Hostile Environment Claims of Sexual Harassment: The Continuing Expansion of Sexual Harassment Law

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Notes

HOSTILE ENVIRONMENT CLAIMS OF SEXUAL HARASSMENT:
THE CONTINUING EXPANSION OF SEXUAL HARASSMENT LAW

I. INTRODUCTION

Although sexual harassment may be relatively new to the judicial system, it is a well established fact of life for many working women. Every working day many women are faced with unwelcome sexual remarks, unwanted physical contact, embarrassing conversations with a boss about personal and intimate subjects, derogatory jokes, pornographic magazines and posters, and demands for sexual relations with the promise of job benefits which may or may not be accompanied by the threat of termination for refusing to comply. Initially, courts were

1. Sexual harassment at the workplace is becoming an increasingly widespread and widely discussed problem. See W.F. Pepper & F.R. Kennedy, Sex Discrimination and Employment 36 (1981) (studies show that anywhere from 49% to 90% of women in workforce feel they have been victims of sexual harassment at work); see also Henson v. City of Dundee, 682 F.2d 897, 902 n.5 (11th Cir. 1982) (citing Senate Committee on Labor and Human Resources hearings at which acting chairman of Equal Employment Opportunity Commission cited rising number of charges of sexual harassment filed with that agency); Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449, 1451 (1984) (high incidence of workplace conduct perceived by women as offensive and harassing).


2. C. Lefcourt, Women and the Law (release No. 2, July 1988) § 3.02. Defining sexual harassment has always been a difficult task. Id. For the purposes of this Note, sexual harassment will be broadly defined as follows:

Sexual harassment in employment is any remark or overt behavior of a sexual nature in the context of the work situation that has the effect of making a woman uncomfortable on the job, impeding her ability to do her work, or interfering with her employment opportunities. It can be manifested by looks, touches, jokes, innuendos, gestures, epithets, or direct propositions. At one extreme, it is the direct demand for sexual compliance coupled with the threat of firing if a woman refuses. At the other, it is being forced to work in an environment in which, through various means, such as sexual slurs, the public displays of de-
reluctant to consider these kinds of behavior as sex discrimination within the reach of Title VII of the Civil Rights Act of 1964 for fear that the judicial system would be intruding in the personal area of social relationships, where judicial scrutiny traditionally has not intervened. However, in 1976, a breakthrough occurred when the District Court for the District of Columbia recognized a cause of action for sexual harassment. Since then, many courts, including the United States Supreme Court, have acknowledged sexual harassment as a form of sex discrimination. Title VII of the Civil Rights Act of 1964 states in pertinent part:

(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The prohibition against discrimination based upon sex is found in § 703 of Title VII and was introduced in a "last-minute attempt" to block the passage of Title VII. Note, Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition, 76 Mich. L. Rev. 1007, 1010 (1978); see also Holtzman & Trelz, supra note 1, at 265 (discussing Rep. Howard W. Smith's attempt to block passage of Title VII by adding prohibition against sex discrimination).

However, § 717 of Title VII, added eight years later in 1972, shows that sex discrimination in employment was indeed of great concern to Congress: "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R. Rep. No. 238, 92d Cong., 1st Sess. 5, reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2141.

The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex.

One commentator has noted that in our society we must tackle "a culturally conditioned attitude which may very well regard overtures by employers or supervisors as being 'inevitable,' 'normal,' 'complementary to feminity,' and even 'socially desirable.'" W.F. Pepper & F.R. Kennedy, supra note 1, at 35.

The court held that...
Two categories of sexual harassment are now recognized by the courts. The first includes the most blatant form of harassment, quid pro quo harassment. This encompasses situations where an employer demands sexual favors from an employee, promising economic or other tangible job benefits in return, and then denies the employee job benefits or fires her when she refuses to cooperate. This fact pattern typically sexual harassment in the workplace was a form of sex discrimination, and therefore a violation of Title VII. In Williams, the plaintiff claimed she was sexually harassed by her supervisor. When the plaintiff refused her supervisor's sexual advances, the supervisor eventually fired her. The defendants argued that Title VII did not apply to this case because the plaintiff was fired not because she was a woman, but simply because she refused to have sex with her boss. Although the court stated that it found this argument somewhat interesting, it did not accept the defendants' proposition because the court believed that their argument obscured the facts. The court held that Title VII was not only invoked, but was violated by the supervisor's conduct because the conduct "created an artificial barrier to employment which was placed before one gender and not the other." 6

6. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (Supreme Court's first, and so far only, sexual harassment case). For a discussion of this case, see infra notes 51-58 and accompanying text. See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (court upheld plaintiff's claim that she was sexually harassed by supervisor's conduct which included sexually demeaning remarks and repeated requests for sexual relations); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (court upheld plaintiff's claim of sexual harassment, even though harassment did not result in tangible loss of job benefits, holding that sexually demeaning remarks and propositions to which she was subjected constituted "illegal poisoning" of her conditions of employment).

7. The term "quid pro quo" harassment was coined by Professor Catherine A. MacKinnon. Note, supra note 1, at 1454 n.27. One court described this form of sexual harassment as follows: The classic example of sexual harassment is the situation in which sexual demands are made by a supervisor to a subordinate in exchange for career advantages or under threat of adverse job consequences. Because tangible job consequences are involved, this type of offense has been characterized as 'quid pro quo' sexual harassment.

Downes v. FAA, 775 F.2d 288, 290 (Fed. Cir. 1985). The first case to hold this type of harassment actionable under Title VII was Williams, 413 F. Supp. 654. See Holtzman & Trelz, supra note 1, at 266. For a discussion of Williams, see supra note 5.

8. For the purposes of this Note, when referring to the victim of sexual harassment the pronoun "she" will be used. This is not meant to represent the belief that only women can be or are victims of sexual harassment in the workplace, for that is not the case. However, sexual harassment, an assertion of power by a superior over a subordinate, claims a much higher percentage of women as victims simply because more women than men occupy the inferior employment positions. Thus, sexual harassment only as it impacts upon women in the workforce will be explored. See, e.g., C. LEFCOURT, supra note 2, §§ 3.03(1)-.03(2); W.F. PEPPER & F.R. KENNEDY, supra note 1, at 35-36; Note, supra note 1, at 1451.

