FROM THE FACTORY TO THE FIRM: CLARIFYING STANDARDS FOR BLUE-COLLAR AND WHITE-COLLAR SEXUAL HARASSMENT CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964†

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The passage of Title VII of the Civil Rights Act of 1964 marked the beginning of the movement towards awareness and enforcement of women's rights in the workplace. The movement has since led to a generation where the term "sexual harassment" has become part of the common vernacular. Title VII, however, provides less than clear guidance in the application of its sweeping prohibitions, and sexual harassment litigation has resulted in inconsistent results among courts. In this note, the author explores one notably dissonant area of sexual harassment claims—hostile work environment cases. Specifically, the Sixth and Tenth Circuits are directly split on the issue of whether the nature of the work environment where the gender discrimination is alleged to have occurred is a factor to be taken into account when evaluating a hostile work environment claim. In examining this issue in the context of blue-collar and white-collar working environments, the author outlines the disparities in the circuits' approaches and the broader implications of these differences. The author ultimately concludes that the proper examination of Title VII hostile work environment sexual harassment claims must include consideration of the work environment as a whole. She provides a framework for applying the broader standard and also addresses employee acceptance of certain work site conditions, employer defenses, effects of future claims, and relevant counterarguments.

I. INTRODUCTION

"It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was

† *Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 to -17 (1994).*

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designed to bring about a magical transformation in the social mores of American workers."[1]

The latter half of the twentieth century marked several changes in American law. Arguably the greatest of these changes occurred in the domain of civil rights. This evolution generated, among countless other significant events, a substantial shift in the field of employment law pertaining to the individual rights of workers. Within these rights, issues of discrimination and harassment by supervisors and co-workers have moved to the forefront of our collective consciousness; from wide-reaching statutes and case law to workplace sensitivity training to episodes of popular television shows, we have been inundated with information on how to avoid or handle illegal situations on the job. For the generation that endured the 1991 Clarence Thomas–Anita Hill scandal,[2] the term "sexual harassment" and an understanding of the rights of women on the job have become part of our common vernacular. Yet despite such broad-based recognition of the problems associated with harassment and discriminatory employment actions, even the most distinguished state and federal courts often seem perplexed as to how some of the basic laws established in this field should be interpreted and applied.

Perhaps the most significant—and problematic—of the modern discrimination statutes is Title VII of the Civil Rights Act of 1964[3] (Title VII), enacted to protect the individual rights of workers. Title VII provides a cause of action for discrimination based on, among other protected classes, sex.[4] The statute has commonly been interpreted as prohibiting many forms of *harassment* based on one's membership in a protected class.[5] Unfortunately, the language of Title VII provides no standard by which a harassment claim may be analyzed, leaving much to the collective judicial imagination.[6]

1. Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff'd*, 804 F.2d 611 (6th Cir. 1986).

2. *See generally* Tom Shales, *At the Senate Hearings, More of the Mortifying Spectacle*, WASH. POST, Oct. 14, 1991, at D1.

3. 42 U.S.C. § 2000e-1 to -17 (1994).

4. The pertinent part of Title VII reads:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

5. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66, 73 (1986) (holding that "hostile environment" sex discrimination is actionable under Title VII).

6. What might otherwise appear to be lack of foresight on the part of the legislature in defining the standards for sex discrimination, including harassment, may be excused by the fact that the Title VII prohibition of discrimination based on sex was not—by any stretch of the imagination—adequately reviewed by Congress before the statute's enactment. The "curious genesis of the Title VII sex discrimination prohibition" is legendary. *Rabidue*, 584 F. Supp. at 428 n.36. In *Rabidue*, Judge

As such, sexual harassment claims constitute much of the litigation over the application of Title VII.[7] In the four decades since the enactment of the statute, the federal circuit courts have been notably dissonant in determining the standard to be applied in cases alleging Title VII hostile work environment sexual harassment.[8] In one of the most recent developments in this area of law, the Sixth Circuit held that the analysis of sexual harassment claims does not vary depending on the nature of the work environment, thereby expressly rejecting the view expressed by other circuit courts.[9]

In proposing that a complete analysis of hostile work environment sexual harassment claims must include consideration of the type of work environment in which the claim arose, this note examines the language and legislative history of Title VII's discrimination based on sex provisions[10] and the way those provisions have been defined through case precedent, as well as the circuit courts' varying interpretations of the standard by which an employee's hostile work environment claim should be examined, including the development of the "reasonable person"[11] and "reasonable woman"[12] standards. This note further analyzes the view, expressed by several circuit courts, that hostile work environment claims should be evaluated differently based on the type of environment

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Newblatt, writing the majority opinion for the Eastern District of Michigan, recounted the colorful history of the inclusion of sex as one of Title VII's protected classes:

> This Court—like all Title VII enthusiasts—is well aware that the sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith. But the joke backfired on Smith when the amendment was adopted on the floor of the House under the House five-minute rule.
>
> While sex discrimination thus was not even close to being a major concern of the original drafters of Title VII, it cannot be denied that sex discrimination was indeed very important to the 1972 and 1978 amendments to Title VII. . . . Therefore, it is entirely correct to conclude that Title VII—*as it now stands*—reflects a deep commitment to the eradication of gender based discrimination.

Id. (citations omitted).

7. Harassment claims may be based on any of the protected classes referred to in Title VII: race, color, national origin, religion, and sex. *See* 42 U.S.C. § 2000e-2. However, the analysis in this note will be restricted to claims of sexual harassment, and, more specifically, harassment of women by men. Sexual harassment claims almost exclusively consist of male on female harassment. *See* Mary Anne Weiss, Note, *Ninth Circuit Broadens Reasonableness Standard for Hostile Work Environment Sexual Harassment:* Fuller v. City of Oakland, 31 U.S.F. L. REV. 665, 665 (1997), *citing* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 5 (1992) *and* Rachel A. Hetherington & Barbara C. Wallace, *Recent Developments in Sexual Harassment Law*, 13 MISS. C. L. REV. 37, 38 n.2 (1992) (stating most sexual harassment claims are brought by women against their male supervisors).

8. *Compare* Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537 (10th Cir. 1995) (explaining that in some blue-collar environments, such as a construction site, "[i]ndelicate forms of expression are accepted or endured as normal human behavior"), *with* Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999) (explicitly rejecting "the view that the *standard* for sexual harassment varies depending on the work environment").

9. *See generally Williams*, 187 F.3d at 564.

10. *See* 42 U.S.C. § 2000e-2.

11. *E.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (applying the "reasonable person" standard).

12. *E.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (applying the "reasonable woman" standard).

in which they take place.[13] Finally, this note proposes that, where applicable, courts should allow defendant employers to present evidence that the plaintiff in a hostile work environment case accepted the conditions of his or her employment before accepting a position, and thus assumed much of the risk of potential problems on the job.

