicated that the conduct would have been welcome); Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 1327 (S.D. Miss. 1986) (finding conduct could not have been unwelcome because the "plaintiff often made jokes about sex and participated in frequent discussions and bantering about sex") *aff'd*, 924 F.2d 971 (5th Cir. 1987).

ior, giving suggestive gifts, and engaging in sexual horseplay;[130] frequently "us[ing] crude and vulgar language," "initiat[ing] sexually oriented conversations," asking male employees about their marital and extramarital sexual relationships while "volunteer[ing] . . . intimate details" about her own marital and premarital sexual relationships;[131] and participating in sexual jokes coupled with the use of extremely vulgar language.[132] Notice that the unwelcomeness inquiry is very fact specific and dependent on the fact finder's evaluation of each individual case. Distinguishing sexual conduct that is welcome from that which is unwelcome is often difficult[133] because "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated and flatly rejected" sexual advances is often elusive.[134] For this reason, the inquiry is problematic, especially with regard to a sensitive issue such as sexual norms.

### *C. The Problems*

There are two problems with proving that the challenged conduct was unwelcome that unnecessarily discourage victims from filing legitimate sexual harassment claims. The first problem is that the legal framework used to prove that challenged conduct is unwelcome unfairly places the burden of proving this element on the victim. Instead of reducing sexual discrimination at work, it protects the undercurrent of sexuality in the workplace at the expense of the emotional and bodily integrity of the female employee.[135] It preserves male access to "traditional" workplace sex "by the operation of sexism in the law."[136]

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130. *See Reed*, 939 F.2d 484, 486–87, 491–92 (finding that the challenged conduct was welcome and that the plaintiff had amazing resilience and relished reciprocating in kind).

131. Gan v. Kepro Circuit Sys., 28 Fair Empl. Prac. Cas. (BNA) 639, 640 (E.D. Mo. 1982).

132. *See* Ramsdell v. Western Mass. Bus Lines, 615 N.E. 2d 192, 194 (Mass. 1993) (finding that even though the environment was " 'rife with sexually explicit language and sexual innuendos,' " the plaintiff's use of extremely vulgar language and her participation in sexual jokes precluded a claim that the conduct was unwelcome).

133. *See* Nichols v. Frank, 42 F.3d 503, 510–11 (9th Cir. 1994).

134. Barnes v. Costle, 561 F.2d 983, 999 (D.C. Cir. 1997) (MacKinnon, J., concurring).

135. *See* Estrich, *supra* note 19, at 828.

136. *Id.* at 815 (noting that in everyday life the "male domain is protected by the wielding of real power—economic, physical, psychological, and emotional" and that in law, "it is protected by . . . manipulating [ ] doctrines to embrace female stereotypes . . . by the operation of sexism in law").

Placing the burden of proof on the plaintiff allows the courts to inject their own moral assessments of how women should or should not behave[137] into their legal judgments in a way that hurts women because it focuses on the woman's conduct as seen from a man's perspective. This makes litigation more difficult for victims, aiding in the harassment and perpetuating some of the most pernicious and demeaning sexual stereotypes of women.[138]

First, placing the burden of proof on the plaintiff rests on the untenable presumption that most people welcome sexual advances in the workplace. Some courts and commentators claim that sexual interaction at work is socially useful and therefore should be protected because it may be beneficial or at least nonoffensive.[139] They claim that sexual interaction at work is socially useful[140] because an undercurrent of appropriate sexuality in the workplace may stimulate people to work harder, to be kinder, to react favorably, to develop emotional intimacy, and to lace conversations with humor and good-natured teasing.[141] The unwelcomeness element of sexual harassment claims exists, they argue, to distinguish this socially useful or nonoffensive conduct from actionable sexual harassment.[142]

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137. *See* Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 963 (8th Cir. 1993) (overruling the district court's finding that a woman who had posed nude for a biker magazine could not be offended by sexual advances at work and noting that the plaintiff's "private life, regardless how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her workplace by her employer").

138. *See* Estrich, *supra* note 19, at 826.

139. *See* Barnes v. Costle, 561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring) (noting that "[s]exual advances may not be intrinsically offensive .... [because they involve] social patterns that to some extent are normal and expectable" ); LINDEMANN & KADUE, *supra* note 10, at 135 (noting that "sexual advances often have social utility and often are not inherently offensive"); Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 541 (1994) (noting that a sexual undercurrent at work "may be beneficial or at least nonoffensive to many individuals of both genders"). *See also* Estrich, *supra* note 19, at 828 (noting that it has been argued that the notice requirement is imposed on the woman because men need "love," and arguing that "at the very least ... we might demand that such men look for love outside of work, or at least ask for it first") (citations omitted).

140. *See* LINDEMANN & KADUE, *supra* note 10, at 135. *See also Nichols*, 42 F.3d 503, 510 ("[C]ourts are understandably reluctant to chill the incidence of legitimate romance. People who work closely together and share common interests often find that sexual attraction ensues. It is not surprising that those feelings arise even when one of the persons is a superior and the other subordinate.... [We tend] to find our friends, lovers, and even our mates in the workplace...."). *But see* Estrich, *supra* note 19, at 860 (asserting that the social utility of consensual sexual conduct in the workplace does not outweigh the disadvantages).

141. *See* Radford, *supra* note 139, at 542.

142. *See id.* at 504 ("The stated rationale for the unwelcomeness element of the definition of sexual harassment is that it is difficult to distinguish harassing sexual conduct from conduct that occurs simply because 'sexual attraction may often play a role in the day-to-day social exchange between employees.'") (citing Policy Guidance on Current Issues of Sexual

The EEOC seems to agree. The EEOC has defined sexual harassment to include "unwelcome" sexual conduct.[143] In conjunction with its definition, the EEOC has "emphasized that '[s]exual attraction is a fact of life' that 'may often play a role in the day-to-day social exchange between employees in the workplace,'"[144] "that Title VII rules must be carefully crafted so as not to intrude on 'purely personal, social relationship[s],'"[145] and that "'[s]exual harassment continues to be addressed in separate guidelines because it raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus, may warrant separate emphasis.'"[146]

The commentators note that the rationale for including the unwelcomeness element of sexual harassment claims "resembles that for including an 'offensiveness' element in the definition of battery."[147] To state a claim of battery, the plaintiff must prove that the challenged contact was offensive because "in a crowded world, a certain amount of personal contact is inevitable, and must be accepted."[148] If physical contact is considered "normal" or "likely to occur between people in day-to-day life," it is not actionable battery.[149] Similarly, sexual contact in the workplace that is considered "normal" or part of an employee's daily life is protected by the unwelcomeness element of sexual harassment claims and is not considered actionable sexual harassment.[150]

Many courts have accepted this rationale, although it fails to recognize that "[w]hile physical contact may be inevitable and normal in a crowded world, sexual advances *in the workplace* need not be."[151] The fact that "offensive sexuality is so routinely considered

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Harassment, E.E.O.C. Notice N-915-050, at 7 (March 19, 1990)) [hereinafter EEOC Policy Guidance].

143. 29 C.F.R. § 1604.11(a)(1998). *See also supra* notes 49, 50 and accompanying text.

144. Radford, *supra* note 139, at 509 (quoting Brief for the United States and Equal Employment Opportunity Commission as Amici Curiae at E-6, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), reprinted in Daily Labor Report (BNA) No. 241, at E-1 (Dec. 16, 1985) [hereinafter EEOC Brief]).

145. Radford, *supra* note 139, at 509 (quoting Preamble to Interim Guidelines on Sex Discrimination, 45 Fed. Reg. 25,024 (1980)).

146. Radford, *supra* note 139, at n.187 (quoting the EEOC's proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266, 51,267 (1993) (to be codified at 29 C.F.R. § 1609) (proposed Oct. 1, 1993).

147. *Id.* at 504.