9. See Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) (plaintiff asserted claim of quid pro quo harassment after supervisor told her that cooperation with his sexual advances was necessary for continued employment).
fled early sexual harassment cases. 10

The second type of harassment recognized by the courts, and the form upon which this Note will focus, is termed hostile environment harassment. 11 This cause of action involves continual subjection to sexually demeaning behavior, such as derogatory sexual comments, unwanted touching, or a variety of other conduct of a similar nature, which creates a hostile and offensive environment for the employee. 12

The law in this area of sexual harassment has continued to expand since first recognized by the courts in 1981. 13 This Note will trace the development of this area of the law, examining the parameters of this cause of action and some of its most significant developments. This Note will also explore the implications of Broderick v. Ruder, 14 a recent hostile work environment decision which has significantly expanded sexual harassment law. 15

II. BACKGROUND

A. The Evolution of the Hostile Work Environment Cause of Action

In 1981, the Court of Appeals for the District of Columbia became the first court to hold that subjecting an employee to a sexually hostile

10. See, e.g., Tomkins, 568 F.2d 1044 (supervisor told plaintiff cooperation with his sexual advances was necessary if they were to have satisfactory working relationship); Williams, 413 F. Supp. 654 (plaintiff claimed she was sexually harassed because her refusal to tolerate supervisor’s advances resulted in termination from employment).

11. Hostile work environment harassment covers a much broader range of behavior than quid pro quo harassment. It does not require that the employee’s job status be conditioned upon her cooperation with the sexual demands of a superior. Therefore, this theory of harassment provides legal recourse for victims of conduct as offensive and debilitating as quid pro quo propositions, who would be unable to sue under the theory of quid pro quo harassment. See, e.g., Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (plaintiff claimed she was victim of hostile environment sexual harassment because she was continually subjected to sexually demeaning remarks and repeated propositions for sexual favors from her supervisor); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (plaintiff claimed sexual harassment arising from vulgar remarks and sexual propositions directed to her by supervisor); see generally Note, supra note 1, at 1455.

12. See Note, supra note 1, at 1455-56 (“In essence, the employee claims that she should not be forced, simply because she is a woman, to tolerate abusive conditions in order to earn a living; she seeks relief from degrading conditions continually imposed upon her.”).

13. The first case to recognize a hostile environment claim of sexual harassment case was Bundy, 641 F.2d 934. For a discussion of Bundy, see infra notes 18-21 and accompanying text.


15. The Broderick case has been hailed as “a significant extension of sexual harassment protections.” Woman Was Sexually Harassed at SEC, Judge Rules, Philadelphia Inquirer, May 15, 1988, at 12-A, col. 1.
working environment violated Title VII, even though the employee was not deprived of any economic or other tangible job benefit for refusing to tolerate the harassing conditions. In *Bundy v. Jackson*, the plaintiff's supervisors repeatedly asked her for sexual favors. The court held that this conduct violated Title VII's prohibition against sex discrimination with respect to the terms, conditions and privileges of

16. The words "hostile," "offensive" and "abusive" are used interchangeably by courts that have decided cases involving this form of harassment. The term "hostile work environment" was derived from the EEOC's Guidelines on Sexual Harassment, issued in 1980 and codified in Title 29 of the Code of Federal Regulations, § 1604.11, which state in pertinent part:

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

29 C.F.R. § 1604.11(a) (1986).

17. *Bundy*, 641 F.2d at 943-44. In *Bundy*, the Court of Appeals for the District of Columbia termed this issue a "novel question." Id. at 943. The court found that the plaintiff did have an actionable claim of sexual harassment within the reach of Title VII, noting that it was the first court to so hold. Id.

Historically, the Court of Appeals for the District of Columbia has been instrumental in the area of sexual discrimination. In *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), it was one of the first courts to recognize a cause of action for sexual harassment. See *Holtzman & Trelz*, supra note 1, at 266. *Barnes* involved a quid pro quo claim of sexual harassment by an Environmental Protection Agency administrative assistant against her supervisor, the administrator of that agency, alleging that he had repeatedly requested sexual favors from her, telling her that if she cooperated he would provide her with additional job benefits. *Barnes*, 561 F.2d at 984-85. When the plaintiff refused these advances, the supervisor retaliated by firing her. Id. at 985.

The district court concluded that there was no actionable discrimination, stating that the plaintiff's suit merely amounted to a claim that she was discriminated against not because of her sex but because she refused to have a sexual relationship with her supervisor. Id. at 986. The court of appeals disagreed and held that this type of harassment was a form of sex discrimination because the plaintiff's "participation in sexual activity would never have been solicited" but for her "womanhood." Id. at 990. The court of appeals stated that "the statutory embargo on sex discrimination . . . is not confined to differentials founded wholly upon an employee's gender." Id. The court stated that "it is enough that gender is a factor contributing to the discrimination in a substantial way." Id. (footnote omitted).


19. Id. at 940. In *Bundy*, the plaintiff alleged that one supervisor continually requested that she spend the afternoon with him at his apartment and questioned her about her sexual proclivities, and that another supervisor made repeated sexual advances toward her and asked her to stay in a motel with him in the Bahamas. Id. Upon complaining to the supervisors of these two men, the plaintiff was told that "any man in his right mind would want to rape you." Id.
employment. The court stated that a person's psychological well-being is a protected condition of employment, and determined that the plaintiff was psychologically affected by the harassing conduct she described. Shortly after the Bundy decision, other courts began recognizing hostile work environment sexual harassment.

One year later, in Henson v. City of Dundee, the Eleventh Circuit, adopting the reasoning set forth in Bundy, articulated five elements that a plaintiff must prove in order to establish a prima facie case of harass-

20. Id. at 943-44. The plaintiff's claim was "essentially that 'conditions of employment' include the psychological and emotional work environment—that the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation... illegally poisoned that environment." Id. at 944. To interpret what is covered by "terms, conditions, or privileges of employment," the Bundy court looked to the Fifth Circuit's opinion in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), in which the plaintiff claimed a violation of Title VII resulting from an offensive working environment created by a practice of racial discrimination. The Rogers court stated that the language of Title VII "should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation" of discrimination. Id. at 238. The court then stated that "the phrase 'terms, conditions, or privileges of employment'... is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with... discrimination." Id. For further discussion of Rogers, see infra note 21.

21. Bundy, 641 F.2d at 944-46. The court stated that this result "follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially [racially] discriminatory work environment, regardless whether the complaining employees lost any tangible job benefits as a result of the discrimination." Id. at 943-44 (emphasis in original).

Rogers is the seminal case regarding racially discriminatory work environment claims. See Holtzman & Trelz, supra note 1, at 246 n.44. In Rogers, the EEOC, representing a Spanish surnamed woman employed by an optical company, charged the owners of that company with discrimination based upon national origin. Rogers, 454 F.2d at 236. The employee alleged that, among other things, her employers "segregat[ed] the patients." Id. The court of appeals stated that Title VII should be interpreted liberally and declared that the psychological conditions of the workplace were entitled to protection under Title VII because the "terms, conditions, and privileges" language of Title VII is sufficiently broad to encompass the "practice of creating a working environment heavily charged with ethnic or racial discrimination." Id. at 238. Thus, the court concluded that creating a discriminatory work environment constituted an illegal employment practice. Id. at 239.