II. DEVELOPMENT OF THE MODERN SEXUAL HARASSMENT CLAIM

Title VII,[14] enacted as part of the Civil Rights Act of 1964, proscribes discrimination by an employer in hiring, firing, promoting, and other work-related practices based on race, color, sex, national origin, or religion.[15] The purpose of Title VII is "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[16]

Title VII's prohibitions are not limited to overt discrimination. The provision of Title VII outlawing discrimination based on sex[17] "has been interpreted to prohibit sex harassment and to cover more than only the literal terms and conditions in the narrow contractual sense."[18] Sexual harassment cases under Title VII "have traditionally been analyzed as falling into one of two categories: 'quid pro quo' or 'hostile work environment' causes of action."[19] Quid pro quo harassment is what most individuals would recognize as "typical" sexual harassment, defined as involving the "conditioning of concrete employment benefits on sexual favors."[20]

In 1980, the Equal Employment Opportunity Commission (EEOC) published guidelines defining sexual harassment as a form of prohibited sex discrimination under Title VII.[21] The Supreme Court first recognized hostile work environment sexual harassment in the 1986, *Meritor Savings Bank v. Vinson*[22] decision; more specifically, the Court held that the lan-

13. *See generally* Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3d Cir. 1999) (considering evidence of male employees' "locker room" conversations at a police department); Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997) (considering evidence of working conditions at a mine); Gross v. Burggraf Constr. Co., 53 F.3d 1531 (10th Cir. 1995) (analyzing the treatment of women on a construction site); Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) (deliberating a harassment claim in the context of a casino floor environment); Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988) (evaluating the environment and general treatment of women at a car dealership).

14. *See* 42 U.S.C. § 2000e-1 to -17.

15. *See id.* § 2000e-2.

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

17. *See* 42 U.S.C. § 2000e-2.

18. Penny Nathan Kahan & Lori L. Deem, *Sexual Harassment Update*, SEO5 A.L.I.-A.B.A. 671, 675 (1999).

19. *Id.* at 676.

20. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 62 (1986).

21. *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1985), *construed in Meritor*, 477 U.S. at 65.

22. 477 U.S. 57 (1986).

guage of Title VII is not limited to a proscription of only "economic" or "tangible" discrimination.[23] In support of this ruling, the Court referred to the EEOC guidelines,[24] which the majority found had convincingly theorized that sexual harassment leading to noneconomic injury—hostile work environment—violates Title VII.[25]

The *Meritor* decision provided the standard for actionable hostile work environment sexual harassment: "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.'"[26] Furthermore, the Court has also held that the harassment of a female employee, whether based on a quid pro quo or hostile work environment claim, must be "due to her gender," or such that it would not occur but for the sex of the employee.[27]

Importantly, the *Meritor* ruling further stated that courts must consider the "totality of the circumstances" in which hostile work environment sexual harassment is alleged to have occurred.[28] This requirement, with all its inherent vagaries, practically invited sexual harassment litigation. The totality-of-the-circumstances element is particularly relevant to a discussion of whether the same analysis applies to blue-collar and white-collar hostile work environment claims, given the varying characteristics that affect these different types of employment situations.

In order to prove a prima facie case of hostile work environment harassment based on sex, a plaintiff must demonstrate that: (1) she is a member of a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on her gender; (4) the harassment created a hostile work environment; and (5) her employer is liable for the harassment.[29] The fourth element of the prima facie case "requires

23. *See id.* at 64, 73.

24. *See* 29 C.F.R. § 1604.11.

25. *See Meritor*, 477 U.S. at 65–66.

26. *Id.* at 67 (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). In *Henson*, the Eleventh Circuit wrote:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Henson, 682 F.2d at 902.

27. *See* Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 538 (10th Cir. 1994); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987).

28. *See Meritor*, 477 U.S. at 69 (citing Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(b) (1985)). As this section of the Guidelines states:

> In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 C.F.R. § 1604.11(b) (1985).

29. *See* Williams v. Gen. Motors Corp., 187 F.3d 553, 560–61 (6th Cir. 1999) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)).

the plaintiff to show that the harassing actions were so 'severe or pervasive' that she was subjected to a hostile work environment."[30] In addition to the prima facie case, the 1993 *Harris v. Forklift Sys., Inc.*[31] decision clarified the elements of a claim for gender discrimination resulting from a hostile work environment as having both objective and subjective elements.[32] Citing *Meritor* for the proposition that Title VII is violated "[w]hen the workplace is permeated with 'discrimination, intimidation, ridicule, and insult' . . . that is sufficiently severe or pervasive to . . . create an abusive working environment,"[33] the *Harris* Court stated the standard requires "an objectively hostile or abusive work environment—[one] that a reasonable person would find hostile or abusive," as well as the victim's subjective perception that the environment is abusive.[34]

The *Meritor* and *Harris* holdings have been interpreted to allow courts to consider the nature of the work environment in which a sexual harassment claim originates.[35] *Rabidue v. Osceola Refining Co.*[36] was the initial judicial decision to propose that in evaluating the work environment in which harassment is alleged, courts should take into account the differences between blue-collar and white-collar environments. Subsequent to *Rabidue*, other circuit courts adopted this premise by taking into account disparities in blue- and white-collar work standards in harassment cases.[37] The cases distinguish specific types of environments where certain behavior may be more or less acceptable. The Tenth Circuit's decision in *Gross v. Burggraf Construction Co.*[38] proposes one distinction:

> [W]e must evaluate Gross' claim of gender discrimination in the context of a blue collar environment where crude language is commonly used by male and female employees. Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments.[39]

In *Gross*, the female plaintiff worked as a water-truck driver for a road construction company.[40] She was a seasonal, hourly employee under the supervision of defendant Anderson, whom she claimed, inter alia, had used profanity toward and in reference to her.[41] The Tenth Circuit,

30. Anderson v. Memphis Bd. of Educ., 75 F. Supp. 2d 786, 792 (W.D. Tenn. 1999) (citing *Harris*, 510 U.S. at 21–22).

31. 510 U.S. 17 (1993).

32. *See id.* at 21–22.

33. *Id.* at 21.

34. *Id.*

35. *See* Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537–39 (10th Cir. 1995).

36. 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986).

37. *See* cases cited *supra* note 13.

38. 53 F.3d 1531 (10th Cir. 1995).

39. *Id.* at 1538.

40. *See id*. at 1535.

41. *See id.* at 1536. In Gross' complaint, she contended that her claim against both Burggraf Constr. Co. and her supervisor, Anderson, were supported by the following facts:

> 1) Anderson referred to her as a "cunt"; 2) after Anderson was unable to elicit a response from Gross over the CB radio, he made the following statement to another Burggraf employee: "Mark, sometimes, don't you just want to smash a woman in the face?"; 3) on one occasion, as

after stating that it would evaluate the plaintiff's claim "in the context of a blue collar environment where crude language is commonly used by male and female employees,"[42] found that although the evidence presented by the plaintiff reflected "crude and rough comments used by a construction boss in reprimanding or motivating his employees regarding their job performance,"[43] in fact "[n]one were related"[44] to the plaintiff's gender.

