DISCRIMINATION LAW—DEFINING THE HOSTILE WORK ENVIRONMENT CLAIM OF SEXUAL HARASSMENT UNDER TITLE VII

Barbara L. Zalucki
DISCRIMINATION LAW—DEFINING THE HOSTILE WORK ENVIRONMENT CLAIM OF SEXUAL HARRASSMENT UNDER TITLE VII

INTRODUCTION

Defining sexual harassment is a complex challenge to our legal system. For many years, women have recounted their experiences, describing sexually harassing behavior as part of their daily lives.  

1. The definition of sexual harassment is the subject of this comment. The need to redefine sexual harassment stems from the debate on how to define “sex.” The term “sex” has been variously interpreted by courts in assessing Title VII claims. One purpose of this comment is to demonstrate that those various interpretations have been inconsistent, and to suggest some refinement in the use of the term “sex” to include both sex and gender role elements. For instance, commentators define sexual harassment differently: “the unwanted imposition of sexual requirements in the context of a relationship of unequal power,” C. MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEXUAL DISCRIMINATION I (1979); and “unsolicited nonreciprocal male behavior that asserts a woman’s sex role over her function as worker.” L. Farley, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 14-15 (1978).

2. This comment focuses on the sexual harassment of working women by men. However, men also have alleged sexual harassment and discrimination on the basis of sex in the workplace. See, e.g., Huebschen v. Department of Health and Social Servs., 716 F.2d 1167 (7th Cir. 1983) (male plaintiff could not bring a § 1983 claim against his female supervisor based on Title VII since she was not an employer); Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983), aff’d, 749 F.2d 732 (11th Cir. 1984) (male employee established prima facie case of discrimination on the basis of sex and sexual harassment based on unwelcome homosexual advances by manager); Wright v. Methodist Youth Servs., 511 F. Supp. 307 (N.D. Ill. 1981) (discharge of a male employee for refusing to accept sexual advances of homosexual supervisor is a violation of Title VII).

Note that, in the two cases above involving unwelcome homosexual advances, the employees were protected because they were male, not because they were either heterosexual or homosexual. Thus, when a male supervisor approaches only male employees, there is a violation of Title VII on the basis of sex, just as there would be if a male supervisor approached only female employees. An interesting dilemma might arise in the case of a “bisexual supervisor who demands sexual favors from members of both sexes.” I. Sullivan, M. Zimmer, & R. Richards, Employment Discrimination, § 8.7.1, 360 n.2 (1988). There would probably not be a violation of Title VII, as the employees would not be singled out on the basis of sex. Furthermore, it is important to note that Title VII does not include sexual orientation as a protected category, nor has it been interpreted to protect homosexuals in the workplace. See Desantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

spite the prevalence of sexual harassment in the workplace and its acceptance as a legal concept, women workers still fail to report sexually harassing behavior, causing some of these women to experience detrimental psychological and physical effects or a delay in career advancement.4

In defining sexual harassment, courts have recognized that unwanted sexual advances or other sexually harassing behavior is a form of discrimination on the basis of sex.5 Congress prohibited this form of discrimination with the enactment of Title VII of the Civil Rights Act of 1964.6 Although Congress has never prohibited sexual harassment specifically, the Equal Employment Opportunity Commission, an agency created by the Civil Rights Act,7 has developed advisory report[ed]" some form of unwanted visual, verbal, or physical attention in the workplace. Id. at 217.

However, no study or survey can reflect truly the extent of sexual harassment in the workplace. A survey conducted by the Harvard Business Review and Redbook magazine in 1981 reported that male and female workers “agree on what harassment is,” but “disagree strongly on how frequently it occurs.” See Collins & Blodgett, Sexual Harassment . . . Some See It . . . Some Won’t, 59 Harv. Bus. Rev. 76, at 77 (Mar.-Apr. 1981). Yet, another study that examined sexuality in a more general context demonstrated a gender gap in defining sexual harassment. See B. Gutek, Sex and the Workplace: The Impact of Sexual Behavior and Harassment on Women, Men, and Organizations 42-54 (1985). “Men report almost as many overtures from women under some circumstances, but men are more likely to view such encounters positively, to see them as fun and mutually entered. A high proportion of the more serious incidents reported by men are sexual touching, but by their own reports, many do not view sexual touching as sexual harassment.” Id. at 53. For a more recent report on the incidence of sexual harassment in the workplace, see Bratton, The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment, 17 N.M.L. Rev. 91, 95-98 (1987).

4. A harassed woman, who may feel intimidated at possible repercussions of a complaint of sexual harassment, may ignore the problem or resign to avoid the issue.

Those who complain, as well as those who do not, express fears that their complaints will be ignored, will not be believed, that they instead will be blamed, that they will be considered “unprofessional,” or “asking for it,” or told that this problem is too petty or trivial for a grown woman to worry about, and that they are blowing it all out of proportion.

C. Mackinnon, supra note 1, at 49.

Ignoring the sexual harassment may cause the woman to feel depression, anger, alienation, anxiety, or other psychological traumas leading to emotional breakdown. Physical effects often include headaches, nausea, loss of appetite, and fatigue. See Comment, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U. Pa. L. Rev. 1461, 1464-66 (1986).


guidelines for identifying valid sexual harassment claims. 8

Actionable sexual harassment exists in two forms: the quid pro quo claim and the hostile work environment claim. 9 In a quid pro quo situation, an employer proposes to exchange an economic benefit for sexual acquiescence by an employee. 10 The second actionable claim of sexual harassment, a hostile work environment, is more subtle and need not be characterized by the loss of an economic benefit. 11 A hostile work environment claim can arise from conduct of a sexual nature based on sex or based on gender. 12 A claim based on sex involves conduct of a sexual nature, such as unwelcome touch, 13 leering, innuendoes, crude jokes, or the display of explicit pictures. A claim based on gender, on the other hand, involves conduct that is non-sexual, and detrimental to a woman as a member of a protected class. 14

This comment attempts to define the hostile work environment claim of sexual harassment under Title VII. 15 Part I summarizes the

---


9. See C. Mackinnon, supra note 1, at 32-47.

10. The quid pro quo exchange may be an explicit exchange, such as, "If you won't sleep with me, you won't get your promotion," or something less explicit, "If you want the job, you have to do something 'nice' for me."

11. For an argument that the distinction between the quid pro quo claim and the hostile work environment claim should be eliminated, see Note, Abolishing the Quid Pro Quo and Work Environment Distinctions in Sexual Harassment Cases under the Civil Rights Act of 1964: Vinson v. Taylor, 60 St. John's L. Rev. 177 (1985).

12. The term "sex" or "sexual" is commonly and colloquially used to refer to men or women in a generic sense. However, social science terminology has evolved more precise language usage. "Sex" is reserved for anatomical identity, based on genitalia and physical secondary sex characteristics. The term "gender" is used to indicate aspects of identity or behavior related to both perception of self and social roles. See M. Richmond-Abbott, Masculine and Feminine: Sex Roles over the Life Cycle 41-53 (1983).

13. For a discussion of touch and sexuality, see N. Henley, Body Politics: Power, Sex, and Nonverbal Communication 108-23 (1977). Unwelcome touch may include, but is not limited to, pinching, deliberate fondling, or brushing against another's body. It is interesting to note that men and women view their body accessibility to touch differently. In addition, in one study, "[w]omen respondents reported higher amounts of being touched by others than did men (and they also reported higher levels of touching others themselves)." Id. at 112.

14. See supra note 12. The ways in which courts have contributed to this confusion is demonstrated by their varying interpretations of the word "sexual" to refer to situations involving discrimination with regard to both sex and gender. See infra notes 195-248 and accompanying text.

development of the sexual harassment claim, focusing on the use of Title VII and the Equal Employment Opportunity Commission Final Guidelines to define sexual harassment in the workplace.\(^{16}\) Part II discusses the conceptual framework that courts have used to recognize a hostile work environment claim.\(^{17}\) Part III identifies fact patterns which represent a clear claim of hostile work environment sexual harassment.\(^{18}\) Part IV focuses on controversial claims of verbal sexual harassment and non-verbal sexual harassment involving explicit pictures, drawings, and notes.\(^{19}\) These foregoing sections limit the analysis of sexual harassment to the examination of conduct pertaining to a woman as a sexual being. Part V, however, considers an expanded definition of hostile work environment sexual harassment by including claims of gender harassment, which involves conduct that is non-sexual.\(^{20}\)

I. THE DEVELOPMENT OF THE SEXUAL HARASSMENT CLAIM UNDER TITLE VII

A. Using Title VII to Define Sexual Harassment in the Workplace

Congress, seeking to outlaw employment discrimination, passed Title VII of the Civil Rights Act of 1964, which provides in part:

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

that is directed solely at plaintiff because she is a woman is cognizable under the equal protection clause of the Constitution).

Relief is also available in tort law. For a complete discussion of tort liability in sexual harassment cases, see Dworkin, Ginger, & Mallor, Theories of Recovery for Sexual Harassment: Going Beyond Title VII, 25 SAN DIEGO L. REV. 125, 137-46 (1988); Comment, supra note 4, at 1475-94; Note, The Dehumanizing Puzzle of Sexual Harassment: A Survey of Law Concerning Harassment of Women in the Workplace, 24 WASHBURN L.J. 574, 597-603 (1985).