The employers argued that the plaintiff's allegation was not within the statutory protection of Title VII because it did not assert action directed toward any employee, but only toward the employers' patients. Id. at 238. The court determined that "absence of discriminatory intent by an employer does not redeem an otherwise unlawful employment practice, and that the thrust of Title VII's proscriptions is aimed at the consequences or effects of an employment practice and not at the employer's motivation." Id. at 239.

22. 682 F.2d 897 (11th Cir. 1982).
23. Id. at 903-05. This court appears to have been one of the first to articulate these elements. See Holtzman & Trelz, supra note 1, at 242 n.20. Although the court never mentioned how it determined that these elements were essential to a hostile environment claim, it is almost certain that the court relied upon the disparate treatment formula for guidance because the court concluded that sexual harassment fell within the disparate treatment category of discrimination. See Henson, 682 F.2d at 902; Holtzman & Trelz, supra note 1, at 242 n.20. For further discussion of the disparate treatment formula and sexual harassment, see infra notes 35-39 and accompanying text.

24. Henson, 682 F.2d at 903. This element is satisfied merely by a statement that the employee is a woman or a man. Id.

25. Id.; see, e.g., Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986) ("[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'"); Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 650 (6th Cir. 1986) (court determined that plaintiff, who said she "didn't think [the alleged harassment] was that big of a deal," failed to show she was significantly offended, and could not prevail on claim).

26. Henson, 682 F.2d at 903. Courts usually state that the harassment would not have occurred but for the sex of the employee. See, e.g., Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987) (harassment that would not occur but for sex of employee may be actionable if sufficiently patterned and pervasive); Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) (plaintiff must prove that harassment would not have occurred but for her sex), cert. denied, 481 U.S. 1041 (1987); Henson, 682 F.2d at 904 (in typical case in which male supervisor makes sexual advances to female worker, it is obvious that supervisor did not treat male employees in similar fashion, and therefore it is simple for plaintiff to prove that but for her sex, harassment would not have occurred).

This element encompasses the aspect of intent. It is notable, however, that the employer's intent in discriminating based on the employee's sex is rarely, if ever, mentioned in the cases. This is probably due to the fact that, as one student commentator noted, "[t]here is no point in litigating the motive behind sexual harassment; by definition, sexual harassment occurs because of the harassed employee's sex." Note, supra note 1, at 1456. If the plaintiff shows that the harassment would not have occurred but for her sex, then it is a logical inference that the discriminatory practice was intentional. See, e.g., Henson, 682 F.2d at 904.

Because the disparate treatment model of discrimination, which was used in Henson and has so strongly influenced the development of sexual harassment law, focuses on the employer's intent, some courts and commentators have concluded that it is not an appropriate model for analysis of hostile work environment cases. Consequently, those courts do not adhere rigidly to the five-prong test or the order of proof formulated by the disparate treatment model as adapted to sexual discrimination cases.

27. Henson, 682 F.2d at 904; see, e.g., Meritor, 477 U.S. at 67 (sexual harassment must be sufficiently severe or pervasive to affect plaintiff's working conditions and create hostile or abusive environment); Highlander, 805 F.2d at 650 (court must look to totality of circumstances to determine whether alleged harassment created hostile working environment that significantly affected plaintiff's psychological well-being).
The plaintiff in *Henson* claimed she was forced to work in a hostile and offensive environment because she was continually subjected to "demeaning sexual inquiries and vulgarities," and was repeatedly propositioned throughout her two-year employment as a police dispatcher. Because the plaintiff made a showing of all five elements, the court held that she had established a prima facie case of hostile environment sexual harassment. This five-prong test has been applied by many courts in analyzing hostile environment claims.

In *Katz v. Dole*, the Fourth Circuit took a different approach to the

28. *Henson*, 682 F.2d at 905. This element has been the subject of much debate among the courts. Holtzman & Trelz, *supra* note 1, at 263. Several different standards for employer liability have been suggested. Compare *Meritor*, 411 U.S. at 69-73 (Supreme Court declined to rule on liability of bank, but did state that employer was not always strictly liable for actions of supervisor, and advocated looking to agency principles for standards of liability) with *Henson*, 682 F.2d at 910 (court held employer strictly liable for acts of supervisor in cases of quid pro quo harassment, but required proof that employer knew or should have known of harassment to apply strict liability in hostile work environment cases) and *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) (court held employer strictly liable for actions of supervisor where supervisor had authority to "hire, fire, discipline or promote, or at least to participate in or recommend such actions," even if supervisor violated company policy) and *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977) (court allowed employer to escape liability by showing that supervisor contravened company policy without employer's knowledge, and that employer took corrective action as soon as situation was discovered). For further discussion of employer liability in sexual harassment cases, see Holtzman & Trelz, *supra* note 1, at 263-86; Note, *supra* note 3, at 1025-31; Note, *supra* note 1, at 1460-63.

29. *Henson*, 682 F.2d at 899.

30. *Id.* at 905.


Some courts, though in effect requiring the elements, do not articulate all five in their opinions. See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). Furthermore, some courts do not even speak in terms of elements at all and discuss only the requirement that a plaintiff establish that the conduct was sufficiently pervasive and offensive to create a hostile working environment. See *Meritor*, 477 U.S. 57; *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983). This may be a result of the fact that, over time, several elements have become self-evident. As an example, most courts no longer mention the first element, that the plaintiff be a member of a protected group, since all that is necessary to satisfy this requirement is a statement that the plaintiff is a man or a woman. *Henson*, 682 F.2d at 903. Also, respondeat superior may not be listed by a court as an element to be proved, but it is clearly necessary in any case where a plaintiff attempts to hold an employer liable for the actions of an employee. See *id.* at 905 ("[w]here . . . plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiff's supervisor . . . she must show that the employer knew or should have known of the harassment . . . and failed to take prompt remedial action").

32. 709 F.2d 251 (4th Cir. 1983).
analysis of hostile environment claims.\textsuperscript{33} Previously, courts reasoned that sexual harassment claims fell within the disparate treatment model of discrimination.\textsuperscript{34} Disparate treatment is a form of discrimination in which an employer treats certain employees “less favorably than others because of their race, color, religion, sex, or national origin.”\textsuperscript{35} This model of discrimination influences both the elements of a plaintiff’s claim and the order of proof in sexual harassment cases. Under this approach, the plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence.\textsuperscript{36} The burden then shifts to the defendant to “articulate some legitimate, nondiscriminatory reason” for the employment decision or practice.\textsuperscript{37} The plaintiff then must show

\textsuperscript{33} Id. at 255-56. In \textit{Katz}, the plaintiff, an air traffic controller, filed a hostile work environment claim based on her repeated subjecttion to “sexual slur, insult and innuendo . . . [and the] vulgar and offensive sexually related epithets addressed to and employed about [her] by supervisory personnel as well as by other controllers.” Id. at 254. The court held that the atmosphere described by the plaintiff constituted hostile environment harassment, and that the plaintiff was thus subjected to sex discrimination under Title VII. Id. at 256.

