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Employment Law

I. LIQUIDATED DAMAGES CLAUSE IN PARTNERSHIP AGREEMENT HELD NOT NONCOMPETITION COVENANT

In *J.W. Hunt & Co. v. Davis*[1] the South Carolina Court of Appeals held that a liquidated damages clause in a partnership agreement was not a covenant not to compete and was not subject to the reasonableness test used in evaluating noncompetition clauses.[2] In *Davis* the court of appeals continued to define covenants not to compete narrowly. However, by focusing exclusively on the classification question, the court left unresolved the more important issue of how to treat clauses that do not fall into the category of covenants not to compete but that produce the same effect.

J.W. Hunt and Company (J.W. Hunt), a public accounting firm in South Carolina, operates as a general partnership. Davis became a voting partner in 1971. In 1986 the partners adopted a new partnership agreement that included Article VII, which allows a withdrawing partner to service former clients if the partner pays J.W. Hunt liquidated damages calculated by a preset formula.[3] In 1990 Davis resigned from J.W. Hunt and began to service several of the partnership's clients. The partnership brought suit against Davis seeking

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1. ___ S.C. ___, 437 S.E.2d 557 (Ct. App. 1993).

2. The reasonableness test is described in *Rental Uniform Service v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983) (per curiam). The *Dudley* test requires consideration of five factors. The prohibition must be: (1) necessary for protection of the employer's legitimate interest, (2) not unduly harsh or oppressive in curtailing the employee's legitimate efforts to earn a livelihood, (3) reasonable from a sound public policy standpoint, (4) supported by valuable consideration, and (5) reasonably limited as to time and place. *Id.* at 675-76, 301 S.E.2d at 143 (citing Sermons v. Caine & Estes Ins. Agency, 275 S.C. 506, 273 S.E.2d 338 (1980)).

3. Article VII of the J.W. Hunt partnership agreement contained the following clause:

> In the event a Partner either voluntarily or involuntarily leaves the employ of the Firm and such partner either "directly or indirectly" within a period of three (3) years of such departure from the Firm does work for former or existing clients of the Firm, such partner shall pay the Firm the following as liquidated damages: An amount equal to two (2) times the annual gross billings to the client for the last full year the client was a client of the Firm, which amount shall be paid within thirty (30) days of written demand by the Firm. The meaning of "directly or indirectly" is that such Partner will not render public accounting services in any of its phases, as an individual practitioner, as a member of a partnership of which he is a partner, or as an employee for an employer; provided, however, this provision shall not apply if such partner is employed by a client as an employee on a full-time basis as a treasurer, comptroller or in a similar capacity.

Davis, ___ S.C. at ___ n.1, 437 S.E.2d at 558 n.1.

enforcement of Article VII. Using the set formula, the trial court determined that Davis owed J.W. Hunt $879,068 in damages. Davis appealed.[4]

Affirming the trial court's decision, the court of appeals examined cases concerning similar provisions in accounting partnership agreements to decide whether Article VII was a covenant not to compete.[5] In *Dixon, Odom & Co. v. Sledge*,[6] *Engel v. Ernst*,[7] and *Francis v. Schlotfeldt*,[8] the partners technically were free to practice their trade and to compete with their previous partners.[9] Similarly, Article VII does not prevent Davis from competing with his former partners; he can practice his profession anywhere and can offer accounting services to anyone, including clients of J.W. Hunt. The court noted, "Article VII neither prohibits Davis from practicing public accounting for any specific period of time nor from servicing any client in any specific geographic region."[10] The court decided, therefore, that Article VII was not a covenant not to compete.[11]

Having characterized Article VII as "nothing more than a term of an ordinary contract,"[12] the court refused to apply the reasonableness test applied to covenants not to compete. Despite the potential burden on Davis, the court enforced the provision as "'a [contractual] business arrangement'"[13] "'without inquiry into its fairness.'"[14]

The court did not address the central issue the appellant raised. The court discussed whether Article VII was a covenant not to compete, a point that neither party debated.[15] According to the court, "On appeal, Davis argues the trial judge erred in concluding Article VII is not a covenant not to compete."[16] This statement of the issue does not reflect the appellant's position. Arguing "that South Carolina law requires that Article VII of the Hunt partnership agreement be analyzed under the same rules which control

4. *Id.* at ___, 437 S.E.2d at 558.

5. *Id.* at ___, 437 S.E.2d at 559.

6. 296 S.E.2d 512 (N.C. Ct. App. 1982).

7. 724 P.2d 215 (Nev. 1986) (per curiam).