16. See infra notes 21-68 and accompanying text.
17. See infra notes 69-89 and accompanying text.
18. See infra notes 90-126 and accompanying text.
19. This comment refers to such claims of non-verbal sexual harassment as "symbolic harassment." The author of this comment coined the term "symbolic harassment" by analogy to the concept of symbolic expression. Symbolic expression, a message delivered by non-verbal conduct, is within the scope of constitutional protection under the first amendment. See, e.g., Spence v. Washington, 418 U.S. 405 (1974) (using a flag to convey a message of peace). See infra notes 127-94 and accompanying text.
20. See infra notes 195-248 and accompanying text.
In addition to granting equal treatment to all employees, Congress established the Equal Employment Opportunity Commission (EEOC) to guide the implementation of Title VII and to encourage compliance with the Act.\footnote{21}

Discrimination on the basis of sex originally was not part of the proposed Civil Rights Act of 1964.\footnote{22} The United States House of Representatives did not even consider this form of discrimination until the day before the passage of the Act, when Representative Howard Smith of Virginia proposed a floor amendment to the Act to include sex under Title VII.\footnote{23} Those in opposition to the amendment, however, argued that an amendment prohibiting "[discrimination on the basis of sex] would not be to the best advantage of women at this time."\footnote{24} Nonetheless, Representative Smith's amendment was adopted, and the bill passed with the word "sex" included among the words race, color, religion, and national origin.\footnote{25} Under the Equal Opportunity Act of 1972,\footnote{26} Congress reiterated its position regarding discrimination on the basis of sex by declaring that "[it] 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 unlaw-

\begin{footnotes}
\footnote{21}{42 u.s.c. § 2000e-2(a) (1982).}
\footnote{22}{42 u.s.c. §§ 2000e-4 and 5 (1982).}
\footnote{23}{During the extensive committee hearings on the civil rights bill, discrimination on the basis of sex was hardly mentioned. The only time the word "sex" was used during the committee hearings in relation to the proposed Act was before the House Rules Committee, where a motion to amend the bill to add sex to the other classifications was defeated.}
\footnote{24}{110 Cong. Rec. 2577 (1964).}
\footnote{25}{Id. In a letter from Assistant Secretary of Labor, Esther Peterson, dated February 7, 1964, the Department of Labor responded to the proposed amendment by stating: "'We are aware that this order could be expanded to forbid discrimination on the basis of sex. But discrimination based on sex, the Commission believes, involves problems sufficiently different from discrimination based on the other factors listed to make separate treatment preferable.'" (quoting from a Report on the President's Commission on the Status of Women). Id.}
\footnote{26}{See 110 Cong. Rec. 2584 (1964).}
\end{footnotes}
ful discrimination."^{28}

In the 1970's, several courts began to expand this definition of unlawful discrimination to include other behavior in a claim of discrimination on the basis of sex. The United States District Court for the District of Columbia in *Williams v. Saxbe*^{29} considered whether unwelcome sexual behavior such as sexual advances by a male supervisor constituted unlawful discrimination within the meaning of Title VII. Addressing the issue of Congress' intent when it enacted the Civil Rights Act of 1964, the district court in *Williams* stated:

[There is ample evidence that Congress' intent was not to limit the scope and effect of Title VII, but rather, to have it broadly construed. Furthermore, the plain meaning of the term "sex discrimination" as used in the statute encompasses discrimination between genders whether the discrimination is the result of a well-recognized sex stereotype or for any other reason. . . . There therefore can be no question that the statutory prohibition of [Title VII] reaches all discrimination affecting employment which is based on gender.]^{30}

Unwelcome sexual advances, which would not have occurred but for claimant's sex, therefore were held to be within the meaning of discrimination on the basis of sex under Title VII.^{31} Similarly, in *Barnes v. Costle*,^{32} the Court of Appeals for the District of Columbia Circuit acknowledged that when a female employee refuses to submit to the sexual advances of her male supervisor and, as a result, loses an economic benefit, her employer is guilty of an illegal employment practice under Title VII.^{33}

The idea that "sexual harassment" was an actionable claim under Title VII developed gradually among the courts. When a plaintiff specifically alleged sexual harassment as her claim instead of discrimination on the basis of sex, courts initially were reluctant to recognize a sexual harassment cause of action under Title VII.^{34} In *Corne v.*

---

31. Id. at 657-58.
32. 561 F.2d 983 (D.C. Cir. 1977).
33. Id. at 990-91.
34. See Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) ("[Title VII] is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley."), rev'd, 568 F.2d 1044 (3d Cir. 1977). The Court of Appeals for the Third Circuit reversed the district court's ruling,
Bausch & Lomb, Inc.,\textsuperscript{35} the district court decided that a supervisor’s verbal and physical sexual advances toward a female employee constituted a personal “peculiarity or mannerism” of the supervisor.\textsuperscript{36} The court reasoned that “[i]t would be ludicrous to hold that the sort of activity involved here was contemplated by the [Civil Rights] Act” because such a holding would create “a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another.”\textsuperscript{37}

Despite the district court’s holding in Corne that unwelcome sexual advances are a personal problem and not a Title VII problem, not all courts were so anxious to dismiss sexual harassment claims. In Munford v. James T. Barnes & Co.,\textsuperscript{38} the court concluded that sexual harassment was a form of discrimination on the basis of sex and that it was a type of activity prohibited by Title VII.\textsuperscript{39} The Munford court agreed with the reasoning of the courts in Williams and Barnes that Title VII “prohibits any impediment to employment which affects one gender but not the other,” and that sexual harassment is just such an impediment.\textsuperscript{40}

As these courts began to recognize sexual harassment claims of the quid pro quo type, in which sexual favors are solicited in exchange for an economic benefit, courts also questioned the existence of another more subtle type of sexual harassment—the hostile work environment claim. Bundy v. Jackson,\textsuperscript{41} the first case to recognize a claim of a sexually hostile work environment, differed from previous sexual harassment cases in that the employee did not allege a loss of a tangible job benefit. Instead, she alleged that sexually stereotyped insults, such as “telling her that ‘any man in his right mind would want to rape you,’ ” and degrading propositions to “spend the workday afternoon with him at his apartment,” affected her work environment and

holding that the court took too narrow a view of discrimination on the basis of sex under Title VII. Tomkins, 568 F.2d at 1048-49.

For a further discussion of case law addressing sexual harassment claims during the 1970’s, see Conte & Gregory, Sexual Harassment in Employment—Some Proposals Toward More Realistic Standards of Liability, 32 Drake L. Rev. 407, 419-26 (1982-83).

\begin{itemize}
\item \textsuperscript{35} 390 F. Supp. 161 (D. Ariz. 1975), vacated and remanded, 562 F.2d 55 (9th Cir. 1977).
\item \textsuperscript{36} 390 F. Supp. at 163.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} 441 F. Supp. 459 (E.D. Mich. 1977) (employee who refused sexual advances from her supervisor subsequently was subjected to repeated sexual innuendoes).
\item \textsuperscript{39} Id. at 465-66.
\item \textsuperscript{40} Id. at 465.
\item \textsuperscript{41} 641 F.2d 934 (D.C. Cir. 1981).
\end{itemize}
were thus prohibited by Title VII.\textsuperscript{42}

The court in \textit{Bundy} applied the interpretations of Title VII used previously in race and ethnic discrimination cases to analyze whether "conditions of employment" include[d] the psychological and emotional work environment."\textsuperscript{43} Specifically, the court relied heavily on the Fifth Circuit Court of Appeals' decision in \textit{Rogers v. EEOC},\textsuperscript{44} an ethnic discriminatory environment case, to identify a sexually discriminatory work environment. The court in \textit{Bundy}, following the lead of Judge Goldberg's opinion in \textit{Rogers}, extended the principles of Title VII to include a protection of an individual's psychological well-being from sexually harassing conduct as a condition of employment.\textsuperscript{45}

\[ \text{T} \text{he phrase "terms, conditions, or privileges of employment" in Section 703 [of Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .}^{46} \]

Furthermore, \textit{Bundy} reiterated the congressional intent of Title VII enunciated in \textit{Rogers}, that "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities . . . ."\textsuperscript{47}

However, it was not until 1986 that the United States Supreme Court recognized the hostile work environment claim as a form of sexual harassment actionable under Title VII. In \textit{Meritor Savings Bank v. Vinson},\textsuperscript{48} a supervisor fondled female employees in public and repeat-

\begin{footnotes}
\item 42. \textit{Id.} at 940.
\item 43. \textit{Id.} at 944. \textit{See, e.g.,} Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) (a pattern of derogatory ethnic and racial remarks may violate Title VII if found to create a hostile work environment); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir. 1977) (segregated employee eating clubs may violate Title VII if injurious to employee's psychological well-being), \textit{cert. denied sub nom.}, Banta v. United States, 434 U.S. 819 (1977).
\item 44. 454 F.2d 234 (5th Cir. 1971) (Spanish-surnamed employee brought an action against her former employer for ethnic discrimination), \textit{cert. denied}, 406 U.S. 957 (1972).
\item 45. \textit{Bundy}, 641 F.2d at 944-45.
\item 46. \textit{Id.} at 944 (quoting \textit{Rogers v. EEOC}, 454 F.2d 234, 238 (5th Cir. 1971), \textit{cert. denied}, 406 U.S. 957 (1972)).
\item 47. \textit{Id.} (quoting \textit{Rogers v. EEOC}, 454 F.2d 234, 238 (5th Cir. 1971), \textit{cert. denied}, 406 U.S. 957 (1972)). Judge Goldberg in \textit{Rogers} observed that "[Title VII] evinces a Congressional intention to define discrimination in the broadest possible terms." \textit{Rogers}, 454 F.2d at 238.
\item 48. 477 U.S. 57 (1986).
\end{footnotes}
edly asked one employee to have sexual relations with him. Vinson alleged that during her four years of employment, she was harassed constantly by her supervisor and that such conduct affected her work environment to the point where she frequently became ill and was discharged for excessive sick leave. In considering Vinson’s claim, the Supreme Court acknowledged the existence of a hostile work environment claim of sexual harassment. Although it failed to create a detailed framework for identifying a hostile work environment, the Court observed that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” The harassment in this case was pervasive enough to provide a basis for stating a claim for hostile work environment sexual harassment.