\textsuperscript{34} See \textit{Henson}, 682 F.2d at 902 (pattern of sexual harassment inflicted upon employee because of employee's sex is disparate treatment with respect to terms, conditions, or privileges of employment).

\textsuperscript{35} \textit{Note}, \textit{supra} note 3, at 1019 n.93.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the United States Supreme Court set forth the elements of a disparate treatment claim in a case involving racial discrimination. The plaintiff must show

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

\textsuperscript{36} Id. at 802. Proof of the discriminatory intent of the employer is essential to a disparate treatment claim, and “can in some situations be inferred from the mere fact of differences in treatment.” International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The McDonnell Court acknowledged that these elements would vary depending on the facts of the case at hand, and it is evident that courts have adjusted them to fit the fact patterns of sexual harassment claims. \textit{McDonnell}, 411 U.S. at 802 nn.13 & 14; see \textit{Henson}, 682 F.2d at 911, n.22. For the \textit{Henson} court's application of the \textit{McDonnell} elements to a sexual harassment case, see \textit{supra} notes 23-28 and accompanying text. For a discussion of the view that the disparate treatment approach is inappropriate for analysis of hostile work environment claims, see \textit{infra} note 41 and accompanying text.

There is also another form of discrimination called disparate impact discrimination. This occurs when an employment practice appears neutral on its face but in actuality discriminates against a group of employees because of their race, religion, sex, ethnicity or any other legally prohibited basis. Proof of discriminatory motive is not required in the disparate impact approach. \textit{Note}, \textit{supra} note 3, at 1019-20 n.93.

\textsuperscript{37} Id. at 802. For a discussion of the elements comprising the plaintiff’s prima facie case, see \textit{supra} notes 23-28 and accompanying text.

\textit{McDonnell}, 411 U.S. at 802.
that the reason given by the defendant was pretextual.\textsuperscript{38} Many early courts and legal commentators considered the disparate treatment analysis to be a useful framework for evaluating quid pro quo claims of sexual harassment.\textsuperscript{39} When the theory of hostile work environment harassment began to evolve, some courts attempted to apply the disparate treatment approach to these claims as well.\textsuperscript{40}

The \textit{Katz} court, however, concluded that the disparate treatment formula was unsuitable for the plaintiff’s, or any other, hostile environment claim.\textsuperscript{41} The court did not specifically address the \textit{Henson} elements of a prima facie claim, although it required them in effect, and formulated a different order of proof.\textsuperscript{42} The court seemed to state that a prima facie case is established by the plaintiff’s showing that sexual advances, insults or other sexually harassing conduct occurred.\textsuperscript{43} The employer may rebut this evidence by showing that the alleged events never happened, were merely isolated, or were insignificant.\textsuperscript{44} The

\textsuperscript{38} Id. at 804-05 (plaintiff must be allowed opportunity to prove that reasons given by defendant in support of employment decision or practice were cover-up for discriminatory motivations).

\textsuperscript{39} See Note, supra note 3, at 1020 n.93; see also Williams v. Saxbe, 413 F. Supp. 654 (D.C. 1976), rev’d on other grounds sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). For a discussion of Williams, see supra note 5.

\textsuperscript{40} See \textit{Henson}, 682 F.2d at 902.

\textsuperscript{41} \textit{Katz}, 709 F.2d at 255-56. Focusing on the order of proof dictated by the disparate treatment model, the court concluded that it was not suitable for hostile environment claims because it revolved around the discriminatory intent of the employer. \textit{Id.} at 255. The court stated:

In the usual case involving allegations of disparate treatment, once the plaintiff establishes that he or she was disadvantaged in fact by some employment decision or practice, the crux of the matter is the question of motive: was there an intent to discriminate along legally impermissible lines such as race or gender?

\textit{Id.}

In hostile environment cases, "the sexual advance or insult almost always will represent an \textit{intentional} assault on an individual's innermost privacy." \textit{Id.} (quoting \textit{Bundy v. Jackson}, 641 F.2d 934, 945 (D.C. Cir. 1981)) (emphasis added). Therefore, a showing of discriminatory intent is unnecessary. For discussion of the disparate treatment approach and the requirement of intent, see supra note 26.

The disparate treatment model of discrimination is, however, considered well suited for analysis of quid pro quo claims of sexual harassment. Note, supra note 1, at 1454. In such claims, proof of a discriminatory reason for the supervisor's or employer's action is central to the plaintiff's case. See \textit{id.} ("quid pro quo harassment constitutes sex discrimination . . . when it erects an employment barrier for workers of one sex but not for workers of the other"). For examples of quid pro quo cases influenced by the disparate treatment approach, see \textit{Tomkins v. Public Serv. Elec. & Gas Co.}, 568 F.2d 1044 (3d Cir. 1977); \textit{Williams}, 413 F. Supp. 654.

\textsuperscript{42} Often courts do not specifically address the \textit{Henson} elements, but require them in effect. For a discussion of the various approaches of the courts in adhering to the \textit{Henson} elements, see supra note 31.

\textsuperscript{43} \textit{Katz}, 709 F.2d at 256.

\textsuperscript{44} \textit{Id.} at 255-56.
court concluded that the plaintiff proved her case by showing that she was subjected to genuine and significant sexual harassment of which the employer was, or should have been, aware and took no corrective action.  

A significant interpretation of the parameters of a sexual harassment claim occurred two years after *Katz*, in *McKinney v. Dole*. The *McKinney* court analyzed the question of whether an act, non-sexual in nature, may be considered as part of the harassing conduct in the evaluation of a claim of hostile environment sexual harassment. In *McKinney*, the plaintiff based her hostile environment claim in part on an incident in which her supervisor grabbed and twisted her arm. The court stated that an incident need not have sexual overtones or involve sexuality in an overt or obvious way in order to qualify as sexual harassment. The court held that the arm-grabbing incident was a form of sexual harassment because it would not have occurred but for the plain-

45. *Id.* at 256. Regarding proof of respondeat superior, the court stated that the plaintiff must show that the employer is liable by proving that the employer knew of the harassment, or should have known of it, and took no steps to remedy the situation. *Id.* The employer may rebut this evidence by showing that prompt action was taken to correct the situation. *Id.*

46. 765 F.2d 1129 (D.C. Cir. 1985).

47. *Id.* at 1131-32.

48. The plaintiff brought a hostile environment claim based upon several incidents of harassment. *Id.* The incident upon which the court's attention was focused occurred during a meeting between the plaintiff and her boss. *Id.* at 1132. They argued and as the plaintiff attempted to leave the office, the supervisor grabbed and twisted her arm causing physical injury. *Id.* The defendant argued that summary judgment should be granted in his favor because the plaintiff did not allege that there were sexual overtones connected to this incident. *Id.* at 1136-37.