148. Radford, *supra* note 139, at 504 & n.18 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 42 (5th ed. 1984)).

149. *Id.*

150. *See id.*

151. *Id.* (emphasis added).

normal, abuse of power acceptable, and the dehumanizing of women in sexual relations unremarkable,"[152] does not mean that it should continue to be acceptable behavior, given that Title VII invalidates all "artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the bases of . . . impermissible classification[s]" such as sex.[153] Tort law requires that a doctor secure affirmative, informed consent before he touches a woman, but according to the current legal framework, an employer need not seek a woman's consent; he may legally touch any subordinate or co-worker until and unless she expresses, through her conduct, non-assent.[154]

Assuming that sexual conduct in the workplace is beneficial, "normal," or likely perpetuates the myth that most people are not offended by sexual attention.[155] Accepted sociological and psychological findings about women's attitudes toward sexual attention at work, however, contradict this assumption.[156] Psychological and sociological research indicates that most people would find sexual attention at work humiliating, distracting, and potentially harmful to their ability to perform their jobs successfully.[157]

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152. Estrich, *supra* note 19, at 860.

153. Barnes v. Costle, 561 F.2d 983, 987 (1977) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)) (internal quotation marks omitted).

154. *See* Estrich, *supra* note 19, at 828.

155. *See* Radford, *supra* note 139, at 505.

156. *See id.* at 505 & n.23; *Id.* at 522 & n.147 (noting studies that emphasize that the majority of women do not like sexual encounters in the workplace).

157. *See id.* at 526. For psychological and sociological research supporting this assertion, see *id.* at 520–24. Some commentators argue that the same is true of racial and ethnic harassment. *See id.* at 526, 529. As with sexual harassment, racial and ethnic harassment is humiliating, distracting, and potentially harmful to a person's ability to perform successfully at work. *See id.* at 526. Yet in racial and ethnic harassment cases, the challenged conduct is presumed unwelcome. *See id.* at n.187 (noting that "racial slurs are intrinsically offensive and presumptively unwelcome") (citing EEOC Brief, *supra* note 144, at E-5). The courts in racial and ethnic harassment cases focus on the severity and pervasiveness of the harasser's conduct and not on whether the challenged conduct was unwelcomed. *See id.* at 526, 529 (citing for support Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 (7th Cir. 1991) (examining the effect of a mention of the Ku Klux Klan on a black worker and noting that "[p]lainly, any black would find this graffiti threatening")). Because the psychological and sociological studies support the same presumption for both forms of harassment in the workplace, commentators urge that sexual harassment cases be brought in line with racial harassment cases. The author notes, however, that racial and gender classifications are treated differently in other areas of the law. *See, e.g.*, Davis v. Monsanto Chem. Co., 858 F.2d 345, 348 n.1 (6th Cir. 1988) (justifying a different treatment of racial harassment as opposed to sexual harassment by pointing to the different level of constitutional scrutiny that is applied in race discrimination as opposed to sex discrimination cases). For example, a race-based classification challenged pursuant to the Equal Protection Clause of the Constitution will be examined as a suspect classification subject to strict scrutiny while a gender-based classification will be examined as a quasi-suspect classification subject to intermediate scrutiny. Before coming to the conclusion that race and sexual harassment cases should be dealt

Second, placing the burden of proof on the plaintiff focuses the inquiry on the plaintiff and her conduct, not on the alleged perpetrator and the challenged conduct.[158] This implies that the victim is somehow to blame for the harasser's conduct, that she must have behaved, spoken, or dressed in a way that invited the harasser, that she somehow "asked for it." It also defines the issue "more by the actions, reactions, motives, and inadequacies of the victim than by those of the defendant."[159] This places the focus on the "appropriateness of the male-female relationship and [on] the woman's role in provoking, accepting, endorsing, and affirming" the challenged conduct.[160] The victim, after being sexually harassed at work, must then tolerate "the indignity of the Court's presumption that she is to blame."[161] This implied presumption overlooks the fact that the harasser has free will and can choose to control his behavior. If an employee behaves, speaks, or dresses unprofessionally, the issue may be handled through the appropriate supervisory channels. It should never legally justify sexual harassment.

Third, placing the burden of proof on the plaintiff predisposes the court to disbelieve the plaintiff. It privileges the possibility that she may be lying or filing a frivolous suit to get even because she is vengeful or perhaps scorned.[162] Evidence suggests, however, that female employees rarely file frivolous or meritless sexual harassment claims.[163] Psychological and sociological studies demonstrate

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with identically, the history, the reasons, and the differences relating to the respective classifications should be closely analyzed. The author has not addressed this issue because it is beyond the scope of this Note.

158. *See* Estrich, *supra* note 19, at 828.

159. *Id.* at 815.

160. *Id.* at 814.

161. *Id.* at 829 ("Women are invisible as anything other than potential sexual objects of men. . . . And in making the determination of the harassment of women dependent upon the extent of 'sexually provocative' behavior *by* women, the Court adopts a rule which holds women responsible for their own torment. Thus, the victim of harassment . . . suffers not only the direct injury of sexual abuse, but also the indignity of the Court's presumption that she is to blame.").

162. *See* Radford, *supra* note 139, at 529 n.187 (noting "that the 'unwelcomeness test is at root the product of an outdated stereotype' about women using legal action to abuse lovers who have spurned them") (quoting Michael D. Vhay, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 344 (1988)). *But see* Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994) (expressing concern about frivolous suits because "unfounded charges, or charges based on misconceptions or misunderstandings, can wrongfully destroy careers, if not lives").

163. "[A] great deal of sexual harassment does not result in the filing of formal charges." Juliano & Schwab, *supra* note 10, at 2 n.5 (citing Jane E. Larson & Jonathan A. Knee, *We Can Do Something About Sexual Harassment*, WASH. POST, Oct. 22, 1991, at A21 (noting that "only five to 10 percent of women who are sexually harassed ever formally complain")).

victims' extreme reluctance to file sexual harassment complaints.[164] Victims do not file sexual harassment claims because they are "afraid of making waves, afraid of confrontation, and afraid of being retaliated against or losing their jobs,"[165] afraid of "reprisal and blame, concern[ed] about loss of privacy, or the belief that nothing would be done in response to the complaint,"[166] even concerned for the harasser because of the gravity of making a formal, public complaint.[167] Instead of filing claims, evidence demonstrates that the most common response to sexual harassment is passivity and silence.[168] As opposed to filing claims, sexual harassment victims commonly change jobs.[169] They may also ignore the behavior or ignore the harasser, tell the harasser to stop and make a joke of the behavior, or go along with the harassment.[170]

In any event, protection against frivolous claims already exists. There is no need to use the unwelcomeness element for this purpose. The fact finder still has an obligation to determine the credibility of both the target and the alleged harasser. Furthermore, in order to establish a quid pro quo claim successfully, the plaintiff must prove that the acceptance or rejection of the unwelcome sexual conduct resulted in tangible and detrimental employment action.[171] Similarly, in order to establish a hostile environment claim successfully, the plaintiff must prove by a preponderance of the evidence that a reasonable person would consider the challenged conduct severe and pervasive.[172] The court's assessment of both parties and all of the witnesses combined with the inherent protections provided by the elements of the respective claims will suffice to protect the alleged harasser from the possibility of a frivolous claim.

Finally, the burden of proof is placed on the plaintiff even though the plaintiffs are almost exclusively female, even though

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164. *See* Radford, *supra* note 139, at 523 & nn.149, 150 (noting a study that indicated that only five percent of the targets filed a formal complaint); Weiner, *supra* note 19, at 636 & n.71.

165. Weiner, *supra* note 19, at 636.

166. Radford, *supra* note 139, at 523.

167. *See id.* at 523 & n.152 (noting a researcher's comments: "Women are aware of the gravity of making a formal, public complaint; women won't do that lightly. If there is a reasonable excuse for a man's behavior, women are very forgiving.").

168. *See* Radford, *supra* note 139, at 523 & n.154 (noting a study that indicates that the most common reaction of targets of sexual harassment is "passive"); Weiner, *supra* note 19, at 627 & n.29, 636 & nn.71–73.

169. *See* Radford, *supra* note 139, at 523 & n.150.

170. *See id.* at 523 & nn.154–56.

171. *See supra* notes 78–80 and accompanying text. *See generally* discussion *supra* Part I.B.1.