8. 704 P.2d 281 (Kan. Ct. App. 1985).

9. *See Francis*, 704 P.2d at 382; *Dixon*, 296 S.E.2d at 515; *Engel*, 724 P.2d at 217.

10. J.W. Hunt & Co. v. Davis, ___ S.C. ___, ___ 437 S.E.2d 557, 559 (Ct. App. 1993).

11. *Id.* at ___, 437 S.E.2d at 560.

12. *Id.* at ___, 437 S.E.2d at 560.

13. *Id.* at ___, 437 S.E.2d at 560 (quoting Miller v. Williams, 300 So.2d 752, 755 (Fla. Dist. Ct. App. 1974), *cert. denied*, 314 So.2d 780 (Fla. 1975)).

14. *Id.* at ___, 437 S.E.2d at 560 (quoting Francis v. Schlotfeldt, 704 P.2d 381, 382 (Kan. Ct. App. 1985)).

15. See generally Final Brief of Appellant and Final Brief of Respondent, in which both parties argue as if the provision were not a covenant not to compete.

16. *Davis*, ___ S.C. at ___, 437 S.E.2d at 558.

covenants not to compete and that the Court erred in failing to do so,"[17] the appellant indirectly conceded that Article VII is not a covenant not to compete.

By focusing on the classification of Article VII, the court of appeals missed an excellent opportunity to affirm and clarify South Carolina's position established by *Almers v. South Carolina National Bank*[18] on how to treat such clauses. In *Almers* the South Carolina Supreme Court held that a clause that does not specifically prohibit competition nevertheless is treated as a covenant not to compete when the clause accomplishes the same practical result.[19] The court's decision placed South Carolina in the minority.[20]

Because *Almers* is one of only two cases on point from South Carolina, the scope of the rule announced therein is debatable. *Almers* and *Wolf v. Colonial Life & Accident Insurance Co.*[21] each concerned forfeiture clauses in employment contracts.[22] Therefore, arguably South Carolina's rule only covers forfeiture agreements. Furthermore, whether the contract's form is a determinative factor is unresolved. For example, perhaps *Almers* should apply only to cases involving employment contracts and not partnership agreements. Had the *Davis* court applied *Almers* it would have found that distinctions of form and penalty are unimportant.

Examining the reasoning of *Almers* and *Wolf*, it becomes apparent that the rule adopted by those courts should apply equally to the present case. The *Almers* case involved a forfeiture provision if the employee competed with the employer.[23] The court held that the clause accomplished the same purpose as a covenant not to compete and should be treated similarly, stating that

> our discussion throughout this case illustrates that the covenant not to compete and forfeiture upon competing are but alternative approaches to accomplish the same practical result. Therefore, we would not substitute the reasoning of the pure logician for the realities of the business world and embark on a separate course of treatment for covenants not to compete

17. Final Brief of Appellant at 5.

18. 265 S.C. 48, 217 S.E.2d 135 (1975).

19. *See id.* at 59, 217 S.E.2d at 140.

20. *See id.* at 53-56, 217 S.E.2d at 137-38. The *Almers* court explained that the majority approach does not analogize covenants not to compete to provisions accomplishing the same result. The majority's first reason is that other penalties would not have the same immediate and overwhelming impact as a noncompetition clause that "'might disable a former employee from earning a living at what is perhaps the only occupation for which he is qualified.'" *Id.* at 55, 217 S.E.2d at 138 (quoting Couch v. Administrative Comm. of Difco Lab. Inc. Salaried Employees Profit Sharing Trust, 205 N.W.2d 24, 26 (Mich. Ct. App. 1972)). A second justification is that the freedom to contract would be impaired. *Almers*, 265 S.C. at 56, 217 S.E.2d at 138.

21. 309 S.C. 100, 420 S.E.2d 217 (Ct. App. 1992) (per curiam).

22. *See Wolf*, 309 S.C. at 103, 420 S.E.2d at 218-19; *Almers*, 265 S.C. at 50-51, 217 S.E.2d 135-36.

23. *See Almers*, 265 S.C. at 50-51, 217 S.E.2d at 136.

> and forfeiture provisions. When pruned to their quintessence, they tend to accomplish the same results and should be treated accordingly.[24]

Wolf involved an agreement that did not prohibit competition by its terms but called for forfeiture of commissions in the event of competition. The court ruled, "Such clauses are subject to the same requirements and strict analysis as covenants not to compete."[25]

In both cases, the courts examined the agreement's function and not its form to determine whether to apply the reasonableness test. Similarly, in a case like *Davis*, the form of the penalty merits application of the reasonableness test. Whether the penalty is a forfeiture or fee percentage is inconsequential.