B. Using the EEOC Final Guidelines in an Attempt to Define Sexual Harassment

On November 10, 1980, the EEOC published Final Guidelines broadly defining sexual harassment and providing a statutory framework for analyzing behavior in the workplace. The first section contains a three-part definition of harassment on the basis of sex:

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,

49. Id. at 60.
50. Id.
51. Id. at 66.
53. Vinson, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). For a further discussion of Henson, see infra notes 69-74 and accompanying text.
55. On April 11, 1980, interim guidelines were published in the Federal Register for a sixty-day period. See Final Guidelines, 45 Fed. Reg. 25,024 (1980). After receiving a very favorable response from the public, the interim guidelines were altered slightly to become the Final Guidelines. For a discussion of the minor changes that the EEOC made to the interim guidelines, see Smith, Prologue to the EEOC Guidelines on Sexual Harassment, 10 Cap. U.L. Rev. 471 (1981).
(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. 56

According to these guidelines, sexual harassment is harassment directed at the "sex" of the employee. 57 The EEOC, in drafting the Final Guidelines, did not provide specific definitions of critical terms, notably “sex,” “unwelcome sexual advances,” “requests for sexual favors,” and “other verbal or physical conduct of a sexual nature.” The apparent rationale for this general definition is that it is difficult to identify every form of sexually harassing conduct. “[T]he same actions which, under one set of circumstances, would constitute sexual harassment, might, under another set of circumstances, constitute acceptable social behavior.” 58

In addition to defining sexual harassment broadly as “unwelcome sexual advances” or “requests for sexual favors,” the guidelines require that the harassing behavior affect the individual’s employment in one of three ways. The first two ways are forms of quid pro quo harassment. If submission to the proscribed conduct is made a condition of employment or is used as the basis for employment decisions, then it is quid pro quo harassment because an economic benefit is exchanged for sexual compliance. 59 The third possible way for the behavior to affect the individual’s employment is for the conduct to interfere unreasonably with the employee’s work performance, thus creating an offensive or hostile work environment. 60

The EEOC stated further in the Final Guidelines that it would consider facts alleging sexual harassment on “a case by case basis,” looking “at the record as a whole and at the totality of the circumstances,” paying particular attention to the context and nature of the harassment. 61 The remainder of the guidelines focuses on the issues of employer liability for sexually harassed employees and prevention of sexual harassment in the workplace. 62

56. 29 C.F.R. § 1604.11(a) (1988).
57. Id. See supra note 12 for a discussion of the term “sex.”
60. 29 C.F.R. § 1604.11(a) (1988).
61. 29 C.F.R. § 1604.11(b) (1988).
62. See 29 C.F.R. §§ 1604.11(c)-(g) (1988). The guidelines point out that an “[employer] is responsible for its [sexually harassing] acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether
While the EEOC Final Guidelines may provide some assistance for courts considering sexual harassment claims, there are several issues that the guidelines leave unresolved. As mentioned previously, the guidelines do not define “verbal or physical conduct of a sexual nature.” Therefore, a potentially wide range of conduct can be encompassed by this phrase. Unwelcome touches and obscene language most likely would be considered sexual harassment within this phrase, but courts also have found that commercial pictures of half-nude women or hand-drawn explicit caricatures of women are a form of sexual harassment. In addition, the phrase “sexual nature” in the guidelines can be construed in two different ways. It can be interpreted either as conduct discriminating on the basis of sex in a biological sense or as conduct discriminating on the basis of gender. Finally, the guidelines do not define the line between an offensive work environment and an inoffensive one. Instead, the offensiveness of the work environment and a “determination of the legality of a particular action will be made from the facts, on a case by case basis.”

In short, sexual harassment is actionable under Title VII as a form of discrimination on the basis of sex. The EEOC developed a broad definition of sexual harassment, using all-encompassing lan-
guage to advise employers, employees, and courts that many forms of conduct can be construed as sexual harassment causing an offensive or hostile work environment.

II. THE HOSTILE WORK ENVIRONMENT

In Henson v. City of Dundee,69 the Court of Appeals for the Eleventh Circuit delineated the necessary elements of a hostile work environment claim against an employer under Title VII. These elements include the following: (1) the employee belongs to a protected group, i.e., a simple stipulation that the employee is a man or a woman;70 (2) the employee is subject to unwelcome sexual harassment; (3) the harassment complained of is based upon sex, i.e., but for the fact of claimant's sex, she would not have been the object of harassment; (4) the harassment complained of affects a "term, condition, or privilege" of employment; and (5) liability is determined under the doctrine of respondeat superior.71

The second Henson element, that the employee is subject to unwelcome sexual harassment, is the foundation of a hostile work environment claim. In order to establish unwelcome sexual harassment, the employee would first have to show that the alleged conduct is sexual harassment as defined by either the EEOC guidelines or other appropriate guidelines or through prior case law. Second, the employee must prove that the conduct was "unwelcome in the sense that the employee did not solicit or incite [the behavior], and in the sense that the employee regarded the conduct as undesirable or offensive."72 Finally, in order for conduct to be actionable, Henson requires that the "[sexual harassment] must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."73 In determining whether the behavior is pervasive, the Henson test involves consideration of whether the "sexual harassment at

---

69. 682 F.2d 897 (11th Cir. 1982). In Henson, the plaintiff was a police dispatcher who alleged that her supervisor continually propositioned her and that she had been subjected to a hostile work environment created by daily use of vulgar language. Id. at 899.

70. While the court correctly decided that this is an element that needs to be stipulated, it is highly probable that such a determination would require neither excessive time nor substantive examination.


72. Id. at 903.

73. Id. at 904. See supra notes 48-54 and accompanying text for the endorsement of this standard by the Supreme Court in Vinson.
the workplace is sufficiently severe and persistent to affect seriously the psychological well being of employees . . . .”

Courts have relied on Henson to create their own frameworks for resolving hostile work environment sexual harassment claims. For instance, in Katz v. Dole, the Court of Appeals for the Fourth Circuit adopted a two-step analysis for determining whether an offensive work environment exists.

First, the plaintiff must make a prima facie showing that sexually harassing actions took place, and if this is done, the employer may rebut the showing either directly, by proving that the events did not take place, or indirectly, by showing that they were isolated or genuinely trivial. Second, the plaintiff must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation.

Similarly, in Downes v. Federal Aviation Administration, the Court of Appeals for the Federal Circuit adopted its own test, drawing upon Henson. According to the Downes court, to establish a hostile work environment claim, the plaintiff must show that the misconduct has at least two elements: “(1) the offensive conduct must be sufficiently pervasive so as to alter the conditions of employment, and (2) be sufficiently severe and persistent to affect seriously the psychological well-being of an employee.” Therefore, in both Katz and Downes, the courts stressed the need, as did the court in Henson, for the plaintiff to prove that sexually harassing behavior took place in a pervasive, offensive manner.

Analyzing these various frameworks, it appears that courts rely

74. Henson, 682 F.2d at 904.
75. See, e.g., Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987). The dissent proposed the following two-step test for analyzing hostile environment sexual harassment claims:
First, it must be determined whether or not the allegedly discriminatory behavior was ambiguously or patently offensive. Where the conduct was patently offensive and the offending individual was plaintiff’s supervisor, the inquiry may end: with or without notification of the wrong, the employer may be held liable. However, where it is found that the supervisor’s behavior was ambiguous, i.e., less than overtly offensive, a second finding must be made as to whether the plaintiff, by some objective action at the time of the allegedly offensive conduct displayed objection to the conduct of the supervisor.
Id. at 1566-67 (Hill, J., dissenting).
76. 709 F.2d 251 (4th Cir. 1983). See infra notes 137-39 and accompanying text for a full discussion of this case.
77. Katz, 709 F.2d at 255-56.
78. 775 F.2d 292 (Fed. Cir. 1985). See infra notes 107-09 and accompanying text for a full discussion of this case.
79. Downes, 775 F.2d at 292.
on a variety of distinctions to determine whether behavior is actionable as sexual harassment. First, courts identify the kind of conduct experienced by the victim. Sexually harassing conduct can take many forms: physical abuse, verbal harassment, or non-verbal symbolic harassment, which is harassment of a woman with a symbolic message. Second, courts consider the frequency of the conduct. Applying a pervasive standard, the conduct must be a condition of employment and not a single isolated instance. "A hostile working environment is shown when the incidents of harassment occur either in concert or with a regularity that can reasonably be termed pervasive." Third, courts examine the nature of the conduct to determine whether it is offensive. Since every case is factually different, what is considered offensive in one situation may not be offensive in another, similar situation. In addition, people have different perceptions of what kind of conduct constitutes offensive behavior. Men and women have different perceptions of offensive conduct, and individuals may view the degree of offensiveness differently. The differing views among women

80. See infra notes 152-94 and accompanying text for a discussion of symbolic harassment. See supra note 19 for a discussion of symbolic harassment.

