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LENGTH: 31976 words**ARTICLE:** THE MISUSE OF SUMMARY JUDGMENT IN HOSTILE ENVIRONMENT CASES**NAME:** Theresa M. Beiner ***BIO:**

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LEXISNEXIS SUMMARY:

... The allegations of sexual harassment made by Paula Jones against President Clinton have again refocused the country's attention on sexual harassment law. ... The first Supreme Court decision to acknowledge sexual harassment as a viable theory under Title VII was Meritor Savings Bank, FSB v. Vinson. While openly accepting the existence of harassment claims, the Court held that such claims are not limited to situations in which the plaintiff has faced "tangible, economic barriers." ... Thus, if a supervisor treated women in a demeaning manner, but did not treat male subordinates the same way, that could constitute sexual harassment. ... As we can tell from the above section, an increasingly common way for an employer to obtain summary judgment in a hostile environment case is for it to argue that the events, as plaintiff describes them, are not sufficiently severe or pervasive to alter the plaintiff's working environment. ... The court found that the actions of Saxton's supervisor were not sufficiently severe or pervasive to raise an issue of fact for purposes of summary judgment. ... In this study, 26% of female attorneys who handle gender-based employment discrimination cases "had observed a judge treat such cases as if they were unimportant or a waste of time," while only 10% of their male counterparts agreed. ...

TEXT:

[*71]

The allegations of sexual harassment made by Paula Jones against President Clinton have again refocused the country's attention on sexual harassment law. The Paula Jones case also provides an example of a court using a very potent procedural tool - summary judgment - to circumvent a plaintiff's ability to proceed to trial. In this Article, the author argues that federal courts are misusing summary judgment in hostile environment cases brought under Title VII. Through a review of federal district and court of appeals decisions granting summary judgment, the author shows how the courts are manipulating procedural and substantive standards in an effort to take these cases from the jury. Finally, using a combination of statistical and anecdotal information regarding discrimination claims and the judiciary's attitude

toward discrimination claims, the author attempts to account for this phenomenon.

A power over a man's subsistence amounts to power over his will. ⁿ¹

Introduction

Harassment law, and particularly sexual harassment law, has once again become a vibrant topic for public debate due to the allegations against President Clinton in *Jones v. Clinton*. ⁿ² This case finally has focused attention on a battle that had not, up until this point, been fought in public. For several years now, an attack on harassment law has been conducted (and often has succeeded) in the courtrooms throughout the United States through the use of a very potent procedural tool: summary judgment. Summary judgment is an effective tool for the courts to eliminate cases that have little or no factual support. Yet, there is a growing trend to grant summary judgment in harassment cases brought under Title VII of the Civil Rights Act of 1964 ⁿ³ where arguable issues of fact exist. ⁿ⁴ Harassment law found an invigorated voice due to Anita Hill's allegations of sexual harassment leveled at then Supreme Court Justice nominee Clarence Thomas during his 1991 confirmation hearings. ⁿ⁵ In the years after the hearings, there was a dramatic jump in the number of harassment charges filed with the Equal Employment Opportunity Commission ("EEOC"). ⁿ⁶

[*73] With ever burgeoning court dockets, the federal courts sought a coping strategy to handle the increase in harassment cases. ⁿ⁷ One way to manage them was to look hard at each case during summary proceedings such as motions to dismiss and motions for summary judgment. The courts quickly realized, however, that motions to dismiss have drawbacks. Liberal federal notice pleading ⁿ⁸ coupled with the rules of amendment under the federal rules of civil procedure ⁿ⁹ make it difficult to obtain a dismissal on a discrimination claim based on the pleadings. ⁿ¹⁰ This left summary judgment as the key tool for the courts to use to clear their dockets of this increasing form of litigation. ⁿ¹¹

[*74] This Article necessarily involves that indefinite area of the law in which substance and procedure intersect. This is an area that scholars tend to avoid, instead clinging to the supposition that substance and procedure are distinct. ⁿ¹² Yet, any practicing lawyer can tell you that procedure can make all the difference. Discrimination claims in particular have had an interesting procedural history driven largely by the fact that "discrimination is an elusive concept, and, unless one adheres to objective criteria, it is difficult to prove." ⁿ¹³ This has led commentators to recognize that the manner in which procedural tools are applied to harassment cases is often "outcome-determinative," ⁿ¹⁴ thus making careful application of procedural rules such as summary judgment all the more important.

The courts frequently have used summary judgment to reject hostile environment claims on a variety of bases, ⁿ¹⁵ sometimes pushing the envelope beyond the scope of factual situations deserving of summary judgment. In particular, courts increasingly are granting summary judgment based on the lack of severity or pervasiveness of the harassment. ⁿ¹⁶ Unfortunately, more often than not this has worked to the benefit of defendants, who typically have the resources to make motions that plaintiffs' attorneys do not. ⁿ¹⁷ **[*75]** Moreover, because of liberalized rules of summary judgment, such motions have a much lower cost for defendants. ⁿ¹⁸ Not surprisingly, the practice has returned at a time when Title VII plaintiffs finally have an opportunity for jury trials pursuant to the Civil Rights Act of 1991. ⁿ¹⁹ No longer are these cases being taken from judicial fact finding, but instead from a jury of the plaintiff's peers. The end result is that plaintiffs are losing their opportunity to test their facts before a jury and are instead again bound by the decision of a single judge on less than a full record.

This development is particularly troublesome when the ground for summary judgment is the lack of severity or pervasiveness of the alleged harassment. This standard requires the fact-finder to look at the totality of the circumstances to determine whether a reasonable person would find the harassment "sufficiently severe or pervasive to alter the conditions of the victim's employment." ⁿ²⁰ This is necessarily a fact-specific inquiry based on social norms that are best assessed by a jury - not one judge sitting in isolation.

This Article reviews the latest Supreme Court cases on harassment law and summary judgment. It then looks at the

trend of courts to grant summary judgment based on the lack of severity or pervasiveness of the harassment (many times improperly under the standards set out for such motions). Finally, this Article discusses possible reasons for this trend. In particular, this Article looks at the increase in harassment litigation and the impact of jury trials on harassment litigation, as well as the tendency of the judiciary to "look down" on harassment cases, discounting plaintiffs, their testimony, and their theory of litigation. ⁿ²¹

I. Background on Hostile Environment Law

How the courts have defined the elements of a hostile environment claim will have a distinct effect on how such claims are litigated, ⁿ²² as well as the extent to which summary judgment is feasible. ^[*76] There are five United States Supreme Court cases that address harassment in the workplace. ⁿ²³ All five cases do so in the context of sexual harassment. This Article is not limited to sexual harassment, although there has been a distinct rise in such cases. Instead, I have reviewed hostile environment claims involving all protected statuses under Title VII. ⁿ²⁴ A review of these Supreme Court cases provides some insight into how lower courts can manipulate Title VII to grant summary judgment more often than is appropriate.

The first Supreme Court decision to acknowledge sexual harassment as a viable theory under Title VII was *Meritor Savings Bank, FSB v. Vinson*. ⁿ²⁵ While openly accepting the existence of harassment claims, ⁿ²⁶ the Court held that such claims are not limited to situations in which the plaintiff has faced "tangible, economic barriers." ⁿ²⁷ Instead, the Court held that a plaintiff need not prove such economic loss. Relying on the language of Title VII itself, ⁿ²⁸ the EEOC Guidelines on sexual harassment, ⁿ²⁹ and two lower court precedents, ⁿ³⁰ the Supreme Court attempted to set out the parameters of such a claim. One limitation came from the language of Title ^[*77] VII itself, which prohibits discrimination in "terms, conditions or privileges of employment." ⁿ³¹ Therefore, in order to be actionable, the Supreme Court reasoned, the harassing behavior must affect a term, condition or privilege of employment as those terms are used in Title VII. ⁿ³² As the Court put it, "for 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.'" ⁿ³³ Courts have interpreted this to mean that a single incident, if sufficiently severe, can give rise to a claim. ⁿ³⁴

The Court also addressed the "erroneous" conclusion of the trial court that the alleged voluntary nature of plaintiff Meritor's relationship with her harasser negated any claim of discrimination. Here, the Court drew a fine line distinction. "The fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" ⁿ³⁵ While formulating the standard in this manner, the Court acknowledged that the issue of welcomeness "presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact." ⁿ³⁶

The Meritor Court did give some insight into what types of evidence would be applicable to such a determination, and in doing so, established a "totality of the circumstances" standard in assessing harassment. The court of appeals had held that "testimony about ^[*78] respondent's 'dress and personal fantasies'... had no place in this litigation." ⁿ³⁷ The Supreme Court disagreed, stating that "while 'voluntariness' in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome." ⁿ³⁸ Instead, the Court once again referred to the EEOC Guidelines for support of its opinion that "the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" ⁿ³⁹

The Court also addressed whether the employer bank could be held liable if there was harassment by Meritor's supervisor. Caught between the trial court's standard of actual notice and the court of appeals' standard of strict liability, the Court refused to "issue a definitive rule," ⁿ⁴⁰ instead "agreeing with the EEOC that Congress wanted courts to look to agency principles for guidance in this area." ⁿ⁴¹ The Court referred to this standard because the language of Title VII defined employer to include an "agent" of the employer. ⁿ⁴² It also acknowledged that common-law agency principles

might not be "transferable in all their particulars to Title VII." ⁿ⁴³ Not surprisingly, this led to confusion among the lower courts and produced scholarly debate as to what the standard is for imposing liability on [*79] employers for harassment perpetrated by employees. ⁿ⁴⁴ The Court clearly rejected the two extremes presented by the trial court and court of appeals. Thus, employers are not "always automatically liable for sexual harassment by their supervisors" and "absence of notice to an employer does not necessarily insulate that employer from liability." ⁿ⁴⁵

Finally, the Court addressed where employer grievance procedures and policies against harassment fit into the claim. While acknowledging that the existence of a grievance procedure and an anti-discrimination policy were "plainly relevant," the Court rejected the position that their existence "coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability." ⁿ⁴⁶ The Court found problems with the employer's policy in *Meritor*. First, it did not specifically address sexual harassment and therefore "did not alert employees to their employer's interest in correcting that form of discrimination." ⁿ⁴⁷ In addition, the policy required the plaintiff to complain to her alleged harasser. ⁿ⁴⁸ The Supreme Court reasonably found this a sufficient reason to justify the plaintiff's refusal to use the grievance procedure. ⁿ⁴⁹

In *Harris v. Forklift Systems, Inc.*, ⁿ⁵⁰ the Supreme Court revisited the issue of what level of harassing behavior is actionable under Title VII. In particular, the Court was faced with a split in the circuits as to whether the harassment had to "seriously affect [the] psychological well-being of the plaintiff in order to be actionable." ⁿ⁵¹ The *Harris* Court explained that a Title VII violation occurs "when [*80] the workplace is permeated with 'discriminatory intimidation, ridicule, and insult'...that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" ⁿ⁵² In reiterating this standard, the Court rejected what it considered the two extreme approaches of making every utterance of an epithet actionable and requiring that the conduct produce "tangible psychological injury." ⁿ⁵³ In doing so, the Court adopted both an objective and subjective approach to the determination.

First, the conduct must be severe or pervasive enough to create "an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive." ⁿ⁵⁴ The use of a "reasonableness" standard has been criticized. ⁿ⁵⁵ Several courts have reinterpreted this standard in light of the victim of harassment. For example, a reasonable woman standard has been adopted by several lower federal courts in the context of sexual harassment of a woman. ⁿ⁵⁶ Adoption of the reasonable woman standard, in particular, has engendered controversy. ⁿ⁵⁷

[*81] Second, the *Harris* Court also held that the victim must "subjectively perceive the environment to be abusive." ⁿ⁵⁸ The Court reasoned that if the victim does not subjectively find the environment abusive, the conduct does not alter the terms, conditions, or privileges of employment enough to make it actionable under Title VII. ⁿ⁵⁹ In light of this standard, the harassment need not "seriously affect" the plaintiff's "psychological well-being" to be actionable. ⁿ⁶⁰

The *Harris* Court did note that this is not a "mathematically precise test." ⁿ⁶¹ Instead, the Court again endorsed a totality of the circumstances approach to the determination. ⁿ⁶² The totality of the circumstances standard has three possible meanings in this context. First, it could be that the Court intended to have the fact-finder look at the context in which the discrimination took place. Second, it could mean that the Court wishes the fact-finder to look at all of the harassing incidents together to get a sense of the "big picture" surrounding the harassment of the plaintiff. Third, the Court could have intended it to encompass both these interpretations. The Court specifically set out several factors for the lower courts to consider when determining what the totality of the circumstances means. These factors include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." ⁿ⁶³ While noting that "no single factor is required," the Court did explain that the harassment's effect on the plaintiff's psychological well-being is relevant to whether the plaintiff found the environment abusive. ⁿ⁶⁴ Based on the Court's factors as described above it seems that the Court meant the fact-finder to look at both possible interpretations described above - the context in which the harassment took place and all the harassing incidents themselves - to determine whether the

harassment is sufficiently severe or pervasive in the particular fact pattern. ⁿ⁶⁵

[*82] One of the Supreme Court's more recent pronouncements on harassment law sheds further light on these interpretations of the "totality of the circumstances" standard. In *Oncale v. Sundowner Offshore Services, Inc.* ⁿ⁶⁶ the Court explained

The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances."...In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field - even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. ⁿ⁶⁷

The context of the alleged harassment, according to the Court, is key to determining whether the incident qualifies as severe enough to be actionable. Yet, whether harassment is pervasive necessarily involves consideration of the number of instances. It seems reasonable to expect, then, that the Court intends that the harassment be judged by both its severity and the cumulative nature of the incidents. Thus, while one instance of minimally annoying behavior may not be enough to alter the terms, conditions, or privileges of plaintiff's employment, several may.

The *Oncale* Court also settled two questions that had been lingering in the area of harassment law. One issue, the primary holding of the case, was whether same-sex sexual harassment is actionable under Title VII. The Court clearly held that it was. ⁿ⁶⁸ Second, the Court resolved whether the alleged harassing behavior must be of a "sexual" nature. Many lower courts had held that, in the context of sexual harassment, the harassing behavior need not be "explicitly sexual in nature" in order to constitute discrimination. ⁿ⁶⁹ Thus, if a supervisor treated women in a demeaning manner, but did not treat male subordinates the same way, that could consti [*83] tute sexual harassment. This, however, was not quite a universal rule. ⁿ⁷⁰ The Court in *Oncale* explained that this was indeed a correct interpretation, stating:

harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. ⁿ⁷¹

These three cases have left several issues unresolved. For example, is the perspective of the reasonable person in the victim's position (e.g., the "reasonable woman") the appropriate objective standard? Under what circumstances can an employer be held liable for harassment by its supervisors? ⁿ⁷² Finally, what sorts of remedial measures will insulate an employer from liability? ⁿ⁷³

The Supreme Court has addressed some of these issues in two recent cases: *Faragher v. City of Boca Raton* ⁿ⁷⁴ and *Burlington Industries, Inc. v. Ellerth*. ⁿ⁷⁵ In *Faragher*, the Court addressed under [*84] what circumstances an employer may be held liable for the actions of supervisory employees that create a hostile work environment. In doing so, the Court acknowledged that its "cases have established few definite rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive." ⁿ⁷⁶ In order to frame a standard, the Court looked at various theories of imputing liability to employers for the actions of their supervisors. The Court took into consideration that supervisors can easily misuse their authority and that the threat of an adverse employment action is

always there for an employee who does not act in the manner a supervisor wishes. ⁿ⁷⁷ On the other hand, the Court acknowledged its statement in Meritor that employers would not automatically be liable for the acts of their supervisors. ⁿ⁷⁸ With this in mind, as well as Title VII's emphasis on correcting problems before they reach litigation, the Court set this standard:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence ... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. ⁿ⁷⁹

The Court also made clear that this defense does not exist if the supervisor's harassment involves a "tangible employment action" against the harassed employee, such as a demotion, pay cut, or discharge. ⁿ⁸⁰

In Burlington, the Supreme Court addressed whether an employee needed to prove a tangible job detriment in order to maintain a quid pro quo harassment claim. ⁿ⁸¹ The Court recharacterized the issue, however, as whether the company was vicariously liable for the acts of its supervisor. ⁿ⁸² The Burlington Court recognized that although the terms "quid pro quo" and "hostile environment" are useful in differentiating between harassing situations in which a threat is carried out and harassing situations in which a threat is [*85] not carried out, the labels possess little significance. ⁿ⁸³ Thus, even though Ellerth's claim involved unfulfilled threats, that was not fatal to her harassment claim; instead, it simply meant that she had a hostile environment claim, rather than a traditional quid pro quo claim. ⁿ⁸⁴ In de-emphasizing the distinction between these two theories of harassment, the Court agreed with what some commentators had previously stated - that sexual harassment occurs more on a continuum than in distinct, separable theories. ⁿ⁸⁵ After recharacterizing the case in this manner, the Burlington Court adopted, essentially, the identical holding it had set forth in Faragher. ⁿ⁸⁶

While these cases have not fully set out all the contours of harassment law, the lower courts have endeavored to do so. It seems that courts (and perhaps litigants) have difficulty functioning without elements of a claim. Therefore, it does not come as all that much of a surprise that the lower courts have attempted to fashion elements of a claim for harassment out of the discussions and holdings of Meritor and Harris. These elements are not new; they were delineated in one of the earliest and most influential hostile environment cases - Henson v. City of Dundee. ⁿ⁸⁷ The courts have come up with varying formulations, which lend themselves to granting summary judgment for defendants. ⁿ⁸⁸ Elements are very convenient [*86] for both the courts and the litigants. However, in the context of summary judgment, they tend to work against plaintiffs. A defendant employer seeking summary judgment need only show that one element of the claim is factually unsupported in order to convince a court to grant summary judgment in a particular case. The more elements a cause of action has, the more chances a defendant has to show that some element is missing, and therefore summary judgment is warranted.

II. Background on Summary Judgment Law

The law of summary judgment is no doubt in part responsible for making harassment cases more easily disposed of by courts. [*87] Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ⁿ⁸⁹ In addition, the rule provides how such a motion should be made:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein ... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. ⁿ⁹⁰

The Supreme Court has interpreted both these sections on several occasions. ⁿ⁹¹ These cases are relevant to determining if the lower courts are properly granting summary judgment in harassment cases.

In one year, the Supreme Court issued three significant decisions on Rule 56 - *Anderson v. Liberty Lobby, Inc.*, ⁿ⁹² *Celotex Corp. v. Catrett*, ⁿ⁹³ and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* ⁿ⁹⁴ Prior to these cases, summary judgment was rarely granted for the defendant. ⁿ⁹⁵ Oft-referred to as the "summary judgment trilogy," ⁿ⁹⁶ all three of these cases are of interest in this context.

In *Anderson*, the Court addressed whether and how the standard of proof applicable to a particular claim applies in the context of a motion for summary judgment. ⁿ⁹⁷ The case involved the standard for libel as decided in *New York Times v. Sullivan*. ⁿ⁹⁸ In particular, the Court addressed the requirement that "actual malice" be proven by clear and convincing evidence. ⁿ⁹⁹ In ruling on this issue, the Court explained the standard under Rule 56(c), describing what is necessary for summary judgment for this type of claim and in general.

The Court began with a discussion of materiality. The Court explained that whether a fact is material to the claim or issue under scrutiny for summary judgment is determined by the underlying substantive law. ⁿ¹⁰⁰ Under Rule 56, "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." ⁿ¹⁰¹ The Court noted that the issue of materiality was "independent of and separate from" whether the evidentiary standard applicable to the particular claim factors into a motion for summary judgment. ⁿ¹⁰²

Instead, what is relevant is whether the issue of material fact is genuine, or, as the Court characterized it, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ⁿ¹⁰³ The Court set out some guidelines for the district courts in assessing summary judgment motions. First, the Court made clear that the judge should not weigh the evidence in deciding a motion for summary judgment. ⁿ¹⁰⁴ Instead, "the judge's function is...to determine whether there is a genuine issue for trial." ⁿ¹⁰⁵ Following this fairly clear announcement as to a judge's duty in such cases, the Court discussed precedent on this issue that makes it less than clear. The Court stated, "As [our prior precedent] indicates, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." ⁿ¹⁰⁶ It is difficult to determine how a judge, who is charged not to "weigh" the evidence, can somehow determine whether the evidence is "merely colorable" or "not significantly probative" without weighing the evidence.