172. *See* notes 94–105 and accompanying text.

they are likely to be less powerful and more economically dependent than men, even though psychological and sociological studies indicate that "[w]omen tend to interpret a broader range of behaviors as constituting sexual harassment than do men,"[173] and even though men are more likely to initiate sexual behavior because they are less likely to view it as unwelcome.[174] These findings suggest that the presumption that sexual conduct at work is welcomed should be reversed in the context of sexual harassment and that the burden of proving the more unlikely factual situation should be placed on the actor, the person most likely to misinterpret the situation.[175] If a man is likely to misunderstand a woman's ambiguous behavior, then that man should have the burden of making sure the conduct is welcome before proceeding, and at trial he should have the burden of proving it objectively. The potential perpetrator, or his employer, is in the best position to control his actions and to guard against, prevent, and correct misbehavior. For these reasons, the burden of proving that the challenged conduct is welcome should be on the defendant.[176]

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173. Radford, *supra* note 139, at 521–522 & nn.139, 141, 145 (citing a 1989 study noting a "tendency among men to see promiscuous, seductive, and generally 'sexy' behavior—where women see or intend to project only friendly and outgoing behavior," and noting "clear and consistent" results . . . showing that "[m]en, especially when observing women's behaviors, were more likely to perceive sexual motives or intentions (flirtatiousness, promiscuity, seductiveness, sexiness) than women"); *see also* Weiner, *supra* note 19, at 635.

174. Radford, *supra* note 139, at 521 & nn.140, 148 (citing a study noting that sixty-seven percent of the males surveyed "said they would be 'flattered' if they were propositioned by a woman at work, while only seventeen percent of the women responded that they would consider a proposition by a male flattering").

175. *See id.* at 543 (noting that courts should place the burden of proof on those who would use power-oriented sexual conduct in the workplace because this would hold them accountable for not determining in advance whether their conduct is acceptable to the person toward whom they direct it); Weiner, *supra* note 19, at 635 & n.70 (noting a "study [that] concluded that women who intend only to be affable will often be misinterpreted" and that the "party who is trying to establish the more improbable set of facts . . . ought to have the burden of proof") (internal citations omitted).

176. *See* Estrich, *supra* note 19, at 839 (noting that in quid pro quo cases it hardly seems too much to expect that as between the powerful blackmailer and his less powerful victim, he, rather than she, should bear the burden of the blackmail); Radford, *supra* note 139, at 526 (noting that the burden of proving welcomeness rightly belongs to the person who perpetrates the sexual conduct); *see also* Radford, *supra* note 140, 528 & n.179 (noting that logic and social policy dictate that if existing problems cannot be alleviated without someone changing his or her behavior, the person causing the problem should be the one who is forced to change, as is the case for drunk drivers). Some commentators may argue that requiring the perpetrator to prove the welcomeness of his conduct is tantamount to assuming him "guilty until proven innocent," but this argument ignores the fact that Title VII is not a criminal statute aimed at punishing the harasser. Radford, *supra* note 139, at 545. Rather, Title VII is designed to discourage employers from discriminating against employees on the basis of gender. *See* discussion *supra* Part I.A.

The second problem is that the legal framework used to prove that the challenged sexual conduct was unwelcome is used by the defense to inflame the fact finder's prejudice through "intrusive, irrelevant, [and] damaging" inquiries[177] that may expose the plaintiff to "embarrassment, loss of privacy, and ... shame."[178] Distinguishing between sexual conduct that is welcome and sexual conduct that is unwelcome is often difficult[179] because "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected" sexual advances is often elusive[180] and "presents difficult problems of proof [that] turn largely on credibility determinations."[181] Frequently, what actually occurred is unclear[182] because the parties tell conflicting stories[183] and often there are no percipient witnesses.[184] Defense attorneys may take advantage of this difficulty and use it to convince the fact finder that the plaintiff is unworthy of protection. Unscrupulous defense attorneys may attempt to show that the plaintiff is either "a nut or a

177. Weiner, *supra* note 19, at 621.

178. Estrich, *supra* note 19, at 833.

179. *See* Nichols v. Frank, 42 F.3d 503, 510–11 (9th Cir. 1994) ("[W]hat constitutes the most blatant form of sexual harassment ... is not always answered easily.... [I]t is frequently not clear what the facts actually are. The parties may tell totally conflicting stories, in the trial court and elsewhere, and there are often no percipient witnesses. When there is a dispute over what transpired, we rely on the findings of the fact-finder, unless those findings are clearly wrong."); Radford, *supra* note 139, at 529 n.187 (noting that "sexual advances and innuendoes are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous") (citing EEOC Brief, *supra*, note 144 at E-5).

180. Barnes v. Costle, 561 F.2d 983, 999 (D.C. Cir. 1977) (MacKinnon, J., concurring). *See Nichols*, 42 F.3d at 510 ("Whether particular conduct is appropriate or whether it crosses the line is the subject of disagreement and controversy, always heated and often legitimate. Public opinion can change rapidly. It is quite possible for conduct that is acceptable today to become unacceptable tomorrow. One's views are influenced by one's age, sex, national origin, religion, philosophy, education, and experience. There is no uniform attitude towards the role of sex nor any agreement on what is appropriate for inclusion in a code governing sexual conduct.").

181. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986). *Accord* Cuesta v. Texas Dept. of Criminal Justice, 805 F. Supp. 451, 455 (W.D. Tex. 1991) (noting that it is predictable in sexual harassment cases for parties to enter into a "swearing match" where "[a] large part of the [c]ourt's task consequently bec[omes] evaluating the testimony and determining whom to believe" about "alleged activity [that usually] occurs in private, without documentation and beyond the observation of third parties").

182. *See Nichols*, 42 F.3d at 511.

183. *See id.*

184. *See id.*

slut"[185] or attempt to stigmatize the plaintiffs as "liars and whores, as vindictive and spiteful, as villains rather than victims."[186]

In *Meritor Savings Bank v. Vinson*,[187] the Court held that "a complainant's sexually provocative speech or dress is . . . obviously relevant" to the unwelcomeness inquiry. The implication was that if the Court found a woman's speech too inappropriate or her dress too provocative, she would have to tolerate what would otherwise be construed as sexual harassment. In effect, the Court implied that a man may legally treat a woman with less respect if the Court found that what she wore or what she said was "inappropriate;"[188] a woman should beware of what she says and how she dresses for fear that she may provoke a man's sexual advances. This holding opened the door to evidentiary abuses. What the victim wore, how she talked, and whom she slept with became the focus

185. Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rules of Evidence 412*, 48 VAND. L. REV. 1155, 1156 n.1 (1995).

186. Estrich, *supra* note 19, at 813.

187. 477 U.S. 57, 69 (1986).

188. Regarding what a court might regard as "inappropriate" dress, Estrich, *supra* note 19, at 828–29, makes the following observation:

> What is "sexually provocative" dress? Does the Court mean that women who wear short skirts intend to invite sexual advances? That tight sweaters may justly be pled as provocation for otherwise offensive conduct? That men are legally entitled to treat women whose clothes fit snugly with less respect than women whose clothes fit loosely? By accepting the notion of "sexually provocative" clothing, the Court effectively denies women the right to dress as they wish. Women who wear short skirts, take pride in their own bodies, dress for themselves, go out directly from work, wear hand-me-down clothes, have gained weight lately, or even are trying to be attractive to their husbands and boyfriends are all, under the Court's view, presumed to welcome advances by *any* man on the job.

Regarding what a court might regard as "inappropriate," i.e., unfeminine, behavior, Estrich adds:

> A woman who behaves in the most stereotypical ways—complimenting men, straightening their ties, "mov[ing] her body in a provocative manner," let alone eating dinner with the boss on a business trip, or remaining friendly even after rejecting his advances—may find that the sexual advances she rejects are, as a matter of law, not unwelcome. Similarly, women who act too much like men—who use "crude and vulgar language," or choose to eat with the men in the employee lunchroom—cannot be heard to complain of a work site which is "permeated by an extensive amount of lewd and vulgar conversation and conduct." Their "unfeminine" behavior apparently deprives them of protection, whatever the statutory mandate. Like women in rape cases who have sexual pasts, their conduct makes them fair game.