81. In Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), Judge Goldberg articulated that "conditions of employment" for Title VII purposes includes the subtle "psychological as well as economic fringes" of an employee's work environment. Id. at 238. See supra notes 44-47 and accompanying text.

82. In Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), see supra notes 41-47 and accompanying text, the District of Columbia Circuit Court of Appeals observed that frequent sexually harassing conduct was an essential element of the hostile work environment claim. The Court of Appeals noted that although a pattern of harassment directed at an employee can violate Title VII, an isolated instance of sexually harassing behavior is not sufficient to constitute a hostile work environment. Bundy, 641 F.2d at 943 n.9.

83. Lopez v. SB Thomas, Inc., 831 F.2d 1184, 1189 (2d Cir. 1987); see also Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir. 1986) ("the proliferation of demeaning literature and epithets was sufficiently continuous and pervasive to establish a 'concerted pattern of harassment' in violation of Title VII").

84. For instance, in Jones v. Wesco Investments, Inc., 846 F.2d 1154 (8th Cir. 1988), the president of Wesco argued in his brief that since a traditional place where a man meets a woman is at the work place, there is nothing wrong with a man, even a supervisor, telling a female that she looks nice or asking a female out on a date. Id. at 1157 n.6.

85. This comment's perception of offensive conduct is derived from Justice Stevens' opinion in FCC v. Pacifica Found., 438 U.S. 726 (1978). In Pacifica, Justice Stevens observed that "[o]bnoxious, gutter language describing [sexual acts] has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions. . . . Verbal or physical acts exposing those intimacies are offensive irrespective of any message that may accompany the exposure." Id. at 746 n.23.

86. Different perceptions of sexual harassment are evident because sexual harassment is also defined in the context of power. "Sexual harassment is not only a product of gender-based dominance; it plays an important role in maintaining that dominance and perpetuating circumstances in which domination-based views become cultural norms." Bratton, supra note 3, at 98. "Male perceptions of sexual harassment have triumphed pre-
and men are important, especially because it is the victim who objects to the conduct and alleges sexual harassment.

Finally, courts focus on the behavior between the harasser and the victim to determine if it is "unwelcome in the sense that the employee did not solicit" the undesirable conduct. In a sexual harassment case, "[t]he correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome." Since her conduct can only proceed from her perceptions and motives, a reasonable victim standard is implied. However, neither the Supreme Court in Vinson nor the EEOC guidelines explicitly states whether a reasonable person or a reasonable victim standard should apply in all sexual harassment cases.

III. A CLEAR CLAIM OF HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT

A review of hostile work environment sexual harassment cases

These different perceptions were illustrated in a survey conducted by Redbook magazine and Harvard Business Review. See Collins & Blodgett, supra note 3, at 84-89 for enclosed exhibits of this survey.

87. Henson, 682 F.2d at 903.
88. Vinson, 477 U.S. at 68.
89. One court, however, debated this issue. In Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 107 S. Ct. 1983 (1987), the Sixth Circuit Court of Appeals adopted the perspective of a reasonable person's reaction to a similar environment under similar circumstances. Id. at 620. The dissent, on the other hand, adopted a reasonable victim standard "which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant." Id. at 626 (Keith, J., dissenting). See infra notes 175-90 and accompanying text for a full discussion of this case.

Moreover, some courts appear to apply a "reasonable harasser" standard, whereby the court considers the behavior of the harasser toward the victim in determining whether the actions of the perpetrator were unreasonable. In Benton v. Kroger Co., 640 F. Supp. 1317 (S.D. Tex. 1986), the court said that "[a]n inference that a boss may be crude and not so understanding, thereby making work life unpleasant for certain employees, is not proof of sexual harassment." Id. at 1321. See infra notes 145-49 and accompanying text for a discussion of this case.
evidences an emerging pattern which demonstrates a judicial willingness to recognize a sexual harassment claim under Title VII if a plaintiff satisfies certain conditions. Several cases demonstrate that pervasive, offensive physical touching of a sexual nature accompanied by some form of verbal sexual harassment may be actionable under Title VII.\textsuperscript{90} In \textit{Phillips v. Smalley Maintenance Services Inc.},\textsuperscript{91} an employer touched the plaintiff without her consent as he "hit her ['a]cross the bottom' with the back of his hand."\textsuperscript{92} In addition to physical contact, the employer repeatedly harassed Phillips by asking "how often [she] and her husband had sex and 'what positions' they used" and by telling her that she had to "engage in oral sex with [her employer] at least three times a week."\textsuperscript{93} In \textit{Phillips}, the court accepted with little debate the claim that the employee was subject to unwelcome sexual harassment.\textsuperscript{94}

There are two reasons why the court in \textit{Phillips} may have accepted this claim so readily. First, the continuous sexually harassing behavior satisfied the standard of pervasive and offensive behavior, and it clearly involved "sexual advances" and "verbal or physical conduct of a sexual nature."\textsuperscript{95} Second, the offensive behavior clearly affected terms and conditions of Phillips' employment, as she testified to medical problems, such as chronic anxiety, resulting from the sexual harassment.\textsuperscript{96}

The results in other cases with similar patterns of physical and verbal conduct highlight the importance of the pervasiveness element in the courts' evaluations of hostile work environment claims. In \textit{Robson v. Eva's Super Market, Inc.},\textsuperscript{97} an employer patted the plaintiff on her buttocks and felt the back of her blouse, without her permission,
to see if she was wearing a bra. The court held that this conduct, in addition to verbal harassment in the form of continual profanity directed towards her, and an offer of one hundred dollars to "go to bed" with him, constituted sexual harassment. In Priest v. Rotary, an employer engaged in many sexually harassing physical acts, such as placing his arms around an employee's waist, grabbing areas of her body, rubbing his body against her body, and unzipping her uniform. The court held that such behavior, along with comments to another employee about her breasts, and other offensive remarks made about her to patrons, constituted sexual harassment. Other cases point out that tucking a stray tag into a woman's blouse could be as sexually harassing as peering over a bathroom stall when a woman is there, when accompanied by other factors such as a pattern of offensive verbal harassment or other forms of physical sexual conduct.

Not all physical and verbal conduct of a sexual nature in the workplace, however, violates Title VII. As the Vinson court stated, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" With pervasive behavior as the standard, courts look to whether the conduct was frequent, offensive, and unwelcomed by the victim.

Although in quid pro quo claims a court may accept a few instances of behavior as sexual harassment, courts have yet to accept a single isolated instance of harassing behavior as conclusive evidence of a hostile work environment. In Downes v. Federal Aviation Administration, the court held that incidents of unusual behavior, such as "referring to [plaintiff] as the 'Dolly Parton of the office,'" verbally speculating on the frequency of sexual relationships, describing a non-

98. Id. at 859.
99. Id. at 859, 864.
100. 634 F. Supp. 571 (N.D. Cal. 1986).
101. Id. at 575.
102. Id. at 582.
103. See Harrison v. Reed Rubber Co., 603 F. Supp. 1457, 1459 (E.D. Mo. 1985) (various actions by the employer including placing his hand on an employee's hand constituted sexual harassment under Title VII).
105. Vinson, 477 U.S. at 67 (quoting Henson, 682 F.2d at 904).
106. See supra notes 81-83 and accompanying text for a discussion of the relevance of the frequency of sexually harassing conduct to the hostile work environment claim.
107. 775 F.2d 288 (Fed. Cir. 1985). For an earlier discussion of the analytical framework which the court used in Downes, see supra notes 78-79 and accompanying text.
employee in a degrading manner, and touching a plaintiff's hair were not a pervasive pattern of offensive conduct.  

The court also noted that the conduct had not been repeated to the point where it became routine and thus was not a condition of employment.  

Similarly, in Christoforou v. Ryder Truck Rental, Inc., the plaintiff alleged “three specific incidences of sexual harassment over the course of the approximately a year and a half she knew [her district manager].” Such sporadic events did not fit the pervasive standard that “depended on the existence of a 'poisoned' atmosphere.”