The Court alluded to the controlling standards of Rule 50(a), which governed what were then called "directed verdicts," ⁿ¹⁰⁷ stating [*89] that the standard for summary judgment "mirrors" the standard for directed verdicts. ⁿ¹⁰⁸ On the subject of directed verdicts, the Court noted that "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." ⁿ¹⁰⁹ "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." ⁿ¹¹⁰ Finally, the Court quoted extensively from an 1871 Supreme Court decision:

Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of

a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. ⁿ¹¹¹

While helpful in further elucidating what character of evidence a nonmoving party must produce to withstand summary judgment (more than a "mere scintilla"), it is still difficult to comprehend how a judge is to make this decision without weighing the evidence or, at least, comparing the character of the moving and nonmoving parties' evidence. There appears to be a significant difference between a judge deciding a directed verdict motion after hearing all the evidence of both sides, including rebuttal evidence, and deciding a case on the cold record of written and documentary evidence that is characteristic of a summary judgment motion. ⁿ¹¹² Indeed, the Court itself did not precisely say that the standards for both motions are "identical," instead it used words like "very close" and "mirrors." ⁿ¹¹³ However, the purpose of this section is not to criticize the current standards for summary judgment, but instead to discuss them as a [*90] foundation for analyzing how the courts are using these standards in hostile environment cases.

With this background on summary judgment generally in mind, the Anderson Court went on to analyze the question presented by the case: whether and, if so, to what extent, the substantive evidentiary standard plays some part in a motion for summary judgment. ⁿ¹¹⁴ Once again analogizing to directed verdict jurisprudence as well as motions for acquittal in criminal cases, the Court concluded that "just as the 'convincing clarity' requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment." ⁿ¹¹⁵ Therefore, the courts must consider the clear and convincing standard in ruling on a motion for summary judgment in a libel case involving actual malice. As the Court put it, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." ⁿ¹¹⁶ In Anderson, that meant that "where the New York Times 'clear and convincing' evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant." ⁿ¹¹⁷

While the use of the clear and convincing standard would obviously make it easier for the trial court to grant summary judgment in this instance, the Anderson Court reiterated its cautious stance on granting such motions. It noted that "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," and explained that its holding would not "denigrate" the jury's role in a civil trial. ⁿ¹¹⁸ In addition, it told courts to be cautious in granting such motions:

The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor ... Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. ⁿ¹¹⁹

The relevance of the Anderson holding lies in its invocation of the evidentiary standard for purposes of summary judgment. Pro [*91] fessor Ann C. McGinley already has commented on the effect the 1986 summary judgment cases have had on non-harassment Title VII and ADEA claims. ⁿ¹²⁰ Professor McGinley argued that after Anderson, a sliding scale evidentiary approach should be used for purposes of non-harassment Title VII claims. ⁿ¹²¹ Although there is no heightened evidentiary standard in harassment cases like the clear and convincing standard in libel cases, there is an evidentiary component of the hostile environment finding that should be considered in ruling on a motion for summary judgment under the reasoning of Anderson. The Supreme Court in both Meritor and Harris told the courts that evidence of a hostile environment must be viewed from the perspective of the "totality of the circumstances." ⁿ¹²² This means that the lower courts should look at all the evidence of harassment together and in context - not look at the evidence piecemeal, concluding, in essence, that "incident a is not enough to create a hostile environment, incident b is

not enough to create a hostile environment, and incident c is not enough to create a hostile environment." Instead, the courts must consider incidents a, b, and c together to determine if a reasonable jury could find that the incidents considered together would be enough to find for the plaintiff. ⁿ¹²³

The incorporation of this standard in the courts' analyses of summary judgment should result in summary judgment being granted in fewer cases. The totality of the circumstances standard requires a fact-finder to assess a number of circumstances, in context, to determine whether they are sufficiently severe or pervasive. This determination necessarily involves the weighing of evidence, often including the plaintiff's and the defendant's explanations of what happened, as well as the character and cumulative effect of the incidents. As discussed above, this is improper on a motion for summary judgment. ⁿ¹²⁴

In the second trilogy case, *Celotex Corp. v. Catrett*, the Court assessed what was the moving party's burden on a motion for summary judgment when that party would not have the burden of proof at trial. In particular, the Celotex Court was confronted with a [*92] situation in which the defendant argued, while offering no evidence, that the plaintiff had no proof that the decedent had been exposed to the defendant's asbestos. ⁿ¹²⁵ The plaintiff, on the other hand, presented three documents that she argued tended to show that her deceased husband had been in fact exposed to the defendant's asbestos. ⁿ¹²⁶ The defendant argued that any such evidence was inadmissible hearsay. ⁿ¹²⁷ Under this fact pattern, the Court described the burdens on the non-moving and moving parties in the summary judgment context, while further explaining the general standard for summary judgment.

To begin with, the Celotex Court set out its interpretation of Rule 56(c), explaining:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. ⁿ¹²⁸

Quoting Anderson, the Celotex Court reiterated that this "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)." ⁿ¹²⁹

The Court pointed out that this does not leave a moving party with no burden at all; instead, the Court stated:

[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" which it believes demonstrate the absence of a genuine issue of material fact. ⁿ¹³⁰

Drawing from language in sections (a), (b), and (c) of Rule 56 of the Federal Rules of Civil Procedure, the Court concluded that this does not mean that the moving party must "support its motion with affidavits or other similar materials negating the opponent's claim." ⁿ¹³¹ So, precisely what does a moving party, who does not have the burden of proof on an issue at trial, have to show in order to obtain summary judgment on that issue? The Court explained that "the burden on the moving party may be discharged by 'showing' - that [*93] is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." ⁿ¹³²

Rule 56(e) requires the nonmoving party, on the other hand, "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answer to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" ⁿ¹³³ This does not mean that the nonmoving party "must produce evidence in a form that would be admissible at trial." ⁿ¹³⁴ Instead, the nonmoving party may use any evidence designated as acceptable under

Rule 56(c), which includes "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." ⁿ¹³⁵ Interestingly, in spite of the reference to "pleadings" in this Rule, the Supreme Court specifically stated that a nonmoving party cannot rely on "the mere pleadings themselves." ⁿ¹³⁶ This is due to language in Rule 56(e), which states that "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading." ⁿ¹³⁷ This language was added to the Rule to disapprove of cases allowing a party to resist summary judgment by reference to his or her pleadings. ⁿ¹³⁸

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Court rounded out its trilogy with a case suggesting that issues such as intent and motive may be appropriate for determination by a motion for summary judgment. ⁿ¹³⁹ *Matsushita* involved an alleged antitrust conspiracy to set artificially low prices on consumer electronics products in the United States to drive out American competitors. ⁿ¹⁴⁰ The particular issue was whether the plaintiffs had raised an issue of fact as to the defendant's antitrust conspiracy. The Court opined that if the "factual context renders [the plaintiffs'] claim implausible - if the claim is one that simply makes no economic sense - [the plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." ⁿ¹⁴¹ The Court held summary judgment was proper because economic factors, such as the alleged predatory pricing scheme, would result in defendants losing a considerably large amount of money, strongly suggesting that the defendant had "no motive to enter into the alleged conspiracy." ⁿ¹⁴² This case is notable because the Court engaged in the dubious process of inferring the defendants' motive on summary judgment. The Court also engaged in an inferential process that is uncommon, and some would say improper, in deciding a motion for summary judgment. As will be shown in the next section, it is of uncertain applicability in the context of employment discrimination.

One commentator summed up these cases shortly after they were handed down:

Matsushita unwarrantedly strengthened summary judgment by expanding the courts' authority to foreclose from the factfinder certain interpretations of facts and to declare a plaintiff's theory of the case impossible as a matter of law. [Anderson] equated summary judgment with directed verdict and suggested that judges may assess the probative worth of competing evidence at either the summary judgment or directed verdict stage of proceedings. The [Celotex] decision may have overlooked important aspects of the case record in its zeal to see summary judgment entered as well as extolled. ⁿ¹⁴³

The net result, commentators have argued, would be for summary judgment to shift away from being a "plaintiff's motion" toward being a "defendant's motion." ⁿ¹⁴⁴ However, the impact from these cases is less than clear. In a fairly recent study of summary judgment rates, Sinclair and Hanes opined that "when viewed in the long [*95] run, it does not appear that the proportion of summary judgment motions granted has increased significantly." ⁿ¹⁴⁵

A. Summary Judgment in Employment Discrimination Cases

While the summary judgment trilogy has generally signified a loosening in the standards used for summary judgment, ⁿ¹⁴⁶ not all courts have agreed that this means that summary judgment should be easily granted in employment discrimination cases. Indeed, since the trilogy, several courts consistently have argued to the contrary. ⁿ¹⁴⁷ For example, the Eighth Circuit has repeatedly reaffirmed ⁿ¹⁴⁸ that "summary judgment should seldom be used in employment-discrimination cases." ⁿ¹⁴⁹ As the court explained, "because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." ⁿ¹⁵⁰ Likewise, courts in the Seventh and Fourth Circuits have indicated their apprehension about summary judgment in these cases. ⁿ¹⁵¹ The main reason behind their reluctance is the necessary intent analysis that goes along with most employment discrimination cases. ⁿ¹⁵² As a district court in Indiana pointed out, "such cases often turn on issues of motive or intent" making them unlikely candidates for summary judgment. ⁿ¹⁵³ While intent does not always factor into harassment cases, the logic of these cases has been extended to include harassment claims.

Other courts have suggested that hostile environment cases, in particular, involve a highly fact-specific inquiry and therefore do not [*96] lend themselves to decision on summary judgment. ⁿ¹⁵⁴ As the Fourth Circuit concluded, whether "harassment [is] sufficiently severe or pervasive is quintessentially a question of fact." ⁿ¹⁵⁵ This makes sense. Given the totality of the circumstances standard, which focuses, at least in part, on an assessment of the actual context in which the harassment occurs, it would be difficult to resolve these issues on a motion for summary judgment. In addition, the nature of these claims, often involving widely conflicting accounts of the alleged harassing incidents, necessitates credibility determinations that are improper on a motion for summary judgment. ⁿ¹⁵⁶ Finally, the nature of the determination of whether a reasonable person would find the behavior harassing is necessarily predicated on a close examination of the facts and an assessment of them based on community standards of what is appropriate behavior. Who better may make this assessment than a jury of local citizens?

In spite of the reasoning of these courts, other courts have made it easier for a defendant to obtain summary judgment. ⁿ¹⁵⁷ In fact, the Seventh Circuit has recently backed off its position that summary judgment is usually inappropriate in employment discrimination cases, stating:

Language in some of our cases implies that because intent is a critical issue in employment discrimination cases, summary judgment is unlikely to be appropriate in such cases ... But as there is no separate rule of civil procedure governing summary judgment in employment discrimination cases, what the language we have referred to really means is just that courts should be careful in a discrimination case as in any case not to grant summary judgment if there is an issue of material fact that is genuinely contestable, which an issue of intent often though not always will be ... Summary judgment is hardly unknown, or for that matter rare, in employment discrimination cases, more than 90 percent of which are resolved before trial...many of them on the basis of summary judgment for the defendant. ⁿ¹⁵⁸

[*97] The Seventh Circuit in particular has been honest about the "drift" of the federal courts toward increased use of summary judgment in employment cases. As the Wallace court explained, "the expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial." ⁿ¹⁵⁹ While acknowledging that this is understandable given the expanding federal caseload and the implications of the Speedy Trial Act, the court was reluctant to agree to wholesale adoption of the broad use of summary judgment. Regarding the aforementioned "drift," the court stated:

[It] must be resisted unless and until Rule 56 is modified (so far as the Seventh Amendment permits) to bring federal practice closer to the practice in the legal systems of Continental Europe, where there is no hard and fast line between pretrial and trial and where procedure is more summary and informal than in the United States. ⁿ¹⁶⁰

With this background and the current trend in mind, it is not all that surprising that courts are considering summary judgment in questionable cases.

III. The Misapplication of Summary Judgment in Hostile Environment Cases

There are two ways in which courts inappropriately have manipulated both harassment law and summary judgment in an effort to dismiss cases prematurely. Harassment law is a multi-element analysis, of which each element must be proven by the plaintiff. In the context of summary judgment under Rule 56, a defendant need only show that plaintiff's evidence of one element is lacking in order for the court to grant summary judgment. ⁿ¹⁶¹ A review of cases in which summary judgment has been granted for the defendant revealed several common ways that a defendant may attack a plaintiff's hostile environment case in an effort to defeat the lawsuit prior to trial. ⁿ¹⁶² In particular, the courts may decide on a motion for summary judgment that the conduct is not sufficiently severe or pervasive enough for a reasonable jury to find for the plaintiff. ⁿ¹⁶³ Also, the courts may divide up the incidents into discrete parts, holding

that the individual incidents alone are not sufficiently severe or pervasive, while ignoring the totality of the circumstances standard that applies in such cases. ⁿ¹⁶⁴

The use of the elements of a harassment claim to defeat a plaintiff's case on summary judgment in itself would not be all that disturbing if it appeared that these were not "close cases." Part of the problem with these cases, I contend, is that many courts have been too quick to grant summary judgment. They often use incorrect standards, decide cases on disputed facts, or ignore the standard applicable to hostile environment cases - the totality of the circumstances - altogether. In this manner, many courts are misusing summary judgment in a class of cases that have serious civil rights implications.

A. Identifying the Trend

Below I discuss a series of cases in which, I contend, there is an issue of fact making summary judgment improper. These cases, however, do not tell us whether this phenomenon is isolated, common or representative of an increasing trend. Indeed, it is very difficult to make this determination. ⁿ¹⁶⁵ Yet, I have tried to assess this trend by executing two simple WESTLAW searches. I began with the year 1987 - the first full year after the Supreme Court's decision in *Meritor*, which set the severe or pervasive standard. ⁿ¹⁶⁶ While [*99] these searches are never perfect, ⁿ¹⁶⁷ they do give a rough estimate of how often this is happening and whether the practice is increasing. The results from a search consisting of court of appeals cases is shown in Table One below.

Each case found in this search was reviewed to determine if summary judgment actually was granted or overturned on the basis of lack of severity or pervasiveness. ⁿ¹⁶⁸ In some cases, the lack of severity or pervasiveness of the harassment was one of two or more grounds for summary judgment. The increase in cases after 1993 is of particular interest, because that year the Supreme Court issued its ruling in *Harris*. Prior to *Harris*, some courts had required a heightened burden of injury (for example, the harassment had to seriously effect a victim's psychological well-being) ⁿ¹⁶⁹ in hostile environment cases. *Harris* removed this heightened injury requirement ⁿ¹⁷⁰ and should have led to fewer summary judgment motions being upheld on this ground.

[SEE TABLE IN ORIGINAL]

A similar phenomenon, with greater ramifications for the individual plaintiff, is shown in Table Two below. This Table provides a rough, although underinclusive, estimate of how often district courts have granted summary judgment based on lack of severity or pervasiveness. Because the district courts are often the last arbiter of a plaintiff's case, these cases are of particular importance. ⁿ¹⁷¹ The results suggest that more defendants are making motions for summary judgment based on the severity or pervasiveness ground. The rate of summary judgments being upheld on appeal appears to have increased, but the sample size is too small to make too many generalizations about this trend. The increase begins to jump significantly in 1994 - the year after *Harris* was decided. This does not tell us whether summary judgment is being improvidently granted. [*101] Indeed, there was a decided increase in the number of EEOC claims being filed, which likely means more lawsuits based on harassment. ⁿ¹⁷² While it is difficult to make hard and fast generalizations from this data due to imperfect information, ⁿ¹⁷³ these cases, at the least, provide precedent for granting such motions. The next question is what sort of precedent are they setting. Only by examining the cases themselves can we uncover whether summary judgment is being misused.

[SEE TABLE IN ORIGINAL]

B. Summary Judgment in Cases Based on Lack of Severity or Pervasiveness

As we can tell from the above section, an increasingly common way for an employer to obtain summary judgment in a hostile environment case is for it to argue that the events, as plaintiff describes them, are not sufficiently severe or

pervasive to alter the plaintiff's working environment. The alleged discriminatory behavior must be both subjectively and objectively harassing. Therefore, it is not enough that the victim of the harassment perceives the environment as hostile. Instead, it must also appear objectively hostile to a "reasonable person." ⁿ¹⁷⁵

Courts are granting summary judgment on the severity or pervasiveness ground more frequently. ⁿ¹⁷⁶ The development of harassment law itself accounts for some of the ease courts find in granting these motions. First, most courts, including the United States Supreme Court, have noted that generally "isolated" or "sporadic" instances of harassing behavior are not enough to maintain a claim. ⁿ¹⁷⁷ However, the courts have acknowledged that a single incident, if sufficiently severe, can be actionable as harassment. ⁿ¹⁷⁸ Whether an isolated or sporadic instance of harassment should or should not be actionable is not a point raised in this Article. Instead, the problem lies in the courts granting summary judgment in cases in which it appears that the incidents could well be characterized as severe and/or pervasive, or, at least, there is an issue of fact as to the severity and/or pervasiveness of the incident or incidents.

Judging whether an environment would or would not be harassing to a "reasonable person" - the standard applicable to hostile environment cases - is a particularly difficult job. Indeed, it is often inappropriate for a court to make such a determination on a motion for summary judgment. It is difficult for a court, on papers alone, to determine the atmosphere of the work environment and how it might be perceived by an employee working in that environment. Traditionally, such judgment calls about human attitudes and behavior are inappropriate for decision on summary judgment. ⁿ¹⁷⁹ It is particularly troublesome in the hostile environment context, in which a plaintiff (and the plaintiff's coworkers as well) may perceive an environment very differently than the alleged harasser. Yet courts have become increasingly comfortable with granting summary judgment in questionable cases. To get a sense of the nature of these cases, a series of examples that illustrate this point are discussed below.

[*103] In *Saxton v. AT&T Co.*, ⁿ¹⁸⁰ the Seventh Circuit held that the plaintiff failed to raise an issue of fact as to whether a reasonable person would find that her supervisor's conduct created a hostile environment. The facts as described by that court indicate two overt sexually-related acts. First, Saxton's supervisor requested to meet with her at a club after work to discuss problems with her work performance. ⁿ¹⁸¹ Once there, the her supervisor placed his hand on Saxton's thigh several times and rubbed his hand along her upper thigh. ⁿ¹⁸² After they left the club, he pulled her into a doorway and kissed her. ⁿ¹⁸³ Plaintiff objected to these actions. ⁿ¹⁸⁴ Later, he put his hand on her leg in the car on the way home. ⁿ¹⁸⁵ On another occasion, they went to lunch to discuss work. ⁿ¹⁸⁶ After lunch, the supervisor stopped at an arboretum to take a walk. ⁿ¹⁸⁷ "[He] 'lurched' at [the plaintiff] from behind some bushes, as if to grab her." ⁿ¹⁸⁸ Once again, the plaintiff rebuffed his advance. ⁿ¹⁸⁹ After these incidents, the supervisor's attitude toward plaintiff changed. ⁿ¹⁹⁰ "He refused to speak with her, treated her in a condescending manner, and teased her about her romantic interest in a coworker. ⁿ¹⁹¹ In addition, [the supervisor] seemed inaccessible and on several occasions canceled meetings that he had scheduled with [the plaintiff]." ⁿ¹⁹²

The court found that the actions of Saxton's supervisor were not sufficiently severe or pervasive to raise an issue of fact for purposes of summary judgment. ⁿ¹⁹³ According to the court, Saxton's showing failed on several grounds. First, as to the two incidents of "undoubtedly inappropriate" behavior detailed above, the court held that they "did not rise to the level of pervasive harassment as that [*104] term has been defined by this court." ⁿ¹⁹⁴ As to her allegations of getting the "cold shoulder" from her boss, the court opined:

Saxton has offered no evidence that Richardson's conduct was frequent or severe, that it interfered with her work, or that it otherwise created an abusive work environment. Thus, although it might be reasonable for us to assume that Richardson's inaccessibility, condescension, impatience, and teasing made Saxton's life at work subjectively unpleasant, the evidence fails to demonstrate that his behavior was not "merely offensive,"...but instead was "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." ⁿ¹⁹⁵

The court furthered reasoned that even if there were questions of fact as to whether Saxton's work environment had

become difficult, there was not enough evidence to raise an issue of fact as to whether a reasonable person would have found the environment hostile. ⁿ¹⁹⁶

The Saxton case presents a fact pattern that, for a number of reasons, is very difficult to resolve on a motion for summary judgment. ⁿ¹⁹⁷ First, there are two incidents that involve a significant level of severity. The type of physical touching in which the alleged harasser engaged, i.e., grabbing plaintiff and trying to kiss her, stroking her thigh, etc., was definitely directed at her because of her sex and would be offensive to someone who was not interested in pursuing a relationship with the harasser. ⁿ¹⁹⁸ There was no question, even in the court's view, that plaintiff made her dislike of these advances known to the alleged harasser. ⁿ¹⁹⁹ These incidents, combined with the "cold shoulder" treatment after her complaint, should have raised enough of an issue of fact to get beyond summary judgment. In spite of the nature of plaintiff's evidence, the court still found no issue of fact on the question of pervasiveness or severity.