Estrich, *supra* note 19, at 830.

during discovery and at trial.[189] This had the effect of intimidating women and forcing them to think twice before filing a legitimate sexual harassment claim.[190] It placed the vulnerable female worker on the defensive, always considering herself a potential victim, always on guard lest her conduct later be used to prove that she incited or invited the actions of her harasser.[191] The victim was forced to monitor every activity, including speech, dress, physical contact, outside sexual activities, and even personal fantasies for fear that her own actions might be used against her in the unwelcomeness analysis.[192]

These two problems may account for the reason sexual harassment at work remains widespread,[193] even epidemic,[194] yet

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189. *See id.* at 828.

190. *See* Monnin, *supra* note 185, at 1156 ("By disclosing the intimate details of plaintiffs' sex lives, defense lawyers, with the sanction of sexual harassment law, force claimants to think twice about continuing their claims."); Weiner, *supra* note 19, at 636 n.74 ("Defense lawyers ask questions about plaintiffs' sexual lives and personal habits in an effort both to dig up behavior that courts would disapprove of and to intimidate women into not pressing their claims.").

191. *See* Weiner, *supra* note 19, at 641.

192. *See* Radford, *supra* note 139, at 530; Weiner, *supra* note 19, at 641 ("[W]hen a female worker dresses to go to work in the morning, she should consider not only the appropriateness of her attire on a professional level, but also whether her skirt is too short, her high heels to high, or her sandals too revealing. . . . When the worker interacts with her colleagues and supervisors, she should refrain from making sexual remarks in even a joking manner. She should not touch any of her colleagues, nor allow any of them to touch her. . . . [W]hen the worker goes home at night, she should still be aware that her outside activities could be used at some later time to show that she would welcome sexual interplay at work or at least not be offended by it.") (quoting Radford, *supra* note 140, at 546).

193. *See* Juliano & Schwab, *supra* note 10, at 3 ("Widespread sexual harassment has been documented for decades.") (citing Claire Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 217 (noting that nine out of ten women report they have experienced one or more forms of unwanted attention on the job); BARBARA A. GUTEK, SEX AND THE WORKPLACE 46 (1985) (noting that 53.1% of the women identified themselves as victims of sexual harassment); Sexual Harassment in the Federal Workplace, Trends, Progress, Continuing Challenges, U.S. Merit Systems Protection Board at 13 (1995) (noting that 42% of women in a study of federal employees in 1980 reported having experienced harassing behavior; 42% in 1987; and 44% in 1994)).

194. "Sexual harassment in the workplace remains an epidemic." Juliano & Schwab, *supra* note 10, at 2 (citing Andre Mouchard, *Experts: Fewer harass at work*, ORANGE COUNTY REG., Feb. 10, 1996, at C1 (noting that "complaints about sex harassment are on the rise"); *N.H. Sees Jump in Sex Complaints*, BOSTON GLOBE, May 20, 1996, at 23 (noting that "greater awareness is responsible for a 30 percent increase in the number of sexual harassment complaints filed in New Hampshire in the past year")); Elizabeth Shogren, *Sex Harassment Message Often Unheeded, Many Women Contend; Workplace: Passes, groping and offensive comments are still rampant but victims aren't confronting such conduct*, L.A. TIMES, Sept. 12, 1995, at 1. *But see* Don Lee, *Complaints of Sex Harassment Decline in State*, L.A. TIMES, Oct. 14, 1996, at A1 (noting that the number of sexual harassment allegations filed with state employment agencies have dipped 3 percent, ending a decade of consecutive increases).

underreported.[195] The fact that Title VII's protections remain underutilized and ineffective and that victims remain forced to choose between economic survival and sexual harassment suggests a need to reform the legal framework that courts use to determine whether conduct is actionable.

## III. CHANGING THE LEGAL FRAMEWORK COURTS USE TO DETERMINE WHETHER CHALLENGED CONDUCT IS UNWELCOME

Courts should implement three reforms[196] to alleviate the two problems associated with the legal framework that courts use to determine whether challenged conduct is actionable.

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195. *See* Estrich, *supra* note 19, at 833. "Complaints continue to pour into the EEOC, and litigation in state and federal court has expanded." Juliano & Schwab, *supra* note 10, at 2 & n.4 ("In 1990, the Commission received 6,000 sexual harassment complaints. For both 1995 and 1996, the number jumped to more than 15,000 sexual harassment complaints."). However, "a great deal of sexual harassment does not result in the filing of formal charges." *Id.* at 2 n.5 (citing Jane E. Larson & Jonathan A. Knee, *We Can Do Something About Sexual Harassment*, WASH. POST, Oct. 22, 1991, at A21 ("[O]nly 5 to 10 percent of women who are sexually harassed ever formally complain."). "[M]ost disputes are resolved without filing" a claim, and "[m]ost filed cases are settled or dropped." *Id.* at 7 (citing Mark Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 7 (1986) (citing Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1981))). *See also* Monnin, *supra* note 185, at 1158 (noting that "research indicates that sexual harassment remains a vastly underreported form of employment discrimination despite the fact that the incidence of sexual misconduct in the workplace is quite high").

196. In contrast to the suggested reforms, some commentators suggest that the unwelcomeness inquiry is unnecessary and unjustified. *See* Estrich, *supra* note 19, at 826–27; L. Camille Hebert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 587–88 (1995) (arguing that the law should not tolerate any sexual conduct in the workplace and that eliminating the unwelcomeness requirement would "simply result in holding harassers responsible for their inappropriate sexual behavior . . . regardless of the actions of the target of the harassment").

Professor Estrich suggests that in quid pro quo cases, the inquiry is superfluous. By definition, in order for a plaintiff to state a quid pro quo sexual harassment claim, a direct connection between the sexual advances and the job benefit or loss must be established. Estrich, *supra* note 19, at 831. Estrich suggests that the issue is not whether the conduct was unwelcome but whether an employer used his or her power over the employee to coerce an individual into intimate contact. *See id.* Estrich believes this would not bar consensual sex; it would merely prohibit conditioning a job benefit upon sex. *See id.* at 832–33. She argues that even if the employee had no problem trading sex for a promotion, it would be "very difficult to argue" this kind of bargain is "worthy of protection." *See id.* at 832.

In hostile environment cases, Professor Estrich believes that the unwelcomeness inquiry is "utterly gratuitous" "when the environment is not proven objectively to be hostile, because an unwelcome environment which is not objectively hostile does not give rise to liability in any event." Estrich, *supra* note 19, at 833. If the conduct is not objectively unwelcome, the inquiry into the complainant's personal sexual history would have invaded her privacy, but it would not have resulted in liability. *See id.* Alternatively, the inquiry is "gratui-

### *A. Shifting the Burden of Proving Unwelcomeness From the Plaintiff to the Defendant*

First, to alleviate the problems associated with placing the burden of proof on the plaintiff to demonstrate that the challenged conduct was unwelcome, the courts should shift the burden of proof from the plaintiff to the harasser. Instead of requiring alleged victims of sexual harassment to prove that they did not welcome the challenged conduct as part of their prima facie cases, courts should presume that the conduct was unwelcome and require the harasser, after the plaintiff presents a prima facie case, to prove by objective evidence that the plaintiff affirmatively welcomed the conduct.[197] The defendant may prove that the conduct was welcome by showing that it was desirable or considered nonoffensive or clearly solicited, incited, or consented to by the plaintiff.[198] Ambiguous conduct such as silence, a polite "no," evasive behavior, or failure to complain would not constitute affirmative evidence of consent.[199]

For example, in *Dockter v. Rudolf Wolff Futures, Inc.*,[200] the Seventh Circuit affirmed the district court's finding that the plaintiff's initial rejections of the defendant were "neither unpleasant nor unambiguous, and gave [the defendant] no reason to believe that his [conduct was] unwelcome. . . . After one misguided act, in which he briefly fondled plaintiff's breast and was reprimanded by her for doing so, he accepted his defeat and terminated all such conduct."[201] The conduct at issue consisted of the following: The defendant would enter the plaintiff's office, shut and lock the

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tously punitive," because even if the challenged conduct is proven objectively hostile, the harasser may escape liability nonetheless by portraying the victim, through her conduct, as unworthy of the protection. *See id.*

197. *See* Radford, *supra* note 139, at 932.