In addition to the frequency of conduct, courts also must assess the offensiveness of the physical or verbal conduct. In Scott v. Sears, Roebuck & Co., the plaintiff alleged that fellow employees' suggestive attitudes and behavior, such as requests to take her out, an alleged slap on her buttocks, and indecent comments concerning her sexual activity, created a hostile work environment. The court stated that such examples “of being offensively propositioned” (i.e., a request to join an employee at a restaurant after work), and other suggestive behavior were not “so pervasive or psychologically debilitating that they affected [her] ability to perform on the job.” The incidents of sexual harassment, including an alleged slap on the buttocks, did not “rise to a level of 'hostility' offensive enough to be considered actionable,” and thus did not create a hostile work environment claim under Title VII.

Similarly, in Vermett v. Hough, the court considered whether the nature of defendant's conduct, specifically antics such as “goosing” plaintiff with a shotgun, “holding a coffee cup shaped like a breast and fondling the nipple while staring at her chest,” and stapling an attention slip to a broken zipper on someone's trousers, was sexually offensive. The court concluded that the trooper's acts were more childish antics than offensive sexual harassment since they were not intended to be acts of a sexual nature; defendant “would have per-

---

108. Downes, 775 F.2d at 293-94.
109. Id. at 294.
111. Id. at 301.
112. Id. (citing Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981)).
113. 798 F.2d 210 (7th Cir. 1986).
114. Id. at 211-12.
115. Id. at 214.
116. Id. at 213-14.
118. Id. at 598-99.
formed [the acts] on any other trooper, male or female.’’ The court probably did not interpret these childish antics as offensive behavior since they had only a minimal chance of debasing human beings, as they were not intended to offend any particular gender.

After determining whether the conduct itself is offensive, courts then question whether the plaintiff invited the conduct by her own behavior. In *Sand v. Johnson Co.*, the court considered behavior such as giving modest gifts, an attempted kiss, and a comment about a woman’s bosom as flirtatious behavior rather than sexual harassment. Since the employer pursued a relationship with Sand by giving gifts which she accepted, the court concluded that these events indicated more of a “romantic ambience.” Similarly, in *Gan v. Kepro Circuit Systems*, evidence of crude and sexually-oriented language and physical conduct of a sexual nature, such as fondling the plaintiff, was considered an example of flirtatious behavior because it was welcomed by plaintiff. The fact that the plaintiff often used sexually-oriented language and made her own marital sexual relationship a regular topic of conversation at the office also influenced the court. Since she had contributed to the behavior, the plaintiff could not argue that the sexually harassing behavior was unwelcome to her.

In summary, if the sexually harassing conduct is both verbal and physical and represents an offensive pattern of unwelcome behavior, courts agree that the plaintiff has asserted a valid claim of sexual harassment under Title VII. In an attempt to define sexual harassment, courts demonstrate a willingness to follow this standard. These cases require that the sexually harassing conduct must be frequent enough to create a pervasive condition of work and be reasonably offensive in order to be actionable. Furthermore, courts consider whether the victim contributed to the alleged harassing conduct by welcoming the behavior. Absent these restrictions, all behavior that interferes with a woman’s work performance arguably could be construed as actionable sexual harassment. However, the employee must still satisfy the other

119. *Id.* at 607.
121. *Id.* at 726-27. For a similar factual case, see Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149, 1177 (M.D. Pa. 1982) (a forced kiss and sexual advances were not found to be unwelcome offensive behavior).
123. 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982).
124. *Id.* at 640-41.
125. *Id.* at 640.
Henson requirements to establish a cause of action.126

IV. CONTROVERSIAL CLAIMS OF HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT

When faced with a case involving only a claim of verbal harassment, courts must determine if this behavior is pervasive for it to be actionable under Title VII.127 However, pictures from an adult magazine, crude graffiti, or sexually-oriented drawings also can be asserted as a basis for a sexual harassment claim. Since pictures and written words are not verbal conduct but convey many of the same messages as spoken words, this comment refers to offensive drawings and words as instances of symbolic harassment.128 In the case of verbal and symbolic harassment, courts have disagreed over how much and what type of harassment produces an actionable hostile work environment claim.

A. Verbal Harassment

As in sexual harassment cases involving some form of physical contact, in verbal harassment cases the employee still must prove that the verbal language is pervasive (i.e., so frequent as to become a condition of employment), offensive, and unwelcome. However, verbal sexual harassment may be more difficult to prove than physical sexual harassment because of the prevalence of abusive language in the workplace. Furthermore, verbal abuse is generally viewed as less offensive than physical touching.129

Verbal sexually harassing language must be so frequent as to constitute a condition of employment pervasive enough to affect the work performance of the employee. In Horn v. Duke Homes, Inc.,130 the plaintiff's plant superintendent made leers, obscene gestures, and

---

126. See supra notes 69-74 and accompanying text for a discussion of the Henson requirements.

127. First amendment concerns may be implicated in verbal harassment cases; however, this issue is not discussed in this comment. See, e.g., Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987) (first amendment was not implicated by employee's claims of hostile work environment sexual harassment).

128. See supra note 19.

129. Indeed, under tort law, offensive physical contact is more actionable than offensive verbal conduct. For instance, relief is available for many types of physical sexual invasions under assault and battery. See, e.g., Hatchett v. Blacketer, 162 Ky. 266, 172 S.W. 533 (1915) (recovery of damages for assault and battery because defendant squeezed plaintiff's breast). For definitions of assault and battery, see RESTATEMENT (SECOND) OF TORTS §§ 18, 21 (1965). Unlike battery, which consists of offensive contact, "[v]erbal abuse generally is not actionable unless other conduct or circumstances can be shown to have caused 'reasonable apprehension' of imminent contact." Comment, supra note 4, at 1477.

130. 755 F.2d 599 (7th Cir. 1985).
other remarks about plaintiff's sexual needs, even inviting her to have oral sex with him.\textsuperscript{131} The Court of Appeals for the Seventh Circuit, affirming the holdings of the district court, stated that "sexual harassment characterized 'the totality of his relationship with women in the plant.'"\textsuperscript{132} The plaintiff proved "that consent to [the plant superintendent's] sexual advances was a condition of employment and that such a condition violated [the plaintiff's] Title VII rights."\textsuperscript{133}

However, in \textit{Sapp v. City of Warner Robins},\textsuperscript{134} frequent unwelcome sexual remarks and propositions from supervisors or co-workers were not held to be sexual harassment because the remarks were not sufficiently pervasive to affect a condition of employment.\textsuperscript{135} The court concluded that a "single effort to get the plaintiff to go out with him was not of a repeated or continuous nature . . . to affect plaintiff's psychological well-being."\textsuperscript{136}

The offensiveness of verbal harassment depends upon the words used by the harasser and the manner in which they are used. In \textit{Katz v. Dole},\textsuperscript{137} the plaintiff was the object of verbal sexual abuse in the form of sexual slurs, insults, and innuendoes made by her fellow employees over a four-year period.\textsuperscript{138} The court held that such behavior constituted sexual harassment because the "words used were ones widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from 'the disgust and violence they express phonetically.'"\textsuperscript{139} Katz proved that she was subjected to sustained verbal sexual abuse, intensely offensive both to her personally and to the reasonable person.

Offensive verbal harassment may include language concerning sexual activity or the human body. In \textit{Morgan v. Hertz Corp.},\textsuperscript{140} the court stated that sexually indecent comments, such as, "Did you get any over the weekend?" are a form of sexual harassment and discrimination on the basis of sex.\textsuperscript{141} The court came to the "conclusion that

\begin{itemize}
\item \textsuperscript{131} \textit{Id.} at 601-02.
\item \textsuperscript{132} \textit{Id.} at 602.
\item \textsuperscript{133} \textit{Id.} at 603.
\item \textsuperscript{134} 655 F. Supp. 1043 (M.D. Ga. 1987).
\item \textsuperscript{135} \textit{Id.} at 1049.
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} 709 F.2d 251 (4th Cir. 1983). For an earlier discussion of the analytical framework which this court used, see \textit{supra} notes 76-77 and accompanying text.
\item \textsuperscript{138} \textit{Katz}, 709 F.2d at 254.
\item \textsuperscript{139} \textit{Id.} The Court of Appeals' opinion did not state what the particular words at issue were.
\item \textsuperscript{141} \textit{Id.} at 128.
\end{itemize}
sex discrimination exist[ed] at Hertz because of the history of vulgar and indecent language tolerated by management and directed toward women employees." In addition, in *Coley v. Consolidated Rail Corp.*, sexually harassing remarks included references to a woman's menstrual periods and various moods, the size of her breasts, and "inquiries as to when she was going to 'do something nice for him.'" After determining offensiveness and frequency, a court may still find that no sexual harassment existed if the plaintiff welcomed the behavior by not objecting to it. In *Benton v. Kroger Co.*, the court concluded that no hostile work environment was created by the sexual harassment. The plaintiff alleged that her manager made several innuendoes about sexual favors, including an invitation "to 'jump' over and to stop on his groin." In holding for the defendant, the court focused on the plaintiff's temper, dissatisfaction with her work assignments, her medical treatment, and the fact that she remained silent during this period of alleged sexual harassment. The court, focusing on the supervisor's remarks, said that "[a]n inference that a boss may be crude and not so understanding, thereby making work life unpleasant for certain employees, is not proof of sexual harassment." Since verbal sexual harassment may be viewed as less offensive than physical sexual harassment, the success of a plaintiff's case depends upon the specific words used to harass her, and the context in which they were used. For instance, in *Sapp* and *Benton*, the courts did not view the remarks as sufficiently pervasive and offensive, compared to the words used in *Katz* or *Horn*. A single sexual innuendo may be offensive to a woman and an example of sexual harassment, but one remark does not demonstrate a condition of employment or a case of actionable hostile work environment under Title VII. A pervasive pattern of offensive behavior is clearly established by the

142. *Id.*


144. *Id.* at 647.