In Saxton, the Seventh Circuit engaged in a "divide and conquer" strategy that is becoming increasingly common in courts granting summary judgment in hostile environment cases. At [*105] though it is well settled, in hostile environment cases, that the fact-finder must look at the "totality of the circumstances," the court essentially ignored this standard. Instead, the court engaged in a piecemeal analysis of the alleged incidents and found that, in isolation, the incidents were not sufficiently severe or pervasive. In its analysis, the court separated the initial two incidents from the resulting "cold shoulder" treatment. The court held that the incidents and resulting treatment were insufficient individually, without attempting to assess them as part of the whole context in which the harassment took place. ⁿ²⁰⁰ Given the standards set out by the Supreme Court ⁿ²⁰¹ and the deference given non-moving parties in the context of summary judgment, the Seventh Circuit's strategy is improper.

The court in *Hosey v. McDonald's Corp.* likewise engaged in a divide and conquer strategy to grant summary judgment. In that case, the court separated incidents involving remarks made by a supervisor from those involving touching by that same supervisor. ⁿ²⁰² In *Hosey*, a female supervisor ⁿ²⁰³ at a McDonald's restaurant made unwanted sexual advances toward a male subordinate. ⁿ²⁰⁴ Specifically, she asked him out on numerous occasions and made offensive comments to him, including telling him "she would like to know what it felt like to have [him] inside her." ⁿ²⁰⁵ She also touched him offensively on ten occasions, ⁿ²⁰⁶ including grabbing his rear end and pinching him. ⁿ²⁰⁷ The district court, with the Fourth Circuit affirming, found these incidents insufficiently severe or pervasive to be actionable. ⁿ²⁰⁸ The court dismissed the supervisor's action, stating "while [plaintiff] may have thought such conduct improper, Title VII does not prohibit teenagers from asking each other for dates." ⁿ²⁰⁹ Citing *Saxton v. AT&T*, ⁿ²¹⁰ the *Hosey* court dismissed the touching incidents as insufficient evidence of a hostile environment. ⁿ²¹¹ This case, including the number of incidents, seems to be about more than teenagers asking each other out on dates. The plaintiff was subjected to repeated acts of a sexual nature which included offensive touching on the job. It is difficult to conceive of what would be sufficiently pervasive to get to the jury in this context if this case does not meet that standard.

[*107] In ruling in *Hosey*, the district court relied on another questionable summary judgment case coming out of the Seventh Circuit. ⁿ²¹² In *Weiss v. Coca-Cola Bottling Co.*, the Seventh Circuit upheld summary judgment in favor of a defendant in the context of sexual harassment. ⁿ²¹³ The plaintiff, Weiss, was subjected to various forms of harassment by her supervisor, Lawrence, including compliments, questions about her personal life, comments about how beautiful she was, and requests for dates. ⁿ²¹⁴ After the plaintiff made it clear that she did not date people with whom she worked, the conduct stopped for several weeks. ⁿ²¹⁵ However, the alleged harasser again asked Weiss out - this time to a wedding. ⁿ²¹⁶ In addition to these acts, Lawrence "jokingly" called Weiss a "dumb blond" when she would commit errors on the job. ⁿ²¹⁷ On one occasion, Weiss called Lawrence at home when she was having difficulty with a month-end inventory. ⁿ²¹⁸ Later that same day, Lawrence telephoned Weiss from a bar and asked her to join him when she was finished with the inventory. ⁿ²¹⁹ Accompanied by a co-worker, Weiss went to the bar. ⁿ²²⁰ Upon Weiss' arrival Lawrence discussed the inventory problem with her, but later put his arm around her chair and tried to kiss her. ⁿ²²¹ The next week, Lawrence left "I love you" signs in her work area. ⁿ²²² Weiss also testified that Lawrence put his hand on her shoulder six times during her employment. ⁿ²²³ Weiss eventually was terminated for cause. ⁿ²²⁴

In finding for Coca-Cola on summary judgment, the Weiss court relied on *Scott v. Sears, Roebuck & Co.*,ⁿ²²⁵ which held that summary judgment was proper "despite the plaintiff being subjected to propositions, lewd comments and a slap on the buttocks when these were relatively isolated instances."ⁿ²²⁶ *Scott* since has been effectively overruled by the Supreme Court's holding in *Harris*.ⁿ²²⁷ The continued reliance on *Scott*, with its requirement that the harassment "cause such anxiety and debilitation to the plaintiff that working [*108] conditions were 'poisoned',"ⁿ²²⁸ is clearly misplaced. Yet, bad precedent begets bad precedent with the result that plaintiffs continue to lose at the summary judgment stage (seemingly in spite of *Harris*).

In *Rocha Vigil v. City of Las Cruces*ⁿ²²⁹ a pro se plaintiff's case was dismissed on summary judgment. Rehearing was denied over the dissent of a federal court of appeals judge.ⁿ²³⁰ The plaintiff alleged that while she worked as a clerk in an airport, she was subjected to both sexual and racial harassment.ⁿ²³¹ In particular, on one occasion, her supervisor offered her "X-rated software."ⁿ²³² He left pornography in her desk drawer and repeatedly requested that she go flying with him.ⁿ²³³ In holding that these events were not enough to raise an issue of fact as to sexual harassment, the court of appeals reasoned:

Appellant's single encounter with pornographic material left inside a folder by a previous worker and her supervisor's single attempt to give her pornographic software are not reasonably regarded as giving rise to an abusive environment ... Further, given the lack of specificity in the record regarding the nature and frequency of her supervisor's invitations to go flying, such allegations are insufficient to defeat summary judgment.ⁿ²³⁴

The *Rocha Vigil* court, like the courts in *Saxton* and *Hosey*, divided the incidents into discrete parts and found them, in isolation, insufficient to raise an issue of fact on a claim for sexual harassment.

Likewise, the *Rocha Vigil* court upheld summary judgment in favor of the defendant on plaintiff's racial harassment claim, which involved plaintiff's statements that her "supervisor frequently referred to Hispanic individuals in derogatory terms such as "wetbacks.""ⁿ²³⁵ She also alleged that her supervisor "tolerated discriminatory treatment of Hispanic airport customers."ⁿ²³⁶ Finally, in her "draft affidavit," the plaintiff alleged that when she complained to her supervisor about his discriminatory comments and actions, he responded, "I didn't know that Mexicans had rights."ⁿ²³⁷ Again, it was the conclusory allegations regarding the frequency of this harassment [*109] that resulted in summary judgment being granted in favor of defendant.ⁿ²³⁸

Part of the problem in *Rocha Vigil* seemed to be the court's inability to handle dual bases for discrimination. A woman, like Ms. *Rocha Vigil*, who is also a member of another protected group - in this case Hispanic - is experiencing harassment based on two Title VII protected categories. There is no reason why both improper motivations should not be considered together in determining whether, overall, the environment was hostile to Ms. *Rocha Vigil*. The court instead disaggregated the two bases of her harassment, refusing to view them as part of the same totality of harassing incidents. While at first this might seem justifiable in light of the distinct categories set forth in Title VII,ⁿ²³⁹ nothing in the statute or case law suggests that multiple bases for discrimination cannot be considered together.ⁿ²⁴⁰ Courts simply have gotten into the habit of seeing forms of discrimination as distinct. Indeed, the facts of this case suggest that the combination of Ms. *Rocha Vigil*'s gender and race motivated her employer's disparaging treatment.ⁿ²⁴¹

Judge Lucero, dissenting from the denial of a petition for rehearing in this case, disagreed with the court's analysis in this case. He explained:

In affirming summary judgment for the City of Las Cruces, the panel holds that it is per se unreasonable for a Hispanic worker to consider what she describes as her supervisor's "frequent" references to "wetbacks" as being hostile or abusive. I am disappointed that the panel reaches that conclusion; more importantly, I can see no legal or factual basis to

support it. [*110] The term "wetback" is severely degrading. Accordingly, its use hardly needs to be pervasive for a Hispanic employee to find her work environment hostile or abusive - and reasonably so. While Ms. Vigil's pro se allegations that the term was used "frequently" are understandably not a model of specificity or legal draftsmanship, I cannot see how the panel is able to construe those allegations to mean that the term may have been used so infrequently as to preclude Ms. Vigil's subjective perceptions of a hostile work environment from being objectively reasonable. ⁿ²⁴²

Another example of bad precedent is provided by the court in *Blankenship v. Parke Care Centers, Inc.* ⁿ²⁴³ In *Blankenship*, two seventeen year old hospital dietary aides claimed harassment by a forty-year-old male coworker. ⁿ²⁴⁴ One of the plaintiffs endured the coworker's blowing kisses at her, licking his lips and looking at her, and "smiling at her seductively or perversely on several occasions; [making] obscene gestures toward his crotch on one occasion; touching his finger against her chest above her breast on one occasion; and [making] vulgar sexual remarks in her presence about another female co-worker" during a five to six day period. ⁿ²⁴⁵ The other plaintiff, was harassed by the same coworker. ⁿ²⁴⁶ He told her that "he was 'falling in love' with" her. ⁿ²⁴⁷ He tickled her on one occasion, hugged her and/or kissed her on the cheek on four occasions. ⁿ²⁴⁸ He also approached her from behind and lifted her breasts. ⁿ²⁴⁹ He repeatedly asked her out on a date. ⁿ²⁵⁰ While the court agreed that the second plaintiff presented a stronger case, ⁿ²⁵¹ it concluded that "neither Plaintiffs' contentions definitively meet the applicable legal standard. Accordingly, the nature of the conduct itself conceivably could provide an alternative basis for granting Defendants' motions." ⁿ²⁵²

EEOC v. Champion International Corp. ⁿ²⁵³ provides yet another example of a situation in which a court overstepped its bounds and invaded the province of the jury. In this case, an African-American woman named Jackson confronted a male co-worker, Butram, who [*111] was poking two female coworkers with a stick. ⁿ²⁵⁴ According to Jackson, when the alleged harasser saw her observing this behavior, he shouted to her "What the fuck are you looking at!" and allegedly told her he would make her job more difficult. ⁿ²⁵⁵ He then shouted at her, "Suck my dick, you black bitch," while dropping his pants and holding his penis. ⁿ²⁵⁶ In addition to this incident, another co-worker told fellow employees that he wanted to hang Jackson in a cornfield and that if she brought any gang-member friends to work, he would bury them in a cornfield. ⁿ²⁵⁷ Finally, a fellow employee who was African-American found a Ku Klux Klan card posted on the inside of a beam at the factory where they worked. ⁿ²⁵⁸ The card was eventually shown to Jackson by one of her African-American coworkers. ⁿ²⁵⁹ The EEOC brought a Title VII suit against Champion, Jackson's employer, which moved for summary judgment. ⁿ²⁶⁰

While there was some discrepancy about the primary incident of harassment, ⁿ²⁶¹ the court evaluated the plaintiff's claim based on Jackson's account, which is appropriate at the summary judgment stage. ⁿ²⁶² Indeed, "in moving for summary judgment, Champion contends that...even if the incidents Jackson asserts occurred as she alleged, they do not rise to a sufficient level to constitute harassment actionable under Title VII." ⁿ²⁶³ The court explained:

In the present case, the only event or behavior the EEOC can point to as the basis of a sexually hostile work environment with regard to Jackson is the Butram incident. Taking the evidence in the light most favorable to the EEOC, Butram's behavior was deplorable and even offensive, humiliating, and threatening to Jackson. It very well could have interfered with her work performance at the time. There is no evidence, however, from which this court can draw a reasonable inference that Butram's sexual harassment of Jackson was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. This single incident, which was of very limited duration and included nothing [*112] but expressive behavior, with no follow-up or repeat, is simply not enough to violate Title VII as sexual harassment. ⁿ²⁶⁴

The court here conveniently overlooked that, based on the standard set out by the Supreme Court in *Meritor*, a single incident, if sufficiently severe, can form the basis of a sexual harassment claim. ⁿ²⁶⁵ One is at a loss to determine what sort of single incident would be severe enough if this incident, as described by Jackson, is not even sufficient to get to the jury. ⁿ²⁶⁶

The court held similarly on the claim of racial harassment. ⁿ²⁶⁷ It acknowledged that the incidents involved (the Butram incident, the derogatory statement, and the Ku Klux Klan incident) were "deplorable and even offensive to Jackson," but held that the Butram incident was a single occurrence and the Ku Klux Klan card "[did] not by itself rise to within anywhere near the same level of severity hypothesized in Daniels." ⁿ²⁶⁸ Also, the derogatory statement did not occur in the workplace or in Jackson's presence. ⁿ²⁶⁹ Again, the Court separates out the incidents failing to even consider whether cumulatively they might amount to a severe or pervasive work environment.

Male plaintiffs have not fared much better in alleging harassment. ⁿ²⁷⁰ In *Wenner v. C.G. Bretting Manufacturing Co.*, the plaintiff [*113] was harassed by a male customer of his company. ⁿ²⁷¹ Over a two-day period, the customer repeatedly gazed adoringly at the plaintiff, complimenting his clothes and telling the plaintiff he was handsome. ⁿ²⁷² At a dinner with representatives of the company, one representative began to rub his feet and leg against the plaintiff's leg under the dinner table. ⁿ²⁷³ The next morning, the same customer representative approached the plaintiff, who was seated at his desk, and told him, "Good morning, Mr. Wenner, you look very handsome today." ⁿ²⁷⁴ While making this statement, the customer representative leaned over plaintiff, rubbed his shoulders and placed his cheek close to that of plaintiff. ⁿ²⁷⁵ The next day, the same customer representative winked at the plaintiff and asked him, "What nice things do you like?" and "What kind of things do you think are pretty?" ⁿ²⁷⁶ After the plaintiff asked the customer representative to stop, the customer representative asked the plaintiff's employer to fire plaintiff for being rude. ⁿ²⁷⁷ The harassment did stop after the customer representative was confronted. ⁿ²⁷⁸

Although the court admitted that "the context in which these incidents arose suggests that they can be construed as sexual in nature, they were neither severe nor pervasive enough to constitute a hostile environment." ⁿ²⁷⁹ The court also found that harassment over a two-day period was "relatively isolated" and therefore insufficient to support his claim. ⁿ²⁸⁰ Finally, the court posited that "plaintiff offered no evidence to suggest that [the alleged harasser's] conduct interfered unreasonably with his work performance." ⁿ²⁸¹ The court, however, did admit that plaintiff stated that the conduct made him uncomfortable about going to work during the two-day period that the customer visited. ⁿ²⁸² This evidence, the court explained, was in [*114] sufficient to support the plaintiff's contention that a reasonable person would find the conduct hostile or abusive or that the harassment was of such a degree that it affected adversely the conditions under which the plaintiff worked. ⁿ²⁸³

The court's analysis in *Wenner* likewise seemed to ignore the relevant legal standards in an effort to keep a case away from the jury. There was indeed evidence there, if believed by the jury (as must be assumed for purposes of a motion for summary judgment), that could have supported a verdict for the plaintiff. The Supreme Court has made clear that a plaintiff need not have a "tangible" job detriment or suffer severe psychological distress in order to maintain a claim for a hostile work environment. ⁿ²⁸⁴ All a plaintiff needs to show is an alteration in the conditions of employment. Being sought out by a customer based on sex does change the conditions of a plaintiff's employment, especially where other similarly situated employees are not subjected to the same treatment.

Courts have engaged in other bizarre and strange stretches to avoid finding alleged acts of harassment sufficiently severe or pervasive to go to the jury. In *Galloway v. General Motors Service Parts Operations*, ⁿ²⁸⁵ the Seventh Circuit held that the term "sick bitch" when directed by a male employee to a female employee was not a "gendered" term. ⁿ²⁸⁶ This interesting linguistic trick occurred in a case that perhaps was not the most sympathetic to the plaintiff. The plaintiff had engaged in a consensual romantic relationship with one of her coworkers, the alleged harasser. ⁿ²⁸⁷ After that relationship ended and for a period of approximately four years until plaintiff quit, the alleged harasser repeatedly called plaintiff a "sick bitch," or simply "sick." ⁿ²⁸⁸ Apparently, the plaintiff had been hospitalized at one time for a "psychiatric disorder." ⁿ²⁸⁹ He also made several more explicit statements. On one occasion, he said, "If you don't want me, bitch, you won't have a damn thing" while on another occasion he made an obscene gesture at her and said, "suck this, bitch." ⁿ²⁹⁰

The court held that "bitch" and "sick bitch" in this context were gender-neutral terms, stating, "we find greater merit in the dis [*115] trict judge's third ground [for summary judgment], that 'sick bitch' - and, we add, the other verbal abuse, and the obscene gesture, that [the alleged harasser] directed toward Galloway - was, in context, not a sex- or

gender-related term." n²⁹¹ The court further reasoned:

It is true that "bitch" is rarely used of heterosexual males... But it does not necessarily connote some specific female characteristic, whether true, false, or stereotypical; it does not draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect. In its normal usage, it is simply a pejorative term for "woman." n²⁹²

It is hard to understand how Judge Posner, the author of this decision, can acknowledge that "bitch" is pejorative when addressed to a woman, but still find this fact pattern insufficient to withstand summary judgment. In this context, where the co-worker is making these statements to an ex-girlfriend, it is hard to imagine how these statements could be considered somehow "ungendered." Indeed, if the context is key to Judge Posner's decision, it seems more reasonable to allow the plaintiff the opportunity to develop fully that context at trial.

This is not only a problem in the Seventh Circuit, although that circuit is one of the leading forces behind this trend. n²⁹³ I have found courts engaging in similar analysis in cases in other jurisdictions, including the Sixth Circuit, n²⁹⁴ the Fourth Circuit, n²⁹⁵ the Tenth Circuit, n²⁹⁶ and numerous district courts. n²⁹⁷ The practice also appears to [*116] be increasing, with these jurisdictions leading the way. n²⁹⁸ Courts have also engaged in similar practices when assessing motions for judgment as a matter of law, n²⁹⁹ where, again, the judge takes the case away from the jury and decides it him or herself. n³⁰⁰ This seems to be a fairly recent phenomenon, with most of the reported cases occurring after 1993. There are signs, however, that this problem might be more widespread in district courts. n³⁰¹ There are several cases in which the courts of appeals have reversed improvidently granted summary judgments. n³⁰² Unfortunately because many cases do not result in an appeal, n³⁰³ the district judge thereby effectively acts [*117] as the final adjudicator of whether a plaintiff will get to try his or her case before a jury. Under these circumstances, district judges must be even more diligent in making certain that plaintiffs are getting their day in court in situations in which a reasonable juror could find for the plaintiff.