The three policy justifications given in *Almers* for following the minority rule all support the reasonableness test's application here. First, the provision in *Almers* unduly burdened the employee. As a result, "while the employee is able to currently support himself and his family, it is likely that he or others similarly situated may be bereaved when the time for retirement has come."[26] Second, the effect of such provisions injures the general public by deterring employees from taking competitive employment.[27] Finally, the court noted the provisions' invalidity at common law. Covenants not to compete became the exception only when reasonable. However, when an employer cannot prevent the employee from competing, but can only use leverage by divesting income rights, as here, the employer attempts to avoid competition rather than to protect legitimate business interests.[28]

Since *Almers*, other courts have considered agreements similar to Article VII and have ruled that the reasonableness test applied. In *Peat Marwick Main & Co. v. Haass*[29] the Texas Supreme Court decided a case with almost identical facts and found the provision invalid.

In *Haass* two accounting firms merged pursuant to an agreement.[30] The agreement included a provision that if Haass withdrew taking clients from the merged firm, Haass would compensate the firm by paying an amount equal to "all fees and expenses, billed or unbilled, due to the Firm from such clients" and "all direct costs, . . . paid or to be paid by the Firm in connection with

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24. *Id.* at 59, 217 S.E.2d at 140.
25. *Wolf*, 309 S.C. at 106, 420 S.E.2d at 220 (citing *Almers*, 265 S.C. 48, 217 S.E.2d 135).
26. *Almers*, 265 S.C. at 56-57, 217 S.E.2d at 139.
27. *Id.* at 57-58, 217 S.E.2d at 139.
28. *Id.*, 265 S.C. at 58-59, 217 S.E.2d at 140.
29. 818 S.W.2d 381 (Tex. 1991).
30. *Id.* at 382.

the acquisition of such client[s]."[31] The court held such covenants subject to the same standards of reasonableness as covenants not to compete.[32]

One of the court's reasons for its holding was the nature of the breach. Even absent a technical prohibition on competing, competition is the conduct for which damages are assessed. The penalty's deterrent effect functions as though the agreement stated expressly that the departing member will not compete when the damages are sufficiently severe. The penalty inhibits competition in virtually the same way as a covenant not to compete.[33]

In *Philip G. Johnson & Co. v. Salmen,*[34] the Supreme Court of Nebraska, considering another similar set of facts, reached the same result. An accounting firm brought action for accounting and to recover damages against a former partner. The departing partner, Salmen, withdrew from the partnership and later accepted professional employment from the firm's former clients. The accounting firm argued that the provision was not a covenant not to compete because it did not prohibit Salmen from continuing in the accounting field but obligated him to remit the fees he earned from servicing certain clients during the three years after his withdrawal from the partnership.[35] The court quickly dismissed this argument, stating that "we consider the distinction put forth by appellant to be artificial and meaningless in any real sense. The effect of the provision, if valid, is to prevent Salmen from earning income by competing for clients served by Johnson at any time."[36]

The appellant's second argument was that the arrangement concerned not employers and employees but partners. The Nebraska Supreme Court explained that the court had passed previously on the question of covenants not to compete between partners.[37] More importantly, the court noted that "a partner with such a minor interest as that held by Salmen is in a real sense no different than an employee."[38] In *Davis* the court should have considered a similar analysis.

Finally, the *Davis* court seemed to place some weight on Article VII's "afford[ing] Davis protection against withdrawing partners from the time of the Article's adoption until Davis' withdrawal."[39] The mutual benefit seems to have influenced the court in its decision to enforce strictly the provision. In *Henshaw v. Kroenecke*[40] the Texas Supreme Court also recognized the

31. *Id.* at 383 n.3.
32. *Id.* at 385.
33. *Id.*
34. 317 N.W.2d 900 (Neb. 1982).
35. *Id.* at 902-03.
36. *Id.* at 903.
37. *See id.* (citing Adams v. Adams, 58 N.W.2d 172 (Neb. 1953)).
38. *Id.*
39. J.W. Hunt & Co. v. Davis, ___ S.C. ___, ___, 437 S.E.2d 557, 559 (Ct. App. 1993).
40. 656 S.W.2d 416 (Tex. 1983).

importance of mutuality of benefit. *Henshaw* involved the enforceability of a covenant not to compete in a partnership agreement which provided for liquidated damages similar to the J.W. Hunt agreement.[41]