The Sixth Circuit, in *Williams v. General Motors Corp.*,[45] disagreed with the premise put forth in *Gross*[46] and held that the standard by which a sexual harassment claim is to be measured must be the same regardless of the type of work environment involved.[47] In *Williams*, the plaintiff had worked at General Motors for over thirty years before filing a claim for sexual harassment.[48] For two of those years, she worked the midnight shift in a tool crib at a GM packing plant, where she alleged she had been subjected to a hostile work environment by her co-workers.[49] Although many of the incidents the plaintiff alleged as evidence of sexual harassment were found to be based on factors other than her sex,[50] the court held that the conduct alleged, when viewed as a whole, created a material question of disputed fact as to whether sexual harassment had occurred.[51]

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she left her truck, Anderson yelled at her: "What the hell are you doing? Get your ass back in the truck and don't you get out of it until I tell you."; 4) Anderson referred to Gross as "dumb" and used profanity in reference to her; 5) only two women out of the four who worked under Anderson's supervision completed the 1990 construction season; 6) Anderson hired Gross solely to meet federal requirements against gender discrimination; 7) Anderson disliked women who were not between the ages of 19 and 25 and who weighed more than 115 pounds; 8) Anderson approached Gross after work one day and offered to buy her a case of beer if she would tell another Burggraf employee to "go fuck himself"; 9) Anderson warned Gross that if she ruined the transmission on her truck she would be fired; and 10) Anderson threatened to retaliate against Gross because he had heard that she was contemplating filing an EEOC claim.

Id.

42. *Id.* at 1538.

43. *Id.* at 1547.

44. *Id.*

45. 187 F.3d 553 (6th Cir. 1999).

46. 53 F.3d 1531 (10th Cir. 1995).

47. The Sixth Circuit stated:

> We do not believe that a woman who chooses to work in the male-dominated trade relinquishes her right to be free from sexual harassment; indeed, we find this reasoning to be illogical, because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment. Surely women working in the trades do not deserve less protection from the law than women working in a courthouse.

Williams, 187 F.3d at 564.

48. *See id.* at 558–59.

49. *See id.* at 559.

50. *See id*. at 564–65. The conduct alleged by Williams included such nonsexual acts as her fellow employees "gluing a box to [her] desk, misplacing a buggy, locking [her] in a crib, [and] blocking the crib entrance with materials." *Id.* The court found that "even if one presumes that they were purposely done with the sole intent of annoying Williams . . . , [t]hese are the kind of pranks that go on in some workplaces." *Id.* at 565.

The more obvious sex-related acts that Williams alleged included several profane comments, including the use of the word "slut" to refer to Williams, which the court held created an inference that "her gender was the motivating impulse for her co-workers' behavior." *Id.* at 565–66.

51. *See id.* at 568.

Thus, the court reversed the lower court's grant of summary judgment for the defendant.[52]

The holding in *Williams* reflects a dichotomy among the circuit courts on the proper standard by which hostile work environment sexual harassment claims should be analyzed.[53] Essentially, the *Williams* holding highlights a multifaceted debate over what the well-established policy[54] of taking into account the "totality of the circumstances" in hostile work environment cases actually requires. Although the "totality" standard has been cited in decisions for some time, the federal courts have consistently failed to set up any bright-line, workable guidelines for its application.

III. UNDERDEVELOPED STANDARDS: THE PROBLEM REFLECTED IN *WILLIAMS*

One of the most important recent developments in the area of hostile work environment sexual harassment is the 1999 decision in *Williams v. General Motors Corp*.[55] In *Williams*, the Sixth Circuit held that the analysis of sexual harassment claims does not vary depending on the nature of the work environment in each case.[56] In so holding, the court expressly rejected the Tenth Circuit's view that hostile work environment claims must be evaluated in the context of whether the behavior took place in a blue- or white-collar[57] environment.[58]

Thus, the Sixth Circuit's holding in *Williams* creates a circuit split; the court declined to follow the Tenth Circuit's previous ruling on hostile work environment sexual harassment and refused to consider work environment evidence in evaluating such claims.[59] The issues raised by *Williams* warrant detailed examination, as this holding and its implications impact every aspect of the traditional hostile work environment analysis under Title VII.

52. *See id.*

53. *See id.*

54. *See generally* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Gross v. Burggraf Constr. Co., 53 F.3d 1531 (10th Cir. 1995); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987).

55. 187 F.3d 553 (6th Cir. 1999).

56. *See id*. at 564.

57. For purposes of this note, work environments are generically referred to as either blue-collar or white-collar. There are, however, inherent shortcomings of such a potentially stereotypical distinction. Referring to an environment as either "blue-collar" or "white-collar" may be an over generalization. Some "blue-collar" environments may be as professional as the most formal office setting, and conversely, some environments that may be considered "white-collar" are in actuality coarse enough to shock the conscience. However, the note will use these terms as descriptive shorthand. When work environments are referenced as such, the intention, as the title of this note suggests, is primarily to discuss distinctively different work settings, i.e., the factory and the firm.

58. *See Gross*, 53 F.3d at 1537–38.

59. *See supra* note 13 and accompanying text.

A. Current Methods of Analysis

The Supreme Court's decision in *Meritor Savings Bank v. Vinson*[60] stated that courts must take the "totality of the circumstances" into account in analyzing a hostile work environment sexual harassment claim.[61] It may be argued that this requirement is not being met when courts ignore the nature of the work environment in which a harassment claim originated. As Circuit Judge Ryan observed in his dissent to the Sixth Circuit's *Williams*[62] decision, the majority opinion in *Williams* based its ruling on what Ryan considered the "mistaken premise"[63] that the totality-of-the-circumstances test "does *not* include the nature and character of the workplace environment."[64] The dissenting judge went on to state that, "[i]n so saying, [the judges in the majority] are simply dead wrong."[65] In Ryan's opinion, "[t]he Supreme Court has made it very clear that the workplace environment indeed is a component of the totality of circumstances to be taken into account in assessing a claim of sexual harassment under Title VII."[66]

Title VII does not per se spell out the standard to be imposed in the "totality" analysis. As such, it is strictly a product of judicial construction, and it therefore follows that Title VII does not *preclude* courts from considering types of work environments in evaluating harassment claims. As the Supreme Court's majority opinion in *Oncale v. Sundowner Offshore Services, Inc.*[67] maintained:

> We have emphasized . . . that 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 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.[68]

60. 477 U.S. 57 (1986).
61. *See id.* at 69.
62. 187 F.3d 553 (6th Cir. 1999).
63. *Id.* at 570 (Ryan, J., dissenting).
64. *Id.* at 570–71.
65. *Id.* at 571.
66. *Id.*
67. 523 U.S. 75 (1998).
68. *Id.* at 81–82.