146. *Id.* at 1322.

147. *Id.* at 1319-20.

148. *Id.* at 1321.

149. *Id.* See *supra* note 89 for a discussion of this case in relation to a reasonable harasser standard.

150. Since the offensive words in *Katz* were not stated in the opinion, the reader can only speculate as to what they were, based on the court's reference to the disgust and violence engendered by such words. For a better understanding of words used with sexual connotations, see C. MILLER & K. SWIFT, WORDS AND WOMEN 95-111 (1977).

151. See *supra* note 82.
courts as the standard which must be applied. Only a pervasive pattern of behavior can alter a woman's condition of employment when she is affected by verbal abuse alone. Furthermore, degrees of offensiveness may be difficult to label because there are different fact patterns and different attitudes concerning permissible behavior among people and the courts. Thus, the courts must look to the “offensive” words and the context in which they were used to determine if the words constitute sexual harassment.

B. Symbolic Harassment

Symbolic harassment claims which involve pictures, drawings, graffiti, and written notes may accompany sexual harassment claims of verbal or physical conduct of a sexual nature. The offensiveness of graffiti, written notes, and “sexual” drawings depends upon the contents of the particular picture or note and where they are displayed. For instance, in *Arnold v. City of Seminole,* the plaintiff's sexual harassment claim asserted that the defendant made vulgar sexual comments, such as referring to plaintiff as “bitch,” and innuendoes, mainly communicated by sexually graphic drawings and demeaning cartoons placed in public work areas. In *Arnold v. City of Seminole,* the plaintiff's sexual harassment claim asserted that the defendant made vulgar sexual comments, such as referring to plaintiff as “bitch,” and innuendoes, mainly communicated by sexually graphic drawings and demeaning cartoons placed in public work areas. In addition to these drawings and cartoons, phrases, such as “The wicked witch is gone,” and “RAT” were written on pieces of paper bearing the plaintiff’s name and posted in the workplace. Since the plaintiff continually advised supervisors of the harassment and discriminatory treatment and they refused to take action to prevent the mistreatment, the court held that the plaintiff satisfied the requirements of proving sexual harassment. The court did not distinguish the many drawings or accompanying phrases from other forms of sexual harassment, but said “that most, if not all, of the harassment . . . [was] fundamentally offensive.”

Two other cases elicited similar responses from the courts. In *Porta v. Rollins Environmental Services, Inc.,* the plaintiff “received seven or eight threatening and sexually offensive, anonymous handwritten notes in her mailbox at the plant.” In the following years,

---

153. Id. at 858. A co-worker posted drawings depicting poses that were offensive to the plaintiff, including one picture which showed a man and a woman, naked, engaging in a sexual act, and another which showed a man having intercourse with a goat inscribed with the plaintiff’s name. Id.
154. Id. at 860.
155. Id. at 869.
156. Id. at 870.
158. Id. at 1279.
several offensive incidents occurred, consisting of abusive verbal exchanges and crude graffiti on a refrigerator in a staff lounge, suggesting that the plaintiff had engaged in oral sex with a co-worker.\textsuperscript{159} The court stated that a jury could find a case of unwelcome harassment because the plaintiff was subjected to a pattern of crude comments and humiliating treatment and was told "that her opinion was not respected because she was a woman."\textsuperscript{160}

Similarly, in \textit{Zabkowicz v. West Bend Co.},\textsuperscript{161} co-workers continually harassed the plaintiff with offensive language, describing her as a "sexy bitch," "slut," and "h \& h", which meant 'hot and horny.'\textsuperscript{162} She also was subjected to approximately seventy-five sexually-oriented drawings, posted conspicuously in the workplace, sometimes bearing the plaintiff's initials or depicting her engaging in various sexual acts.\textsuperscript{163} The court stated that her "colleagues resorted to coarse conduct of a sexual nature in regard to [plaintiff]; the sexually offensive conduct and language used would have been almost irrelevant and would have failed entirely in its crude purpose had the plaintiff been a man."\textsuperscript{164} The court further stated that "Title VII prohibits precisely such psychologically damaging conditions of employment as were forced upon [the plaintiff]."\textsuperscript{165} This would assure that "Title VII does not serve as a vehicle for vindicating the petty slights suffered by the hypersensitive."\textsuperscript{166} Like the court in \textit{Arnold}, this court did not distinguish between the verbal and symbolic harassment, but decided that all of the harassment that the plaintiff suffered was unreasonable and malevolent.\textsuperscript{167}

Symbolic harassment also can include commercially manufactured explicit pictures found in adult magazines. In \textit{Brown v. City of Guthrie},\textsuperscript{168} the plaintiff claimed harassment because of repeated sexual innuendoes, derogatory comments, and exposure to magazines containing photographs of nude women.\textsuperscript{169} The court in \textit{Brown} did not distinguish the various types of harassment; however, the court did say

\begin{itemize}
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id. at 1282.
\item \textsuperscript{161} 589 F. Supp. 780 (E.D. Wis. 1984), aff'd in part, rev'd in part, 789 F.2d 540 (7th Cir. 1986).
\item \textsuperscript{162} 589 F. Supp. at 782.
\item \textsuperscript{163} Id. at 782-83.
\item \textsuperscript{164} Id. at 784.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} 22 Fair Empl. Prac. Cas. (BNA) 1627 (W.D. Okla. 1980).
\item \textsuperscript{169} Id. at 1629.
\end{itemize}
that while the degree of harassment necessary to trigger Title VII pro-
tection is unclear, the various types of harassment in this case were
sufficient to violate Title VII.\textsuperscript{170} In \textit{Eide v. Kelsey-Hayes Co.},\textsuperscript{171} an-
other case involving commercial pictures, the plaintiff was subjected to
a work environment that included a large poster-size picture of a na-
ked woman whose legs were spread apart.\textsuperscript{172} Her male co-workers
and supervisors also subjected her to unwelcome touching and offen-
sive comments, such as referring to her as "Fluffy LeBush," a porno-
graphic movie actress.\textsuperscript{173} The Michigan Court of Appeals found such
behavior to be sexual harassment, stating that "sexual harassment can
take many forms and is often very subtle."\textsuperscript{174}

However, not all courts have been willing to find the display of
nude pictures of women actionable as sexual harassment. In \textit{Rabidue
v. Osceola Refining Co.},\textsuperscript{175} the Court of Appeals for the Sixth Circuit
rejected a claim of verbal sexual harassment which also included a
claim of symbolic harassment. Rabidue contended that a colleague
made extremely vulgar and obscene comments about women, and, on
occasion, directed these comments at her.\textsuperscript{176} In addition, the col-
league and other male workers displayed magazine pictures of par-
tially nude women in offices and work areas.\textsuperscript{177}

The district court in \textit{Rabidue} stated that "the standard for deter-
mining sex harassment would be different depending upon the work
environment."\textsuperscript{178} The court, referring to sexually-oriented conversa-
tions in the workplace, stated:

\begin{quote}
Title VII was not meant to—or can—change this. It must never be
forgotten that Title VII is the federal court mainstay in the struggle
for equal employment opportunity for the female workers of
America. But it is quite different to claim that Title VII was
designed to bring about a magical transformation in the social mo-
res of American workers.\textsuperscript{179}
\end{quote}

In addition, the court considered the effect of sexually-oriented pic-
tures on the hostile work environment claim. Applying a reasonable

\begin{scriptsize}
\textsuperscript{170} Id. at 1632-33.
\textsuperscript{172} Id. at 147-48, 397 N.W.2d at 535.
\textsuperscript{173} Id. at 148, 397 N.W.2d at 535.
\textsuperscript{174} Id. at 154, 397 N.W.2d at 538.
\textsuperscript{176} Id. at 615.
\textsuperscript{177} Id.
\textsuperscript{179} Id.
\end{scriptsize}
person standard, the district court stated that “the average American should not be legally offended by sexually explicit posters” as “modern America features open displays of written and pictorial erotica.”

The Court of Appeals for the Sixth Circuit affirmed this position by considering the sexually-oriented posters “in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.” The court, which decided that the vulgar language and posters had a “de minimis effect” on Rabidue, nonetheless concluded that such vulgarity and posters could be “unwelcomed verbal conduct and poster displays of a sexual nature.” However, the court held that the behavior did not result in a work environment that could be considered hostile or offensive and thus actionable as sexual harassment.

In contrast to the majority, the dissenting opinion in Rabidue took a broader view of Title VII:

Title VII's precise purpose is to prevent such behavior and [offensive language] from poisoning the work environment of classes protected under the Act. . . . As I believe no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative . . . .

The dissent suggested that a reasonable woman standard should be applied in sexual harassment cases. Furthermore, the standard should focus on the behavior in the context of the workplace. The dissent disagreed with the majority's position that posters and language should be considered in the context of societal standards, stating that “[t]he presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy.”