The *Henshaw* court explicitly rejected that only the partnership could benefit from the agreement and that the agreement was unreasonable because the only one of the partners, Henshaw, benefitted from the agreement.[42] The court held that Henshaw could benefit from the agreement and explained that the other partner, Kroenecke, benefitted too: "The covenant not to compete was an integral part of the pre-partnership formation negotiations. Henshaw was the person for whose benefit the restraint was imposed. Kroenecke, however, also benefitted by coming into an established business."[43]

Nevertheless, the court applied a reasonableness test to the covenant. In determining the terms' reasonableness, the court noted that "Henshaw had a right to protect himself from the possibility that Kroenecke would establish a rapport with the clients of the business and upon termination take a segment of that clientele with him."[44] Further, the court explained that Henshaw's having a legitimate business interest to protect made the covenant reasonable.[45]

Similarly, the *Davis* court should have taken note of the mutual benefit provided by Article VII. However, the court should have considered it merely a factor in determining the provision's reasonableness.

The South Carolina Court of Appeals republished a definition of covenants not to compete in *Davis*. The more interesting and useful questions about the scope of South Carolina's rule regarding pseudo-covenants not to compete remained uninvestigated. Future cases involving this question may find that South Carolina courts will rely on recent cases from other jurisdictions and the reasoning of South Carolina cases. If so, *Almers'* scope will be expressly expanded to include all contractual provisions involving employment. Such a holding would remain consistent with the policy underlying the *Almers* case and with other cases.

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41. *See Davis*, ___ S.C. at ___ n.1, 437 S.E.2d at 558 n.1; *Henshaw*, 656 S.W.2d at 417.
42. *Henshaw*, 656 S.W.2d at 418.
43. *Id.*
44. *Id.* (citing Hospital Consultants v. Potyka, 531 S.W.2d 657 (Tex. Ct. App. 1975)).
45. *Id.*

II. U.S. SUPREME COURT SETS 'HOSTILE ENVIRONMENT' STANDARD FOR SEXUAL HARASSMENT CASES

In *Meritor Savings Bank, FSB v. Vinson*[1] the United States Supreme Court held that Title VII of the Civil Rights Act of 1964[2] prohibits hostile work environment sexual harassment as a form of sex discrimination.[3] In determining when such a violation occurs, the lower courts took different approaches.[4] Last Term the Court addressed what constitutes hostile work environment sexual harassment. In *Harris v. Forklift Systems*,[5] the Court concluded that a plaintiff does not have to prove psychological damage or other injury to recover under Title VII.[6]

In *Harris* the plaintiff, Theresa Harris, managed Forklift Systems, Inc. (Forklift) from April 1985 until October 1987. Charles Hardy was Forklift's president during this time. Hardy repeatedly insulted Harris while she worked at Forklift. For example, he told Harris several times, "'You're a woman, what do you know' and 'We need a man as the rental manager.'"[7] On one occasion he called he "'a dumb ass woman.'"[8] Hardy further harassed Harris when he "made her the target of unwanted sexual innuendos," proposed they "'go to the Holiday Inn to negotiate [Harris'] raise,'" asked her to retrieve coins from his front pants pocket, and asked her to pick up objects that he threw in front of her.[9]

Harris complained to Hardy about his behavior in August 1987. After Hardy promised to stop, Harris decided to stay at Forklift.[10] However, Hardy broke this promise. In September, when Harris was working with a

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1. 477 U.S. 57 (1986).

2. 42 U.S.C. § 2000e-2(a) (1) (1988).

3. *Vinson,* 477 U.S. at 66.

4. *Compare* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (requiring a plaintiff to show the conduct caused some tangible injury), *cert. denied*, 481 U.S. 1041 (1987) *with* Ellison v. Brady, 924 F.2d 872, 877-78 (9th Cir. 1991) (rejecting *Rabidue*'s requirement).

5. ___ U.S. ___, 114 S. Ct. 367 (1993). Harris brought her action before the passage of the Civil Rights Act of 1991. *See id.* at 369. Under the old Act, she was entitled only to equitable relief, which included reinstatement and back pay. *See* 42 U.S.C. § 2000e-5(g) (1988). Under the 1991 Act, in an intentional discrimination action under Title VII a plaintiff can recover compensatory and punitive damages. 42 U.S.C. § 1981a(a) (1) (Supp. III 1991). The 1991 Act also allows a plaintiff to have a jury trial. 42 U.S.C. § 1981a(c) (Supp. III 1991). For an overview of how the 1991 Act applies to sexual harassment cases see Marian C. Haney, *Litigation of a Sexual Harassment Case After the Civil Rights Act of 1991*, 68 NOTRE DAME L. REV. 1037 (1993).