This quote from *Oncale* reveals the Supreme Court's interpretation of sexual harassment as a claim based in large part upon the environment in which it arises, which is, quite clearly, particularly true of hostile work environment cases.

B. Hostile Work Environment

Compounding the problem of setting standards of analysis for blue- and white-collar environments is, as several recent Courts of Appeals cases reveal, the fact that there are notably divergent opinions among the circuit courts on the threshold question of what actually constitutes "sexual harassment" and/or a "hostile work environment."[69] In fact, some argue that the definitions and standards associated with such terms represent mere rhetoric:

> Years of feminist effort created the term sexual harassment, now a legal wrong and a cultural colossus. But as doctrine the phrase remains elusive, connoting no specific type of harm. Once thought of as a problem that has no name, sexual harassment is now a term that brings no clear image to mind—a name, as it were, that has no problem. Decades of litigation in the federal circuits and the Supreme Court have resulted in the promulgation of workable guidelines but prompted little vivid judicial writing and no courtroom-scene edification; neither the Hill-Thomas pageant of 1991 nor the spectacles that followed shed much light on sexual harassment law.[70]

Some of the most formidable obstacles courts contend with in analyzing sexual harassment cases may be blamed on the ever-confusing objective/subjective "test" for sexual harassment set by the Supreme Court in the *Meritor*[71] and *Harris*[72] decisions. Justice O'Connor, writing for the *Harris* majority, stated that this test "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[73]

The subjective portion of the test requires that the plaintiff "subjectively perceive the environment to be abusive."[74] This element is clearly

69. *Compare* Gleason v. Mesirow Fin., Inc., 118 F.3d 1134, 1144–46 (7th Cir. 1997) (finding no objectively hostile work environment given the nature of the two potentially discriminatory comments), *and* Black v. Zaring Homes, Inc., 104 F.3d 822, 826–27 (6th Cir. 1997) (holding that jokes and comments by male co-worker not sufficiently severe or pervasive to establish hostile work environment), *and* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430–31 (7th Cir. 1995) (holding that several oral incidents did not create an objectively hostile environment), *with* Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904–05 (11th Cir. 1988) (holding that plaintiff made out prima facie case of sexual harassment based primarily on oral comments by co-workers).

70. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 446 (1997) (citations omitted).

71. 477 U.S. 57 (1986).

72. 510 U.S. 17 (1993).

73. *Id*. at 21.

74. *Id.*

problematic, if for no other reason than that it forces a court to decide how an incident or pattern of incidents affected the sensibilities of the plaintiff at the time they occurred.

The objective element has also caused considerable confusion among the circuit courts, in that the *Harris* decision provides little guidance as to what courts must consider in analyzing a sexual harassment claim. Thus, a fundamental question remains: What exactly does "totality of the circumstances"[75] mean? In *Harris*, Justice O'Connor recognized the imprecision of this "standard":

> This is not, and by its nature cannot be, a mathematically precise test . . . . But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may 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 . . . . [However,] no single factor is required.[76]

If none of the factors put forth in *Harris* are required in evaluating sexual harassment claims, it may likewise be argued that this list is not exhaustive, and thus does not exclude consideration of the type of work environment in which sexual harassment claims arise.

The prevailing view in several circuits has been that hostile work environment claims should be evaluated differently based on the type of environment in which they take place.[77] However, these circuits have not put forth any definitive guidelines for conducting such an evaluation. Consequently, as with many aspects of Title VII analysis, courts and litigants are left with little more than a conceptual remedy without guidelines for implementation.

C. Other Considerations in Hostile Work Environment Analysis

1. The Reasonableness Standard

The ongoing development of and debate over the application of "reasonable person"[78] and/or "reasonable woman"[79] standards has created its own dilemma in more recent sexual harassment claims. For example, assume a court decides in a particular case that what may be considered "offensive" and "inappropriate" in a white-collar situation may be considered "normal" language in a blue-collar environment. However, an objective consideration of the level of offensiveness—in determining whether a claim passes the objective part of the sexual harass-

75. *See* cases cited *supra* note 13.
76. *Harris*, 510 U.S. at 22–23.
77. *See* cases cited *supra* note 13.
78. *See supra* note 11 and accompanying text.
79. *See supra* note 12 and accompanying text.

ment test—must ultimately be based on either the "reasonable person" or "reasonable woman" standard. The application of these standards requires asking what behavior a reasonable person/woman in the plaintiff's situation would find offensive to the level of harassing.

There has been considerable controversy over whether a "reasonable person" or a "reasonable woman" standard should be used in sexual harassment cases.[80] Recently, the "reasonable person" standard, as it was used in the *Harris* decision,[81] has been increasingly attacked as a discriminatory standard.[82] In *Mendoza v. Borden, Inc.*,[83] Eleventh Circuit Judge Tjoflat, concurring in part and dissenting in part, explained the current shift in reasoning:

> We . . . [have] become more vulnerable to the charge that in deciding whether the 'reasonable person' would find alleged instances of workplace harassment to be sufficiently severe or pervasive to alter the conditions of employment, we are in fact adopting the perspective of the 'reasonable harasser,' and systematically excluding the experiences of the victims of sexual harassment.[84]

Debate over which standard to apply has existed for some time. In 1986, the Sixth Circuit recognized the distinction between the "reasonable person" and the "reasonable woman": "[U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders . . . ."[85] In *Ellison v. Brady*,[86] the Ninth Circuit also addressed this problem by noting that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[87]

80. *Compare Harris*, 510 U.S. at 21 (applying the "reasonable person" standard), *with* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620–21 (6th Cir. 1986) (applying the "reasonable woman" standard).

81. *See Harris*, 510 U.S. at 17.

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a *reasonable person* would find hostile or abusive—is beyond Title VII's purview. Likewise if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment and there is no Title VII violation.

Id. at 21–22 (emphasis added).

82. *E.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989); *see also* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 819–20 (1991).

83. 195 F.3d 1238 (11th Cir. 1999).

84. *Id*. at 1268 n.11 (Tjoflat, J., concurring in part and dissenting in part) (citations omitted).

85. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., concurring in part and dissenting in part).

86. 924 F.2d 872 (9th Cir. 1991).

87. *Id.* at 879.

2. Drawing Distinctions Between Blue-Collar and White-Collar

Another complicated element in considering blue- and white-collar work environments in hostile work environment claims emerges when deciding where to draw a distinction between certain environments. In some cases, work environments may display mixed characteristics, appearing to be both blue- and white-collar at the same time. In others, the specific environment in which a plaintiff works may clearly be considered either blue- or white-collar, but the defendant employer as a whole may not. Or perhaps the person accused of harassing a blue-collar plaintiff is a white-collar supervisor. Critics of utilizing blue- and white-collar standards of analysis may argue that the applicable terms in these borderline cases are undefinable.