The majority and the dissent in Rabidue disagreed over what constitutes offensive behavior in the workplace. The majority in Rabidue

180. Id. at 433. See supra note 89 and accompanying text for a debate on the reasonable person and reasonable victim standard.
181. Rabidue, 805 F.2d at 622.
182. Id.
183. Id.
184. Id. at 626-27 (Keith, J., dissenting).
185. Id. at 626 (Keith, J., dissenting).
186. Id. (Keith, J., dissenting).
187. Id. at 627 (Keith, J., dissenting).
argued that vulgar language and obscene pictures must interfere unreasonably with the plaintiff's work performance to be actionable under Title VII.\textsuperscript{188} The harassment in \textit{Rabidue}, whether by pictures or words, was not considered sexual harassment by the majority because it was "not so startling as to have affected seriously the psyches of the plaintiff or other female employees."\textsuperscript{189} However, the dissent offered a broader interpretation of Title VII, expanding it to include more forms of harassment. The dissent stated that the precise purpose of Title VII is to "prevent such behavior and attitudes from poisoning the work environment."\textsuperscript{190}

The majority and dissenting opinions in \textit{Rabidue} graphically illustrate a disagreement among courts over the definition of sexual harassment and the proper scope of Title VII. Since vulgarity and commercial pictures are prevalent in our society, a court must decide whether to analyze the work environment as an isolated arena, applying a reasonable victim standard, or as a part of the larger societal context, applying a reasonable person standard, before using Title VII to proscribe such behavior and remedy the injury. In \textit{Katz v. Dole},\textsuperscript{191} a verbal sexual harassment case involving sexual innuendoes and insults, the Court of Appeals for the Fourth Circuit pointed out that the use of Title VII should be limited, and not be employed as a "clean language act."\textsuperscript{192} Arguments such as those presented by the court in \textit{Katz} and by the majority in \textit{Rabidue}, that such behavior should be evaluated in the context of society, are persuasive in that Title VII's primary purpose is to secure equal opportunity in employment and prohibit discrimination, not to "clean up" language in the workplace.

The pervasive standard of severely offensive and persistent conduct limits those pursuing a claim of hostile work environment sexual harassment if the court follows this standard in all types of harassment. Courts, however, must become aware that the definition of sexual harassment is expanding as employees include less obvious forms of sexual harassment in their definition of hostile work environment. Perhaps the Working Women's Institute's definition of sexual harassment is a more precise definition, encompassing several forms of sexual harassment:

\begin{quote}
Sexual harassment in employment is any attention of a sexual na-
\end{quote}

\begin{footnotes}
\textsuperscript{188} Id. at 622.
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 626-27 (Keith, J., dissenting).
\textsuperscript{191} 709 F.2d 251 (4th Cir. 1983).
\textsuperscript{192} Katz, 709 F.2d at 256.
\end{footnotes}
ture in the context of a work situation which 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 looks, touches, jokes, innuendoes, gestures, epithets, or direct propositions. It is less obvious when a woman is forced to work in an environment in which she is subjected to stress or made to feel humiliated because of her sex through such activities as sexual slurs, the public display of derogatory images of women, or a requirement that she dress in revealing clothing.

As the court in *Eide* said, "sexual harassment can take many forms and is often very subtle."

V. EXPANDING THE DEFINITION OF SEXUAL HARASSMENT TO INCLUDE GENDER HARASSMENT

Sexual harassment is not easily definable as a concept, because men and women have different perceptions of appropriate sexual behavior. The definition of sexual harassment has evolved as courts have begun to acknowledge the existence of those differences and the difference between "sex" and "gender." The initial expansion of the concept involved a categorization of sexual harassment into various types of behavior, such as physical, verbal, or symbolic harassment. Then, courts expanded the definition by focusing on the sexual nature of that conduct. Looking for a standard on the nature of conduct, courts went to the EEOC guidelines' definition of sexual harassment as "unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature." Some courts then interpreted sexual nature to mean "sexual . . . in the sense of offensive behavior." They prohibited such behavior as "patting" someone on

---

196. See *supra* notes 55-68 and accompanying text for a discussion of the EEOC's Final Guidelines.
197. *Downes*, 775 F.2d 288, 290 (Fed. Cir. 1985). See also *DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986), cert. denied, 108 S. Ct. 455 (1987). The court in *DeCintio* focused on the meaning of the phrase "discrimination on the basis of sex," holding that the word "sex" refers to membership in a class, that the distinction must be based on a person's sex, not on his or her sexual affiliation. *Id.* at 306-07. In this case, the court held that a preference over another woman candidate because of a sexual relationship was not discrimination based on sex. *Id.* at 308.
the buttocks, repeated sexual slurs, or posting a nude caricature of a woman on the wall of the workplace—all conduct which focuses on a woman in a sexual sense.

However, some courts hold that "conduct of a sexual nature" encompasses conduct pertaining to gender as well as sex, thus expanding the definition of sexual harassment to include gender harassment. In *McKinney v. Dole*, the plaintiff failed to substantiate her claim of sexual harassment against her supervisor in district court. However, the Court of Appeals for the District of Columbia Circuit reversed the decision, framing the issue as whether a physically aggressive, but not explicitly sexual, act by a male supervisor against a female employee constituted sexual harassment.

The court decided that any pervasive harassment which occurs because of the sex of the harassed employee may be actionable under Title VII. The court held that the assumption that the only actionable claim of sexual harassment comprises behavior that is otherwise blatantly sexual, "is legally flawed." While acknowledging that the EEOC guidelines emphasized only explicit sexual behavior, such as sexual advances, the court did not agree with the district court that this meant that all other activities not addressed by the guidelines were precluded from discussion. Furthermore, the court stated that "[w]e have never held that sexual harassment or other unequal treatment of an employee . . . must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones." Therefore, sexual harassment does not necessarily have to be of a sexual nature in the biological sense; it may be actionable if it is directed at a person because of her gender.

Similarly, in *Bell v. Crackin Good Bakers, Inc.*, the plaintiff claimed that her supervisor constantly harassed her with insults such as calling her the "'pimp for the office,'" and talking to her "'like

198. See *supra* note 12 and accompanying text for a discussion of the distinction between sex and gender.
199. 765 F.2d 1129 (D.C. Cir. 1985).
200. *Id.* at 1137.
201. *Id.* at 1131.
202. *Id.* at 1138.
203. *Id.*
204. *Id.* at 1138-39 n.20. See *supra* note 63 for a discussion of courts' acceptance or rejection of the EEOC Final Guidelines.
205. *Id.* at 1138.
206. *Id.*
207. 777 F.2d 1497 (11th Cir. 1985).
[she] was about two years old and two inches high.' 208 The plaintiff was further harassed by her supervisor who suggested that "he would have no women in the plant at all because men were better able to perform all of the functions required in its operation." 209 The trial court granted defendant's motion for summary judgment for it "considered the case as if the petitioner had been seeking relief from 'sexual harassment' " in the context of Henson. 210

However, the Court of Appeals for the Eleventh Circuit reversed as to the corporate defendants and held that the "[plaintiff] was under no obligation to adduce proof of 'sexual advances, requests for sexual favors [or] other verbal or physical conduct of a sexual nature' " in a Title VII claim. 211 The Bell court reasoned that the hostile conduct by the supervisor was prohibited by Title VII because the conduct affected the conditions of her employment, and the mistreatment was directed at her because she was a woman. 212

Other more recent cases have followed the McKinney approach, finding that gender harassment is actionable under Title VII. In Delgado v. Lehman, 213 employees subjected plaintiff to such derogatory verbal abuses as "Okay babe," and "Listen here woman," and calling her stupid. 214 The court referred to such behavior as sexual harassment, stating that such "harassment need not take the form of overt sexual advances or suggestions, but may consist of such things as verbal abuse of women if it is sufficiently patterned to comprise a condition and is apparently caused by the sex of the harassed employee." 215 Likewise, in Hall v. Gus Construction Co., 216 the Court of Appeals for the Eighth Circuit held that the district court correctly considered instances of harassment, such as calling plaintiff "Herpes" or urinating in plaintiff’s car's gas tank, as violating Title VII, even though it was not conduct of a sexual nature. 217 The court reasoned that "[i]ntimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances." 218 Since Congress did not specify all conduct that would be

208. Id. at 1499 (quoting Deposition of Delores D. Bell at 60 and 48).
209. Id. at 1501.
210. Id. at 1501-02.
211. Id. at 1503.
212. Id. at 1501-03.
214. Id. at 463.
215. Id. at 468.
216. 842 F.2d 1010 (8th Cir. 1988).
217. Id. at 1013-14.
218. Id. at 1014.
prohibited under Title VII, the court viewed the "Congressional intention to define discrimination in the broadest possible terms" as prevailing. 219