6. *Harris*, ___ U.S. at ___, 114 S. Ct. at 371.

7. *Id.* at ___, 114 S.Ct. at 369 (quoting Petition for Cert. at A-13).

8. *Id.* at ___, 114 S.Ct. at 369 (quoting Petition for Cert. at A-13).

9. *Id.* at ___, 114 S.Ct. at 369 (alteration in original) (quoting Petition for Cert. at A-14).

10. *Id.* at ___, 114 S.Ct. at 369 (citing Petition for Cert. at A-16).

Forklift customer, Hardy asked her "'What did you do, promise the guy . . . some [sex] Saturday night?'"[11] This prompted Harris to quit, and to file suit against Forklift for sexual harassment.[12]

The district court found that Hardy's comments offended Harris and would offend a reasonable woman. Nevertheless, the district court denied Harris any relief, finding that Hardy's behavior did not cause Harris any psychological or other tangible injury. Thus, the district court dismissed the case, and the Sixth Circuit affirmed.[13]

The Supreme Court relied on Title VII and its decision in *Meritor*, holding that the plaintiff did not have to show that the harassment seriously affected her psychological well-being.[14] Title VII states that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[15]

The Court rejected a requirement that plaintiffs show the harassment seriously affected their psychological well-being because "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[16] The Court believed that an abusive work environment could cause an employee various harms before it affected the employee psychologically. Justice O'Connor wrote, "A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[17] Since Title VII's language is not confined to economic or tangible discrimination, the Court found that conduct producing these effects violates Title VII. The Court stated further that, even if the conduct did not produce any tangible effects, conduct creating an abusive work environment violated "Title VII's broad rule of workplace equality."[18]

In determining when a harasser's conduct violates Title VII, the Court reaffirmed *Vinson*'s test. The Court held that Title VII is violated "[w]hen 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."[19] This test has a

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11. *Harris*, ___ U.S. at ___, 114 S.Ct. at 369 (quoting from Petition for Cert. at A-17) (alteration in original).
12. *Id.* at ___, 114 S.Ct. at 369.
13. *Id.* at ___, 114 S.Ct. at 369-70.
14. *See id.* at ___, 114 S.Ct. at 370-71.
15. 42 U.S.C. § 2000e-2(a) (1) (1988).
16. *Harris*, ___ U.S. at ___, 114 S. Ct. at 370.
17. *Id.* at ___, 114 S.Ct. at 370-71.
18. *Id.* at ___, 114 S.Ct. at 371.
19. *Id.* at ___, 114 S.Ct. at 370 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57,

subjective and an objective prong. First, the victim must actually find the environment hostile. If the victim is not aware of the hostility, the Court noted that the conduct could not alter the victim's employment conditions.[20] Next, the plaintiff must satisfy the objective prong of this test. The Court concluded that offensive conduct does not violate Title VII when a reasonable person would not find that it creates a hostile working environment.[21]

The Court described this test as "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[22] The court admitted that there is no "mathematically precise test" to identify an abusive or hostile work environment.[23] In making this decision, the Court found that the fact finder needs to look at the totality of the circumstances.[24] Relevant 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."[25] Although all are relevant, "no single factor is required" or determinative.[26]

Then, the Court rejected Forklift's argument that the district court correctly applied the *Meritor* test. Although the district court found Hardy's conduct would not interfere with a reasonable woman manager's work performance, the Supreme Court feared that the lower court's application of the *Rabidue* test skewed its finding. Thus, the Court remanded the case for reconsideration.[27]

The Court's finding that a plaintiff does not have to show severe psychological harm is consistent with Title VII and the Court's holding in *Meritor*. Title VII does not suggest that a victim of sexual harassment is required to suffer any actual injury. In interpreting Title VII, the Court found that its ban includes discrimination that alters one's working conditions - the altering of working conditions is the injury.[28] Requiring a plaintiff to prove a tangible injury to recover damages is inconsistent with Title VII. Such a

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at 65, 67 (1986)).

20. *Id.* at ___, 114 S.Ct. at 370.

21. *Harris*, ___ U.S. at ___, 114 S. Ct. at 370.

22. *Id.* at ___, 114 S.Ct. at 370.

23. *Id.* at ___, 114 S.Ct. at 371.