It was essential to the plaintiff's case that this incident be considered in the court's evaluation of her claim, apparently because she alleged only a small number of other incidents of harassment. See *id.* at 1132. Under the totality of the circumstances test, without the addition of the arm-grabbing incident, it was likely that the court would have determined that the incidents were too isolated or insignificant to constitute harassment. See, e.g., *Highlander v. K.F.C. Nat'l Management*, 805 F.2d 644, 649-50 (6th Cir. 1986) (plaintiff may not rely on single isolated event or comment but must prove injury resulted from conduct that occurred frequently); *McKinney*, 765 F.2d at 1138 (harassment must be patterned or pervasive to constitute violation of Title VII); *Katz*, 709 F.2d at 256 (employer may rebut claim of harassment by showing that incidents were isolated or insignificant); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (sexual harassment must be sufficiently pervasive to create hostile working environment, and determination of pervasiveness is based on totality of circumstances).

Because sexuality was not involved in the arm-grabbing incident, the district court granted summary judgment for the defendant. *McKinney*, 765 F.2d at 1137. The court of appeals reversed. *Id.* at 1140.

49. *McKinney*, 765 F.2d at 1138. The court rejected the defendant's argument that physical force toward an employee did not constitute sexual harassment unless it was somehow sexually oriented. *Id.* The court called this argument legally flawed. *Id.*
In 1986, the United States Supreme Court heard a sexual harassment claim for the first time in *Meritor Savings Bank v. Vinson.* The Court, confirming principles used by the courts of appeals in hostile environment cases, held that the plaintiff had established a hostile environment sexual harassment claim. Among these principles, the Court

50. *Id.* It was the court's opinion that the physical aggression exhibited by the supervisor would not have surfaced if the same argument had transpired between the supervisor and a male employee. *Id.* at 1139-40. The court phrased its holding in these terms: "[W]e hold that any harassment or other unequal treatment of an employee or group of employees . . . may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII." *Id.* at 1138.

In a footnote to the above statement, the court of appeals noted that the district court, in support of its conclusion that sexual harassment had not occurred, cited the definition of sexual harassment set forth in the EEOC's Guidelines on Sexual Harassment. *Id.* at 1138-39 n.20. The Guidelines employ the terms "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" to define sexual harassment. 29 C.F.R. § 1604.11(a) (1982). The court of appeals, acknowledging that the Guidelines were owed judicial deference, stated:

Even assuming that harassment that is caused by an employee's sex but that is not overtly sexual does not fall within the EEOC's definition of sexual harassment, we do not believe that an EEOC regulation that identifies certain activities as prohibited by Title VII can or should be taken to mean that any other activities are allowed. Thus we look directly to the words of the statute for guidance.

*McKinney,* 765 F.2d at 1138-39 n.20.

51. 477 U.S. 57 (1986). To date, this is the only sexual harassment case heard by the United States Supreme Court.

52. Holtzman & Trelz, *supra* note 1, at 256; see *Meritor,* 477 U.S. at 64-69. The Court also reaffirmed the EEOC Guidelines on Sexual Harassment. For the relevant text of these guidelines, see *supra* note 16.

53. *Meritor,* 477 U.S. at 67-68. In *Meritor,* the plaintiff, a bank employee, alleged that her supervisor made demands to her for sexual favors. *Id.* at 60. The plaintiff submitted to these demands out of "fear of losing her job," and estimated that she and her supervisor had sexual intercourse "some forty or fifty times." *Id.* The plaintiff also claimed that the defendant had raped her over her four-year course of employment at the bank. *Id.*

The district court, in finding that the plaintiff had not been sexually harassed, stated that "'[i]f [the plaintiff] and [the defendant] did engage in an intimate or sexual relationship during the time of [the plaintiff's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution.'" *Id.* at 61 (quoting *Vinson v. Taylor,* 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980), rev'd, 753 F.2d 141 (D.C. Cir. 1985)).

Both the court of appeals and the United States Supreme Court held that the district court's determination was insufficient to dispose of her claim because the finding was "likely based on one or both of two" incorrect interpretations of the law. *Id.* at 67. The district court erroneously believed that every cause of action for sexual harassment had to include some tangible economic loss to the plaintiff. *Id.* at 67-68. However, this is a necessary element only of quid pro quo cases, and thus the district court never considered the plaintiff's claim under the hostile work environment theory. *Id.*

The district court also was incorrect in inquiring as to the voluntariness of
recognized (1) that Title VII is not limited to cases of economic or tangible discrimination;\(^54\) (2) that there are at least two types of sexual harassment—quid pro quo and hostile working environment;\(^55\) (3) that an actionable hostile work environment claim requires a showing by the plaintiff that the harassment was severe enough to interfere with the plaintiff’s ability to work effectively, thus creating an abusive or hostile working environment;\(^56\) (4) that the essence of any sexual harassment claim is the offensiveness of the alleged harassing conduct;\(^57\) and (5) that the existence of sexual harassment must be determined by an evaluation of the totality of the circumstances.\(^58\)

Shortly after the *Meritor* decision, the Sixth Circuit, in *Rabidue v. Osceola Refining Co.*,\(^59\) introduced the hypothetical reasonable person standard into the evaluation of hostile work environment claims.\(^60\) The plaintiff’s involvement in the sexual relationship with her supervisor. \(^{Id.}\) at 68. The Court stated that the “correct inquiry [was] whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.” \(^{Id.}\) Consequently the Court remanded the case to the district court. \(^{Id.}\) at 73.

\(^54.\) \(^{Id.}\) at 64. In support of this conclusion, the Court cited the EEOC Guidelines on Sexual Harassment which “fully support the view that harassment leading to noneconomic injury [could] violate Title VII.” \(^{Id.}\) at 65.

\(^55.\) \(^{Id.}\) In support of the existence of a hostile work environment cause of action, the Court discussed *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), \(^{cert. denied},\) 406 U.S. 957 (1972). *Meritor*, 477 U.S. at 65-66. *Rogers* was “apparently the first case to recognize a cause of action based upon a discriminatory work environment.” \(^{Id.}\) at 65. For a discussion of *Rogers*, see supra notes 20-21.

\(^56.\) \(^{Id.}\) at 67 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

\(^57.\) \(^{Id.}\) at 68 (citing the EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(a) (1982)). Because the essence of a hostile work environment claim is that the conduct is unwelcome, the voluntariness of an employee’s participation in sexual relations is irrelevant to the case. \(^{Id.}\)

\(^58.\) \(^{Id.}\) at 69.