However, at least one court has carefully analyzed a method of discerning a blue-collar standard, albeit in a criminal law context. In *Anaya v. Hansen*,[88] the First Circuit considered, inter alia, whether blue-collar workers constituted a cognizable group in determining whether the pool of potential jurors in a murder case represented a fair cross section of the defendant's community.[89] Despite holding that blue-collar workers were not a cognizable group for purposes of jury selection, the court found that such a group was at least discernable, though somewhat loosely defined.[90] The court found that a "white collar category consists essentially of those persons involved in professional technical jobs—sales, clerical, and managerial occupations,"[91] while blue-collar workers include "those [who] are laborers and who are crafts people, and who are operators."[92] Thus, the court found some effective categorical distinctions could be made between the two groups.

3. Protecting Blue-Collar Plaintiffs

It may be argued that taking into account work environment evidence would, in effect, hold women in blue-collar work environments to a higher standard than those plaintiffs whose claims arise in a white-collar situation. This may be likened to some form of class or socioeconomic status discrimination.

In *Williams v. General Motors Corp.*,[93] the Sixth Circuit presumed that judicial decisions in which blue- or white-collar work environment evidence is considered would result in an inequitable dilemma for blue-collar sexual harassment plaintiffs.[94] More specifically, the court antici-

88. 781 F.2d 1 (1st Cir. 1986).
89. *See id*. at 2.
90. *See id*. at 5–6.
91. *Id.* at 5 n.6.
92. *Id.*
93. 187 F.3d 553 (6th Cir. 1999).
94. *See id.* at 564.

pated a context in which "the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment."[95] However, this has not been the result in at least one recent case. In *Baty v. Willamette Industries, Inc.*,[96] the fact that the plaintiff worked in a plant where "rough hewn and vulgar" sexual language was common practice did not prevent her from recovering on her sexual harassment claim.[97]

The *Baty* court, drawing in large part upon the Tenth Circuit's holding in *Gross v. Burggraf Construction Co.*,[98] found that the plaintiff had proven she was personally subjected to a "'steady barrage of opprobrious sexual comments,'"[99] despite the defendant's argument that the allegedly harassing incidents "did not involve physical touching, they did not involve any supervisory personnel, and the graffiti [that plaintiff complained of] was done anonymously and was generally not seen by plaintiff."[100] This holding suggests that taking into account blue- and white-collar evidence as part of the totality of the circumstances is not likely to result in a deprivation of remedies to blue-collar employees with valid hostile work environment sexual harassment claims.

D. Employer Liability

Interestingly, a significant quantity of Title VII discrimination and/or harassment cases have turned on the issue of employer liability. Even if a plaintiff can prove that her rights under Title VII have been violated on the job, she must further prove that her employer is liable for such a violation in order to recover damages from that employer.[101] To what degree are employers liable for the actions of some employees toward others on the job? And more specifically, what is an employer's responsibility in hostile work environment cases?

The most important developments regarding this issue come from companion 1998 Supreme Court cases, *Faragher v. City of Boca Raton*[102] and *Burlington Industries v. Ellerth*.[103] These two cases, decided on the same day, set clear standards by which employers could gain—or lose—an affirmative defense to claims of sexual harassment by employees. In

95. *Id.*
96. 985 F. Supp. 987 (D. Kan. 1997).
97. *Id.* at 993.
98. 53 F.3d 1531 (10th Cir. 1995).
99. *Baty*, 985 F. Supp. at 993 (quoting *Gross*, 53 F.3d at 1543).
100. *Id.* at 992.
101. *See generally* Burlington Indus. v. Ellerth, 524 U.S. 742 (1998) (setting the current standards for employer liability under Title VII); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (identifying circumstances under which an employer may be held liable for sexually harassing acts of supervisory employee).
102. 524 U.S. 775 (1998).
103. 524 U.S. 742 (1998).

these linked decisions, the Supreme Court ruled that an employer is strictly liable under Title VII for any sexual harassment by a supervisor that results in a "tangible employment action."[104] If no such action occurs, an employer may still be liable for hostile work environment sexual harassment engaged in by managers or supervisors through on-the-job supervisory misconduct, but only if the employer failed to exercise reasonable care and the victim unreasonably failed to avoid the harm.[105]

In these cases, the Supreme Court put forth a test by which an employer may affirmatively defend against a hostile work environment claim.[106] The employer may avoid liability if it can establish that "(1) it used reasonable care to prevent and correct any harassment (such as by having a sexual harassment policy containing a complaint procedure of which employees were aware), and (2) the employee unreasonably failed to make a complaint under the policy or to avoid harm otherwise."[107]

This test for employer liability is significant for several reasons. It reveals the Supreme Court's view that both defendant employers' and plaintiff employees' actions—before and after harassment allegedly occurs—are under scrutiny in a sexual harassment case; furthermore, it reflects the Court's opinion that employers can defend against claims of hostile work environment sexual harassment by managers or supervisors even if the harassment does in fact take place.

Employers may also be liable for the actions of co-workers without supervisory positions. The general rule applied when a co-worker harasses an employee is to hold the employer liable for such actions if "the employer knew, or should have known, of the harassment."[108] Accordingly, an employer may avoid liability by proving that it took "immediate and appropriate corrective action" upon learning of the alleged harassment.[109]

In *Williams v. General Motors Corp.*,[110] the Sixth Circuit explained how employer liability issues affect the prima facie case of hostile work environment and the totality-of-the-circumstances test:

> We recognize that district courts are required to separate conduct by a supervisor from conduct by co-workers in order to apply the appropriate standards for employer liability, the fifth element in a hostile-work-environment claim. However, the totality-of-the-circumstances test mandates that district courts consider harassment by all perpetrators combined when analyzing whether a plain-

104. *Burlington*, 524 U.S. at 762–63; *Faragher*, 524 U.S. at 808.

105. *See Burlington*, 524 U.S. at 765. "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." *Id.*

106. *See id.*

107. LITTLER MENDELSON, THE 1999 NATIONAL EMPLOYER 240 (1999).

108. *Id.* at 241.

109. *Id.*

110. 187 F.3d 553 (6th Cir. 1999).