The cases in which the courts of appeals have caught and reversed district courts that erroneously dismissed a plaintiff's claim on a motion for summary judgment provide examples of what courts should be doing in these cases at the summary judgment stage. n³⁰⁴ In particular, the Eighth Circuit's decision in *Smith v. St. Louis University* n³⁰⁵ provides an excellent example of a court properly overturning summary judgment granted by an errant district court. In *Smith*, a female anesthesiology resident alleged that her department chairman repeatedly spoke to her using derogatory terms based on her gender. n³⁰⁶ The facts revealed that the chairman referred to female doctors by their first name, while addressing male doctors as "doctor." n³⁰⁷ He told plaintiff that she was attractive and should consider modeling. n³⁰⁸ He referred to her as an "anesthesia babe." n³⁰⁹ Finally, he asked her why she went into medicine rather than nursing or getting married. n³¹⁰ The district court decided that the conduct was not sufficiently "severe or pervasive." n³¹¹ Part of the district court's analysis focused on the nature of the statements made. It believed them to be merely offensive and not always gender-based. n³¹² Finally, the trial court held that the harassment did not sufficiently interfere with plaintiff's work performance. n³¹³

In overruling the trial court's decision in this case, the Eighth Circuit correctly considered the standards for sexual harassment in light of the law on summary judgment. To begin with, it explained that the plaintiff need not show a "tangible psychological injury" in order to show that harassment alters the conditions of her employment. n³¹⁴ Indeed, as the Supreme Court explained in *Harris*, the plaintiff need not show that the conduct "seriously affected em [*118] ployees' psychological well-being." n³¹⁵ Instead, the appellate court acknowledged the *Harris* Court's position that such conduct "can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing their careers." n³¹⁶ Agreeing that the harassment need not be sexually explicit to be actionable, n³¹⁷ the court explained:

Smith has introduced evidence that Schweiss frequently and regularly made derogatory comments toward Smith and at least one other female resident. Moreover, his comments commenced when Smith began her residency and continued virtually throughout her time at the hospital. While Smith was not at all times working with Schweiss ... , Smith need not be exposed continually to the harassment to succeed on her claim; Schweiss was, moreover, the head of the Department, and therefore more omnipresent than a coworker might be. Furthermore, Smith presented evidence that others in the Department relayed some of Schweiss's comments to her. Finally, Smith showed she had been hospitalized twice, the cause of which remains in dispute, and had suffered depression because of the alleged harassment. We think that, if Smith were given the opportunity, a jury could reasonably find that Schweiss's harassment was sufficiently severe or pervasive to meet the Harris standard. ⁿ³¹⁸

While we may not all agree that the plaintiffs in the above cases would have convinced members of a jury of the merits of their claims, the issue at this stage is whether the plaintiff should have been given the opportunity to try. In evaluating these cases, I brought these and other fact patterns to the attention of my colleagues to obtain their input into whether they found the facts, as described, sufficiently severe or pervasive to survive a motion for summary judgment. We often disagreed on that point. Indeed, the nature of the disagreements only went further to prove the point of this Article. It is difficult to decide what is "reasonable" in these contexts. Congress, through the Civil Rights Act of 1991, has left that determination to the jury when compensatory or punitive damages are prayed for by the plaintiff. ⁿ³¹⁹ Given the nature of these claims and the credibility determinations they entail, only the ultimate fact-finder, after hearing the entire case, should be permitted to make this determination in most cases. As the above cases illus [*119] trate, all too often that task is being taken away from the jury - often to the detriment of the plaintiff.

IV. The Reasons Why

The reasons for the courts' increasing hostility to hostile environment claims may be the result of a harmonic convergence of circumstances. First, the trilogy of summary judgment cases has made it easier for the courts to grant summary judgment. ⁿ³²⁰ Second, part of the large increase in summary judgment motions filed and granted beginning in 1994 ⁿ³²¹ could be laid at the feet of the Supreme Court's lessening of the damage required of hostile environment plaintiffs in its 1993 decision in Harris. ⁿ³²² Third, the courts have seen a marked increase in Title VII claims generally, and in harassment claims in particular. ⁿ³²³ This is due, no doubt, in significant part to the increased awareness of this cause of action as a result of the Clarence Thomas/Anita Hill hearings. Fourth, the advent of jury trials in these cases might provide added incentive for courts to grant summary judgment in order to avoid the jury's input on what is a very emotional issue. Fifth, some blame must lay at the feet of plaintiff attorneys who, sensing a new and potentially lucrative claim, have not always been as circumspect, perhaps, as they should be in evaluating a potential client's case. ⁿ³²⁴ Sixth, the number of sitting federal judges appointed by Presidents Reagan and Bush has likely had some influence on the manner in which civil rights law has developed. ⁿ³²⁵ Finally, I believe that the lack of diversity on the [*120] bench exacerbates this problem, ⁿ³²⁶ especially in light of what gender bias task forces have revealed to us about the actions and attitude of the judiciary in cases of this sort. ⁿ³²⁷

A. The Increase in Harassment Cases

It is difficult to come up with statistics that represent the number of hostile environment cases that are resolved through summary judgment. ⁿ³²⁸ Even though Judge Posner has opined that "many of them" are resolved by summary judgment for the defendant, ⁿ³²⁹ the only statistics available involve the number of cases filed and the number of cases resolved before trial. According to the Administrative Office of the United States Courts, in 1995 90% of employment discrimination cases were resolved prior to trial on the merits. ⁿ³³⁰ A more telling statistic, however, is the number of cases filed. There has been a decided increase in the number of civil rights cases filed generally. The Administrative Office of the Courts has attributed the increase in civil rights cases filed to the enactment of the Civil Rights Act of 1991. ⁿ³³¹ According to that office, civil rights cases have [*121] increased by 53% since 1989. ⁿ³³² In addition, "civil rights cases arising from employment-related issues accounted for 47 percent of the 28,749 civil rights cases filed

in 1993." ⁿ³³³ A rise in sexual harassment cases in particular has been attributed to the media attention given to the Clarence Thomas/Anita Hill hearings. ⁿ³³⁴ This increase in caseload comes at a time when courts are under increased pressure, from the Civil Justice Reform Act of 1990, ⁿ³³⁵ to reduce the expense and delay in the civil justice system. ⁿ³³⁶ In addition, the Speedy Trial Act has likewise put increased pressure on the federal courts. ⁿ³³⁷ Although overall civil case filings have decreased since 1985, ⁿ³³⁸ criminal cases filed in the federal courts have increased. ⁿ³³⁹

One court actually has acknowledged that increased caseload has played a role in the increased granting of summary judgment. In *Wallace v. SMC Pneumatics, Inc.*, ⁿ³⁴⁰ Seventh Circuit Chief Judge Posner explained it in this manner:

The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal districts. ⁿ³⁴¹

While one is certainly sympathetic to increases in court caseloads, reduction of those caseloads should not come on the backs of plaintiffs with viable claims. Further, if part of the problem is the theory of sexual harassment, there are other ways, such as through the [*122] legislative process, to address these issues. The courts should not be using a procedural tool to effect substantive change.

B. Findings of Task Forces

The use of summary judgment in sexual harassment cases may be accounted for, in part, in the attitudes that judges bring to such cases. While the cases I have examined involved a variety of harassment claims, including claims based on race and religion, the majority of them were sexual harassment claims. ⁿ³⁴² Thus, it is important to determine whether there is something about sexual harassment claims in particular that is resulting in the increased granting of summary judgment in this category of cases.

In 1971, professors John Johnston and Charles Knapp published the results of a study of judicial opinions in cases involving sex discrimination. ⁿ³⁴³ Their conclusion was "that by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable." ⁿ³⁴⁴ As the professors concluded:

With some notable exceptions, [judges] have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. Particularly striking, we believe, is the contrast between judicial attitudes toward sex and race discrimination. Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist" - at least their opinions in that area exhibit a conscious attempt to free themselves from habits of stereotypical thought with regard to discrimination based on color. With respect to sex discrimination, however, the story is different. "Sexism" - the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and [*123] social roles solely on the basis of sex differences - is as easily discernible in contemporary judicial opinions as racism ever was. ⁿ³⁴⁵

Looking at a wide variety of judicial opinions and protective legislation, Johnston and Knapp proved their point by reviewing law over a one-hundred-year period. ⁿ³⁴⁶ Over twenty-five years have passed since Johnston and Knapp's work. Recent studies in this area, however, suggest that judicial attitudes and decision making in the sex discrimination area have not changed as much as they should. ⁿ³⁴⁷

In an article published last year, Robert J. Gregory uses two Seventh Circuit cases as examples of how courts treat

sex discrimination cases differently than race discrimination cases under Title VII, even though both types of cases involve identical legal standards. ⁿ³⁴⁸ As Professor Gregory concludes:

In the race context, courts seem particularly receptive to claims that racially harassing behavior has affected the terms or conditions of an individual's employment, resolving any ambiguities in favor of the claimant and de-emphasizing the need for any specific number of instances of harassment. In the sex context, the judicial reaction seems less solicitous, with courts more often stressing the ambiguities in the conduct at issue and the need for repeated instances of harassing conduct. ⁿ³⁴⁹

Gregory also states that "the case law reveals a judicial tolerance of sexual harassment that has no analog in the area of racial harassment and which leaves working women without the full protection of the law." ⁿ³⁵⁰

Gregory opines, as have other scholars, that perhaps this is the result of too few female judges on the bench. ⁿ³⁵¹ Indeed, at least one study has shown that there is a statistically significant difference in the way in which male and female appellate judges evaluate discrimination cases. ⁿ³⁵² As that study found, "more than 63 percent of the votes cast by women judges supported the plaintiff's claim of discrimination. In contrast, male judges supported the plaintiff 46 percent of the time." ⁿ³⁵³ The authors of the study suggested one possible explanation for these differences in employment discrimination cases: "Women may tend to support the claimant in employment discrimination cases simply because they are likely to have experienced such discrimination directly, or have encountered gender-related obstacles in their professional lives, or feel a close affinity with those who have." ⁿ³⁵⁴

The conclusions of this study would come as no surprise to the Gender Bias Task Forces that have sprung up in the United States beginning in the mid-1980s. Discrimination based on gender, race, and ethnicity in the legal profession and court system throughout the United States has been well-documented by Gender, Ethnic and Racial Bias Task Forces. ⁿ³⁵⁵ In addition to findings about the treatment of lawyers and litigants based on their sex, several studies document discrimination based on claims involving sex discrimination. Many task forces have documented and sought to address problems facing women in the domestic violence and family law areas. ⁿ³⁵⁶ Fewer have investigated the extent to which bias against a certain type of case affects the outcome of a particular case. The Task Force reports of the District of Columbia, as well as those of the Eighth, Ninth, and Second Circuits have interesting statistics and anecdotal evidence of the treatment of discrimination cases in court. The information of these task forces - based on practice in federal courts - is particularly relevant in accounting for the frequent use of summary judgment in harassment cases.

The Ninth Circuit's Gender Bias Task Force was one of the first to report on the status of sex discrimination cases in federal courts. It found:

"Women's cases," narrowly defined as involving claims of employment discrimination, sexual harassment, or reproductive rights, have been among the most visible federal litigation over the past decade ... [With respect to employment law cases], both case law and focus group discussions illuminated the interaction of this population of plaintiffs (almost all females) with the judiciary and the bar (both of which are largely dominated by males). Instances of overt gender bias involve only a handful of judges, and federal judges generally have expressed little tolerance for blatant sexual harassment. Most focus group participants, however, believed - and the case law illustrated - that more subtle gender bias, directed toward female plaintiffs, witnesses, and lawyers, as well as institutional impediments to female plaintiffs in civil rights employment cases, are more widespread.

Moreover, federal district court judges are perceived to be less receptive to employment discrimination cases of all types than they are to commercial cases with high monetary stakes. In 23 of the 26 appellate court decisions reviewed

over a five-year period, the defendant had prevailed in the trial court. On appeal, more than half those cases were reversed in full or in part. Indeed, a review of Ninth Circuit appellate opinions over the past five years shows that the appellate court has been a leader in understanding the legal rights of women in the workplace. ⁿ³⁵⁷

In addition to findings by the Ninth Circuit's Task Force, the District of Columbia Circuit's Task Force on Gender, Race, and Ethnic Bias reported that "early in the Committee's work, it [*127] learned that some attorneys perceived that equal employment cases were treated by judges as unimportant." ⁿ³⁵⁸ In this study, 26% of female attorneys who handle gender-based employment discrimination cases "had observed a judge treat such cases as if they were unimportant or a waste of time," while only 10% of their male counterparts agreed. ⁿ³⁵⁹ However, 16-17% of court employees observed "a judge treat an employment discrimination case as unimportant or a waste of time - a higher percentage than for any other case category apart from prisoner petitions." ⁿ³⁶⁰ Indeed, this was verified by interviews with judges in the circuit, three of whom spoke "unfavorably about employment discrimination cases." ⁿ³⁶¹ One appellate judge stated that some judges had an "attitude" about Title VII plaintiffs and identified them as "disgruntled employees." ⁿ³⁶² Unsurprisingly, some attorneys felt this attitude was leading to reduced access to the courts, at least in cases of attorneys' fees decisions, as well as in the ability of some plaintiffs to obtain counsel. ⁿ³⁶³

Recently, the Eighth Circuit has issued its preliminary report, containing information on both the use of summary judgment in sex discrimination cases as well as judicial attitudes toward sex discrimination cases. ⁿ³⁶⁴ This report documented opinions on sex discrimination cases:

One-third of plaintiffs' attorneys and one-quarter of defendants' attorneys reported that discrimination cases had been pushed through the courts without adequate time (sometimes/often/many times). Twenty-nine percent of plaintiffs' attorneys and 11% of defendants' attorneys reported judges indicated that such cases are frivolous, unimportant, or undeserving of federal court time (sometimes/often/many times). When judges were asked whether they agreed that discrimination cases were undeserving of federal court time because "the issues are trivial," a majority expressed disagreement or strong disagreement (53.4%). A substantial minority reported a neutral opinion on the issue (35.6%) and a small number (10.9%) suggested that they agreed or strongly agreed. ⁿ³⁶⁵

Given that the two groups who have an interest in discrimination cases being considered trivial by courts - defense counsel and [*128] judges - agreed almost at the identical rate that courts considered them less important, this statistic seems to have a degree of accuracy. Indeed, one would expect this to be the minimum - the floor of the percentage of defense attorneys and judges who view these cases as trivial. It is unlikely that many judges and defense attorneys would readily admit to the trivial treatment of such claims by judges. In addition, judges and defense attorneys see these cases through a particular lens. In the case of defense attorneys, it is a defense-oriented lens. As to the nature of the lens the judges view these cases through, it should be that of neutrality.

That 35.6% of the judges responding were neutral on this issue ⁿ³⁶⁶ is likewise problematic. The Eighth Circuit Gender Fairness Task Force sent the survey to all judges in the Eighth Circuit and its findings are based on 102 surveys completed by judges themselves. ⁿ³⁶⁷ Thus, the 35.6% represents a significant number of judges. One explanation for this statistic is that these judges see some cases as "trivial" and others as having more merit. Yet, even if the judges responding did encounter a few or even some weak cases, one is hard pressed to understand how a judge, who is charged with upholding federal law, could be "neutral" on the characterization of discrimination cases as generally involving "trivial issues."

While it is disturbing that almost 11% of judges responding consider such cases trivial, it may not be surprising given the atmosphere at the courts within the Eighth Circuit. The vast majority of employment units within the Eighth Circuit have no sexual harassment policy. ⁿ³⁶⁸ Not surprisingly, 80% of the employees surveyed thought that sexual harassment incidents went unreported. ⁿ³⁶⁹ In particular, 111 court employees reported some sort of unwanted sexual attention or sexual coercion on the job. ⁿ³⁷⁰ Of these, 25.7% reported unwanted sexual attention or sexual coercion by a

male judge. ⁿ³⁷¹ Given that some judges appear to be engaging in sexually [*129] harassing behavior, it is unsurprising that they might believe such behavior to be "trivial" or grant summary judgment more frequently in such cases.

The Eighth Circuit Task Force also specifically addressed the use of summary judgment in sex discrimination cases. "One-half of plaintiffs' attorneys and 10% of defense attorneys reported that summary judgment was granted too easily to defendants in discrimination cases with some frequency (sometimes/often/many times)." ⁿ³⁷² That 10% of the practicing defense bar (in whose interest it is to keep this practice going) would admit this is quite telling. In addition, "judges reported that summary judgments were granted to defendants much more frequently than plaintiffs." ⁿ³⁷³ The statistical differences are dramatic. Judges reported that summary judgment is granted for defendants sometimes (46.7%), often (12%), and many times (5.3%) - for a total of 64% - in sex discrimination cases. ⁿ³⁷⁴ On the other hand, plaintiffs receive summary judgment in sex discrimination cases "sometimes" according to 16.2% of the judges surveyed. The majority - 64.9% - indicated that plaintiffs never receive summary judgment. ⁿ³⁷⁵ One can read the judicial statistics two ways. Either plaintiffs are bringing unmeritorious cases more frequently or there is a judicial bias that favors summary judgment against plaintiffs in sexual harassment cases.

The Second Circuit's Task Force report likewise supports these findings, although in a preliminary manner. ⁿ³⁷⁶ The Second Circuit Task Force noted that "preliminary indicators" suggested that employment discrimination plaintiffs were treated less fairly. ⁿ³⁷⁷ Many lawyers commented to the Task Force that they perceived that judges disfavored these cases. Focus groups gave specific examples of comments made by judges indicating this bias. For example, "one judge was alleged to have said in open court that a plaintiff's sexual harassment claim was not serious because her employer only stared at her breasts, rather than touching them, and "most women like that." ⁿ³⁷⁸ Part of the problem seemed to center on the increase in these types of cases:

Some judges surveyed expressed their belief that the proliferation of small cases involving individual claimants, including employment discrimination cases, clog the federal courts and divert attention of judges away from larger, more significant [*130] civil cases. Others expressed concern that rapidly growing caseloads, due in part to increasing employment litigation, will require an increased number of judges, destroying the collegiality and cohesiveness of the federal bench. ⁿ³⁷⁹

This impatience translated into several appellate opinions, which the Task Force stated, "hinted that some trial judges have exhibited impatience with employment discrimination claims, as well as stereotyped thinking about the seriousness or the reality of sexual harassment claims." ⁿ³⁸⁰ While the task force was cautious in its conclusions, ⁿ³⁸¹ its preliminary findings are consistent with the findings of other federal task forces as well as with findings of the state task forces.

Like their federal counterparts, state task forces have made interesting findings concerning women in the court system. While not as telling, perhaps, on the issue of Title VII, these task forces do shed light on general perceptions of women in the court systems. As of 1990, a task force in Minnesota had recommended that education programs be instituted to train judges in an effort to "raise the awareness of judges concerning gender-based employment discrimination within the courts and of the impact sexist, discriminatory remarks have on the overall processing of gender-based employment cases in the court." ⁿ³⁸² Perhaps the Delaware Task Force summed it up best on the issue of the need for more female judges:

There are serious practical costs to the quality of justice in our society and ultimately to democratic principles in the exclusion of women as decision makers from the judicial system. Such exclusion assures that the process and outcome of justice reflect the views, values and beliefs of only male members of our society - less than half of the population.