\(^60.\) The introduction of the hypothetical reasonable person standard was presumably an attempt to bring to the law of sexual harassment a basis of objectivity for the evaluation of the offensiveness of the alleged harassing behavior. See \(^{Id.}\). For a plaintiff to prevail under this standard, she must prove that a reasonable person’s psychological well-being would have been affected by the same or similar circumstances. \(^{Id.}\).

This standard has been assailed on the principle that it cannot accurately reflect the perceptions of both the harasser and the victim, as it is assumed to do, because men and women often have differing perceptions as to what is appropriate sexual behavior. Note, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 Iowa L. Rev. 1109, 1129 (1986). As one commentator noted: “If women and men always communicated their sexual interests and desires in the same manner, or if they understood each other’s communications, they could, in fact, be represented by the same hypothetical person . . . .

Behavior is not so accurately perceived, however; a gender gap in sexual communications exists. Men and women frequently misinterpret the intent of [the opposite sex].” \(^{Id.}\) (quoting Weiner, *Shifting the Communication Burden: A Meaningful Consent Stan-
court believed this standard to be the most equitable method of evaluating the offensiveness of the alleged harassment.\textsuperscript{61} The court held that regardless of how offended the plaintiff was, it must be clear that the conduct would have interfered with the hypothetical reasonable person's ability to function effectively in the same or similar environment.\textsuperscript{62} If not, the plaintiff will not prevail on her claim.\textsuperscript{63}

In \textit{Rabidue}, the plaintiff alleged she was sexually harassed by a co-worker who made "obscene comments about women generally, and, on occasion, \ldots directed\ldots obscenities \ldots to the plaintiff."\textsuperscript{64} The court determined that the plaintiff did not show that her working environment was sufficiently hostile to constitute actionable harassment.\textsuperscript{65} It was the court's opinion that women must expect a certain amount of demeaning conduct in certain work environments.\textsuperscript{66} The court concluded that the

\begin{footnotesize}
\textsuperscript{61.} \textit{Rabidue}, 805 F.2d at 620. The court stated that it adopted this standard "[t]o accord appropriate protection to both plaintiffs and defendants." \textit{Id.}

\textsuperscript{62.} \textit{Id.} In making this assessment, the court listed several subjective and objective factors to be considered:

\begin{itemize}
  \item The nature of the alleged conduct,
  \item The background and experience of the plaintiff, her co-workers, and supervisors,
  \item The totality of the physical environment of the plaintiff's work area,
  \item The lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs,
  \item Coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.
\end{itemize}

\textit{Id.}

\textsuperscript{63.} \textit{Id.} Evidence that the plaintiff's psychological well-being was seriously affected must also be shown for the claim to be successful. \textit{Id.}

\textsuperscript{64.} \textit{Id.} at 615. In addition to the defendant's obscenities, the plaintiff was exposed to "pictures of nude and scantily clad women" displayed in the office. \textit{Id.}

In describing the defendant co-worker, the court stated that "[he] was an extremely vulgar and crude individual. \ldots Management was aware of [his] vulgarity, but had been unsuccessful in curbing his offensive personality traits during the time encompassed by this controversy." \textit{Id.} The court described the plaintiff in equally unflattering terms:

The plaintiff's supervisors and co-workers with whom plaintiff interacted almost uniformly found her to be an abrasive, rude, antagonistic, extremely willful, uncooperative, and irascible personality. She consistently argued with co-workers and company customers \ldots. She disregarded supervisory instruction and company policy whenever such direction conflicted with her personal reasoning and conclusions. In sum, the plaintiff was a troublesome employee.

\textit{Id.} The plaintiff was terminated from her position and brought a discriminatory discharge claim in this same action. \textit{Id.} at 618.

\textsuperscript{65.} \textit{Id.} at 623.

\textsuperscript{66.} \textit{Id.} at 620-22. The Sixth Circuit quoted the language of the district court with approval:

Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girly magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that

\end{footnotesize}
incidents the plaintiff described were within this amount of expected harassment. Further, the court held that the hypothetical reasonable person would not have been significantly affected by the same or similar circumstances.

B. Broderick v. Ruder: *The Expansion of Sexual Harassment Law*

Recently, the District Court for the District of Columbia expanded the law of sexual harassment in *Broderick v. Ruder*. In 1988, the Broder-
ick court became the first court to recognize a hostile work environment claim based on conduct which was not specifically directed toward the plaintiff or toward women in the office in general.

In *Broderick*, the plaintiff, a female staff attorney with the Securities and Exchange Commission (SEC), claimed she was forced to tolerate a work environment in which it was obvious to the entire office staff that employees who were involved in relationships with supervisory personnel received job benefits in exchange. The plaintiff argued that this atmosphere created a hostile work environment. The SEC maintained that Title VII did not apply to this case because only "social/sexual interactions between and among employees" were involved, not discrimination based upon sex. The court evaluated the totality of the circumstances and concluded that a prima facie case of sexual harassment was established because "[t]he evidence at trial established that

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70. The plaintiff did claim she was the target of sexual harassment on two occasions. She stated that on one occasion the regional administrator, drunk at an office party, untied her sweater and kissed her. The plaintiff also said that the regional administrator and another supervisor "made sexually suggestive remarks about her dress and figure." *Broderick*, 685 F. Supp. at 1273-74. The court did not emphasize these incidents, calling them isolated, and placed greater weight on the fact that the plaintiff was forced to work in an environment in which sexual relations were exchanged for job benefits. *Id.* at 1278.

71. The plaintiff did not claim that there were overt signs of a derogatory and discriminatory attitude toward the female employees, such as, for example, openly displayed pictures of nude women, verbal abuse, sexual innuendo and so forth.

72. *Id.* Among the relationships recited by the plaintiff, one involved a clerical worker and her supervisor, an assistant regional administrator. *Id.* at 1275. In the period of one year the clerical worker received a $300 cash award, two promotions and perfect scores on her annual performance evaluation. *Id.* Another relationship, although not shown to be sexual in nature, involved another assistant regional administrator and a staff attorney. They socialized together frequently and the administrator had promoted the attorney's career by advancing her from a grade of GS-11 to GS-14 in just over two years. *Id.* at 1274. The plaintiff argued that it was the pervasiveness of such highly offensive behavior—the exchange of sexual relations for job benefits—that created a sexually hostile working environment which significantly affected her psychological well-being and interfered with her ability to perform her job responsibilities. *Id.* at 1273. She stated that the conduct "poisoned any possibility of her having the proper professional respect for her supervisors and affected her motivation and performance of job responsibilities." *Id.*

73. *Id.*

74. *Id.* at 1280. For a discussion of the applications of Title VII, see *supra* note 3. The SEC further argued that the plaintiff was paranoid in feeling sexually harassed by exposure to relationships between supervisors and employees. *Broderick*, 685 F. Supp. at 1280. The court stated that this argument was "unacceptable," and went on to say that "[h]owever relaxed one's views of sexual morality may be in a different context, such views do not cover the pattern of conduct disclosed by the record in this case." *Id.*
such conduct of a sexual nature was so pervasive at the [regional office] that it [could] reasonably be said [to have] created a hostile or offensive work environment." Thus, the court concluded that the "exchange of consensual sexual relations for tangible employment benefits . . . create[s] and contribute[s] to a sexually hostile working environment."76

III. Analysis

The law of sexual harassment has experienced tremendous growth over the last decade. What started out on hesitant and unsure footing has become a well-accepted cause of action, firmly entrenched as a part of the law of sex discrimination and constantly expanding in its definition and reach, encompassing many forms of conduct and injury.