> tiff has alleged the existence of a hostile work environment, the fourth element of a hostile-work-environment claim. The totality of the circumstances, of necessity, includes all incidents of alleged harassment; as such, district courts must not conduct separate analyses based on the identity of the harasser unless and until considering employer liability.[111]

Employing workers in a blue-collar environment does not impose upon employers a duty to make sure their workers are always on their best behavior. In *Galloway v. General Motors Service Parts Operations*,[112] the Seventh Circuit held that although a co-worker's actions toward the plaintiff were "undignified and unfriendly,"[113] the conduct was not based on the plaintiff's sex and thus did not constitute hostile work environment sexual harassment.[114] As one commentator noted, "[i]n deciding whether conduct is severe enough to establish [a] hostile environment, it will be necessary to distinguish between words and conduct which are 'mere vulgar pleasantries' what is considered shop talk, and words and conduct which have crossed the line into the deeply offensive and sexually harassing."[115]

The defendant employer in *Baty v. Willamette Industries, Inc.* suggested one method by which employers should be allowed to utilize blue-collar-related work environment evidence.[116] In its posttrial motion for judgment as a matter or law, or alternatively, for a new trial or remittitur, the defendant argued that the trial court had "erred in not including in the hostile work environment [jury] instructions the Tenth Circuit's statement in *Gross* that language is 'rough hewn and vulgar' in some environments."[117] Although that contention was ultimately rejected by the district court, it seemed to have been discredited merely as part of a general rejection of the *Gross v. Burggraf Construction Co.*[118] holding.

As courts increasingly adopt the premise that in hostile work environment sexual harassment cases, the totality-of-the-circumstances test necessarily requires analysis of evidence as to the nature and conditions of the work environment in which the harassment is alleged, inclusion of this type of information in jury instructions is likely to become more widespread.

111. *Id*. at 562–63.

112. 78 F.3d 1164 (7th Cir. 1996).

113. *See* Deborah F. Buckman, Annotation, *Conduct of Plaintiff as Defense in Action for Employment Discrimination Based on Sexual Harassment Under Federal Civil Rights Statutes*, 145 A.L.R. FED. 459, 472–73 (1998).

114. Galloway, 78 F.3d at 1168.

115. Jana Howard Carey, *Defending Sexual Harassment Claims*, 587 P.L.I./L.I.T. 7, 23 (1998) (citing Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1010 (7th Cir. 1994)); *see also* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (recognizing Title VII was not meant to "purge the workplace of vulgarity").

116. Baty v. Willamette Indus., Inc., 985 F. Supp. 987 (D. Kan. 1997).

117. *Id.* at 997 (citing Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1538 (10th Cir. 1995)).

118. 53 F.3d 1531 (10th Cir. 1995).

IV. RECOMMENDATION

In light of prior case law development on the analysis of hostile work environment sexual harassment claims,[119] the Sixth Circuit's recent holding in *Williams v. General Motors Corp.*[120] is tenuous at best. The proper examination of hostile work environment sexual harassment claims under Title VII must include consideration of the type of work being done and the work environment as a whole. Even those courts that *have* recognized a difference between blue-collar and white-collar environments have not adequately explained their methods of analyzing the issues relevant to such a recognition.[121] In addition, evidence of the plaintiff's knowing and intelligent "acceptance" of the conditions of the workplace upon being informed prior to hiring should be considered relevant to the defenses of employers.

In order to resolve the disparities between the circuit courts in analyzing hostile work environment claims, courts should consider all relevant factors—the actual totality of the circumstances[122]—in evaluating sexual harassment claims. In proposing a true application of this standard, by which both blue- and white-collar hostile work environment claims should be analyzed, several initial issues must be addressed: How does the type of work environment become established? What factors are relevant? Who has the burden of proof in providing work environment evidence? In addition, the policy implications of taking into account the work environments in which sexual harassment claims arise, and, conversely, the policy implications of failing to do so must be examined.

Consideration of all relevant factors—the totality of the circumstances—in evaluating sexual harassment claims must include the type of work environment within which the claim arose, including the general atmosphere, the camaraderie of workers, the typical formality or informality of language used, any sexual tension in the workplace, and the way in which the plaintiff seems to fit in with the work environment.[123]

119. *See* cases cited *supra* notes 13 and 54.

120. 187 F.3d 553 (6th Cir. 1999).

121. *See generally* cases cited *supra* note 13.

122. *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(b) (1985); *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1985) (applying the totality-of-the-circumstances test).

123. These types of considerations have been effectively employed. For example, in *Rabidue v. Osceola Refining Co*., 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), District Judge Newblatt, writing for the majority, stated:

> [In Title VII cases, the judiciary is entitled] to consider the nature of the employment environment in which the given plaintiff suffered the alleged harassment. This in turn authorizes courts to consider factors such as the educational background of the plaintiff's co-workers and supervisors, the physical make up of the plaintiff's work area, and the reasonable expectation of the plaintiff with respect to the kind of conduct that constitutes sex harassment.
>
> Thus, . . . the standard for determining sex harassment would be different depending upon the work environment. Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this.

This evidence would be relevant to both the presentation of the defense and the plaintiff's rebuttal of that defense, if any.

In suggesting that the proper analysis of any sexual harassment claim necessitates examination of the work environment in which the claim developed, this note does not propose a new, more restrictive standard of proof for blue-collar plaintiffs in sexual harassment cases; rather, it urges the effective expansion and more comprehensive application of the totality-of-the-circumstances test previously sanctioned (yet ineffectively utilized) by the U.S. Supreme Court.[124] Of course, several competing considerations permeate any claim for hostile work environment sexual harassment—some political, some legal, and some purely social.

A. Establishing Blue-Collar and White-Collar Work Environments

A true application of the totality-of-the-circumstances test, as set forth in *Meritor Savings Bank v. Vinson*,[125] requires analysis of the type of work environment in which a sexual harassment claim arises. In order to establish whether a sexual harassment claim stems from a blue- or white-collar environment, the parties involved in such a case should be allowed to present evidence to the court in an effort to establish the type of environment at issue.

There are several methods by which courts may obtain the relevant knowledge needed to analyze the type of work environment involved in a sexual harassment claim. Allowing evidence to be presented as to the culture of the job site and the plaintiff's understanding and acceptance of that environment would assist courts in clarifying some of the gray areas in these types of claims. In his concurrence to the *Harris v. Forklift Systems, Inc.*[126] decision, Justice Scalia noted the need for a more refined explication of the factors to be analyzed in sexual harassment claims:

> [The current "test" for sexual harassment] does not seem to me a very clear standard . . . . Today's opinion does list a number of factors that contribute to [a finding of a hostile work environment], . . . but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude.[127]

As this quote suggests, the proper analysis of hostile work environment sexual harassment claims is hindered by a multitude of indeterminate factors. A wholesale reform of the manner in which sexual harassment claims are examined is, however, quite unlikely to occur. Working within the standards already set—and a refined contemplation and appli-

Id. at 430.

124. *See Meritor Sav. Bank*, 477 U.S. at 69.

125. *Id.*

126. 510 U.S. 17 (1993).

127. *Id.* at 24 (Scalia, J., concurring).

cation of those standards—may be the only option which leads to a more precise, practical analysis.

