Be Prepared: Unsuspecting Employers Are Vulnerable for Title VII Sexual Harassment Environment Claims

By JEFFREY S. LYONS*

CONGRESS ENACTED TITLE VII of the Civil Rights Act of 1964[1] ("Title VII") to protect employees from discrimination in the workplace.[2] Over the past three decades, however, Title VII hostile work environment actions have expanded potential liability for employers to the point that the employers must take preventive measures or be susceptible to unexpected Title VII suits. An unprepared employer could be caught off guard in situations where, over the course of an employee's tenure, the employee endures occasional pranks, or is exposed to occasional sexual epithets, or coarse or vulgar language. While each of these situations clearly exposes the employee to an unsavory work environment, individually they may not cross the threshold of an actionable Title VII claim. However, the court might consider this conduct collectively, and thus the employer may be liable for creating or maintaining a hostile work environment in violation of Title VII, even if no individual instance would have violated the Act.

The following hypothetical situation illustrates how an employer could be liable for maintaining a hostile work environment in violation of Title VII without ever having knowledge that such a hostile environment existed in his workplace. Consider the following scenario: Kathy Brady was a carpenter for Diamond Construction where she had built houses for six years. The jobsites where she worked were typical of construction jobsites in that there was quite a bit of swearing and workers occasionally played pranks on one another. Everyone at

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1. 42 U.S.C. § 2000e-2 (1994).

2. The Congressional record amending Title VII with the Civil Rights Act of 1991 indicates that the purpose of Title VII is to provide "protections and remedies in order to deter discrimination . . . and provide meaningful relief for victims of discrimination." 137 CONG. REC. H1662, H1664 (1991).

Diamond considered Brady typical of the crew. She swore no more or less than the rest, and occasionally participated in pranks. She was a good carpenter who normally got along with everyone at the jobsites and never complained about her job. Brady was a single mother. Some of the job bosses and other men at work flirted with her from time to time and sometimes, when they asked her out, she accepted.

One day, Brady came into the job supervisor's office and quit. Diamond was served a week later with a Title VII sexual harassment suit. The suit alleged that Diamond maintained a hostile work environment and listed fifteen separate instances over the course of the last two years to support the claim. Even though none of the individual alleged instances crossed the Title VII threshold of an actionable offense, the question raised was whether Diamond could still be liable for maintaining a hostile work environment based on the quantity of separate instances.

This scenario demonstrates the precise issue addressed by the Sixth Circuit Court of Appeals in *Williams v. General Motors Corporation*.[3] The *Williams* court stated that "a work environment viewed as a whole may satisfy the legal definition of an abusive work environment, for purposes of a hostile environment claim, even though no single episode crosses the Title VII threshold."[4]

This Comment addresses the following questions: If no single episode crosses the Title VII threshold, can an employer reasonably anticipate a hostile work environment suit? Moreover, how can an employer defend against such a suit? Part I of this Comment provides the background of Title VII. It explores the evolution of the hostile environment claim and the current state of the law as to how hostile environmental claims affect employer liability. Part II discusses the problem created by a split in authority on the application of the Supreme Court's hostile environment test and the ramifications of each circuit's precedent on employer liability. Part III identifies the problems for employers and employees created by the *Williams* decision. Part IV provides a workable solution for resolving the problems created by the varying interpretations of Supreme Court precedent.

I. Background

A. Title VII Sexual Harassment

Title VII defines an unlawful employment practice as:

3. 187 F.3d 553 (6th Cir. 1999).
4. *Id.* at 564.

> [F]or 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.[5]

By its terms, Title VII provides employees with a remedy against employers when conditions of employment are affected by tangible employment actions (*quid pro quo* claims)[6] such as inequities of pay, and exclusion from promotion, demotion, or discharge.[7] Since Title VII was passed, the Equal Employment Opportunity Commission ("EEOC") and the Supreme Court have broadened their reach to include instances of harassment that do not rise to the level of tangible employment action.[8] By not requiring a tangible employment action, the EEOC and the Court have created a new breed of claim, one that targets work environments that are so pervasively hostile that they constructively discriminate against an individual because of sex. Therefore, acts that make the work environment sufficiently hostile to affect the conditions of employment become actionable under Title VII.[9] However, to this day, the lower courts still have difficulty defining the conduct that meets this standard. The reason for this confusion lies in the lack of clear guidance from either the EEOC guidelines or Supreme Court precedent that would allow the lower courts to apply a uniform standard.[10]

5. 42 U.S.C. § 2000e-2(a)(1)-(2).

6. Tangible discrimination cases are "based on threats which are carried out [and] are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment [case]." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998).

7. *See id.* at 761.

8. *See* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 65 (1986).

9. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

10. For example, the current standard in the EEOC 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) (2002).

B. Evolution of the Hostile Environment Claim

In 1980, the EEOC issued guidelines that outline actionable workplace conduct amounting to sexual harassment.[11] In doing so, the EEOC essentially created a new form of Title VII action—the hostile work environment claim. The United States Supreme Court distinguishes a hostile work environment claim from a *quid pro quo* claim by stating that while both are cognizable under Title VII,[12] the *quid pro quo* claim requires a showing of "explicit or constructive alterations in the terms or conditions of employment."[13] The hostile work environment claim, however, requires a showing of conduct severe or pervasive enough to create a hostile work environment.[14] The Supreme Court held that "[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,' . . . Title VII is violated."[15] Case law currently guiding the courts as to what conduct constitutes a hostile work environment is grounded in three key Supreme Court decisions: *Meritor Savings Bank, F.S.B. v. Vinson*,[16] *Harris v. Forklift Systems, Inc.*,[17] and *Oncale v. Sundowner Offshore Services, Inc.*[18]

1. *Meritor Savings Bank, F.S.B. v. Vinson*

In *Meritor*, the Supreme Court held for the first time that a claim of hostile work environment based on sexual harassment was a violation of Title VII.[19] The Court adopted the EEOC guidelines stating, "Since the guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[20] There were essentially two issues before the court. The first was whether a hostile work environment claim was actionable

11. *See* 29 C.F.R. § 1604.11(a).
12. *See Ellerth*, 524 U.S. at 752.
13. *Id.*
14. *See id.*
15. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (internal citations omitted).
16. 477 U.S. 57 (1986).
17. 510 U.S. 17 (1993).
18. 523 U.S. 75 (1998).
19. *See Meritor*, 477 U.S. at 66.
20. *Id.*

under Title VII,[21] and the second was to what extent the employer could be liable for maintaining such an environment.[22]

Ms. Vinson, the plaintiff in *Meritor*, brought suit alleging that she had "constantly been subjected to sexual harassment"[23] by the branch manager of the bank where she had been employed for four years. She alleged there had been instances of sexual relations with the bank manager and claimed that she did not refuse his advances for fear of losing her job.[24] The bank's defenses were: (1) Ms. Vinson was not the victim of sexual harassment because the relationship was consensual, and (2) holding the employer vicariously responsible for hostile work environment harassment caused by an employee is improper because "the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing."[25] On the issue of the voluntary relationship, the Court stated that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII."[26] On the issue of vicarious liability (based on allowing its employees to conduct themselves in a manner that creates a hostile work environment) the Court indicated that a per se rule of strict liability was inappropriate and that agency principles should probably apply.[27] However, the Court did not fully resolve this issue.

By adopting the EEOC guidelines, *Meritor* fostered greater protection for employees against conduct that would not have been actionable under the *quid pro quo* doctrine. However, in holding that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," the opinion fell short of providing any clear guidance as to what would be considered severe or

21. *See id.* at 66–67.

22. *See id.* at 69–70.

23. *Id.* at 60.

24. *See id.*

25. *Id.* at 68–70.

26. *Id.* at 68.

27. *See id.* at 73. Justice Marshall wrote that he believed that the question of employer liability was properly before the Court and criticized the majority for not answering that question. *See id.* at 74 (Marshall, J., concurring). In fact, the question of employer liability for acts by a supervisor was not squarely answered by the Court for another twelve years in the Court's companion decisions of *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), discussed *infra* Part I.C.

pervasive enough to create such an environment.[28] That same issue presented itself in *Harris v. Forklift Systems, Inc.*

2. *Harris v. Forklift Systems, Inc.*

In *Harris*, the plaintiff was a manager at defendant Forklift Systems.[29] At work, Ms. Harris was bombarded with sexual innuendo and sex-based epithets by Mr. Hardy, the president of the company.[30] She alleged that the harassing conduct of Mr. Hardy forced her to quit her job.[31] The lower court found the case close but stated that the conduct of Mr. Hardy was not "so severe as to be expected to seriously affect [Harris's] psychological well-being."[32] The facts of *Harris* placed the issue squarely before the Court to determine how the "severe and pervasive" analysis should be applied.

The Supreme Court held that the conduct does not have to rise to the level of tangible psychological injury before it becomes actionable.[33] In an attempt to clarify the "severe and pervasive" language provided by *Meritor*, Justice O'Connor, writing for the unanimous Court, declared:

> 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.[34]

The Court then went on to state that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all of the circumstances."[35] The Court described its totality of circumstances test by acknowledging that while no single factor is required, the factors to be examined are the frequency and severity of the discriminatory conduct, whether the conduct is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.[36]

28. *Meritor*, 477 U.S. at 67 (internal brackets and quotation marks omitted).
29. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993).
30. *See id.*
31. *See id.*
32. *Id.* at 20 (quoting Appellant's Petition for Certiorari at A-34–35, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)).
33. *See id.* at 21.
34. *Id.* at 21–22.
35. *Id.* at 23.
36. *See id.*

Harris resulted in the development of a totality of the circumstances test and an objective/subjective test.[37] The totality of circumstances test focuses on factors that determine the severity and type of conduct alleged and how it interferes with the employee's work performance.[38] The objective/subjective analysis, in essence, asks two questions: (1) would a reasonable person perceive the environment as hostile or abusive, and (2) did the plaintiff perceive the environment as hostile or abusive?[39] However, *Harris* failed to crystallize *Meritor's* "severe and pervasive" analysis. Whether the totality of the circumstances test applies to the objective and subjective analysis, or whether it is a separate test mandating an examination of the existing work environment, was still left to the interpretation of the lower courts.