198. *See supra* note 112 and accompanying text; Radford, *supra* note 139, at 525. Some commentators argue that requiring an employee to affirmatively and objectively determine that his conduct is welcome before proceeding further would discourage and take the romance and spontaneity out of personal, social interactions. *See* Radford, *supra* note 139, at 545. But these limitations apply in the workplace, not in the social realm. *See id.* These incidental restrictions serve a very important purpose—to maintain a working environment that increases productivity by defining limits that respect all workers' rights to reach their greatest potential without unnecessary and unwelcomed interference or distraction from others. *See id.* Individuals expect some restrictions in situations where they deal with others. The workplace is no different.

199. *See* Radford, *supra* note 139, at 532.

200. 913 F.2d 456 (7th Cir. 1990).

201. *Id.* at 459.

door, sit opposite her, and just stare at her.[202] He played with her hair on several occasions.[203] On one occasion, while she bent over to get the mail, the defendant came up from behind her, grabbed her waist, and said "I could drive you crazy."[204] He frequently called her at her home requesting that she meet him at various places.[205] At a restaurant he insisted on sitting on the same side of the booth as the plaintiff and, while waiting, he grabbed the plaintiff and attempted to kiss her several times.[206] After returning her to her apartment building, he again attempted to kiss her and fondled her breast.[207] This conduct always occurred under the defendant's pretext that they were engaging in work-related activities.[208] The plaintiff consistently, albeit politely, rejected each and every one of the defendant's advances.[209] The court still, however, affirmed the finding that there was insufficient proof of unwelcomeness.[210]

The proposed reform would preclude such a finding. Under the proposed reform, the plaintiff's polite refusals would be considered what they are: polite refusals. The defendant would not be privileged to ignore a woman's words. If the defendant misinterpreted "a short skirt, an interchange of jokes between two other parties, or even knowledge about a target's outside sexual activities as an invitation or consent," that would "never in itself be adequate to [justify sexual advances or to] show welcomeness."[211] Neither would silence.[212] To meet his burden of proof, the defendant would have to point to some affirmative act or clear language[213] that demonstrated by the preponderance of the evidence that the plaintiff consented to the defendant's advances. Finally, if the evidence turned out to be equally balanced or of equal probative value, the facts would be construed in favor of the plaintiff instead of the harasser because the burden of persuasion would fall upon him.[214]

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202. *Id.* at 460.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 459–60.
209. *Id.*
210. *Id.* at 460–61.
211. Radford, *supra* note 139, at 547.
212. *See id.* (noting that under the proposed reform, potential harassers would "not be able to suggest that silence or pleasant refusals were actually mere masks of consent by the target").
213. *See* Radford, *supra* note 139, at 547.
214. *See id.*

Reforming the current legal framework by shifting the burden of proof from the plaintiff to the harasser would encourage plaintiffs to file sexual harassment claims because they would not need to face the indignity of the court's presumption that they welcomed, solicited, or incited the perpetrator. This reform would help to break down outdated notions of what constitutes proper female behavior and encourage courts to shift their foci from the plaintiff to the detrimental effects of sexual harassment. Shifting the burden of proof "would more appropriately satisfy the aims of sexual harassment law"[215] and construe Title VII in a way that broadens the "humanitarian and remedial purposes underlying the federal proscription of employment discrimination,"[216] helping to transform the workplace into "a place where the privacy and free choice of others not to be the targets of sexual advances takes precedence over a worker's right to engage in sexual conduct."[217]

Shifting the burden of proof would also be consistent with changes that have already been made by Congress and the Judicial Conference of the United States to the *Federal Rules of Evidence.* Amendments to the rules have shifted the burden of demonstrating the admissibility of evidence in sexual harassment cases from the opponent to the proponent of the evidence, or from the sexual harassment victim to the perpetrator.[218] These amendments are part of the suggested reforms that will help alleviate the second problem associated with the legal framework courts use to determine whether challenged conduct is unwelcome.

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215. *Id.* at 499.

216. Barnes v. Costle, 561 F.2d 983, 994 (D.C. Cir. 1997).

217. Radford, *supra* note 139, at 530.

218. *See* FED. R. EVID. 412 advisory committee's note ("The balancing test [in Rule 412] . . . differs in three respects from . . . Rule 403. First, it reverses . . . Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard . . . is more stringent . . . requiring that the probative value of the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to "prejudice to the parties.").

### *B. Restricting the Admissibility of Evidence by Narrowly Defining "Relevance" and by Applying the* Federal Rules of Evidence *Consistent with the Rationale Behind Amending Rule 412 and the Humanitarian and Remedial Purposes Underlying Title VII*

The second suggested reform would alleviate the defense attorneys' temptation to exploit the various difficulties associated with the legal framework used to prove that the challenged conduct was unwelcome. The reform consists of two parts, one substantive and one procedural. The substantive reform involves using the *Federal Rules of Evidence* to significantly narrow the content of the evidence that a perpetrator may introduce to show that the challenged conduct was welcome. Courts should more narrowly define what is "relevant" pursuant to Rules 401[219] and 402[220] for purposes of sexual harassment, and if evidence tending to embarrass, shame, or invade the privacy of a victim remains admissible pursuant to 403[221] or 404[222] of the *Federal Rules of Evidence*, courts should use Rule 412 as a tool to exclude such evidence, consistent with the humanitarian and remedial purposes underlying the Rule and Title VII.

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219. Rule 401 of the *Federal Rules of Evidence* reads as follows: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Fed. R. Evid.* 401.

220. Rule 402 of the *Federal Rules of Evidence* reads as follows: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." *Fed. R. Evid.* 402.

221. Rule 403 of the *Federal Rules of Evidence* reads as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Fed. R. Evid.* 403.

222. Rule 404 of the *Federal Rules of Evidence* reads as follows:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion .... Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*Fed. R. Evid.* 404.

Proving that the challenged conduct was unwelcome is an evidentiary issue.[223] Evidence, to be admissible, must be relevant to the issue for which it was proposed. In making the relevancy determination under Rule 401 of the *Federal Rules of Evidence*, some courts have considered the plaintiff's sexual activities outside of the work environment.[224] They have also considered evidence of a plaintiff's past sexual conduct with the alleged harasser.[225] Evidence of the harasser's past sexual conduct with other employees has been excluded,[226] but evidence of the plaintiff's past sexual conduct with other employees has not been similarly barred.[227] Defining "relevant" evidence this broadly encourages tactical abuses.

To curb the defense's opportunity to abuse the plaintiff, courts should redefine "relevance." Courts should exclude evidence of the plaintiff's sexual activities outside of the workplace[228] unless the activities involve the alleged harasser.[229] "In an action for sexual

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223. *See* Henson v. Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (citing Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U.L. REV. 535, 561 (1981) (noting that "[w]hether the advances are unwelcome . . . becomes an evidentiary question")).

224. *See, e.g.*, Walker v. Sullair Corp., 736 F. Supp. 94, 98 (W.D.N.C. 1990) (finding plaintiff's discussions about her sex life and sexual fantasies and reports regarding the sexual content of her dates relevant to the welcomeness inquiry); *Mitchell*, 116 F.R.D. at 483 (allowing the deposition of "a photographer who ha[d] allegedly taken sexually suggestive pictures of one or more of the plaintiffs").

225. *See, e.g.*, Steele v. Offshore Shipbuilding., 867 F.2d 1311, 1313 (11th Cir. 1989) (admitting evidence that plaintiff sent a sexually explicit gift to the alleged harasser); Swentek v. USAir Inc., 830 F.2d 552, 557 (4th Cir. 1987) (noting that provocative speech and dress is relevant in determining welcomeness but *only* when it bears directly on the plaintiff's contact with the alleged harasser).

226. *See, e.g.*, Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 539 (10th Cir. 1994) (excluding evidence of the accused supervisor's sexual conduct with someone other than the plaintiff); Kelly-Zurian v. Wohl Shoe Co., 27 Cal. Rptr. 2d 457, 463 (Cal. Ct. App. 1994) (holding trial court did not abuse its discretion by granting a motion in limine to exclude evidence of any alleged claims of sexual harassment against the alleged harasser by anyone).