Broderick is potentially a very significant development in this area of the law. It represents the first time that a court has decided a hostile work environment case not upon the incidents of harassment directed at the plaintiff, but squarely upon the nature of the environment itself.77

75. Broderick, 685 F. Supp. at 1278. In evaluating the totality of the circumstances, the court considered the testimony of other SEC employees regarding the working atmosphere to which the plaintiff and the other employees were subjected. Id. Three of the supervisors whom Broderick charged with sexual harassment also testified at the trial. Of their testimony, the court said "[w]ith due consideration for the compromising position in which they found themselves, we find [their] testimony . . . less than forthright and . . . in material respects false and incredible . . . . [W]e regard the testimony of all these witnesses as deserving of little credence." Id. at 1275; see also Woman Was Sexually Harassed at SEC, Judge Rules, Philadelphia Inquirer, May 15, 1988, at 12-A, col. 1.

76. Broderick, 685 F. Supp. at 1280. Broderick resulted in a court-approved settlement called "unheard of" in terms of the extent of the relief granted. SEC Agrees to Outside Review in Sexual Harassment Case, Washington Post, June 17, 1988, at A1, col. 2. Broderick was awarded back pay and interest, which although not yet calculated, is estimated to be between $35,000 and $50,000; attorneys' fees; a promotion to the GS-15 level and her choice of a new position with either the SEC's Enforcement Division or the General Counsel's Office; and the removal of negative performance evaluations from her personnel file. Id.

In addition, the SEC is permanently enjoined from retaliating against Broderick, and it may not create or condone a sexually hostile work environment, nor refuse to investigate charges of sexual harassment, nor refuse to discipline those found responsible for sexual harassment. Id.

The SEC has also agreed to educate its employees about sexual harassment and to hire an outside consultant to investigate the conduct of the three supervisors involved in Broderick's suit and recommend disciplinary action. Id. It is interesting to note the court's conclusion that "[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive." Id. at 1278 (quoting Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985), aff'd sub nom. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)).

77. See Broderick, 685 F. Supp. at 1280. In previous cases, successful plaintiffs were those who claimed that specific harassing incidents, directed toward them, were sufficiently pervasive to affect the conditions of employment in violation of Title VII. See, e.g., Henson v. City of Dundee, 682 F.2d 897, 899 (11th Cir. 1982) (plaintiff made showing that supervisor directed crude and vulgar lan-
By evaluating the nature of the work environment, the Broderick approach gives the totality of the circumstances greater effect, allowing the court more freedom to consider and weigh all aspects of the work environment in determining whether or not it is hostile or abusive.\(^78\)

Prior to Broderick, the totality of the circumstances appeared to be comprised of only those incidents directed toward the plaintiff. Had the Broderick court followed this approach, the plaintiff's cause of action would have failed because the few instances of harassment directed at her would have been insufficient to constitute a Title VII violation.\(^79\) In expanding the scope of the totality of the circumstances test, the court relied on three cases.\(^80\)

It has been said that this decision is "a significant extension of sexual harassment protections" because of the fact that "[m]ost defendants [sic] who have been successful in past cases showed that they were directly harassed and subjected to sexual discrimination." Woman Was Sexually Harassed at SEC, Judge Rules, Philadelphia Inquirer, May 15, 1988, at 12-A, col. 1. In this case, Broderick was victimized by what went on around her in the office. \(\text{Id.}\)

78. In previous cases, the most important consideration for the courts was the character and frequency of the harassing conduct that was directed specifically to the plaintiff. See, e.g., Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) (plaintiff must demonstrate that "injury resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency"), cert. denied, 481 U.S. 1041 (1987); Highlander v. KFC Nat'l Management, 805 F.2d 644, 650 (6th Cir. 1986) (same); Downes v. FAA, 775 F.2d 288, 294 (Fed. Cir. 1985) (five incidents of alleged harassing conduct by supervisor over period of three years, even if not trivial in nature, "do not show that conduct ... has become a 'condition' of anyone's employment"); Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (plaintiff's employment was "conditioned by a pattern of personally directed sexual insult and innuendo"). It was thought that such conduct would have the greatest and most serious impact upon the plaintiff's ability to work effectively in that environment. However, it is also likely that many plaintiffs did not attempt to introduce evidence of the general work atmosphere, (because prior to Broderick such evidence did not alone establish a cause of action), thus not presenting courts with many opportunities to determine the significance of the whole environment. When an occasional plaintiff did offer such evidence, it was not accorded the same weight as the other harassing incidents. See, e.g., Rabidue, 805 F.2d at 622 n.7 (plaintiff claimed that pictures of nude women displayed in office and vulgarity and offensiveness of supervisor's personality contributed to hostile work environment). Obviously being the target of harassment does have an extremely serious effect on the victim. However, other occurrences in the workplace can also have a serious impact on an individual, even when that person is not involved in the incidents themselves.

79. The court described these incidents as "isolated." Broderick, 685 F. Supp. at 1278.

80. \(\text{Id.}\) at 1277 (citing King v. Palmer, 778 F.2d 878, 880 (D.C. Cir. 1985); Priest v. Rotary, 634 F. Supp. 571, 581 (N.D. Cal. 1986); Toscano v. Nimmo, 570 F. Supp. 1197, 1199 (D. Del. 1983)).
In *King v. Palmer* \(^81\) and *Toscano v. Nimmo* \(^82\) the plaintiffs were denied job promotions and sued their employers for sexual discrimination, claiming that the positions were given to women who had engaged in sexual relations with the employers. \(^83\) Both courts determined that the promotions were conditioned upon the granting of sexual favors and that this condition of employment violated Title VII. \(^84\) It is suggested that this conduct indicated sexual discrimination, not the more specific discriminatory practice of sexual harassment. The conduct did not fit within quid pro quo harassment because the denials of the promotions were not a result of the plaintiffs' refusal to engage in sexual relations. \(^85\) Nor did it fit within the existing hostile work environment theory of harassment. At that point in time, a plaintiff had to establish patterned and pervasive harassment directed toward her in order to state a claim for this type of harassment, and it is clear that the promotion incidents alone would have been insufficient for that purpose.