24. *Id.* at ___, 114 S.Ct. at 371; *see also* 29 C.F.R. § 1604.11(b) (1993) (stating that the EEOC will look at the totality of the circumstances to determine if alleged behavior is sexual harassment).

25. *Harris*, ___ U.S. at ___, 114 S. Ct. at 371.

26. *Id.* at ___, 114 S.Ct. at 371.

27. *Id.* at ___, 114 S.Ct. at 370-71.

28. Meritor Sav. Bank, FSB v. Vinson, 477 U. S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

standard requires a higher level of harassing conduct than otherwise would be required to show an alteration of the plaintiff's working conditions.

This new standard seems to create a broader remedy than previously available. The Court indicated that a hostile environment is created when severe or pervasive discriminatory conduct exists, even if this conduct does not interfere with the plaintiff's work performance.[29] The Court's use of "severe or pervasive" shows that the plaintiff's work environment must do more than merely differ from the other employees' work environments before courts will find a violation of Title VII. Although Justices Scalia and Ginsburg would like to focus more on whether the conduct unreasonably interfered with the plaintiff's work performance, they would find a violation of Title VII when "the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'"[30]

Even though this standard will further the goal of workplace equality, it still allows a certain level of harassment. Because the test only outlaws conduct that a reasonable person would find hostile, it allows for a "reasonable" level of harassment.[31]

In trying to determine what an unreasonable level of harassment is, the Court did not fashion a per se rule. This uncertainty produces another benefit. Because no certain guidelines exist, employers may take more preventive steps to reduce potential liability. Thus, one may argue these precautionary steps would implement the Equal Employment Opportunity Commission's advice that prevention is the best policy.[32]

While the Court took this opportunity to clarify the standards for proving a hostile work environment, it left unanswered from whose perspective the fact finder should determine whether the conduct establishes a hostile work environment. Should courts use the standard of a reasonable person or of a reasonable woman? Even though the Court indicated that the fact finder should use a reasonable person standard,[33] a recent Seventh Circuit case shows this question is unresolved.[34] The proponents of the reasonable

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29. *See Harris*, ___ U.S. at ___, 114 S. Ct. at 371.

30. *Id.* at ___, 114 S.Ct. at 372 (Ginsburg, J., concurring) (alteration in original) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989)).

31. *See* Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 48 (1990) (arguing that any interference is unreasonable).

32. *See* 29 C.F.R. § 1604.11(f) (1993); *cf.* 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, 818-19 (1993) (discussing how employers' overreaction may bar legitimate conduct); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 483 (1991) (discussing how employers overregulate their employees' speech).

33. *See Harris*, ___ U.S. at ___, 114 S. Ct. at 370.

34. *See* Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 534 n.13 (7th Cir. 1993) (citing

woman standard argue that the reasonable person test does not give enough weight to women's views of sexual harassment. First, they argue the "reasonable person standard tends to be male-biased."[35] Second, courts and commentators point out that women may view as offensive conduct that men may consider harmless.[36] As one commentator stated, the reasonable person standard "is a stark denial of a range of social facts that make sexual harassment a distinctly different experience for women than it would be for men."[37] Because men control most workplaces, women may interpret harassing conduct as a statement of a woman's lack of ability to succeed.[38] Furthermore, women's view of sex also gives them a different perspective when faced with sexual harassment.[39] Thus, a reasonable woman standard will serve to highlight a woman's perspective of sexual harassment.

Despite these advantages, the reasonable woman standard has not escaped criticism.[40] First, even if courts do adopt this test, it does not guarantee women greater protection. In *Rabidue v. Osceola Refining Co.*,[41] the district court applied the reasonable woman standard, but did not find a hostile work environment.[42] Thus, the problem may not come from the test but from the perspective of those applying it.[43] However, with the passage of the 1991

Burns v. McGregor Elec. Indus., 989 F.2d 959 (9th Cir. 1993); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991)); *see also* Currie v. Kowalewski, 842 F. Supp. 57 (N.D.N.Y. 1994) (stating that *Harris* did not decide whether the reasonable person standard or the reasonable woman standard applies).

35. *Ellison*, 924 F.2d at 879; *see* Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1405 (1992).

36. *Ellison*, 924 F.2d at 878 (citing Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988); Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L. J. 1177 (1990); Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990); *see also* Jolynn Childers, Comment, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L. J. 854, 884-85 (1993) (supporting the reasonable woman standard because men and women frequently view sexual conduct differently).

37. Ehrenreich, *supra* note 36, at 1202.

38. *Id.* at 1203-05.

39. *Id.* at 1205.