227. *See, e.g.*, Weiss v. Amoco Oil Co., 142 F.R.D. 311, 315 (S.D. Iowa 1992) (finding that discovery of information concerning plaintiff's past sexual conduct with other co-workers was acceptable); Mitchell v. Hutchings, 116 F.R.D. 481, 483 (D. Utah 1987) (noting that past sexual history, if known by the alleged harasser, could "have a bearing on what conduct [the defendant] thought was welcome" and allowing discovery of evidence that a co-worker had allegedly been fondled by the plaintiff); Gan v. Kepro Circuit Sys., Inc., 28 Fair Empl. Prac. Cas. (BNA) 639 (admitting evidence that plaintiff had been fired from previous job for propositioning a married man to show that she was the sexual aggressor).

228. *See, e.g.*, Kelly-Zurian v. Whole Shoes, 27 Cal.2d 457 (Cal. Ct. App. 1994) (holding no abuse of discretion to exclude evidence that plaintiff watched X-rated videotapes, had an abortion, and participated in sexual conduct with non-employees as irrelevant and unduly prejudicial).

229. *See, e.g.*, Sardigal v. St. Louis Nat'l Stockyards Co., 42 Fair Empl. Prac. Cas. 497, 502 (S.D. Ill. 1986) (admitting evidence that plaintiff visited alleged harasser alone at night in non-employment contexts); Evans v. Mail Handlers, 32 Fair Empl. Prac. Cas. 634, 637

harassment . . . while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-workplace conduct will usually be irrelevant."[230]

For example, evidence that a plaintiff fondled the defendant hours before he crept up from behind her and kissed her would be admissible to show that the kiss was welcomed by the plaintiff because evidence of fondling has a tendency to make the defendant's claim that the conduct was welcome more probable than it would be without that evidence. However, evidence that a woman posed nude in a national magazine outside of working hours should not be relevant to the issue of welcomeness of sexual advances at work because it does not make it more probable, necessarily, that she will welcome *any* sexual advances from her coworkers or employer *at work.*[231] This is particularly true where the plaintiff never engaged in sexual dialogue or gestures. The fact that she posed nude should not be equated with "lawful acquiescence to unwanted sexual advances."[232]

Evidence of the plaintiff's sexual activities with the defendant should be considered relevant but only if it is linked temporally to the challenged conduct and when it is reciprocal in kind and degree to the harasser's sexual advances. For example, if the parties had a prior sexual relationship, that relationship should not be relevant with regard to the challenged conduct on a separate, later occasion if the relationship had ended.[233] Otherwise, consent on one prior occasion would, in effect, give the defendant a sexual right to the plaintiff at will and in perpetuity. Similarly, if the plaintiff has engaged and interacted with the alleged harasser, that conduct should not be relevant if it is not of the same type

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(D.D.C. 1983) (admitting evidence of off-premises consensual sexual relations with alleged harasser).

230. FED. R. EVID. 412, advisory committee's note (citing Burns v. McGregor Elec. Ind., Inc., 989 F.2d 959, 962–63 (8th Cir. 1993)).

231. *See* Burns v. McGregor Elec. Ind., Inc., 989 F.2d 959 (8th Cir. 1993) (holding it was inadmissible to consider the plaintiff's choice to pose nude for a national magazine on her personal time to show plaintiff was not the kind of person that would find the challenged work-related conduct offensive when she had never told sexual stories or engaged in sexual gestures at work). *See also* FED. R. EVID. 412 advisory committee's note (citing *Burns* with approval and noting that posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work).

232. *Burns*, 989 F.2d 959, 963; Katz v. Dole 709 F.2d 251, 254 n.3 (4th Cir. 1983) ("A person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment.").

233. *See* Shrout v. Black Clawson Co., 689 F. Supp. 774, 779 (S.D. Ohio 1988) (finding prior sexual relationship between the parties irrelevant because the offensive conduct occurred after the relationship was terminated).

or degree. The fact that the plaintiff had baked the defendant a birthday cake, given him a card signed "love," and even given him a picture of herself in a belly dancing costume should not be relevant if the reciprocate act was forcing himself upon her.[234]

As to evidence of defendant's sexual conduct with third parties in the workplace, that evidence should only be considered relevant if it corroborates the plaintiff's claim[235] because Rule 412 only applies to "victims" of sexual misconduct.[236] It does not protect the perpetrator. Rather, it only protects an individual who "can reasonably be characterized as a 'victim of alleged sexual misconduct.'"[237]

Finally, evidence of the plaintiff's sexual conduct with third parties in the workplace should be excluded.[238] The EEOC has noted that evidence of the complainant's general character and past sexual behavior toward others is considered to have limited, if any,

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234. *See* Wangler v. Hawaiian Elec. Co., 742 F. Supp. 1458, 1465 (D. Haw. 1990).

235. For decisions supporting this view, see Heyne v. Caruso, 69 F.3d 1475, 1481 (9th Cir. 1995) (holding that the district court should have permitted evidence of the supervisor's harassment of other women at work because it was relevant to show that he viewed female workers as sexual objects); Dockter v. Rudolf Wolff Futures, 913 F.2d 456, 459 (7th Cir. 1990) (admitting evidence that other female workers were subject to the same harassing conduct complained of by the plaintiff); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1499 (M.D. Fla. 1991) (noting that evidence that other female co-workers were sexually harassed by the same individual is relevant); Cuesta v. Texas Dept. of Criminal Justice, 805 F. Supp. 451, 455–56 (W.D. Tex. 1991) (admitting evidence by other women who worked at the same office that the defendant routinely harassed them in a similar fashion).

236. *See* FED. R. EVID. 401(b)(2) ("In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged *victim* is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any *victim* and of unfair prejudice to any party.") (emphasis added).

237. FED. R. EVID. 401 advisory committee's note ("Rule 412 does not . . . apply unless the person against whom the evidence is offered can reasonably be characterized as a 'victim of alleged sexual misconduct.'").

238. For decisions supporting this view, see Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 855–56 (1st Cir. 1998) (holding evidence that the plaintiff had "engag[ed] in multiple affairs with married men, [w]as a lesbian, and [w]as suffering from a sexually transmitted disease" inadmissible); Stacks v. SW Bell Yellow Pages, Inc., 27 F.3d 1316, 1326–27 (8th Cir. 1994) (holding evidence of plaintiff's affair with a married co-worker was inadmissible to show that such workplace conduct did not offend her); Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (holding it was improper for the district court to admit evidence of general, past sexual behavior at work with other co-workers and supervisors to show plaintiff was the kind of person who could not be offended by the challenged conduct and thus welcomed the harasser's conduct on unrelated occasions); Howard v. Historic Tours, 177 F.R.D. 48, 51 (D.D.C. 1997) (holding an inquiry into plaintiff's sexual behavior with other employees irrelevant and minimally probative); Sheffield v. Hilltop Sand & Gravel Co., 895 F. Supp. 105, 107 (E.D. Va. 1995) (excluding testimony from co-workers that plaintiff had engaged in sexually explicit conversations with them); Stalnaker v. Kmart Corp., 71 Fair Empl. Prac. Cas. 705 (BNA) (D. Kan. 1996) (noting that questions to female witnesses about their sexual or romantic activities would be inadmissible under Rule 412).

probative value.[239] If the harasser did not know about the plaintiff's sexual conduct with co-workers, then any evidence as to such conduct could not possibly affect the harasser's perception and consequential behavior[240] and could not be relevant because what is unknown cannot make anything more probable than not. If the harasser did know about the plaintiff's conduct with co-workers, to find such evidence relevant, one would have to say that previous sexual behavior or history with one co-worker would make it more probable than not that the plaintiff would welcome a similar relationship with any other employee. Reality and experience belie this conclusion.[241]

Evidence may also be admissible pursuant to Rule 404 of the *Federal Rules of Evidence.* Rule 404 prohibits the introduction of "[e]vidence of a person's character or a trait of his character . . . for the purpose of proving action in conformity therewith on a particular occasion."[242] For example, a plaintiff could not present evidence of a defendant's propensity to pick fights with his neighbors for the purpose of proving that on the particular day in question, the defendant acted in conformity with his propensity and assaulted his wife. Similarly, proof that sexual conduct was welcome on prior occasions cannot be admitted to show that conduct was welcome on the specific occasion at issue.[243]

Rule 404(b), however, allows a party to introduce character evidence for purposes other than to prove action in conformity therewith.[244] Such evidence may be introduced to prove motive or intent.[245] Evidence of specific instances of prior conduct that demonstrate character is the most convincing form of such evidence.[246] Thus, specific instances of prior sexual conduct with the alleged

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239. *See* EEOC Policy Guidance on Sexual Harassment (Mar. 19, 1990), *reprinted in* 8 Fair Empl. Prac. Man. (BNA) 405:6687.