Decisions regarding the rights and treatment of women within a court system dominated by men often reflect patriarchal beliefs about women's role in society. ⁿ³⁸³

The Colorado Task Force found that gender also impacts damage awards. Two-thirds of the lawyers surveyed believed men received higher awards for losses in future earning capacity than did women. ⁿ³⁸⁴ In addition, a majority of women attorneys surveyed believed male plaintiffs were often found to have longer work life expectancies than female plaintiffs. ⁿ³⁸⁵ The Texas Task Force found difficulties for women pursuing sexual harassment claims based on a lack of access to the court system and insufficient remedies. ⁿ³⁸⁶ Rhode Island's Committee on Women in the Courts used trained observers to watch courtroom interactions for signs of gender bias. ⁿ³⁸⁷ It documented 96 incidents of gender bias in 58.4 hours of courtroom observation. ⁿ³⁸⁸ Thirty-one percent of these instances were attributed to judges. ⁿ³⁸⁹ In particular, it noted that judges consistently delayed their responses to women (while not delaying responses to men), and did not make eye contact with women. ⁿ³⁹⁰

Perhaps most disturbing, however, is that some task forces reported incidents of harassment by court personnel, including judges themselves. ⁿ³⁹¹ For example, in New Mexico 23% of female attorneys surveyed reported that hostile or sexist jokes about women were made by judges in court, in chambers, or at social gatherings. ⁿ³⁹² Female attorneys in Louisiana reported that they had been kissed or embraced by judges. ⁿ³⁹³ And, of course, female attorneys being referred to as "honey," "dear," etc., occurred as well. ⁿ³⁹⁴ Vermont reported that almost one-third of women attorneys responding to their survey stated that judges made comments about female attorney's appearance, and over one-half of the female attorneys surveyed believed women litigants and witnesses were subjected to demeaning behavior in court. ⁿ³⁹⁵

Research of political scientists suggests that the presence of more female judges might well have an effect on the use of summary judgment, at least in cases perceived to involve "women's issues." ⁿ³⁹⁶ [*132] While this is not the first scholarly article on law to suggest that female judges may make a difference in the outcome of cases, ⁿ³⁹⁷ it is one of the few to detail recent data that might support this assertion. In a study of federal circuit judges, Davis, Haire and Songer found that women judges, more often than male judges, supported claimants in employment discrimination cases. ⁿ³⁹⁸ In a study of state supreme court justices, Allen and Wall found that the majority of women justices that they studied ⁿ³⁹⁹ exhibited "pro-woman" voting behavior on "women's issues." ⁿ⁴⁰⁰ As they explained:

[*133]

The data in this study indicate that women justices perceive a broad spectrum of women's issues as a single issue dimension. Sex discrimination, sexual conduct and abuse, medical malpractice, property settlements, and the relationship between child and parent all appear to be viewed as integral parts of an agenda. And while one study demonstrates that the presence of a woman justice on a state supreme court increases the number of pro-women sex discrimination rulings, the research in the present study indicates that even when the majority of the court opposes an expansion of women's rights, female justices still hold to their beliefs. ⁿ⁴⁰¹

Specifically in the context of sex discrimination cases, Gryski, Main, and Dixon have found that the presence of a female justice increases the number of pro-woman decisions by a state supreme court. ⁿ⁴⁰²

Conclusion

Courts are using summary judgment as a means to clear their dockets. While this is not wholly improper, it becomes problematic when it results in summary judgment being granted in close cases. Hostile environment cases increasingly have become a target for some courts. In particular, the lack of severity or pervasiveness ground has created a niche for courts to grant summary judgment. This is perplexing for a number of reasons. First, it is very difficult for a court to determine what the environment is like at a particular place of employment without hearing the witnesses describe it live. The problem is exacerbated by the courts ignoring the applicable standard in these cases - that the harassment be judged by the "totality of the circumstances." This is necessarily a very fact-specific inquiry that does not lend itself to

determination on a motion for summary judgment.

Second, the harassment is judged based on a "reasonable person" standard. This is a standard that involves local norms of appropriate behavior that are better judged by a jury of the plaintiff's peers than a single judge. It may well be that the juries in these cases would not hold for the plaintiff, but the plaintiff deserves a chance to explain his or her position and describe the environment in which he or she was forced to work. Only in this way will we as a society be able to establish appropriate workplace norms that will have the imprimatur of consensus. Finally, by letting juries decide, both judges and the public can obtain a sense of what are appropriate workplace norms.

While some have argued that harassment law improperly tries to impose morality in the workplace, it could just as easily be argued that it tries to establish a level of professionalism in the workplace so that people can do their jobs without interference from irrelevant factors. For example, what harm would result from requiring employees to ask a co-worker if he or she is interested in going out with him or her before grabbing, touching, or kissing that co-worker? The workplace would certainly be more civilized for plaintiffs such as Blankenship, Hosey, and Saxton. It would certainly make them better able to do their jobs. That is the point of employment discrimination law: to allow a person to perform their job without the influence of extraneous factors that have no bearing on his or her ability to do the job. The disappointment comes from seeing the courts, the entities charged with making sure these rights are protected and enforced, beginning to become a part of the problem.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Summary Judgment General Overview Criminal Law & Procedure Criminal Offenses Crimes Against Persons Coercion Elements Labor & Employment Law Discrimination Harassment Sexual Harassment Hostile Work Environment

FOOTNOTES:

n1. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 861 (1986) (Brennan, J., dissenting) (quoting *The Federalist* No. 78 (Alexander Hamilton)).

n2. 990 F. Supp. 657 (E.D. Ark. 1998); see also Anita F. Hill, *Lest We Forget - Sexual Harassment Isn't About Sex*, *Hous. Chron.*, Mar. 20, 1998, at 39 (noting that more than 17,000 claims of sexual harassment were filed in 1997); Anita F. Hill, *The Paula Problem*, *Newsweek*, June 9, 1997, at 38 ("For those of us who care about sexual harassment, the matter of *Jones v. Clinton* is a great conundrum."); Leslie Kaufman, *A Report from the Front: Why It Has Gotten Easier to Sue for Sexual Harassment*, *Newsweek*, Jan. 13, 1997, at 32 (discussing the evolution of sexual harassment suits); Thomas Sowell, *Radical Feminism Has Hurt Society*, *San Antonio Express-News*, June 11, 1997, at 5B (criticizing feminist response to the Paula Jones lawsuit); Gloria Steinem, *Double Standard Being Applied Against This President*, *Hous. Chron.*, Mar. 24, 1998, at 19 (examining Paula Jones's allegations); Taylor Stuart, *The Facts of the Matter: A Leading Legal Journalist on the Merits of Jones's Sensational Suit - and What the Country Can Learn from Her Case Against Clinton*, *Newsweek*, June 9, 1997, at 39 (evaluating the strength of Paula Jones's case); Carol Tavis, *Beware a "Mean Streak of Prissiness" Across the Land*, *Hous. Chron.*, June 12, 1997, at 47 (examining the standard for sexual harassment); Jeffrey Toobin, *The Trouble with Sex: Why Sexual Harassment Has Never Worked*, *The New Yorker*, Feb. 9, 1998, at 48 (arguing that sexual harassment law has been ineffective).

n3. 42 U.S.C. 2000e to 2000e-17 (1994 & Supp. II 1996).

n4. See *infra* Part III.A and notes 157-60.

n5. See, e.g., Don DeMaio, Sexual Harassment Complaints Are Increasing in Rhode Island, *Providence Bus. News*, Apr. 10, 1995, at 15; M.A. Stapleton, Sexual Harassment Filings on Rise as Awareness Increases, *Seminar Told*, *Chi. Daily L. Bull.*, Dec. 8, 1994, at 1 (recounting the increase in sexual harassment suits after the hearings); Phil Willon, EEOC Chief Faces Long Haul: America Mired in Decade of Anger, Confusion over Equal Rights, *Richmond Times-Dispatch*, Dec. 24, 1995, at A1.

n6. See Willon, *supra* note 5, at A1 (recounting a 150% increase over four years). In 1991, the EEOC reported the filing of 2003 charges of harassment based on sex and 3223 charges of sexual harassment. See EEOC Combined Ann. Rep.: Fiscal Years 1991 and 1992 28. The difference in the nature of these two types of charges is not apparent from the EEOC publication. In 1992, the EEOC reported 2900 charges of harassment based on sex and 5494 sexual harassment charges filed. *Id.* at 30. In 1993, the EEOC reported 7088 charges filed based on sexual harassment and 3506 charges for harassment based on sex. 1993 EEOC Ann. Rep. 22. In 1994, the EEOC reported 8095 charges of sex harassment and 3978 charges of harassment based on sex. EEOC Ann. Rep.: Fiscal year 1994, at 36. Looking at the statistics for sex or sexual harassment charges, this represents an increase of 250% from 1991 to 1994, with significant leaps occurring in each year after the hearings. One news source has stated that sexual harassment charges filed with the EEOC have increased from 6000 in 1990 to 15,300 in 1996. See Kaufman, *supra* note 2, at 32. I could not find any statistics about how many of these charges result in lawsuits, although the EEOC does keep statistics about its own enforcement litigation. See, e.g., 1995 EEOC Ann. Rep. 30-31. In the EEOC's 1995 Annual Report, the Commission did not break down charge statistics based on harassment and other forms of discrimination. Instead, it reported that 26,214 charges were filed based on sex discrimination for that year, up modestly from 1994, in which 25,860 charges based on sex discrimination were filed. See *id.* at 28. The EEOC reported that the number of charges based on race and national origin discrimination were down in 1995. The number of charges based on religion and retaliation was up slightly (1546 in 1994, to 1586 in 1995 for religion; 14,415 in 1994, to 15,377 in 1995 for retaliation) in 1995. See *id.*

n7. It is difficult to predict how many of these cases result in lawsuits. The EEOC only tracks cases in which it files or participates in the lawsuit. See, e.g., EEOC Ann. Rep.: Fiscal Year 1994, at 6 (showing that the EEOC brought "direct lawsuits" or intervened in 398 cases in 1993 and in 357 cases in 1994). It is not unreasonable to assume, however, that such a dramatic increase in charges filed will result in an increase in cases filed.

n8. See Fed. R. Civ. P. 8(a). The rule requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* There was a resurgence of fact pleading in some cases, including Title VII and other civil rights statutes in the late 1970s and early 1980s. See, e.g., *Johnson v. General Elec.*, 840 F.2d 132 (1st Cir. 1988); *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980); Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 *B.C. L. Rev.* 211, 244-45 (1992); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 *Colum. L. Rev.* 433, 444-51 (1986). However, the Supreme Court has more recently refused to apply heightened pleading requirements in civil rights cases under 42 U.S.C. 1983. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). It is likely that this will be applied in the Title VII context as well, given the parallel interpretations of employment discrimination law by the federal courts under both statutes. See, e.g., *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987); *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004 (6th Cir. 1987); see also Karen M. Blum, *Heightened Pleading: Is There Life After Leatherman?*, 44 *Cath. U. L. Rev.* 59 (1994) (detailing effects of *Leatherman* and its implications).

n9. See Fed. R. Civ. P. 15(a) (providing that leave to amend "shall be freely given when justice so requires").

n10. Very few federal cases are disposed of based on Rule 12 motions. See Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 *Am. J. Trial Advoc.* 433, 469 & n.193 (1987).

n11. Judgment as a matter of law is another means by which the courts may resolve cases earlier. See Fed. R. Civ. P. 50. Because this motion cannot be made until the close of the plaintiff's case, it is not as time efficient as summary judgment, which can be made "at any time." Fed. R. Civ. P. 56(b).

n12. See Baumann et al., *supra* note 8, at 213-14. There are, of course, notable exceptions to this. See *id.*; see also Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 *B.C. L. Rev.* 203 (1993); Gregory C. Parliman & Jonathan E. Hill, *Third Circuit Law on Summary Judgment in the Area of Employment Discrimination*, 20 *Seton Hall L. Rev.* 786 (1990).

n13. Baumann et al., *supra* note 8, at 225.

n14. *Id.*

n15. The courts have taken a multi-elemented approach to harassment law. Thus, a defendant need only show that one element is factually lacking in order to succeed on a motion for summary judgment. See *infra* notes 24-72, 86, and accompanying text for a discussion of other elements the courts have used as a basis for summary judgment in hostile environment cases. This Article focuses only on one element of the analysis: the lack of severity or pervasiveness of the harassment. Thorough discussions of the other bases for summary judgment are beyond the scope of this Article.

n16. See *infra* Part III.B.

n17. Indeed, there is a great deal of practical commentary on advising defendants how to obtain summary judgment in hostile environment cases as well as in Title VII cases generally. See, e.g., Barbara Berish Brown et al., *Practising Law Inst., Sexual Harassment Litigation*: 1994, at 165 (1994); Paul W. Cane, Jr., *Practising Law Inst., Litigating Employment Discrimination Cases*: 1995, at 45 (1995); Michael Delikat, *Practising Law Inst., Sexual Harassment Litigation*: 1995, at 223 (1995); Mark S. Dichter & Debra L. Casey, *Practising Law Inst., Litigating Employment Discrimination Cases*: 1995, at 1 (1995); Darrell S. Gay, *Practising Law Inst., Litigating Employment Discrimination Cases*: 1996, at 65 (1996); Richard T. Seymour, *American Law Inst.-American Bar Assoc., Advanced Employment Law and Litig.* 169 (1993). Scholarly commentators have also authored articles aimed at helping defendants obtain summary judgment. See, e.g., Robert J. Aalberts & Lorne Seidman, *Seeking a "Safe Harbor": The Viability of Summary Judgment in Post-Harris Sexual Harassment Litigation*, 20 *S. Ill. U. L.J.* 223 (1996). Plaintiffs generally have fewer resources than defendants in Title VII cases. Therefore, the financial deck is stacked against them. See Baumann et al., *supra* note 8, at 239.

n18. See Kent Sinclair & Patrick Hanes, Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context, 36 Wm. & Mary L. Rev. 1633, 1664-69 (1995).

n19. 42 U.S.C. 1981a(c) (1994).

n20. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). For a full discussion of the law of sexual harassment, see Part I.

n21. One commentator has laid blame for anti-civil rights sentiment among the judiciary at the door of former President Ronald Reagan. "For eight years, Reagan packed the lower federal courts with federal judges who shared his hostility for civil rights; he also placed three anti-civil rights Justices on the [Supreme] Court." Robert Brookins, Hicks, Lies and Ideology: The Wages of Sin is Now Exculpation, 28 Creighton L. Rev. 939, 942 (1995).

n22. See Baumann et al., *supra* note 8, at 225. Baumann, Brown, and Subrin underscore this point:

In evaluating and litigating claims, American lawyers break down general statutory language into specific variables or elements. The choices made in the delineation of the elements of the prima facie case and in the assignment of the burden of proof have a profound impact not only on the nature of a plaintiff's claim but also on the contours of the entire litigation, from the pleadings to discovery, the possibility of Rule 11 sanctions, the outcome and the finality of the decision.

Id.

n23. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

n24. Title VII protects employees from discrimination based on race, color, sex, national origin, and religion. See 42 U.S.C. 2000e-2(a) (1994).

n25. 477 U.S. 57 (1986).

n26. See *id.* at 64. As the Court pointed out "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." *Id.*

n27. *Id.*

n28. See *id.* Specifically, the Court noted the language of Title VII was not limited to "economic" or "tangible" forms of discrimination. *Id.*

n29. See *id.* at 65. The EEOC Guidelines at the time were codified at 29 C.F.R. 1604.11(a) (1985). They defined "sexual harassment" to include "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. 1604.11(a)). The Guidelines also did not limit the definition to quid pro quo situations, but extended it to situations in which "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)(3).

n30. See *Meritor*, 477 U.S. at 65-67 (citing *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982) and *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971)).

n31. 42 U.S.C. 2000e-2(a)(1) (1994).

n32. See *Meritor*, 477 U.S. at 67.

n33. *Id.* (quoting *Henson*, 682 F.2d at 904 and *Rogers*, 454 F.2d at 238).

n34. See, e.g., *Torres v. Pisano*, 116 F.3d 625, 631 n.4 (2d Cir. 1997); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 n.4 (7th Cir. 1991). However, it is difficult to prove a claim based on a single incident in practice. See, e.g., *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 170 (10th Cir. 1996) (holding a single incident insufficiently severe to constitute harassment), cert. denied, 117 S. Ct. 437 (1996), reh'g denied, 117 S. Ct. 1022 (1997); *Jones v. Clinton*, 990 F. Supp. 657, 675 (E.D. Ark. 1998) (holding single incident insufficiently severe or pervasive for purposes of hostile environment claim under 42 U.S.C. 1983).

n35. *Meritor*, 477 U.S. at 68 (citing 29 C.F.R. 1604.11(a) (1985)).

n36. *Id.* While the welcomeness standard has come under scholarly attack, it is not particularly important for purposes of this Article.

Welcomeness is rarely a grounds for summary judgment in sexual harassment cases, no doubt in part because of the Court's cautioning comments in *Meritor*. See, e.g., *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989) (letting issue of welcomeness go to trier of fact); *Griswold v. Fresenius USA, Inc.*, 978 F. Supp. 718, 730 (N.D. Ohio 1997) (denying summary judgment on welcomeness in same-sex sexual harassment context); *Brassfield v. Jack McLendon Furniture, Inc.*, 953 F. Supp. 1438, 1450 (M.D. Ala. 1996); *Dufrene v. Pellitteri*, No. 95-3806, 1996 WL 502459, at *2-*4 (E.D. La. Sept. 4, 1996); *King v. Town of Hanover*, 959 F. Supp. 62, 66 (D. N.H. 1996). But see *Gebers v. Commercial Data Ctr., Inc.*, 47 F.3d 1168 (6th Cir. 1995) (unpublished table decision), available in 1995 WL 9262, at *2 (granting summary judgment on welcomeness issue in quid pro quo context).

n37. *Meritor*, 477 U.S. at 68-69 (quoting *Vinson v. Taylor*, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985)).

n38. *Id.* at 69. This particular portion of the decision, as well, has come under attack by commentators. See, e.g., Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. Rev. 499 (1994); Miranda Oshige, Note, *What's Sex Got to Do With It?*, 47 Stan. L. Rev. 565, 581-82 (1995). Some courts have been unwilling to extend this logic to include plaintiff's behavior in contexts outside of work. See, e.g., *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959 (8th Cir. 1993). A change in the rules of evidence has made it more difficult for a defendant to introduce evidence of a plaintiff's past sexual conduct in the context of a sexual harassment case. See Fed. R. Evid. 412. For a discussion of this rule change, see Jacqueline H. Sloan, *Extending Rape Shield Protection to Sexual Harassment Actions: New Federal Rule of Evidence 412 Undermines Meritor Savings Bank v. Vinson*, 25 Sw. U. L. Rev. 363 (1996).

n39. *Meritor*, 477 U.S. at 69 (quoting 29 C.F.R. 1604.11(b) (1985)).

n40. *Id.* at 72. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would have issued a "definitive rule." Believing the question to be properly before the Court, they preferred the EEOC Guideline standards for employer liability, rather than leaving the issue indefinite. Specifically, they would hold an employer strictly liable for the acts of harassment by its agents and supervisory employees, while only holding an employer liable for harassment by coworkers if the employer "knew or should have known" of the alleged harassing behavior. *Id.* at 74-78 (Marshall, J., concurring).

n41. *Id.* at 72.

n42. See *id.* (citing 42 U.S.C. 2000e(b)).

n43. *Id.*

n44. See, e.g., **Theresa M. Beiner**, *Do Reindeer Games Count as Terms, Conditions, or Privileges of Employment Under Title VII?*, 37 B.C. L. Rev. 643, 682-85 (1996); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, Cornell L. Rev., Nov. 1995, at 66; J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 Va. L. Rev. 273 (1995). There has been considerable confusion on what the appropriate standard is for supervisor

harassment, and the United States Supreme Court recently has resolved this issue. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). For a description of this case, see *infra* text accompanying notes 74-80.

n45. *Meritor*, 477 U.S. at 72. This provides another basis for summary judgment for the defendant, although this particular element of plaintiff's case is not the focus of this Article. See, e.g., *Saxton v. AT&T Co.*, 10 F.3d 526, 536 n.19 (7th Cir. 1993).

n46. *Meritor*, 477 U.S. at 72. Courts have granted summary judgment in cases in which the plaintiff did not use an available complaint process and in which the employer had no reason to know of the harassment. See, e.g., *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 446-48 (7th Cir. 1994) (granting summary judgment based on insufficient showing of notice of harassment to employer). A full discussion of this additional basis for summary judgment is beyond the scope of this Article.

n47. *Meritor*, 477 U.S. at 72-73.

n48. See *id.* at 73.

n49. See *id.*

n50. 510 U.S. 17 (1993).

n51. *Id.* at 20.

n52. *Id.* at 21 (quoting *Meritor*, 477 U.S. at 65, 67).

n53. *Id.*

n54. *Id.*

n55. See, e.g., Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 *Emory L.J.* 151, 198 (1994). Professor Dolkart argues:

A reasonableness test rejects the evaluation of sexual harassment in the context of a structure of gender subordination. It also places the focus on the response of the victim instead of on the conduct of the harasser. A reasonableness standard both aggravates the second injury of litigation and distorts and denies the narratives of individual victims of harassment.