In *Priest v. Rotary*, \(^86\) the court found several Title VII violations. Among these, the court held that the plaintiff established cases of both

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81. 778 F.2d 878 (D.C. Cir. 1985).
83. *King*, 778 F.2d at 878-79; *Toscano*, 570 F. Supp. at 1198.
84. *King*, 778 F.2d at 880; *Toscano*, 570 F. Supp. at 1204. The *King* court stated that "unlawful sex discrimination occurs whenever sex is 'for no legitimate reason a substantial factor in the discrimination.'" *King*, 778 F.2d at 880 (quoting *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981)).
85. See supra note 84.
86. 634 F. Supp. 571 (N.D. Cal. 1986).
quid pro quo and hostile work environment harassment. In establishing the hostile work environment claim, the plaintiff in Priest relied on instances of conduct directed toward her. Only as an aside did the court mention that the employer treated other employees in a similar manner and that the plaintiff was aware of this harassment.

Citing these three cases for the proposition that "Title VII is . . . violated when an employer affords preferential treatment to female employess who submit to sexual advances or other conduct of a sexual nature and such conduct is of common knowledge," the Broderick court concluded that an evaluation of a plaintiff's work environment can include consideration not only of conduct directed at the plaintiff, but all other behavior in the workplace relevant to the creation of a sexually discriminatory and harassing environment. In further support of its position, the court referred to dicta in Vinson v. Taylor where the Court of Appeals for the District of Columbia stated that "[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive.

It is submitted that the Broderick court's approach to the evaluation of the totality of the circumstances is a proper one. Implicit in a totality of the circumstances test is the notion that all circumstances relevant to the plaintiff's claim will be considered by the court. Where a hostile work environment claim is concerned, it follows that evaluation of the totality of the circumstances necessarily includes consideration of the environment as a whole, since it is the environment itself that the plaintiff finds offensive. A consideration of the total environment must therefore include not only those incidents in which the plaintiff was involved, but also incidents involving others of which the plaintiff was aware, provided they are relevant to the plaintiff's claim. Excluding from consideration incidents not involving the plaintiff serves no valid purpose, but renders it impossible for many employees, forced to tolerate hostile environments, to bring causes of action for sexual harassment.

87. Id. It should be noted that the court also held that Title VII was violated because preferential job treatment was given to employees who engaged in sexual relations with the employer. Id. at 581-82. The court offered no explanation for this conclusion and considered this violation as separate from hostile work environment harassment. Thus, although the Priest case was along similar lines as Broderick, the Broderick court chose a different approach and incorporated this kind of behavior into the theory of hostile work environment harassment by way of the totality of the circumstances test.
88. Id.
89. Id. at 582.
92. Id. at 146.
93. It may be possible for a plaintiff to have a cause of action for sexual discrimination in a case where her employer has on one or a few occasions given
Because Broderick is the first case to find a sexually hostile work environment in which the plaintiff was not the target of patterned and pervasive abuse, the decision may serve as a springboard for expansion of the parameters of hostile work environment claims. If standing to sue no longer requires injury sustained as a result of direct personal harassment, the number of potential plaintiffs will greatly increase.

Although the court in Broderick determined that a hostile work environment existed at the SEC, the court did not explain how it arrived at this conclusion, except to state that because the conduct was so pervasive, "it can reasonably be said that such conduct created a hostile or offensive work environment." 94 In determining the offensiveness of the harassment, courts must choose a point of view from which to evaluate the environment. 95 Courts often apply a reasonable person's perspective. 96 It has been suggested that a better approach is the use of the perspective of a reasonable victim. 97 Because no uniform standards seem to exist among the courts, it is unfortunate that the Broderick court declined the opportunity to set forth its guidelines as to the determination of this issue. 98 It is likely, however, that the Broderick court did not engage in extensive analysis of the reasonableness of the plaintiff's claim because the facts of her case clearly indicated the pervasiveness of the offensive behavior, such that either the reasonable person or the reasonable victim would have been significantly affected by such an environment.

The hostile work environment claim developed because women needed a viable course of legal action in situations that fell outside of the quid pro quo exchange. 99 Until courts recognized the hostile work environment cause of action, women were subjected to unwelcome sex-preferential job treatment or promotions to employees with whom he was sexually involved, when the complaining employee was not in direct competition for the particular job opportunity. See, e.g., Priest, 634 F. Supp. at 581-82. However, courts may vary on this question. An allegation of only one or two (in other words, isolated) incidents of this treatment, however, would be insufficient to establish a case of hostile environment harassment. See Broderick, 685 F. Supp. at 1278.

95. Note, supra note 1, at 1459.
96. Rabidue, 805 F.2d at 620. "[T]he trier of fact, when judging the totality of the circumstances impacting upon the asserted . . . hostile environment . . . must adopt the perspective of a reasonable person's reaction to a similar environment under . . . similar circumstances." Id. For further discussion of this perspective, see supra notes 60-63 and accompanying text.
97. For a discussion of the reasonable victim's perspective, see supra note 72.
98. Some courts expressly state that the environment must be evaluated by the reasonable person's perspective. However, most courts state only that, based on the evidence, it must be reasonable to conclude that a hostile environment exists. Among these courts, there seem to be no guidelines for determining reasonableness.
99. See generally C. Lefcourt, supra note 2, § 3.04 (discussing historical de-
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ual remarks, embarrassing conversations or other forms of verbal abuse without any legal recourse. Once courts did recognize it, some women still were unable to seek legal redress for discriminatory working conditions because courts refused to expand the definition of sexual harassment beyond those incidents directed toward the plaintiff. If courts elect to follow Broderick, sexual harassment claims will be accessible to more women and will aid in increasing employers' awareness as to what conduct is and is not acceptable in the workplace.

V. CONCLUSION

As courts continue to hear hostile work environment cases, controversy will no doubt increase over what should be considered actionable harassment. The controversy will be especially sharp in marginal cases, where the conduct alleged is different from the types of behavior involved in previous suits. Given the initial judicial reluctance to consider sexual harassment as anything other than normal social relations between men and women, it is likely that future attempts to broaden the definition of sexual harassment will be met with similar hesitation. Such a reaction would be unfortunate and costly because only through a legal system responsive to the needs of women will women in the workforce achieve equality of opportunity. Courts must allow sexual harassment to be defined by the full range of women's experiences in the workplace. It is suggested that application of the reasonable victim's perspective will provide for this needed flexibility. This perspective should be employed as a universal standard for evaluation of the reasonableness of hostile work environment claims to deter courts from imposing personal judgments as to the offensiveness of the particular work environment.

Jill W. Henken

100. The only women who could assert causes of action for sexual harassment were those who were victims of quid pro quo harassment. See, e.g., Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Tompkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), rev'd on other grounds sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

101. See C. LEF COURT, supra note 2, § 3.02.

102. For discussion of the reasonable victim approach, see supra note 68.