240. *See Howard,* 177 F.R.D. at 51.

241. *See id.*

242. FED. R. EVID. 404(a).

243. *See* Priest v. Rotary, 98 F.R.D. 755, 758 (N.D. Cal. 1983) (holding that evidence of prior sexual relationships is not admissible to prove victim engaged in similar conduct on a particular occasion). Rule 404(a) is consistent with Rule 412's ban on reputation evidence. *See* FED. R. EVID. 412(b)(2) ("Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.").

244. *See* FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .").

245. *See id.*

246. *See* FED. R. EVID. 404(b) advisory committee's notes ("Of the three methods of proving character . . . evidence of specific instances is the most convincing.").

harasser may be admissible for those purposes. For example, in *Heyne v. Caruso*,[247] the court held that specific acts of sexual harassment by the defendant of other female employees were not admissible to prove that the defendant sexually harassed the plaintiff on the particular occasion in question.[248] These acts, however, were admissible to prove intent and motive.[249] The evidence would be relevant and probative of the defendant's general disrespect of his female employees and of his motive for firing the plaintiff after she rejected his advances.[250]

If evidence is otherwise admissible, then the court must balance the probative force of the evidence against its prejudicial impact by applying Rule 412 of the *Federal Rules of Evidence*. Rule 412 reads as follows:

> The following evidence is not admissible in any civil . . . proceeding involving alleged sexual misconduct . . . (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim's sexual pre-disposition . . . Except . . . in a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is *otherwise admissible* under these rules and its *probative value substantially outweighs* the danger of *harm* to any victim *and* of unfair *prejudice* to any party.[251]

Rule 412's requirement that evidence be more probative than prejudicial should be viewed as modifying and potentially excluding more evidence than Rule 403, which precludes the introduction of admissible evidence if its *prejudicial impact* substantially outweighs its probative value.[252] Rule 412 differs in three respects from Rule 403. Rule 412 shifts the burden of demonstrating the evidence's admissibility from the opponent to the proponent of the evidence; the standard has significantly more "bite" than Rule 403's because it requires that the evidence's probative value substantially outweigh the likelihood of harm or prejudice; and finally, it requires the court to examine the harm to

247. 69 F.3d 1475 (9th Cir. 1995).

248. *See id.* at 1480.

249. *See id.*

250. *See id.*

251. FED. R. EVID. 412(a), (b) (emphasis added).

252. *See* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value *is substantially outweighed by* the danger of unfair prejudice . . . .") (emphasis added).

the victim as well as the prejudice to the parties.[253] While Rule 403 *favors* the admission of evidence, allowing a party to introduce evidence that is slightly less probative than prejudicial, Rule 412 *disfavors* the admission of evidence, strengthening Rule 403's standard to account for the prejudicial and devastating nature of the kind of evidence the welcomeness inquiry elicits.[254]

Rule 412 was amended[255] to encourage sexual harassment victims to institute and utilize Title VII's protections by shielding victims from invasion of privacy, embarrassment, sexual stereotyping, and sexual innuendo.[256] Unless the probative value of the evidence substantially outweighs possible harm to the victim, Rule 412 should bar evidence which involves actual physical conduct, activities of the mind such as fantasies or dreams, evidence that may have a sexual connotation for the fact finder, evidence tending to sexually stereotype, evidence relating to the alleged victim's mode of dress, speech, or lifestyle, and evidence geared to embarrass the victim.[257] To further protect the victim from unnecessary

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253. *See* FED. R. EVID. advisory committee's note ("The balancing test . . . differs in these respects from . . . Rule 403. First, it Reverses . . . Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard . . . is more stringent . . . requiring that the probative value of the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts 'harm to the victim' on the scale in addition to 'prejudice to the parties.' ").

254. *See* Monnin, *supra* note 185, at 1160.

255. Note that Rule 412 was amended in 1994 to increase the sexual harassment victims' evidentiary protections. For an excellent analysis of the historical debate surrounding Rule 412's deficiencies and its subsequent amendment, see Monnin, *supra* note 185, at 1161–68, 1177.

256. *See* FED. R. EVID. 412 advisory committee's note ("Rule 412 has been revised to . . . expand the protection afforded alleged victims of sexual misconduct . . . to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.").

257. *See* FED. R. EVID. 412 advisory committee's note ("Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse or sexual contact. . . . This amendment is designed to exclude evidence that . . . the proponent believes may have a sexual connotation for the fact finder [because] . . . such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking . . . evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible."). *See, e.g.*, United States v. Galloway, 937 F.2d 542 (10th Cir. 1991) (holding use of contraceptives inadmissible because use implied sexual activity); United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) (disallowing evidence of birth of an illegitimate child); State v. Carmichael, 727 P.2d 918, 925 (Kan. 1986) (disallowing evidence of venereal disease).

In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. *See* 23 C. *Wright and K. Graham, Jr., Federal Practice and Procedure* § 5384 at 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it

intrusion, courts should diligently apply the relevant evidence and procedural rules.

### *C. Protecting the Victim's Privacy by Diligently Applying the Procedural Protections Provided by the* Federal Rules of Evidence *and the* Federal Rules of Civil Procedure

The third and final suggested reform is procedural. Courts should protect the sexual harassment victim's privacy by diligently applying the procedural protections provided by the *Federal Rules of Evidence* and the *Federal Rules of Civil Procedure.* Rule 412 of the *Federal Rules of Evidence* states the following:

> A party intending to offer evidence . . . must . . . file a written motion at least 14 days before trial *specifically describing the evidence* and stating the purpose for which it is offered. . . . Before admitting evidence under this rule the court must conduct a hearing *in camera.* . . . The motion, related papers, and the record of the hearing must be sealed and remain *under seal* unless the court orders otherwise.[258]

In *Sheffield v. Hilltop Sand & Gravel Co.,*[259] the court punished the defendant for his callous and flagrant disregard of Rule 412's procedural safeguards.[260] The court noted that Rule 412 was designed to protect victims against the negative repercussions of publicly disclosing intimate sexual details by precluding evidence of sexually provocative discussions and activities in the workplace with anyone other than the defendant.[261] In *Sheffield,* the defendant had thoughtlessly filed his motion, describing with particularity the evidence it sought to introduce, without placing the documents under seal.[262] The documents automatically became a matter of public record, invading the plaintiff's privacy, and the defendant failed to articulate a single reason for excusing his reprehensible conduct.[263] Like the court in *Sheffield,* courts should diligently en-

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would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

258. FED. R. EVID. 412(c)(1)-(2) (emphasis added).

259. 895 F. Supp. 105 (E.D. Va. 1995).

260. *See id.* at 109.