Id.; see also Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 *Vand. L. Rev.* 1183, 1203 (1989) (discussing the "male norm" used to judge sexual harassment); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *Yale L.J.* 1177, 1207-08 (1990) (detailing male norms that went into the Sixth Circuit's decision in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986)).

n56. See, e.g., *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 962 n.3 (8th Cir. 1993); *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990); *Yates v. Avco Corp.* 819 F.2d 630, 637 (6th Cir. 1987); see also Dolkart, *supra* note 55, at 219 (noting that the Harris Court's decision does not preclude such a standard). This interpretation is consistent with the EEOC's proposed guidelines, which were later withdrawn. See 58 Fed. Reg. 51, 266 (1993) (proposed 29 C.F.R. 1609.1(c)).

n57. See Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 *Fordham L. Rev.* 773, 818-27 (1993) (criticizing on multiple grounds the reasonable woman standard used to judge behavior of men); Dolkart, *supra* note 55, at 200-10 (arguing that the reasonable woman standard marginalizes women, reducing them to stereotyped characteristics).

n58. *Harris*, 510 U.S. at 21.

n59. See *id.*, at 21-22. Commentators have likewise criticized this standard as refocusing the claim on the conduct of the plaintiff and marginalizing her testimony as somehow "unreasonable" in contrast to the objectively "reasonable person" standard. See Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.*, 21 *N.Y.U. Rev. L. & Soc. Change* 357, 402 (1995).

n60. *Harris*, 510 U.S. at 22.

n61. *Id.*

n62. See *id.* at 23.

n63. *Id.*

n64. *Id.*

n65. See, e.g., *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 444 & n.3 (7th Cir. 1994) (stating that "at the same time, we have cautioned that, in evaluating the situation, a court must be careful to evaluate the 'isolated' incidents cumulatively in order to obtain a realistic view of the work environment") (citations omitted).

n66. 118 S. Ct. 998 (1998).

n67. *Id.* at 1003 (citations omitted).

n68. See *id.* at 1001-02.

n69. *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 (8th Cir. 1994); see also *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987); Joshua F. Thorpe, *Gender-Based Harassment and the Hostile Environment*, 1990 *Duke L.J.* 1361, 1364 (arguing in favor of such a standard).

n70. See Thorpe, *supra* note 69, at 1365-66.

n71. *Oncale*, 118 S. Ct. at 1002. This approach, which is sensible, has been advocated by legal scholars as well. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *Yale L.J.* 1683 (1998); Thorpe, *supra* note 69. For more on *Oncale*, see Richard F. Storrow, *Same-Sex Sexual Harassment Claims after Oncale: Defining the Boundaries of Actionable Conduct*, 47 *Am. U. L. Rev.* 677 (1998).

n72. A split in the circuits on this issue recently led the Supreme Court to grant certiorari to resolve the issue. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) (holding that an employer can be held vicariously liable for actionable discrimination by a supervisor). For example, the Eighth Circuit had adopted the "knew or should have known" standard for supervisor harassment. See *Davis v. City of Sioux*

City, 115 F.3d 1365, 1368 (8th Cir. 1997). The Seventh Circuit had adopted a strict liability standard in a quid pro quo case. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 494-95 (7th Cir. 1997) (en banc) (per curiam), aff'd sub nom. *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 876 (1998). This element likewise provides a basis for summary judgment for defendants. See, e.g., *Gleason v. Mesirow Fin., Inc.*, 118 F.3d 1134 (7th Cir. 1997); *Schutt v. County of Napa*, No. 95-16798, 1995 WL 494588, at *9 (N.D. Cal. Aug. 15, 1995), aff'd in part & rev'd in part, 105 F.3d 666 (9th Cir. 1996) (unpublished table decision).

n73. Taking proper remedial measures also provides a basis for summary judgment for a defendant in a harassment case. See, e.g., *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473 (7th Cir. 1996); *Spicer v. Virginia Dept. of Corrections*, 66 F.3d 705 (4th Cir. 1995); *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401 (5th Cir. 1993) (per curiam).

n74. 118 S. Ct. 2275 (1998).

n75. 118 S. Ct. 2257 (1998).

n76. *Faragher*, 118 S. Ct. at 2284.

n77. See *id.* at 2289-91.

n78. *Id.* at 2291.

n79. *Id.* at 2292-93.

n80. *Id.* at 2293.

n81. 118 S. Ct. 2257, 2265 (1998).

n82. See *id.*

n83. *Id.*

n84. *See id.*

n85. *See infra* note 200.

n86. *Burlington*, at 2270-71 (Ginsburg, J., concurring) (noting that the standard adopted in *Burlington* was "substantively identical" to that of *Faragher*).

n87. 682 F.2d 897, 903-05 (11th Cir. 1982) (listing the elements as "(1) The employee belongs to a protected group. (2) The employee was subject to unwelcome sexual harassment. (3) The harassment complained of was based upon sex. (4) The harassment complained of affected a 'term, condition, or privilege' of employment. (5) *Respondeat superior*"). Although the Supreme Court had the benefit of *Henson* at the time it decided *Meritor* and *Harris*, the Court did not delineate specific elements in the manner of the *Henson* court.

n88. Because *Faragher* and *Burlington* are such recent cases, the formulations in prior cases do not reflect changes in the elements resulting from *Faragher* and *Burlington*. *See, e.g., Davis v. City of Sioux City*, 115 F.3d 1365, 1368 n.5 (8th Cir. 1997) ("(1) Plaintiff is in a protected group; (2) plaintiff was subjected to unwelcome harassment; (3) the harassment was based on plaintiff's sex; (4) the harassment affected a term, condition, or privilege of plaintiff's employment; and (5) the employer knew or should have known of the harassment and failed to take proper remedial action."); *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 797 (10th Cir. 1997) ("(1) She is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on sex; and (4) the harassment altered a term, condition, or privilege of the plaintiff's employment and created an abusive working environment."); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) ("(1) That he was harassed 'because of his 'sex'; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer."); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 806 (5th Cir. 1996) ("(1) She belongs to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition, or privilege of employment (i.e., that the sexual harassment was so pervasive or severe as to alter her conditions of employment and create an abusive working environment); and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action."); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834-35 (6th Cir. 1996) ("1. The employee is 40 years old or older; 2. The employee was subjected to harassment, either through words or actions, based on age; 3. The harassment had the effect of unreasonably interfering with the employee's work performance and creating an objectively intimidating, hostile, or offensive work environment; and 4. There exists some basis for liability on the part of the employer."); *Quick v. Donaldson, Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996) ("(1) [The victim] belongs to a protected group; (2) [the victim] was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) [the employer] knew or should have known of the harassment and failed to take proper remedial action." (quoting *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993))); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) ("(i) That he/she is a member of a protected class; (ii) that he/she was subject to unwelcome sexual harassment; (iii) that the harassment was based upon sex; (iv) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's [employment] and create an abusive [work] environment; and (v) that some basis for employer liability has been established."); *DeAngelis v. El Paso Mun. Police Officers Ass'n.*, 51 F.3d 591, 594 (5th Cir. 1995) ("(1) Sexually discriminatory intimidation, ridicule and insults, which are (2) sufficiently severe or pervasive that they (3) alter the conditions of employment and (4) create an abusive working environment."); *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) ("(1) She was subjected to verbal or physical conduct of a sexual nature, 2) this conduct was unwelcome, and 3) the conduct was 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' However, even if a hostile working environment exists, an employer is only liable for failing to remedy harassment of which it knows or should know." (quoting *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991))); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557 (11th Cir. 1987) ("(1) That the employee belongs to a protected group ...; (2) that the employee was subject to 'unwelcome' sexual harassment ...; (3) that the harassment complained of was based on sex ...; and (4) that the harassment complained of affected a 'term, condition, or privilege' of

employment in that it was "sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment.'" (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

n89. Fed. R. Civ. P. 56(c).

n90. Fed. R. Civ. P. 56(e).

n91. For a history of the summary judgment motion, see Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 *Yale L.J.* 73, 76-79 (1990), Marcy J. Levine, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 *Emory L.J.* 171, 173-91 (1988) and Sinclair & Hanes, *supra* note 18, at 1640-43, 1650-52.

n92. 477 U.S. 242 (1986).

n93. 477 U.S. 317 (1986).

n94. 475 U.S. 574 (1986).

n95. See Issacharoff & Loewenstein, *supra* note 91, at 77-78.

n96. *Id.* at 74; see also Robert M. Bratton, *Summary Judgment Practice in the 1990s: A New Day Has Begun - Hopefully*, 14 *Am. J. Trial Advocacy* 441, 463 (1991) (discussing "the trilogy"); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 *Ohio St. L.J.* 95, 100 (1988) (referring to the "trio of cases").

n97. *Anderson*, 477 U.S. at 252.

n98. 376 U.S. 254, 279-80 (1964).

n99. See Anderson, 477 U.S. at 244.

n100. See id. at 248.

n101. Id.

n102. Id.

n103. Id.

n104. See id. at 249.

n105. Id.

n106. Id. at 249-50 (citations omitted).

n107. The terms "directed verdict" and "judgment notwithstanding the verdict" have now been subsumed under the concept of "judgment as a matter of law" for purposes of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 50. For a discussion of the effect this has had on Rule 50 practice, see Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 Fla. St. U. L. Rev. 689, 693-705 (1996).

n108. Anderson, 477 U.S. at 250.

n109. Id.

n110. Id. at 250-51.

n111. *Id.* at 251 (quoting *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1871)).

n112. See *Gregory*, *supra* note 107, at 702-04 (stating that a court can better assess the sufficiency of a plaintiff's case in a Rule 50 context than in a Rule 56 context). In addition, Rule 50 of the Federal Rules of Civil Procedure permits a defendant to make a motion for judgment as a matter of law at the close of a plaintiff's case. See Fed. R. Civ. P. 50.

n113. *Anderson*, 477 U.S. at 250-51. At least one pair of commentators has argued, based on case law, that *Anderson* is limited to cases involving heightened burdens of proof. See *Sinclair & Hanes*, *supra* note 18, at 1665-66.

n114. *Anderson*, 477 U.S. at 252.

n115. *Id.* at 254.

n116. *Id.*

n117. *Id.* at 255.

n118. *Id.*

n119. *Id.* (citations omitted). The Court reiterated the first sentence of this standard in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992) (quoting *Anderson*, 477 U.S. at 255).

n120. *McGinley*, *supra* note 12, at 228-29.

n121. *Id.* at 245.

n122. See supra notes 39 and 62 and accompanying text.

n123. This analysis is supported by the opinion in *Anderson* itself, which placed no limitations on considering substantive standards for purposes of summary judgment. It was supported more explicitly by the dissent of Justice Brennan, who explained that his interpretation of the Court's holding did not limit its analysis to First Amendment cases. See *Anderson*, 477 U.S. at 257 n.1 (Brennan, J., dissenting). Instead, it applies to all cases. See *id.* (Brennan, J., dissenting). While there was no explicit discussion of what types of standards *Anderson* extends to, the totality of the circumstances standard is the type of substantive standard the application of which can have an effect on a motion for summary judgment. *Id.* (Brennan, J., dissenting).

n124. See *Anderson*, 477 U.S. at 251; see supra note 104 and accompanying text.

n125. *Celotex Corp. v. Catrett*, 477 U.S. 317, 319 (1986).

n126. See *id.* at 320.

n127. See *id.*

N128. *Id.* at 322.

n129. *Id.* at 323 (quoting *Anderson*, 477 U.S. at 250).

n130. *Celotex*, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

n131. *Id.*

n132. *Id.* at 325. This standard has been applied in the employment discrimination case in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 522 (1993), in which the Court discussed summary judgment in the context of the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Because that case arose in the context of discriminatory demotion and discharge, it does not have direct applicability to harassment cases.

n133. *Celotex*, 477 U.S. at 324.

n134. *Id.* The Court explained that the nonmoving party need not, for example, depose his or her own witnesses. See *id.*

n135. Fed. R. Civ. P. 56(c); *id.*

n136. *Celotex*, 477 U.S. at 324. Although the Court was not clear as to why it set out this exception, it probably did so because, according to its analysis, it assumed that the moving party had shown initially that there was no genuine issue of material fact. Under those circumstances, the burden is on the nonmoving party to raise a genuine issue of material fact by reference to evidence - not the pleadings, which contain allegations of fact, but no facts in and of themselves.

n137. Fed. R. Civ. P. 56(e).

n138. See *Celotex*, 477 U.S. at 325.

n139. 475 U.S. 574 (1986).

n140. *Id.* at 577-78.

n141. *Id.* at 587.

n142. *Id.* at 595. Some courts, even in the antitrust context, have been reluctant to apply *Matshushita* and have found ways around it. See *In re Bulk Popcorn Antitrust Litig.*, 783 F. Supp. 1194, 1197 (D. Minn. 1991); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 437-39 (9th Cir. 1990). Indeed, the Supreme Court has backed away from the case. See *Kodak v. Image*

Technical Services, 504 U.S. 451, 467-69 (1992); see generally William W. Schwarzer & Alan Hirsch, Summary Judgment After Eastman Kodak, 45 Hastings L.J. 1, 5-7 (1993) (discussing the impact the decision will have on parties' summary judgment burdens).

n143. Stempel, *supra* note 96, at 108.

n144. See Issacharoff & Loewenstein, *supra* note 91, at 83; see also Edward Brunet, The Use and Misuse of Expert Testimony in Summary Judgment, 22 U.C. Davis L. Rev. 93, 125-26 (1988); William W. Schwarzer et al., The Analysis and Decision of Summary Judgment Motions, 139 F.R.D. 441, 450-51 (1991).

n145. Sinclair & Hanes, *supra* note 18, at 1661. They note that summary judgment rates have fluctuated fairly dramatically over the past 50 years, reaching highs of 66% granted in 1975 and an all-time high of 70% in 1990. See *id.* at 1660-61.

n146. See Gregory, *supra* note 107, at 701-05; Stempel, *supra* note 96, at 106-08.

n147. See, e.g., Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994); Beardsley v. Webb, 30 F.3d 524, 530 (4th Cir. 1994) (expressing this opinion in hostile environment context); Mann v. University of Cincinnati, 864 F. Supp. 44, 46 (S.D. Ohio 1994).

n148. See, e.g., Smith v. St. Louis Univ., 109 F.3d 1261, 1264 (8th Cir. 1997) (citing Crawford, 37 F.3d at 1341); Johnson v. Minnesota Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991).

n149. Crawford, 37 F.3d at 1341 (citing Johnson, 931 F.2d at 1244).

n150. *Id.* (citing Johnson, 931 F.2d at 1244).

n151. See, e.g., Wolf v. Buss (Am.) Inc., 77 F.3d 914, 918-19 (7th Cir. 1996); Beardsley, 30 F.3d at 530; Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1038, 1042 (7th Cir. 1993); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1312 (7th Cir. 1989); Sink v. Knox County Hosp., 900 F. Supp. 1065, 1073 (S.D. Ind. 1995).

n152. See Sarsha, 3 F.3d at 1038, 1042; Holland, 883 F.2d at 1312-13; Sink 900 F. Supp. at 1073.

n153. Sink, 900 F. Supp. at 1073.

n154. See, e.g., Beardsley, 30 F.3d at 530; Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989), vacated in part on other grounds, 900 F.2d 27 (4th Cir. 1990) (en banc); Blankenship v. Parke Care Ctrs., Inc., 913 F. Supp. 1045, 1051 (S.D. Ohio 1995); Mann v. University of Cincinnati, 864 F. Supp. 44, 46 (S.D. Ohio 1994).

n155. Beardsley, 30 F.3d at 530 (quoting Paroline, 879 F.2d at 105).

n156. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 60-61 (1986). A plaintiff may give an account of harassing incidents that the alleged harasser will deny. In fact, Meritor itself presented such a fact pattern. *Id.*

n157. See McGinley, *supra* note 12, at 243 (noting that lower courts granted summary judgment for defendants where plaintiffs' evidence established a "bare bones" prima facie case).

n158. Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997).

n159. *Id.* at 1397.

n160. *Id.*

n161. See A.V. Consultants, Inc. v. Barnes, 978 F.2d 996, 1002 (7th Cir. 1992).

n162. See *supra* notes 44-45 and 71-72.

n163. See, e.g., Raley v. Board of St. Mary's County Comm'rs, 752 F. Supp. 1272, 1279 (D. Md. 1990).

n164. See, e.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir.), cert. denied, 117 S. Ct. 70 (1996).

n165. It is difficult to determine such rates because perfect data is not available even on the electronic databases, such as WESTLAW and Lexis, although they do add some cases that do not appear in the federal reporters. According to a manager at WESTLAW, WESTLAW federal databases do not include all the federal district court and federal court of appeals decisions that are handed down. Instead, WESTLAW endeavors to include cases that are relevant to researchers of its electronic database. It does this by assessing cases on their individual merits as precedent or as being of interest to WESTLAW users. Some cases are brought to its attention by the courts themselves, and others are brought to its attention by attorneys or researchers that find the case of particular interest. For decisions of federal courts of appeals, WESTLAW includes most cases reported in tables in the federal reporter as searchable, full text cases on its database. However, WESTLAW does not publish the table decisions of three circuits - the Third, Fifth and Eleventh Circuits. The WESTLAW representative did note that civil rights cases, and employment discrimination cases in particular, are of greater interest because the area of law is unsettled. Thus, it is likely that more of these cases appear on WESTLAW's federal databases than some areas of law that are more established. All decisions from the time period I searched that were included in West's Federal Reporters, Federal Supplement, and Federal Rules Decisions are included in its federal databases. However, it is in the area of unpublished decisions that these searches become an imperfect counting device. In addition, the searches themselves are not perfect and will not pick up all cases that are even included in these databases. Thus, the numbers on tables one and two are, at best, rough estimates and are necessarily underinclusive.

n166. While some lower federal courts had used this standard prior to *Meritor*, see, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (stating that harassment must be sufficiently pervasive to alter conditions of employment), the Supreme Court made it the law of the land in all circuits in that case.

n167. Indeed, I have found additional cases not discovered by my WESTLAW searches in which summary judgment was granted on the severity or pervasiveness ground. See, e.g., *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995). I used two searches as well as a review of cases cited in a treatise to establish a list of cases to review. With the help of two able research assistants, we reviewed these cases to determine whether summary judgment was granted or denied on the basis of the harassment being insufficiently severe or pervasive. The particular searches I used were intended to gather both Title VII and 1983 cases involving harassment or hostile environment allegations in which there had been a motion for summary judgment based on a lack of severity or pervasiveness. The first search was: ("title vii" "section 1983") & ("summary judgment" /p (hostile /s environment) harass!). We then reviewed cases based on the following locate search: "summary judgment" /p (severe severity /s pervasive!). Fearing this search might be under-inclusive, we executed a second search: ("title vii" "section 1983") & ("summary judgment" & (hostile /s environment) harass!). I then performed a "locate" search based on the terms "summary judgment" /p sufficien! /s sever! pervasiv!. I also used another search, which yielded fewer cases. I executed a similar search on Lexis, and retrieved very few additional cases. Finally, I reviewed cases cited in a treatise as representative of those in which the courts granted summary judgment based on the lack of severity or pervasiveness of the harassment. See Barbara Lindemann & Paul Grossman, 1 *Employment Discrimination Law* 804-05 & n.290 (3d ed. 1996). However, many of the cases cited in the treatise actually were judgments in favor of defendants after trial, and therefore did not have a significant impact on the statistics in tables one and two. The results of these searches are on file with the author. The findings of at least one gender bias task force support that summary judgment is often granted against plaintiffs in employment discrimination cases. See *infra* notes 364-68 and accompanying text.

n168. The last review of court of appeals decisions for inclusion on this list was completed on July 23, 1998. See *Birone v. Indian River Sch.*, 145 F.3d 1329 (6th Cir. 1998) (unpublished table decision), available in 1998 WL 199791; *Dang v. Granite Constr.*, 141 F.3d 1174 (9th Cir. 1998) (unpublished table decision), available in 1998 WL 84149; *Cowan v. Prudential Ins. Co. of Am.*, 141 F.3d 751 (7th Cir. 1998); *Bailey v. James River Paper Co.*, 134 F.3d 376 (9th Cir. 1998) (unpublished table decision), available in 1998 WL 41588. Any cases added to WESTLAW after that time are not included in this table.

n169. See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (requiring serious effect on plaintiff's psychological well-being); *Wolf v. Burum*, No. 88-1233-C, 1990 WL 81219, at *6 (D. Kan. May 16, 1990).