B. Employee Acceptance of Certain Work Site Conditions

In addition to consideration of the type of environment in which sexual harassment is alleged, evidence that an employee plaintiff accepted the conditions of the workplace when accepting a job also should be considered in hostile work environment cases. In certain work environments where the employer recognizes that fellow employees on the job site may be considered unusually rough or vulgar, some employers now disclose the nature of the job site up front and subsequently ask new employees to sign agreements—waivers—indicating the new hire's acceptance of the conditions in which he or she will be working.[128]

This use of waivers may be useful in later sexual harassment claims arising out of just such environments. A waiver should be considered direct evidence of a sexual harassment plaintiff's acceptance of some of the more innocuous crude comments, pranks and so forth that may occur on the job.

This waiver should not, however, protect the employer from sexual harassment that would offend the reasonable woman in a hostile work environment plaintiff's position. Waivers would only be useful, as a practical matter, in those cases where the plaintiff's claim generally lacks merit and/or is based on a retaliatory motive, or where the actions alleged were presumably not based on the plaintiff's sex. A suggestion that more factors be taken into account in hostile work environment sexual harassment claims is not a recommendation that women in certain types of environments should be forced to endure actions that, to the reasonable woman, are offensive enough for the victim to deserve recompense.

C. Employer Defenses

The burden of persuasion in a sexual harassment case lies with the plaintiff.[129] However, once a plaintiff has established a prima facie case, the burden of proof—but not persuasion—shifts to the defendant to put

128. *See* Penny Nathan Kahan & Lynn Urkov Thorpe, *Evaluation and Investigation of Discharge Claims: Employee's Perspective*, ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION MAIN HANDBOOK 18–19 (Oct. 1994). The legal validity of such prospective waivers is still in doubt, however, as no cases to date have upheld this practice. Further, under *Alexander v. Garnder-Denver Co.*, 425 U.S. 36 (1974), an employee's waiver of rights to future discrimination claims under Title VII was held in violation of public policy. *See generally id.*

129. *See* Baty v. Willamette Indus., Inc., 985 F. Supp. 987, 991–93 (D. Kan. 1997). In many cases, this task may be fairly difficult to accomplish. For example, "[c]ounsel for the plaintiff must present a totality of circumstances establishing that the harassing conduct was so severe and pervasive that it created an abusive working environment. This requires a great deal of convincing evidence." Buckman, *supra* note 113, at 472.

forth a legitimate defense.[130] As part of the defendant employer's response to a hostile work environment sexual harassment claim, employers should be allowed to call employees to the stand to describe the conditions of the place of business and the manner in which people typically work together on the job. This evidence would go to the type of work environment involved in each case. Arguably all such evidence should be relevant so long as it directly pertains to the atmosphere in which the harassment is alleged. However, the plaintiff should be allowed to rebut a defendant's evidence that suggests the harassment occurred in one type of environment with evidence that the defendant's description of the work environment is incorrect or misleading.[131]

Employers are held to different standards of liability depending on the position the alleged harasser held with the company. If the offensive conduct is committed by a co-worker, an employer is only liable if the employer was informed of the offending conduct but "failed to take reasonable steps" to remedy it.[132] Thus, an employer can defend against a claim of co-worker sexual harassment by establishing that it was not aware of the conduct, or alternatively, that once it learned of the harassment, it took prompt and effective remedial measures in response.[133] When sexual harassment of an employee is committed by a supervisor, the defendant employer liability is "dictated by traditional agency theory principles."[134] Thus, an employer may escape liability by showing that it

130. *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (holding that a burden-shifting method of proof applies in Title VII discrimination cases).

131. As previously discussed, one of the major challenges in considering the type of work environment is determining what jobs and/or workplaces constitute blue-collar or white-collar environments. In *Anaya v. Hansen*, 781 F.2d 1 (1st Cir. 1986), the court asked: "Is the operator of a medium-sized farm blue collar or white collar? What about an on-site engineer at a construction project? A semipro baseball player? True, there are some workers who can be clearly identified as 'blue collar,' but at a certain point, the term fades into ambiguity." *Id.* at 5. In searching for a clearer standard to apply, the court in *Anaya* looked to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, which defines blue-collar "merely as 'belonging or relating to a broad class of wage earners whose duties call for the wearing of work clothes or protective clothing[.]'" *Id*. at 5 n.6. Finding that definition unsatisfactory, the court also considered the method put forth by the plaintiff-appellant's expert, who used census questionnaires to group job classifications as blue- or white-collar. In court, the expert testified about this procedure:

> We coded occupations using standard census. In the sense that the census has [a] substantive list of several thousand job titles, we were able to do that with considerable confidence. Those categories . . . can be reduced into essentially . . . 9 or 10 categories, which are essentially professional, technical, managerial, sales, clerical, operative, craftsmen and kindred workers, laborers, and service workers. Those were then reduced ultimately to a general classification of white collar or blue collar.

Id.

132. Carey, *supra* note 115, at 29 (citing Kauffman v. Allied Signal, Inc., 970 F.2d 178, 183 (6th Cir. 1992)).

133. *See* Carey, *supra* note 115, at 29–30.

134. *Id*. at 35. "The Restatement (Second) of Agency § 219(1) holds an employer responsible for the torts of its employees acting within the scope of their employment . . . or if the employee uses his apparent authority to further the harassing conduct." *Id.* (citations omitted).

took action to end the offensive conduct immediately upon learning of it, which terminates its agency relationship with the offending supervisor.[135]

One commentator has proposed allowing defendant employers to utilize an additional defense of assumption of risk by employees.[136] "Assumption of risk is an affirmative tort defense, the general principle of which is that a plaintiff who knowingly and voluntarily assumes a risk of harm arising from the negligent or reckless conduct of a defendant is barred from recovery for that harm."[137] This defense is based on the plaintiff's consent in that the plaintiff agrees to assume some or all of the responsibility for future negligence by the defendant.[138]

In cases of hostile work environment sexual harassment, the assumption of risk defense should apply to claims in which a blue-collar worker, and perhaps a white-collar worker who is entering an unusually coarse environment, is informed of the conditions of the workplace by an employer and either expressly or implicitly accepts those conditions in taking a position with the employer. The assumption of risk defense would be particularly applicable in cases where the employee signed a waiver stating that she was informed of the working conditions before commencing employment. Of course, as in basic tort law, defendants could not use this waiver to escape liability for claims in which harassment of an employee is so offensive that applying the assumption-of-risk doctrine would violate public policy.[139]

D. Effects on Future Claims

The use of a broader totality-of-the-circumstances test—one which takes into account the type of work environment in which sexual harassment is alleged, as well as the plaintiff's informed acceptance of the conditions of the workplace—would serve more than an academic purpose. Encouraging courts to take into account these factors may discourage

135. *See id.* at 38.

136. *See generally* Kelly Ann Cahill, Note, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107 (1995) (examining potential assumption-of-risk defense in hostile work environment claims).

137. *Id.* at 1117 (citation omitted).

138. *See id.*

139. *See id.* at 1118–19.

> Tort law has established limits to the defense of assumption of risk. For example, courts have refused to give effect to some express agreements by which the plaintiff assumed a risk or to recognize implied assumption of risk, when allowing the plaintiff to assume the risk is contrary to public policy.