261. *See id.*

262. *See id.*

263. *See id.*

force Rule 412's procedural protections to protect the victim's privacy and to control the form in which this evidence is presented by requiring that motions thoroughly describe the evidence and their proffered purpose, that these motion be filed under seal, and that admissibility determinations be made *in camera.*

The shame and embarrassment that inhibits plaintiffs from invoking Title VII's legal remedies "exist[] equally at the discovery stage as at trial."[264] Thus the policies underlying Rule 412 should inform the application of discovery and procedural rules which may be implicated in sexual harassment cases.[265] Rule 26(b)(1) of the *Federal Rules of Civil Procedure* permits "discovery regarding any matter . . . which is relevant to the subject matter involved in the pending action" and which is "reasonably calculated to lead to the discovery of admissible evidence," even if that information is not admissible at trial.[266] Rule 26 (c) instructs the courts to presumptively issue "confidentiality orders" and "protective orders barring discovery unless the party seeking discovery makes a showing that the evidence" is "relevant" and "cannot be obtained except through discovery."[267] Rule 26 (c) reads as follows:

> Upon motion by a party . . . accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown . . . *the court may make any order which justice requires to protect a party* or person *from* annoyance, *embarrassment,* oppression, or undue burden . . . including . . . that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters . . . that a deposition, after being sealed, be opened only by order of the court . . . [and] that

264. *Howard v. Historic Tours of Am.*, 177 F.R.D. 48, 51 (D.D.C. 1997).

265. *See id.* at 50 (citing FED. R. EVID. 412 advisory committee's note) ("In order not to undermine the rationale of Rule 412, courts should enter appropriate orders pursuant to FED. R. CIV. P. 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality."). *See also* FED. R. EVID. 412 advisory committee's note ("The procedures set forth . . . do not apply to discovery . . . which will be continued to be governed by FED. R. CIV. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to FED. R. CIV. P. 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. . . . Confidentiality orders should be presumptively granted as well.").

266. FED. R. CIV. P. 26(b)(1).

267. FED. R. EVID. 412 advisory committee's note.

> the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.[268]

In *Sanchez v. Zabihi*[269] the court recognized the interplay between Rule 412 and Rule 26(b) and (c).[270] The court used these rules to limit the extent of the defendant's interrogatories.[271] The defendant wanted the plaintiff to tell him whether she had any personal, romantic, or sexual interactions with any co-workers in the last ten years.[272] The court struck the word "personal" from the record, denied any discovery relating to a co-worker who later became her husband, and limited the time period to three years.[273] The court also required that the answers be given under oath, sealed, and submitted only to defendant's attorney who was prohibited from divulging the information to anyone, including the defendant, without first filing a motion, submitting to a hearing, and waiting for a court order.[274] As in *Sanchez*, discovery rules should be used to protect the complainant's privacy and to narrow the form and the content of that which is discoverable in sexual harassment cases.

Applying the rules in the manner suggested is consistent with the Court's holding in *Vinson* that evidence of provocative conduct is relevant to the unwelcomeness inquiry[275] but excludable if unduly prejudicial.[276] Applying the rules in the manner suggested would alleviate the "intrusive, irrelevant, and damaging" inquiries[277] that may expose the complainant to "embarrassment, loss of privacy, and shame"[278] because it will not allow the perpetrator to unnecessarily humiliate, insult, or violate the victim's privacy. Evidence about how the plaintiff dressed, talked, or with whom she

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268. FED. R. CIV. P. 26(c)(4), (6), (7) (emphasis added).

269. 166 F.R.D. 500 (N.M. 1996).

270. *See id.* at 501–02.

271. *See id.*

272. *See id.*

273. *See id.* at 502.

274. *See id.* at 502–03.

275. *See Vinson*, 477 U.S. at 69 (holding that evidence of plaintiff's speech and dress are "obviously" relevant and "[w]hile the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no per se rule against its admissibility").

276. *See id.*, 477 U.S. at 69 (noting that evidence of provocative speech and dress should be admitted with caution in light of the potential for unfair prejudice). *See also Fed. R. Evid.* 412 (Evidence of past sexual behavior is inadmissible if "its probative value *substantially* outweighs the danger of . . . unfair prejudice to any party.") (emphasis added).

277. Weiner, *supra* note 19, at 621.

278. Estrich, *supra* note 19, at 833.

slept would be inadmissable.[279] As would evidence that the plaintiff was promiscuous and thus unworthy of credibility or protection.[280] If Title VII claims are to have any real meaning, the *Federal Rules of Evidence* and the *Federal Rules of Civil Procedure* should be interpreted to protect the victims of sexual harassment and to limit the harasser's power to intimidate and discourage the filing of legitimate claims.[281]

## CONCLUSION

Increasingly, women are coming forward to change the cultural climate and to compel employers to stop sexual harassment. Title VII was enacted to provide women, among others, with equal employment opportunities in the form of a workplace free from sexual discrimination. Sexual harassment is one of the most damaging forms of sexual discrimination. Both quid pro quo and hostile environment sexual harassment claims require that the plaintiff prove that the challenged conduct was unwelcome. The legal framework courts use to determine whether challenged conduct is unwelcome, however, has created two problems which keep sexual harassment widespread and underreported.

First, placing the burden of proof on the plaintiff to prove that the harassment was unwelcome is unfair because it presumes, despite contrary evidence, that women generally welcome sexual behavior in the workplace. It perpetuates pernicious and demeaning sexual stereotypes such as woman as provocateur, woman as the scorned and vengeful lover, and woman as the one who is to blame for the sexual affronts of well-meaning man. Title VII was crafted to protect women as victims in the area of employment because, as a result of discriminatory stereotypes, they, as a group, are generally less powerful and more economically dependent than men and because men and the employers who place them in positions of authority are in the best position to control offensive behavior

279. *Id.*

280. *See* Weiner, *supra* note 19 at 630–31.

281. *See* Priest v. Rotary, 98 F.R.D. 755, 761–62 (N.D. Cal. 1983) (noting that "employees whose intimate lives are unjustifiably and offensively intruded upon in the workplace might face the 'Catch-22' of invoking their statutory rights only at the risk of enduring further intrusions into irrelevant details of their personal lives . . . . By carefully examining our experience with rape prosecutions, however, the courts and bar can avoid repeating in this new field of civil sexual harassment suits the same mistakes that are now being corrected in the rape context").

and to avoid an unintentional violation of Title VII's prohibitions. For this reason, the courts should shift the burden of proving that the challenged conduct was unwelcome from the target to the aggressor. Instead of presuming that the plaintiff solicited, invited, or consented to the sexual advance and making proof of unwelcomeness a part of the complainant's prima facie case, courts should require the harasser to show, as part of an affirmative defense and by objective evidence, that plaintiff's affirmative acts clearly indicated her consent to the challenged sexual advances. Silence, polite refusals, or evasive behavior would not constitute affirmative objective acts justifying the conclusion that the defendant's conduct was welcome.

Second, to discourage the defense from using the unwelcomeness element and the legal framework the courts use to determine whether the challenged conduct is welcome as a defense tactic to inflame the fact finder's prejudice, the courts should implement two additional reforms, one substantive and one procedural.

Substantively, the courts should redefine what is considered "relevant" evidence in sexual harassment cases for discovery and trial purposes. Rules 401 and 402 of the *Federal Rules of Evidence* should be used to include evidence narrowly tailored to the purpose for which it is offered. Evidence of the plaintiff's conduct outside of the workplace should be excluded unless it involves the defendant. Sexual conduct with the defendant should be considered relevant but only if it is limited temporally and if it is reciprocal in kind and degree. The defendant's sexual conduct with other employees should be excluded unless it corroborates the plaintiff's claim. Finally, the plaintiff's sexual conduct with coworkers should be excluded. If evidence tending to embarrass, shame, or invade the plaintiff's privacy is technically admissible pursuant to Rules 403 and 404, then Rule 412 should be used as a tool to exclude such evidence.

Procedurally, the courts should apply, without fail, the protections provided by the *Federal Rules of Evidence* and the *Federal Rules of Civil Procedure* to protect the plaintiff from embarrassment, invasion of privacy, and shame by making admissibility determinations *in camera*, by requiring that motions for admission of evidence thoroughly describe the evidence and its proffered purpose, by requiring that these motions be filed under seal, and by liberally granting confidentiality and protective orders barring discovery unless the evidence is relevant and cannot be obtained otherwise.

Implementing these reforms would broaden the humanitarian and remedial purposes of Title VII and encourage victims of sexual

harassment to come forward and file legitimate claims. The increased filing of legitimate sexual harassment claims, in turn, should reduce the incidence of sexual harassment. Like the woman on the bus who assertively challenges her harasser, working women in America may assert their rights to be free from unwanted sexual attention in the workplace with assurance that the law will protect them from further economic or professional devastation.