40. Radtke v. Everett, 501 N.W.2d 155, 165-67 (Mich. 1993) (rejecting the reasonable woman standard under Michigan's Civil Rights Act); *see generally* Adler & Peirce, *supra* note 32, at 818-27; Childers, *supra* note 36, at 888-902.

41. 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

42. *Id.* at 433.

43. *See* Cahn, *supra* note 35, at 1433; Childers, *supra* note 36, at 901.

Civil Rights Act, which allows plaintiffs to have a jury trial,[44] women will not have to worry as much about white, middle-class, male judges[45] determining how a reasonable woman would view the conduct. Even though white, middle-class males will serve as jurors, their fellow female jurors can make them aware of women's different perspectives of sexual harassment.

Second, the adoption of the reasonable woman standard may perpetuate the differences between men and women rather than allowing each group to understand the other's views.[46] This standard seems to assume men do not have the capacity to understand women's perspective of sexual harassment.[47] Because the differences between men and women's views arise through socialization, it follows logically that a different form of socialization can either weaken or eliminate these differences.[48] As more women enter and obtain higher positions in the workplace, these perception problems likely will be reduced.[49]

Although the reasonable woman standard has some advantages over the reasonable person standard, these advantages do not outweigh its drawbacks. Instead of making the victim's gender controlling, the courts should use gender as one factor in determining if the harasser's conduct creates a hostile environment.

Another unanswered question is whether an expansive definition of a hostile work environment will violate the First Amendment because such a definition would regulate speech based on its content. In characterizing the First Amendment, the Court has stated, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[50] As the claims of hostile environment based on extreme conduct subside and claims based on verbal or other expressive conduct increase, it remains unclear how the courts will address the First Amendment aspects of these cases.

A broad definition of a hostile work environment would raise several First Amendment problems.[51] Although many people assume "that there is no

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44. *See supra* note 5.

45. *See* Cahn, *supra* note 35, at 1433.

46. Childers, *supra* note 36, at 895; *cf.* Radtke v. Everett, 501 N.W.2d 155, 165 (Mich. 1993) (rejecting a gender-conscious standard).

47. *See* Ellison v. Brady, 924 F.2d 872, 884 (9th Cir. 1991) (Stephens, J., dissenting).

48. Childers, *supra* note 36, at 895.

49. *Id.* at 897.

50. Texas v. Johnson, 491 U.S. 397, 414 (1989) (citations omitted).

51. Although the First Amendment addresses government action, no state action problem exists because the government's imposition of civil liability for speech is as much a state action as a direct regulation would be. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); *see also* Browne, *supra* note 32, at 511-12 (arguing that no state action problem exists).

general right of free speech in the workplace,"[52] this assumption does not appear correct.[53] One problem lies in defining what constitutes a hostile work environment. Even though there is a need for a clear definition, *Harris* shows that it is unlikely that one will soon emerge. Because the current definition does not give one reasonably clear notice of what speech is allowable, the vagueness doctrine may invalidate the regulation.[54]

Second, a substantial risk exists that the employers' overregulation will chill the employees' speech.[55] Because courts hold employers liable for any violations and because employers will incur attorneys' fees even when courts do not find them liable, employers may suppress anything resembling impermissible speech.[56] Although speech advocating unpopular or offensive political views[57] could create a hostile work environment, the First Amendment may not allow its suppression. Regulation of speech falling between the advocation of unpopular political views and the recognized exceptions to the First Amendment could raise overbreadth problems. It is likely that the employer will regulate some protected speech to avoid liability. *Robinson v. Jacksonville Shipyards*[58] highlighted this overbreadth problem. In *Robinson* the court issued an injunction banning "sexually suggestive" pictures plus other materials.[59] However, its definition of sexually suggestive is overbroad and could conceivably include the works of Michelangelo and other artists.[60]

Despite these potential problems, courts have not found any First Amendment problems with Title VII.[61] In *R.A.V. v. City of St. Paul*[62] the Supreme Court indicated that Title VII hostile environment claims would survive a First Amendment challenge. Justice Scalia discussed two possible arguments that would justify these regulations. First, he stated that a "valid

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52. Browne, *supra* note 32, at 513.

53. *See id.* at 513-16.

54. *See id.* at 502.

55. Although the First Amendment does not prohibit a private employer from imposing regulations on speech, one should be concerned when the regulations are motivated by the fear of civil liability.

56. *See* Browne, *supra* note 32, at 504-05; *see also* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1812-13 (1992) (discussing why employers would overregulate their employees' speech).