Id. at 1118 (citations omitted).

This issue is particularly relevant to blue-collar workers, some of whom may not be fully aware of their rights when accepting certain employment conditions:

> Courts are generally concerned with protecting particular classes of people from those who may take unfair advantage of them. An express agreement for the assumption of risk will not, in general, be enforced, and conduct will not, in general, be found to constitute implied assumption of risk when the defendant has such greater bargaining power than the plaintiff that their agreement does not represent the plaintiff's free choice.

Id. at 1118–19.

some potential litigants from bringing those hostile work environment claims that are clearly unsupported by evidence or merely retaliatory in nature.[140] The weaker cases in blue-collar environments will likely fall away, either before or after commencing litigation, by utilizing a standard that discourages overreaching claims. This result would protect both plaintiffs and defendants: plaintiffs with valid claims would likely find their cases proceed faster with the EEOC and in the court system, and employer defendants who manage blue-collar environments would be protected from the more frivolous lawsuits of current and former employees.

E. Addressing Counter-Arguments

Taking blue- and white-collar environment evidence into account as part of a totality-of-the circumstances test may not thoroughly resolve the myriad of unrefined standards that accompany Title VII hostile work environment claims. However, such consideration would substantially improve upon several of those problems, including those involving public policy considerations and questions of employer liability.

It may be argued that taking into account work environment evidence would effectively hold women in blue-collar work environments to a higher standard than those plaintiffs whose claims arise in a white-collar situation, which may be likened to some form of class or socioeconomic status discrimination. However, clearly not all women who accept blue-collar positions are in lower socioeconomic positions than are women who work in office settings, for example. The recommendation put forth in this note would not differentiate claims based on the specific job that a plaintiff holds within a certain environment; instead, only information about the work environment as a whole would be considered.

Furthermore, the fact that a plaintiff took a position in a blue-collar environment does not affect the "reasonableness" standard applied to her claim. As the judicial trend leans toward use of the reasonable woman standard, it is evident that this standard is relevant to an analysis of blue- and white-collar hostile work environment claims. The question in any hostile work environment case using the reasonable woman standard would be: What behavior would the reasonable woman consider harassment in this particular work situation? In general, it does not seem unreasonable to assume that the reasonable woman would have different expectations of some work environments than others. The proposal put

140. One practitioner noted:

> Claims of sexual harassment in the workplace are becoming popular for disgruntled employees who have been terminated from their employment or who continue to suffer in an unpleasant and abusive work environment. Of course, many of these claims are valid and based on substantial evidence. Nonetheless, the claim of sexual harassment can clearly be taken too far and applied in too many situations.

Buckman, *supra* note 113, at 470.

forth in this note does not suggest that sexually harassing behavior be tolerated in a blue-collar environment; instead, it merely demonstrates that an accurate usage of the totality-of-the-circumstances requirement would take into account many factors, including the type of behavior a reasonable person/woman would expect to find in a particular work situation.

Taking into account blue-collar environment evidence does not prevent a woman whose personal demeanor is consistent with a more coarse blue-collar environment from recovering on a sexual harassment claim. Evidence that a plaintiff engaged in frank sexual discussions, told sexual jokes, or used foul or vulgar language on the job does not, in most cases, affect her claim so long as the court finds that the reasonable person/woman *and* the plaintiff would find the conduct of a supervisor or coworker to be harassing.[141] In other words, evidence that a female plaintiff in a coarse blue-collar environment took part in some of the crude comments, pranks, and so forth that some such environments may facilitate does not protect her employer from liability.

In order to recover on a hostile work environment claim, a plaintiff must demonstrate that "at some point the plaintiff clearly made coworkers and superiors aware that in the future such conduct would be considered unwelcome."[142] Despite certain rules limiting the use of a plaintiff's conduct against her, a plaintiff employee may be able to use the workplace reputation of her alleged harasser against him. This, most courts have found, may be "relevant in determining his credibility in denying that he engaged in sexual misconduct."[143] It seems counterintuitive that the workplace reputation of an alleged harasser may generally be considered in a hostile work environment case, yet some courts refuse to allow evidence to be introduced which may establish the atmosphere of the workplace itself.

141. *See generally* Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987) (stating that a flight attendant's use of foul and sexual language did not bar her claim); *see also* Carr v. Allison Gas Turbine Div., 32 F.3d 1007 (7th Cir. 1994) (holding that a female tinsmith did not welcome harassment by male co-workers despite the fact that she took part in crude language and behavior). *But see* Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559 (M.D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991) (holding that plaintiff's active involvement in a sexually explicit workplace discredited her hostile work environment claim).

A female plaintiff's conduct both on and off the job site has been argued to be relevant to her hostile work environment sexual harassment claim, but typically, "defense arguments based on the plaintiff's conduct outside the workplace have not been successful in refuting claims of sexual harassment." Buckman, *supra* note 113, at 470. However, as in the aforementioned *Weinsheimer* case, "[e]vidence of the plaintiff's conduct within the workplace . . . has been more effective in convincing the courts that the plaintiff was not in fact offended or harassed." *Id.*

142. Buckman, *supra* note 113, at 478 (citing Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559 (M.D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991)).

143. Carey, *supra* note 115, at 64.

V. CONCLUSION

In hostile work environment sexual harassment cases, courts should consider evidence of blue-collar and white-collar work environments in evaluating the "totality of the circumstances" as prescribed by the Supreme Court's ruling in *Meritor Savings Bank v. Vinson*.[144] The Sixth Circuit's recent holding in *Williams v. General Motors Corp.*,[145] stating that such evidence is irrelevant, is misguided and illogical. That court's holding ignores several of the basic premises on which Title VII was established. The proper analysis for courts to apply in a Title VII claim should include recognition of the type of work being done in a particular environment and consideration of the working conditions as a whole.

Furthermore, evidence of the plaintiff's knowing and intelligent acceptance of the conditions of the workplace upon being informed prior to hire should be considered relevant to the defenses of employers, much like the assumption-of-risk, affirmative defense that is applied in some tort claims.

These proposed modifications to the current method of analysis of hostile work environment sexual harassment claims would remedy much of the confusion over the standards to be applied in varying types of cases. Because Title VII provides little guidance for the application of its prohibitions, and, consequently, courts are essentially left to set the precedent in this field of law, the vague standards applied by courts today necessitate revision.

Although the basic premise of Title VII is familiar—i.e., the protection of individual rights against discrimination—beyond that, little is defined. Courts must begin implementing new, workable methods of evaluating one of the most rapidly expanding areas of Title VII litigation in order to provide plaintiffs with notice of the standards to be applied to their claims, protect employers from constantly defending against frivolous litigation, and prevent judicial incongruity in the area of hostile work environment sexual harassment.

144. 477 U.S. 57 (1986).
145. 187 F.3d 553 (6th Cir. 1999).