n170. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-21 (1993).

n171. See Carol Krafka et al., *Stalking the Increase in the Rate of Federal Civil Appeals* 29 (1995). Although it is difficult to get an accurate picture of the rate of appeal, Krafka, Cecil, and Lombard have approximated that 21-26% of non-prisoner civil rights cases were appealed from 1986 through 1993. Interestingly, the increase in civil appeals generally far outpaces growth in the filing of criminal appeals. See *id.* at 1-3. In 1993, non-prisoner civil rights cases accounted for 19% of the appeals filed. See *id.* at 10.

n172. See EEOC Ann. Rep.: Fiscal Year 1994, *supra* note 6 (noting an increase of 250% between 1991 and 1994).

n173. See *supra* notes 165 and 167.

n174. The last review of district court decisions was performed on August 17, 1998. Any cases appearing after that date on electronic databases will not be reflected in this table. In addition, in the 1995 statistics, one case was counted twice because it involved allegations of both racial and sexual harassment. Summary judgment was granted as to one form of harassment, but not the other. Thus, that case was counted in both columns.

n175. See *Saxton v. AT&T Co.*, 10 F.3d 526, 535 (7th Cir. 1993). Some courts have restated this standard in terms of a reasonable person possessing the same status as the plaintiff. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting a "reasonable woman" standard for sexual harassment cases); see *supra* notes 56-57 and accompanying text. The harassment must also be "unwelcome." See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986). This has not proven to be all that fruitful a ground for summary judgment. See *supra* note 36.

n176. See *supra* notes 165-70 and accompanying text.

n177. See, e.g., *Meritor*, 477 U.S. at 67; *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753 (4th Cir. 1996); *Starrett v. Wadley*, 876 F.2d 808, 820 (10th Cir. 1989).

n178. See supra note 34 and accompanying text.

n179. See *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir.1994); see supra notes 154-56 and accompanying text.

n180. 10 F.3d 526, 535 (7th Cir. 1993).

n181. See *id.* at 528.

n182. See *id.*

n183. See *id.*

n184. See *id.*

n185. See *id.* at 528 n.3.

n186. See *id.* at 528.

n187. See *id.*

n188. *Id.*

n189. See *id.*

n190. See id.

n191. Id.

n192. Id.

n193. See id. at 534-35. The court accepted plaintiff's evidence as true, a typical presumption for a court ruling on a motion for summary judgment in a hostile environment case in which the defendant is arguing lack of severity or pervasiveness. See id. at 529 n.4; see also *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 773 n.6 (4th Cir. 1997); *EEOC v. Champion Int'l Corp.*, No. 93 C 20279, 1995 WL 488333, at *7 (N.D. Ill. Aug. 1, 1995). This is common because harassment often occurs behind closed doors with no witnesses. Thus, a fact-finder often is faced with two very different accounts - that of the harasser and that of the harassed - of the same event. The court considers the plaintiff's account as true because a jury could believe her and disbelieve the harasser.

n194. *Saxton*, 10 F.3d at 534.

n195. Id. at 534-35 (citation omitted).

n196. See id. at 535. *Saxton's* claim also failed on the independent basis that the employer had taken sufficient remedial measures. See id.

n197. The record did contain some facts that worked against plaintiff's case. For example, there was evidence suggesting that the alleged harasser gave other employees the "cold shoulder treatment." See id. at 529 n.4. However, the court of appeals correctly stated that "granting *Saxton* the benefit of the reasonable inferences to which she is entitled on summary judgment, none of these circumstances rules out the possibility that [the alleged harasser] singled her out for particularly harsh treatment after she rebuffed his advances." Id.

n198. See id. at 528.

n199. See id.

n200. See id. at 534-35. *Saxton* also suggests a quid pro quo fact pattern. Apparently, the plaintiff was treated differently by her supervisor

because she complained about his harassment. Many courts have held that quid pro quo harassment requires a plaintiff to show a tangible job detriment to plaintiff in order to maintain such a claim. See, e.g., *Gary v. Long*, 59 F.3d 1391, 1395-96 (D.C. Cir. 1995); *Kauffman v. Allied Signal, Inc. Autolite Div.*, 970 F.2d 178, 186 (6th Cir. 1992); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 461-62 (7th Cir. 1990); *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986). But see *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir. 1996) (noting that denial of seemingly intangible benefits may support quid pro quo claim); *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir. 1994) (holding that "a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo sexual harassment"); *Savino v. C.P. Hall Co.*, 988 F. Supp. 1171, 1181-85 (N.D. Ill. 1997) (describing varying standards of "effect on tangible aspect of employment" applied by the Seventh Circuit). "A tangible job detriment" usually means a pay decrease, demotion, or detrimental change in some other benefit. Threatening the plaintiff with adverse actions, ignoring the plaintiff or not treating the plaintiff as well as others generally is not enough. See, e.g., *Gary*, 59 F.3d at 1396 (finding that "the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances"); *Watts v. New York City Police Dep't*, 724 F. Supp. 99, 103-04 (S.D.N.Y. 1989). According to several commentators, the problem with the manner in which the lower courts have developed harassment law is that they have assumed that quid pro quo and hostile environment cases are two entirely separate and distinct theories. Commentators have argued that quid pro quo and hostile environment claims should be viewed on a continuum of harassing behavior. See e.g., Michele A. Paludi & Richard B. Barickman, *Academic and Workplace Harassment 6-7* (1991) (describing sexual harassment as occurring on a five level continuum); Alexandra A. Bodnar, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. Cal. Rev. L. & Women's Stud. 549, 581-82 (1996); Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 834 (1991); see also Mitchell, 629 F. Supp. at 643 ("Hostile environment is merely one position on the continuum of sexual harassment, and the threat of job detriment is no less real for being implied rather than explicit."). On one extreme is the supervisor who conditions an employee's keeping his or her job on having a sexual relationship with the supervisor. The other extreme is more a "pure" hostile environment case, e.g., pin-ups placed throughout the workplace. Fortunately, the Supreme Court, in its decision in *Burlington*, recently agreed that plaintiffs need not pigeonhole their claims precisely in one category or another. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998); see *supra* text accompanying notes 83-85. This allows courts truly to look at the totality of the circumstances in evaluating a plaintiff's claim.

n201. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1003 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986).

n202. See *Hosey v. McDonald's Corp.*, C. No. AW-95-196, 1996 WL 414057, at *2 (D. Md. May 17, 1996), *aff'd*, 113 F.3d 1232 (4th Cir. 1997).

n203. *Id.* at *1. Although the alleged harasser was a supervisor, she had no direct supervisory capacity over the plaintiff. See *id.*

n204. *Id.*

n205. *Id.*

n206. See *id.* Although plaintiff testified that there were ten such incidents, the court could account for only three or more incidents, given the number of times plaintiff worked with the alleged harasser. See *id.* at *3. However, the court considered that there might have been ten such incidents for purposes of summary judgment, stating that "although a fact-finder may not believe his allegations of repeated touching, the Court accepts Mr. Hosey's contradictory deposition testimony for this motion." *Id.* at *3 n.2 (citing *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 335-37 (7th Cir. 1993)).

n207. See id. at *1.

n208. See id. at *2.

n209. Id.

n210. 10 F.3d 526 (7th Cir. 1993).

n211. Hosey, 1996 WL 414057, at *3.

n212. Id.

n213. 990 F.2d 333, 337 (7th Cir. 1993).

n214. See id. at 334.

n215. See id.

n216. See id.

n217. Id.

n218. See id.

n219. See id.

n220. See id.

n221. See id.

n222. See id.

n223. See id.

n224. See id. at 335.

n225. 798 F.2d 210 (7th Cir. 1986), overruled by *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

n226. *Id.* at 211-14.

n227. See *Saxton v. AT&T Co.*, 10 F.3d 526, 533 (7th Cir. 1993) (recognizing that *Scott* was overruled by *Harris*).

n228. *Scott*, 798 F.2d at 213.

n229. 113 F.3d 1247 (10th Cir.) (unpublished table decision), available in 1997 WL 265095, reh'g denied, 119 F.3d 871 (10th Cir. 1997).

n230. See *Rocha Vigil v. City of Las Cruces*, 119 F.3d 871 (10th Cir. 1997) (Lucero, J., dissenting).

n231. See *Rocha Vigil*, 1997 WL 265095, at *1-*2.

n232. See *id.* at *1.

n233. See *id.*

n234. *Id.* at *2.

n235. *Id.* at *3.

n236. *Id.*

n237. *Id.*

n238. See *id.*

n239. 42 U.S.C. 2000e-2(a) (1994) (prohibiting discrimination "because of such individual's race, color, religion, sex, or national origin").

n240. Indeed, courts have, on occasion, carved out a distinct category based on a combination of protected categories. See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987) (employee brought a Title VII action alleging race and sex discrimination); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (same). Some courts, however, have had difficulty doing this, while others, like the court in *Rocha Vigil*, have not considered the possibility. See *Judy Scales Trent, Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 *Harv. C.R.-C.L. L. Rev.* 9, 17-18 (1989).

n241. Many commentators have noted that minority women are often caught in unique circumstances in the employment discrimination context because the influence of two protected statuses often results in discrimination that is unique to them and not experienced by white women or males of the same racial group. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine and Antiracist Politics*, in *Feminist Legal Theory Foundations*, 383, 384 (D. Kelly Weisberg ed., 1993); Trent *supra* note 240, at 16-18. For an article which describes the theories of Kimberle Crenshaw and Judy Scales Trent, see Hawley Fogg-Davis, *An Argument Against A Historical "Difference" in Feminist Political Theory*, 4 *Circles: Buff. Women's J. L. & Soc. Pol.* 2, 6-9 (1996).

n242. *Rocha Vigil v. City of Las Cruces*, 119 F.3d 871, 874-75 (10th Cir. 1997) (Lucero, J., dissenting) (citations omitted). Judge Lucero likewise thought the plaintiff's sexual harassment claim raised a sufficient issue of fact to overcome summary judgment. See *id.* at 876.

n243. 913 F. Supp. 1045 (S.D. Ohio 1995).

n244. *Id.* at 1047-48.

n245. *Id.* at 1053.

n246. See *id.* at 1047-48.

n247. *Id.* at 1054.

n248. See *id.*

n249. See *id.*

n250. See *id.*

n251. See *id.* at 1054-55.

n252. Id. at 1055.

n253. No. 93 C 20279, 1995 WL 488333, at *1 (N.D. Ill. Aug. 1, 1995).

n254. See id. at *1, *2.

n255. Id. at *2.

n256. Id.

n257. See id. at *3.

n258. See id. at *4.

n259. See id.

n260. See id. at *1.

n261. Two witnesses said they saw a heated argument between Jackson and the alleged harasser. See id. at *3. The two employees who were being prodded with a stick denied that they were being fondled. See id. The alleged harasser did concede that he had an argument with plaintiff but denied any sexual harassment. See id.

n262. See id. at *7.

n263. *Id.* at *6.

n264. *Id.* at *8.

n265. *Meritor*, 477 U.S. 57, 67 (1986) (stating that harassment can be either "severe or pervasive") (emphasis added); see also *Torres v. Pisano*, 116 F.3d 625, 631 n.4 (2d Cir.) (stating that a single incident can be enough), cert. denied, 118 S. Ct. 563 (1997); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511 (11th Cir. 1989) (holding that trial court incorrectly applied "mechanically an absolute numerical standard to the number of acts of harassment which must be committed by the defendant before a jury may reasonably find that a hostile environment exists").

n266. One case in which a single incident was sufficient to withstand summary judgment involved a plaintiff who was allegedly raped after a business dinner. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1302, 1305 (2d Cir. 1995). While rape clearly is a severe form of harassment, something less than that should be actionable. Obviously, conduct that falls short of this could alter the "terms, conditions, or privileges" of plaintiff's employment.

n267. See *Champion*, 1995 WL 488333, at *10.

n268. *Id.* The *Champion* court here refers to *Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991). In *Daniels*, the Seventh Circuit set forth a hypothetical scenario in which a single incident of harassment would be sufficiently severe to be actionable:

If a black worker's colleagues came to work wearing the white hoods and robes of the Klan and proceeded to hold a cross-burning on the premises, all with the knowledge of the employer, this single incident would doubtless give rise to the employer's liability for racial harassment under Title VII.

Daniels, 937 F.2d at 1274 n.4. While this single incident surely would be actionable, incidents short of this should be sufficient as well.

n269. See *Champion*, 1995 WL 488333, at *10.

n270. See, e.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 747-48 (4th Cir. 1996) (involving over 13 separate incidents, some of which were multiple in nature, of sexual harassment of male worker by male supervisor; summary judgment was granted and upheld).

n271. 917 F. Supp. 640, 641 (W.D. Wis. 1995).

n272. See id. at 644.

n273. See id.

n274. Id.

n275. See id.

n276. Id.

n277. See id. at 644-45. Specifically, the customer representative stated that he "would no longer do business with Bretting Manufacturing if [plaintiff] was employed there." Id. at 645.

n278. See id.

n279. Id. at 647. The court, which is in the Seventh Circuit, relied on *Saxton v. AT&T Co.*, 10 F.3d 526, 534-35 (7th Cir. 1993), to support this conclusion. See id. The court was also incorrect in its suggestion that the conduct be "sexual" in nature to be actionable. See supra notes 67-71 and accompanying text; see also *Schultz*, supra note 71, at 1683 (endorsing the view that harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex).

n280. Id.

n281. Id.

n282. See id.

n283. See *id.*

n284. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

n285. 78 F.3d 1164 (7th Cir. 1996). The Galloway case is compared to a similar racial harassment case in Robert J. Gregory, *You Can Call Me a "Bitch" Just Don't Use the "N-Word": Some Thoughts on Galloway v. General Motors Service Parts Operations and Rogers v. Western Southern Life Insurance Co.*, 46 DePaul L. Rev. 741 (1997). Gregory argues that courts seem more willing to permit derogatory behavior based on sex than based on race. *Id.* at 742-43. For more on Gregory's position, see *infra* notes 344-48 and accompanying text.

n286. *Galloway*, 78 F.3d at 1167-68.

n287. See *id.* at 1165.

n288. *Id.*

n289. *Id.*

n290. *Id.*

n291. *Id.* at 1167. Other courts have held in a similar vein that, where rude treatment is directed at both men and women employees, it does not constitute discrimination based on sex. See, e.g., *Marquart v. McDonnell Douglas Corp.*, 859 F. Supp. 366, 368 (E.D. Mo. 1994) (holding that "the attitudes against plaintiff were shared by both male and female coworkers and thus not directed at plaintiff directly because of her sex").

n292. *Galloway*, 78 F.3d at 1168.

n293. Other questionable cases from the Seventh Circuit include *McKenzie v. Illinois Department of Transportation*, 92 F.3d 473 (7th Cir. 1996), *White v. Dial Corp.*, 52 F.3d 329 (7th Cir. 1995), and *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333 (7th Cir. 1993).

n294. See, e.g., *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996).

n295. See, e.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir. 1996); *Webb v. Baxter Healthcare Corp.*, 57 F.3d 1067 (4th Cir. 1995) (unpublished table decision), available in 1995 WL 352485, at *1; *Harris v. Clyburn*, 47 F.3d 1174, (4th Cir. 1995) (unpublished table decision), available in 1995 WL 56634, at *1; *Cobbins v. School Bd.*, 922 F.2d 835 (4th Cir. 1991) (per curiam); *Hosey v. McDonald's Corp.*, C. No. AW-95-196, 1996 WL 414057, at *1 (D. Md. May 17, 1996), *aff'd*, 113 F.3d 1232 (4th Cir. 1997).

n296. See *Rocha Vigil v. City of Las Cruces*, 113 F.3d 1247 (10th Cir.) (unpublished table decision), available in 1997 WL 265095, at *1, *reh'g denied*, 119 F.3d 871 (10th Cir. 1997); *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531 (10th Cir. 1995); *Bolden v. PRC Inc.*, 43 F.3d 545 (10th Cir. 1995).

n297. See, e.g., *McCray v. DPC Indus., Inc.*, 942 F. Supp. 288, 293 (E.D. Tex. 1996) (holding that sporadic or casual racial comments did not create a hostile work environment); *Mart v. Dr. Pepper Co.*, 923 F. Supp. 1380, 1388 (D. Kan. 1996) (holding that vulgar, offensive language did not create a hostile environment); *Wenner v. C.G. Bretting Mfg. Co.*, 917 F. Supp. 640, 646-47 (W.D. Wis. 1995) (holding that sexual acts were not pervasive enough to make a hostile work environment); *Blankenship v. Parke Care Ctrs., Inc.*, 913 F. Supp. 1045, 1054 (S.D. Ohio 1995) (holding that minimal actions by the employer were enough to release liability); *Sink v. Knox County Hosp.*, 900 F. Supp. 1065, 1076 (S.D. Ind. 1995) (holding that "totality of the circumstances" did not show severe or pervasive harassment); *EEOC v. Champion Int'l Corp.*, No. 93 C 20279, 1995 WL 488333, at *8 (N.D. Ill. Aug. 1, 1995) (holding that deplorable acts did not create an abusive work environment); *Raley v. Board of St. Mary's County Comm'rs*, 752 F. Supp. 1272, 1279 (D. Md. 1990) (holding that where women, and not men, were kissed and touched under their clothes, sexual harassment was not pervasive enough to create a hostile work environment).

n298. See *supra* Part III.A.

n299. This occurs in the context of directed verdicts and judgment notwithstanding the verdict, both of which are encompassed in the term "judgment as a matter of law" for purposes of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 50.

n300. See, e.g., *Barnes v. Montgomery County Bd. of Educ.*, 114 F.3d 1186 (6th Cir. 1997) (per curiam) (unpublished table decision), available in 1997 WL 253279, at *3 (affirming judgment as a matter of law despite plaintiff's testimony that her supervisor had brushed up against her, placed his hands on her buttocks, grabbed her buttocks, and insinuated that she would have to submit to his advances in order to keep her job); *Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 172 (1997) (finding series of sexual comments, some directed specifically at plaintiff at bimonthly meetings, insufficient for finding for plaintiff on sexual harassment claim).

n301. See *supra* notes 173-74, accompanying text, and table two.

n302. See, e.g., *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1266-67 (8th Cir. 1997); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1087 (3d Cir. 1996); *Webb v. Baxter Healthcare Corp.*, 57 F.3d 1067 (4th Cir. 1995) (unpublished table decision), available in 1995 WL 352485, at *1 (reversing on sexual harassment claim; upholding on religion and disability-based harassment); *Mullins v. Campbell Soup Co.*, 56 F.3d 72 (9th Cir. 1995) (unpublished table decision), available in 1995 WL 306823, at *6 (reversing summary judgment on hostile work environment claim); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1556-57 (11th Cir. 1987) (reversing summary judgment where jury could infer that alleged harasser influenced the boss to dismiss the plaintiff).

n303. See supra note 168 and accompanying text.

n304. See, e.g., *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1087 (3d Cir. 1996) (reversing grant of summary judgment on racial harassment claim).

n305. 109 F.3d 1261 (8th Cir. 1997).

n306. *Id.* at 1262.

n307. *Id.*

n308. See *id.* at 1263.

n309. *Id.*

n310. See *id.*

n311. *Id.* There was also an alternative ground for the district court's decision, namely that the employer took prompt remedial action. See *id.* The court of appeals also disagreed with the district court's reasoning on this issue. See *id.* at 1265.

n312. See id. at 1263.

n313. See id.

n314. Id. at 1264 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)).

n315. Id.

n316. Id.

n317. See id. at 1265. The Supreme Court recently has upheld this interpretation of harassment law. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002 (1998); see also supra notes 69-71 and accompanying text (explaining that *Oncale* created uniformity among the courts by establishing the rule that harassment need not be sexually explicit to be actionable).

n318. *Smith*, 109 F.3d at 1264-65.

n319. See 42 U.S.C. 1981a(c) (1991).

n320. See supra notes 89-145 and accompanying text.

n321. See supra notes 165-70 and accompanying text.

n322. See supra notes 52-54 and accompanying text. There are two possible ways that this could have led to an increase in the rate of summary judgment. First, plaintiffs could have filed weaker cases because of the reduced need for psychological harm. Second, the courts and defense counsel might have increased their efforts to find a more fruitful means for granting summary judgment, resulting in the expanding use of the insufficiently severe or pervasive ground.