57. *See* Volokh, *supra* note 56, at 1802-03.

58. 760 F. Supp. 1486 (M.D. Fla. 1991). Jacksonville Shipyards, Inc. has appealed this decision, but the Eleventh Circuit has not yet decided this case.

59. *See id.* at 1538.

60. Michael E. Collins, Comment, *Pin-Ups in the Workplace--Balancing Title VII Mandates With the Right of Free Speech*, 23 CUMB. L. REV. 629, 649, 649 n.126 (1993).

61. *See Robinson*, 760 F. Supp. at 1534-36; Doe v. University of Michigan, 721 F. Supp. 852, 863 (E.D. Mich. 1989). One reason for this finding is that defendants have not raised the First Amendment as a defense in most cases. Browne, *supra* note 33, at 512.

62. ___ U.S. ___, 112 S. Ct. 2538 (1992).

basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the . . . speech.'"[63] Second, he wrote that laws aimed at conduct can incidentally regulate a "content-based subcategory of a proscribable class of speech," such as "sexually derogatory 'fighting words.'"[64] Justice Scalia cited Title VII as an example of such a law because it is directed against sexual discrimination in employment.[65]

Justice Scalia seemed to indicate that the secondary effects exception would not be a valid basis for these regulations. He wrote that "[l]isteners' reactions to speech are not the type of 'secondary effects'" that justify restrictions on speech.[66] Nonetheless, these reactions are exactly what Title VII, as now applied, protects against. While plaintiffs may argue that Title VII protects their work performance, their reaction to the speech creates the alteration in their working conditions or the deterioration in their performance. If the employee does not react to the speech in this manner, then no violation of Title VII exists.[67] Thus, the plaintiff's reaction to the speech is integral to the finding of a Title VII violation.

Justice Scalia's second exception provides a basis for applying Title VII to harassing speech. This exception is unlikely to be broadly construed because it merely covers "sexually derogatory 'fighting words.'"[68] Thus, this exception appears to have a potentially significant limitation because it is unlikely that a court would consider subtler forms of verbal harassment as fighting words, obscenity, or libel.[69]

Another justification for these regulations is that employees are a captive audience. One commentator has argued that when a harasser directs his speech at a woman where she cannot move out of hearing range, she may be captive because she cannot readily avoid the harassment.[70] However, this

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63. *Id.* at ___, 112 S.Ct. at 2546 (alteration in original) (quoting City of Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986)).

64. *Id.* at ___, 112 S. Ct. at 2546 (citations omitted).

65. *See id.* at ___, 112 S.Ct. at 2546-47.

66. *Id.* at ___, 112 S.Ct. at 2549 (plurality opinion) (alteration in original) (quoting Boos v. Barry, 485 U.S. 312, 321 (1988).

67. Even if a plaintiff finds that the comments create a hostile environment, Title VII is not violated if a reasonable person (or woman) would not be offended. This fact does not detract from the First Amendment problem because a violation of Title VII depends upon a plaintiff being subjectively offended. *See supra* notes 20-21 and accompanying text.

68. *R.A.V.*, ___ U.S. at ___, 112 S.Ct. at 2546. Justice Scalia also indicated that this exception covers other categories of speech. *See id.* at 2546-47. These other exceptions are likely to be other prescribable categories of speech, such as obscenity and libel.

69. *See* Volokh, *supra* note 56, at 1830 (noting that courts would be dealing with a content-defined subclass of protected speech because not all harassing speech is a proscribable class of speech).

70. *See* Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 36-

doctrine would not seem to support these restrictions on speech for two reasons. First, the Court has not recognized employees as captive audiences.[71] Second, the ban on this speech is underinclusive because it only bans speech expressing certain offensive viewpoints.[72]

In conclusion, it appears that courts and the bar should not take for granted the inapplicability of the First Amendment to Title VII hostile environment claims. As plaintiffs push the limits of what constitutes a hostile environment, the First Amendment likely will provide a defense to claims predominantly based on offensive speech or expressive conduct. The lowering of the threshhold in *Harris* of what effect harassment must have to qualify as a hostile environment seems to set the stage for more such Title VII-First Amendment clashes.

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37 (1990).

71. *See* Browne, *supra* note 32, at 516. *But see* NLRB v. United Steelworkers of Am., 357 U.S. 357, 368 (1958) ("Employees during working hours are the classic captive audience.") (Warren, C.J., dissenting in part and concurring in part); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1535-36 (M.D. Fla. 1991).

72. Browne, *supra* note 32, at 518.