In one opinion, although only in the dissent, the expansive definition of sexual harassment in McKinney was called into question. In Hicks v. Gates Rubber Co., 220 the plaintiff alleged a hostile work environment composed of racial and sexual hostility, where a supervisor referred to blacks as "niggers" and "coons," and a security guard referred to plaintiff as "Buffalo Butt." 221 In addition, she alleged that she was subjected to disparate treatment by both supervisors and co-workers, citing examples such as forcing her to make a four or five foot jump off a loading dock, not permitting her to sit while conducting inspections, refusing her a lunch break, and making her walk around the plant with wet pants after sitting on a wet seat. 222 The court of appeals remanded the case to the district court for consideration of all the evidence relating to sexual harassment within the McKinney standard. 223 Agreeing with the McKinney interpretation, the majority rejected the narrow EEOC definition of sexual harassment as only comprising sexual advances or other instances of behavior with sexual overtones. 224

The dissent, however, believed that McKinney went "far beyond Meritor Savings Bank v. Vinson 225... as to the breadth of Title VII, and in defining how pervasive the 'unequal treatment' must be." 226 "The Supreme Court does not center on 'unequal treatment' but on sexual harassment of the plaintiff with the consequences on her conditions of employment." 227 A "sufficiently patterned or pervasive" standard for unequal treatment would, as Judge Seth suggested, "do violence to disparate treatment doctrines." 228

In addition to this dissent, other courts have expressed judicial reluctance with regard to an expansion of the definition of sexual har-

219. Id. (citing Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514 (8th Cir. 1977) (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)).
220. 833 F.2d 1406 (10th Cir. 1987).
221. Id. at 1409.
222. Id. In addition, Hicks also alleged specific instances of sexual behavior, i.e., rubbing her thighs, squeezing her buttocks, and grabbing her breasts. Id. at 1409-11.
223. Id. at 1415.
224. Id.
226. Hicks, 833 F.2d at 1420 (Seth, J., dissenting).
227. Id. (Seth, J., dissenting).
228. Id. (Seth, J., dissenting).
assment. In *Turley v. Union Carbide Corp.*,\(^{229}\) the district court resisted an attempt to expand the definition of sexual harassment to encompass discriminatory behavior of a non-sexual nature.\(^{230}\) The plaintiff alleged that her foreman "picked" on her all of the time, but that he did not make any sexual advances, sexual jokes, or attempts to touch her.\(^{231}\) The court stated that:

> The [sexual harassment] theory rests upon conduct which can be characterized as sexual. "Sex" in this instance does not mean gender. Rather, it is used pursuant to its more popular meaning. Thus, while the harassment may be directed at a member of the female sex, it is a harassment which plays upon the stereotypical role of the female as a sexual object.\(^{232}\)

This court distinguished discrimination on the basis of sex and gender harassment from sexual harassment by focusing on the nature of the harassment. Since the foreman had harassed her in a non-sexual manner, the court ruled that this behavior did not fall under the label of sexual harassment, but was actionable under a disparate treatment analysis\(^{233}\) as discrimination on the basis of sex.\(^{234}\) The *Turley* court recognized a cause of action based only upon unwelcome sexual conduct that was explicit behavior and discrimination on the basis of sex, noting that "'sex' in this instance does not mean gender."\(^{235}\)

Therefore, the dispositive issue for these courts is to define the reach of Title VII. Title VII seems to prohibit discrimination on the basis of sex, because the statutory term used is "sex."\(^{236}\) What is not clear is whether Congress intended to make discrimination on the basis of gender unlawful.\(^{237}\) The court in *Williams* addressed the issue of congressional intent, stating that the "plain meaning of the term 'sex discrimination' as used in [Title VII] encompasses discrimination be-


\(^{230}\) Id. at 1441-42.

\(^{231}\) Id. at 1442.

\(^{232}\) Id. at 1441-42.

\(^{233}\) Sexual harassment claims were once viewed as a form of "disparate treatment." In disparate treatment cases, "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15. (1977). For a discussion of why sexual harassment claims were once viewed as disparate impact claims, see Vhay, *supra* note 71, at 338-51.

\(^{234}\) *Turley*, 618 F. Supp. at 1442.

\(^{235}\) Id. at 1441.

\(^{236}\) See *supra* note 21 and accompanying text for the language of Title VII.

\(^{237}\) See, e.g., *Downes*, 775 F.2d at 290.
Because Title VII prohibits discrimination with respect to conditions of employment, courts expanded this definition of discrimination to include other behavior, i.e., unwelcome sexual advances, in the ambit of unlawful discrimination. The statute was interpreted as prohibiting offensive behavior directed at an employee in the sexual sense, although it continued to include gender harassment as well. Nevertheless, most courts construed behavior relating only to physical sex as actionable sexual harassment.

However, the position taken by McKinney and the majority in Hicks broadens the courts' definition of sexual harassment to include behavior that is non-sexual, behavior that is directed at a person because of her gender. The Hicks dissent disagreed with McKinney that any harassment or unequal treatment of an employee because of her gender can comprise an illegal practice of sexual harassment under Title VII. McKinney represents an appropriate reading of Title VII in terms of the "Congressional intention to define discrimination in the broadest possible terms." Indeed, it is the purpose of Title VII to prohibit both discrimination on the basis of sexual advances and unequal treatment on the basis of gender, as the courts found in McKinney, Hill, Delgado, and Hicks.

The foundation of any sexual harassment claim will always be discrimination on the basis of sex. Additionally, however, much of the behavior surrounding sexual advances and other offensive conduct includes subtle or direct forms of mistreatment of women based on stereotypical characterizations according to gender roles. For instance, in Porta v. Rollins Environmental Services, Inc., the plaintiff, who was subjected to a pattern of offensive treatment, was told "that her opinion was not respected because she was a woman." In Delgado v. Lehman, the illegal behavior consisted of verbal abuses of wo-

---

238. Williams, 413 F. Supp. at 658. See supra note 30 and accompanying text.
239. Downes, 775 F.2d at 290.
240. Hicks, 833 F.2d at 1420 (Seth, J., dissenting).
241. Rogers, 454 F.2d at 238.
242. For instance, in Lipsett v. University of P.R., No. 87-1931 (1st Cir. Oct. 26, 1988)(LEXIS, Genfed library, US App file), the harassment included walls "with Playboy centerfolds," a list posted on a bulletin board of "sexually charged nicknames for all of the female residents," and repeated sexual advances. Id. at 14-15. In addition to the sexual behavior, plaintiff alleged a "barrage of anti-female commentary while she was a medical student." Id. at 69. The court accepted evidence of a non-sexual "anti-female" attack "to have contributed significantly to the hostile work environment." Id. at 74.
244. Id. at 1282.
men.\textsuperscript{246} In \textit{Arnold v. City of Seminole},\textsuperscript{247} the court included non-sexual instances, such as the phrases, "The wicked witch is gone," and "RAT" in its analysis of sexual harassment.\textsuperscript{248}

Thus, acts that are not overtly sexual, but are still offensive, may be defined as sexual harassment if they constitute a prohibited pattern of discrimination on the basis of sex under Title VII. Gender harassment will be included in this definition as long as the conduct would not have occurred but for her gender, and occurred over a period of time long enough to satisfy a pervasive standard.

\textbf{CONCLUSION}

The right to pursue a hostile work environment claim is derived from Title VII of the Civil Rights Act of 1964. Finding that Title VII "reaches all discrimination affecting employment which is based on gender,"\textsuperscript{249} courts have accepted claims of unwelcome sexual advances and other sexual offensive conduct within the meaning of Title VII as sexual harassment.

However, neither Congress nor the courts adequately defined what sexual harassment is. The EEOC attempted to define sexual harassment broadly and to define the hostile work environment as consisting of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" which interferes with an individual's work performance.\textsuperscript{250} The guidelines clearly referred to harassment based on sex in the biological sense. A variety of distinctions were then developed in case law to define behavior as sexual harassment. Harassment could take many forms: physical, verbal, or symbolic. Courts considered the frequency of the conduct and the offensiveness of the behavior in order to find a sexually harassing condition of employment. Courts also focused on the behavior between the harasser and the victim to determine if the conduct was unwelcome in the sense that the employee did not solicit the undesirable conduct. These distinctions were then evaluated within a pervasive standard of severity and persistence.

Yet, if a court is confronted with a case of harassment that exhibits no behavior directed at a woman in a sexual sense, but behavior directed at her because of her gender, the existing EEOC definition is

\begin{itemize}
\item \textsuperscript{246} \textit{Id.} at 468.
\item \textsuperscript{247} 614 F. Supp. 853 (E.D. Okla. 1985).
\item \textsuperscript{248} \textit{Id.} at 860.
\item \textsuperscript{249} \textit{Williams}, 413 F. Supp. at 658.
\item \textsuperscript{250} 29 C.F.R. § 1604.11(a) (1988).
\end{itemize}
not helpful. The definition of sexual harassment should be modified to include not only sexual conduct, but also gender-based behavior. In effect, courts have been dealing with gender harassment since the first case involving a claim of a hostile work environment. Many instances of sexual harassment are instances of gender harassment. When a co-worker selects and displays a calendar with pictures of nude women, he is making a symbolic statement that could be actionable as sexual harassment as well as gender harassment, since such a display in the workplace could be construed as a subtle form of mistreatment of women. Likewise, sexual harassment toward a woman can obviously result from conduct other than explicit behavior, if it interferes with her work performance. Courts should follow Congress’ intent “to define discrimination in the broadest possible terms.”

Barbara L. Zalucki

---

251. Rogers, 454 F.2d at 238.