n323. See *supra* note 6.

n324. My research did turn up some weak cases. See *Powers v. Dallas County Community College Dist.*, No. CA3: 96-1067-BC, 1997 WL 446442, at *4 (N.D. Tex. July 16, 1997) (granting summary judgment for employer on the grounds that the alleged incidents of harassment were "sporadic and isolated"); *Loum v. Houston's Rest., Inc.*, 985 F. Supp. 1315, 1321 (D. Kan. 1997) (same); *Gillum v. Federal Home Loan Bank*, 970 F. Supp. 843, 852 (D. Kan. 1997) (same), *aff'd sub nom. Penry v. Federal Home Loan Bank*, No. 97-3203, 97-3204, 1998 WL 614412 (10th Cir. Sept. 15, 1998); *Crabtree v. BHK of Am.*, 954 F. Supp. 1138, 1141 (W.D. Va. 1996) (same), *aff'd*, 106 F.3d 390 (4th Cir. 1997).

n325. See Jerome M. Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 *Rutgers L. Rev.* 965, 967 (1993); Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 *SMU L. Rev.* 1861, 1864-66 (1994) (noting that the Reagan and Bush administrations packed the courts with conservatives). But see Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court Packing Efforts of Presidents Reagan and Bush*, 57 *Alb. L. Rev.* 1111, 1124-25 (1994) (arguing that the Rehnquist Court is not as conservative as was feared by liberals).

n326. See Tobias, *supra* note 325, at 1872-74. White males made up 82% of the Reagan and Bush appointments. See Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 *Temp. L. Rev.* 67, 178 n.209 (1994). "As of November 1992, of the 565 district court judges in this country, 392 or 69% were appointed by Presidents Reagan or Bush. Of the 163 circuit court judges, 111 or 68% were appointed by Presidents Reagan and Bush." *Id.* at 178 n.210; see also Thomas B. Stoddard, *Lesbian and Gay Rights Litigation Before A Hostile Federal Judiciary: Extracting Benefit from Peril*, 27 *Harv. C.R.-C.L. L. Rev.* 555, 555 (1992). President Bush appointed many more women than President Reagan. See Tobias, *supra* note 325, at 1865-66. However, many of these women were politically conservative and appointed in response to the Clarence Thomas confirmation hearings. See *id.* Still, President Clinton has nominated far more women and minorities to the bench than any other president. See *id.* at 1866. It is too early to measure the effects these women will have on civil rights claims.

n327. See *infra* notes 353-81 and accompanying text.

n328. See Sinclair & Hanes, *supra* note 18, at 1658 (noting that "the number of cases regularly resolved summarily, however, has not been the subject of significant empirical research since the 1986 [summary judgment] decisions"). Sinclair and Hanes posit that the number of summary judgment motions filed has been increasing steadily, and that the trilogy of Supreme Court cases may not have increased filings significantly. *Id.* at 1659-60. In addition, they review motions granted, concluding "when viewed in the long run, it does not appear that the proportion of summary judgment motions granted has increased significantly, at least on the estimated basis used to sample outcomes." *Id.* at 1661. Yet, civil case filings have generally gone down overall since the trilogy. See *id.* at 1662.

n329. *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997).

n330. *Administrative Office of the U.S. Courts, Report of the Director - 1995*, at 163 (1995).

n331. Administrative Office of the U.S. Courts, Federal Judicial Caseload: A Five Year Review 1989-1993, at 5 (1994).

n332. See *id.*

n333. *Id.* The other significant rise was in state prisoner petitions, which grew by 27% since 1989. In addition, prisoner petitions accounted for 23% of all civil rights cases filed.

n334. See Willon, *supra* note 5, at A1.

n335. Civil Justice Reform Act of 1990 101, 28 U.S.C. 471 (1994).

n336. See *id.*

n337. Speedy Trial Act of 1974, 18 U.S.C. 3152-3156, 3161-3174 (1994). In 1979, Congress passed the Speedy Trial Act Amendments Act in order to further increase the pressure on federal courts to expedite criminal cases. See Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, 93 Stat. 327 (codified at 18 U.S.C. 3161-3174 (1994)).

n338. See Sinclair & Hanes, *supra* note 18, at 1662. Sinclair and Hanes' data show that civil case filings decreased by 20% in 1990, 5% in 1991, and increased slightly by 10% in 1992. Even with the increase in 1992, there were significantly fewer cases filed that year than in 1985. In 1985, there were 273,670 civil cases filed, whereas in 1992, there were 229,119 civil cases filed. See *id.*

n339. In 1989, 44,253 criminal cases were filed; in 1990, 47,411 criminal cases were filed; in 1992, 47,656 criminal cases were filed; and in 1993, 47,850 criminal cases were filed. See Administrative Office of the U. S. Courts, Federal Judicial Workload Statistics 4 (1993).

n340. 103 F.3d 1394 (7th Cir. 1997).

n341. *Id.* at 1397.

n342. This is consistent with EEOC charge filings in this area. The EEOC publishes annual reports that collect data about the number of discrimination charges filed each year. There are generally more sexual harassment claims filed than any other form of harassment, and the discrepancy between sexual harassment charge filings and filings based on other forms of harassment is growing. For example, in 1991, there were 2849 charges of racial harassment filed, 3223 charges of sexual harassment, 867 charges of national origin harassment, and 190 charges of religious harassment. EEOC Combined Ann. Rep. Fiscal Years 1991 and 1992, at 28 (1992). The EEOC keeps a separate category of harassment based on sex, which included 2003 charges. *Id.* In 1994, these numbers had increased, and 4855 charges of racial harassment were filed, 8095 charges of sexual harassment were filed, 1530 charges of national origin harassment were filed, and 365 charges of religious harassment. The separate category of harassment based on sex showed 3978 charges filed. See EEOC Ann. Rep. 36 (1994).

n343. See John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675, 676 (1971).

n344. *Id.*

n345. *Id.*

n346. *Id.*

n347. See, e.g., Gregory, *You can Call Me a Bitch*, *supra* note 285.

n348. *Id.* at 741-42.

n349. *Id.* at 742.

n350. *Id.* at 743.

n351. See *id.* at 774; see also *id.* at 777 n.208 (stating that as of 1994, only 14% of federal judges were women); Oppenheimer, *supra* note 44, at 147-48.

n352. See Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 *Judicature* 129, 131 (1993).

n353. *Id.* This difference persisted even when the statistics were controlled for political party of president appointing the particular judge. Sixty-eight percent of democratic appointed female judges supported the plaintiff's claim, whereas 54.3% of democratic appointed male judges supported the plaintiff's claim. The results on Republican appointees were not statistically significant. See *id.* at 132.

n354. *Id.* at 133.

n355. To date, many states and judicial entities have published reports of the findings of such task forces. See, e.g., California Jud. Council Subcomm. on Gender Bias in the Cts., *Report of the Judicial Council Subcommittee on Gender Bias in the Cts.: Evaluation, List of Modified Recommendations, and Comments* (1990) [hereinafter California Jud. Council]; Colorado Supreme Ct. Task Force on Gender Bias in the Cts., *Final Report* (1990) [hereinafter 1990 Colorado Task Force]; Colorado Supreme Ct. Task Force on Gender Bias in the Cts. *Ann. Rep.* (1991); Connecticut Task Force on Gender, Justice, and the Cts., *Report to the Chief Justice* (1991) [hereinafter Connecticut Task Force]; Delaware State Bar Ass'n Sec. on Women and the L., *Report to the Gender Bias Committee* (1994) [hereinafter Delaware Task Force]; Special Comm. on Race and Ethnicity, *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, available in 64 *Geo. Wash. L. Rev.* 189 (1996); Special Comm. on Gender, *Draft Final Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias* (1995) [hereinafter D.C. Circuit Task Force]; Eighth Circuit Gender Fairness Task Force, *Final Report and Recommendations* (1997), available in 31 *Creighton L. Rev.* 9 (1997); Ad Hoc Comm. on Gender Bias, *Achieving Gender Fairness: Designing a Plan to Address Gender Bias in Hawaii's Legal System* (1989); Illinois Task Force on Gender Bias in the Courts, *Final Report: The Survey of Illinois Judges and Attorneys* (1990); Illinois Task Force on Gender Bias in the Cts., *Report Executive Summary with Status of Recommendations* (1992); Louisiana Task Force on Women in the Cts., *Final Report* (1992) [hereinafter Louisiana Task Force]; Maine Comm. on Gender, Justice and the Cts., *Executive Summary: Report of the Maine Commission on Gender, Justice, and the Courts* (1996) available in 49 *Me. L. Rev.* 135 (1997); Select Comm. on Gender Equality of the Md. Judiciary and the Md. State Bar Ass'n, *Report* (1992); Michigan Supreme Ct. Task Force on Gender Issues in the Cts., *Conclusions and Recommendations* (1989); Minnesota Supreme Ct. Task Force for Gender Fairness in the Cts., *Final Report*, available in 15 *Wm. Mitchell L. Rev.* 829 (1989) [hereinafter Minnesota Task Force]; Nevada Supreme Ct. Task Force on Gender Bias in the Cts., *Justice for Women* (1988); New Jersey Task Force on Women in the Cts., *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts - June 1984*, available in 9 *Women's Rts. L. Rep.* 129 (1986); New Mexico State Bar Task Force on Women and the Legal Profession, *Final Report* (1990) [hereinafter New Mexico Task Force]; New York Task Force on Women in the Cts., *Report of the New York Task Force on Women in the Courts*, available in 15 *Fordham Urb. L.J.* 15 (1986-1987); Ninth Circuit Gender Bias Task Force, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, available in 67 *S. Cal. L. Rev.* 751 (1994); Ohio Joint Task Force on Gender Fairness, *Final Report* (1995); Rhode Island Comm. on Women in the Cts., *Final Report* (1987) [hereinafter Rhode Island Comm.]; Gender Bias Task Force of Tex., *Final Report* (1994) [hereinafter Texas Task Force]; Utah Gender Fairness Comm., *Gender and Justice in Utah; A Six Year Follow-Up on the Utah Task Force on Gender and Justice Report* (1996) [hereinafter Utah Jud. Council]; Vermont Task Force on Gender Bias in the Legal Sys., *Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System* (1991) [hereinafter Vermont Task Force]; Wisconsin Supreme Ct. Gender Equality Comm., *Final Report* (1995). For additional discussions of the findings of gender bias task forces, see Marsha S. Stern, *Courting Justice: Addressing Gender Bias in the Judicial System*, 96 *Ann. Surv. Am. L.* 1 (1996), which details findings regarding treatment of women lawyers. In addition, several articles address discrimination based on gender, race, and ethnicity in the legal profession and court system. See Richard L. Ender, *Gender and Law Practice Income*, *Alaska Just. F.*, Summer 1990, at 1; William A. Martin & M. D. Buffalo, *The Women and Minorities Study: The Results are in!* 26 *Ark. Lawyer* 39 (1992).

n356. National Center for State Cts., *Report of Gender Bias Task Force Recommendations* 3 (1990). This report compiles the recommendations of the task force reports from Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Rhode Island, and Washington, and a summary of findings from Florida. As of the time the National Center for State Courts published its report, New Jersey, New York, Rhode Island, Nevada, Maryland, Massachusetts, Minnesota, Washington, Michigan, and Florida had made some sort of recommendation concerning training and education specifically aimed at domestic violence cases. In addition, New York, Nevada, Maryland, Massachusetts, Minnesota, Washington, and Michigan had made recommendations concerning gender bias in child custody matters. Michigan had recommended training to "educate judges and lawyers to recognized the unfairness which can result from

gender-based stereotypes in the domestic relations area." *Id.*; see also California Jud. Council, *supra* note 355, *Victims of Domestic Violence*, 1-15 (setting out 15 recommendations to judicial council for improvement of domestic violence law); New Mexico Task Force, *supra* note 355, at 54-68 (discussing problems and making recommendations in area of domestic relations); Rhode Island Comm., *supra* note 355, at 36-49; Utah Jud. Council, *supra* note 355, at 6-8 (making several recommendations for domestic violence and domestic relations cases). Many states recommended changes based on gender inequities related to family law and domestic violence cases. See Rhode Island Comm., *supra* note 355, at 16-21; see also California Jud. Council Subcomm. on Gender Bias in the Courts, *Evaluation, List of Modified Recommendations, and Comments, Family Law* (1990) (setting forth 18 recommendations to judicial council for improvements in family law based on task force report); Colorado Task Force, *supra* note 355, at 47-56, 66-72, 82-88 (setting forth recommendations in the areas of child custody and visitation, child support, and domestic violence). Several states particularly identified the areas of divorce, child custody, child support, and domestic violence as areas of study. See, e.g., *id.*

n357. Ninth Circuit Task Force on Gender Bias, *Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias*, available in 45 *Stan. L. Rev.* 2153, 2166, 2169-70 (1993). For a summary of the gender bias task force movement in the federal courts, see *Commentaries on Bias in the Federal Courts*, 32 *U. Rich. L. Rev.* 647 (1998), and Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 *U. Rich. L. Rev.* 615 (1998).

n358. D.C. Circuit Task Force, *supra* note 355, at 98.

n359. *Id.* at 99-100 & n.146.

n360. *Id.* at 101.

n361. *Id.* at 102.

n362. *Id.*

n363. *Id.* at 103. If courts reduce or deny attorneys' fee awards, then fewer attorneys will be willing to take cases, thereby resulting in reduced access to the courts for litigants.

n364. See Eighth Circuit Gender Fairness Task Force, *supra* note 355, at 72-74.

n365. *Id.* at 72-73.

n366. See id. at 73.

n367. Id. at 35. This represents a 68% return rate. In addition, the surveys were not particularly skewed in favor of responses of female judges. Eighty-five of the judges responding were men; 14 were women; and 3 did not identify their gender. See id., at 174. Of all the judges in the courts surveyed (which included appellate judges, district judges, bankruptcy judges, and magistrate judges), 130 are men and 19 are women. See id. at 41. Excluding the three judges of unknown sex, 73.7% of female judges responded, while 65.4% of male judges responded.

n368. See id. at 154 (noting that 12 units had such a policy, 31 units had no policy, and 6 units followed the Model EEO plan).

n369. See id. at 118.

n370. See id. Five hundred and sixty-seven employees responded to the survey.

n371. See id. at 161. A much smaller percentage - 6.6% - reported sexual attention or sexual coercion by a female judge. See id. Because of the low response rate on this aspect of the data, this amounted to one incident, whereas the data for male offenders was based on 26 incidents. See id.

n372. Id. at 73.

n373. Id. at 74.

n374. See id.

n375. See id.

n376. Preliminary Draft Report of the Second Circuit Task Force on Gender, Racial, and Ethnic fairness in the Courts 41-42 (1997).

n377. *Id.* at 41.

n378. *Id.*

n379. *Id.* at 42.

n380. *Id.*

n381. It specifically noted that whether these concerns were well founded "must await study elsewhere." *Id.*

n382. Minnesota Task Force, *supra* note 355, at 921. Minnesota also recommended that judges and attorneys be educated "regarding the appropriateness of the defense tactic of appealing to gender stereotypes." *Id.*

n383. Delaware Task Force, *supra* note 355, at 4.

n384. See 1990 Colorado Task Force, *supra* note 355, at 104. As one Colorado attorney explained:

In several cases I have handled, there has been the assumption by defense counsel, insurance adjusters, and settlement judges that a woman's claim for lost income or impairment of earning capacity is worth less than a man's ... Men are almost universally referred to as the "breadwinners" in these situations, women almost never are.

Id.; see also Vermont Task Force, *supra* note 355, at 149-52.

n385. See 1990 Colorado Task Force, *supra* note 355, at 104.

n386. Texas Task Force, *supra* note 355, at 91-92.

n387. Rhode Island Comm., *supra* note 355, at 12.

n388. See *id.*

n389. See *id.*

n390. See *id.* at 12-14.

n391. See Minnesota Task Force, *supra* note 355, at 941-44 (noting that 26% of female attorneys reported judges were a source of verbal sexual harassment sometimes or often); Connecticut Task Force, *supra* note 355, at 158.

n392. See New Mexico Task Force, *supra* note 355, at 24.

n393. See Louisiana Task Force, *supra* note 355, at 122.

n394. See *id.* at 122. But see Executive Summary, Eleventh Circuit: "Executive Summary" - Report of the Eleventh Circuit Task Force on Gender Bias, available in 32 U. Rich. L. Rev. 751, 761 (1998) (noting that the Eleventh Circuit's findings showed that such terms were rarely used).

n395. See Vermont Task Force, *supra* note 355, at 34-37, 42.

n396. See John Gruhl et al., Women as Policy Makers: The Case of Trial Judges, 25 Am. J. Pol. Sci. 308 (1981).

n397. See, e.g., Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543, 543-44 (1986).

n398. Davis et al., supra note 352, at 131. Women judges supported the claimant over 63% of the time, while male judges supported the claimant 46% of the time. See id. A discrepancy existed even when the authors controlled for political party and region of the country in which the judge sat. See id. at 132.

n399. David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 *Judicature* 156 (1993) [hereinafter *Allen & Wall, Role Orientations*]. The study involved was based on an analysis of voting by 24 female state supreme court justices. See id. at 159. In an earlier study of only 14 justices, Allen and Wall explained the problem of small sample size in this context. David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders*, 12 *Just. Sys. J.* 232 (1987) [hereinafter *Allen & Wall, Behavior*]. They state, "We recognize the problem of generalizability in a sample of this size. However, given the extraordinary minimal representation of women on state supreme courts, any sample is bound to be small." Id. at 236.

n400. Allen & Wall, *Behavior*, supra note 399, at 239; see also Allen & Wall, *Role Orientations*, supra note 399, at 164. In their 1993 article, Allen and Wall describe four role orientations identified by researchers of judicial voting behaviors. Allen & Wall, *Orientations*, supra note 399, at 158. One is the "representative role," in which the female decision maker (or office holder) "incorporates a woman's viewpoint in legal matters directly impacting on women as a category." Id. Women also may act as "tokens," whereby they "modify their behavior in order to conform to the dominant majority." Id. Another possible role for female justices is that of the "outsider," who "disregards institutional traditions." Id. These women have characteristically high self esteem that allows them to break traditional norms. See id. at 159. The result is that as judges, they "exhibit comparatively extreme voting behavior." Id. The fourth role is that of the "different voice," adopted based on the findings of differences between men and women by Carol Gilligan in her ground-breaking book *In a Different Voice*. See id. (citing Carol Gilligan, *In a Different Voice* (1982)). Female jurists falling into this role would place higher values on community and relational interests, as opposed to individual rights. See id. Research supporting this fourth category has had mixed results. See id.; see also Davis et al., supra note 352, at 129-30 (studying gender differences in the decision making of the federal courts of appeals based on Gilligan's thesis). These differences do not extend to all aspects of law. Two studies of urban trial judges found no differences in sentencing patterns between male and female judges. See Gruhl et al., supra note 396, at 314; Kritzer & Uhlman, *Sisterhood in the Courtroom; Sex of Judge and Defendant in Criminal Case Disposition*, 14 *Soc. Sci. Q.* 77 (1977).

n401. Allen & Wall, *Role Orientations*, supra note 399, at 161. Interestingly, the extreme nature of a female justice's behavior is not a result of political party affiliation. As Allen and Wall explain, "while a majority of women Democratic justices serve on courts dominated by Democratic males, they still vote in a manner substantially different from their same-party male colleagues." Id. at 162. In criminal and economic cases, female Republican justices vote conservatively. However, they still tend (although less strongly than their Democratic counterparts) to vote more conservatively than their male counterparts. See id. at 163. However, all female justices (regardless of party) tend to vote more liberally on "women's issues." See id. at 164.

n402. Gerald S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 *J. Pol.* 143, 153 (1986). Perhaps no case exemplifies the mistreatment of plaintiffs based on sex in the context of harassment cases better than *Catchpole v. Brannon*, 42 *Cal. Rptr. 2d* 440 (1995). In that case, the California Court of Appeals overturned a trial judge's decision in a sexual harassment case because the judge's decision was infected with gender bias. See id. at 440.