3. *Oncale v. Sundowner Offshore Services, Inc.*

In 1998, the Court, in *Oncale*, refined the *Harris* test for a hostile work environment. The plaintiff in *Oncale* was a man employed as part of a crew on an offshore oil platform in the Gulf of Mexico.[40] Mr. Oncale alleged sexual harassment, including physical abuse by other male members of the crew, and that complaints to his supervisors went unheeded.[41] The district court dismissed the case, and the court of appeals affirmed, stating that as a male, Mr. Oncale had no Title VII claim for sexual harassment for the actions by other male employees.[42] In a unanimous decision, the Supreme Court reversed and remanded.[43] Because *Oncale* was a same-sex sexual harassment claim, the Court had to focus carefully on the objective and subjective severity of the conduct.[44] The case presented an opportunity to demon-

37. *See id.* at 22–23. *See also* Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 193 (4th Cir. 2000); Williams v. Gen. Motors Corp., 187 F.3d 553, 562 (6th Cir. 1999) (demonstrating the lower courts' application of the totality of the circumstances test promulgated by *Harris*).

38. *See Harris*, 510 U.S. at 23.

39. *See id.* at 21.

40. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998).

41. *See id.*

42. *See id.*

43. *See id.* at 82.

44. The problem in same sex sexual harassment cases is proving that the target of the harassment actually (subjectively) perceived that the conduct was directed at him because of the plaintiff's sex and was not merely boorish and rude behavior. In *Oncale*, the plaintiff claimed that he felt he would have been raped if he had not quit his job. *See id.* at 77. In the Court's opinion Justice Scalia noted that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id.* at 80. However, the plaintiff "must always prove that the conduct at issue was not merely tinged

strate exactly how the objective and subjective analyses mandated by *Harris* should be applied.

In *Oncale*, the Court finally answered the question of how the totality of the circumstances test and the objective/subjective analyses from *Harris* fit together. For a unanimous Court, Justice Scalia wrote that a hostile work environment is to be assessed by inquiring whether "a reasonable person in the plaintiff's position, considering 'all the circumstances'" would consider the environment hostile, and "that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target."[45] This holding requires the totality of the circumstances inquiry to apply to both the objective and subjective prongs of the *Harris* test. Furthermore, the decision indicates that consideration of the social context of the behavior (i.e., the nature of the workplace environment where the conduct took place) is particularly relevant to the subjective analysis because the social context has to be examined in relation to how it is experienced by its target.

By incorporating the totality of the circumstances analysis into the objective and subjective inquiry, the *Oncale* analysis focused more on the perception of the target of the alleged conduct in its social context, rather than examining the nature of the work environment in the abstract, as the *Harris* totality of the circumstances test suggested. This approach allows for a more reasonable inquiry because some conduct is sexual harassment no matter where it occurs, but the same conduct may not be sexual harassment depending on to whom it occurs because it would depend on how the target subjectively perceives the conduct.

The EEOC guidelines and *Meritor* provided the basic framework for the analysis of a Title VII hostile environment claim, and *Harris* refined that framework. *Oncale* is the most recent analysis provided by the Supreme Court, but it still presents problems in its application as demonstrated by the circuit split described below in Part III.

C. Evolution of Employer Liability for Hostile Environment Claims

While the hostile work environment claim was refined by the *Meritor*, *Harris*, and *Oncale* decisions, the Court still had to confront the question of employer liability that was left open by *Meritor*.[46] In *Meritor*,

with offensive sexual connotations, but actually constituted 'discrimination because of . . . sex.'" *Id.* at 81.

45. *Id.* at 81.

46. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 72 (1986).

Justice Rehnquist indicated that agency principles should probably apply to determine the extent of the employer's liability, but did not specifically state that they would.[47] However, Justice Marshall, in his concurrence, unequivocally imputed agency principles to the situation by stating that he would hold the employer liable for actionable conduct by a supervisor of the victim.[48] This was the exact issue before the Court in the companion decisions of *Faragher v. City of Boca Raton*,[49] and *Burlington Industries, Inc. v. Ellerth*.[50]

Twelve years after *Meritor*, the Court adopted Justice Marshall's concurrence and held that an employer can be liable for an actionable hostile environment created by a supervisor who had immediate authority over the employee.[51] For Title VII claims the Court imputed any tangible employment action taken by the supervisor as the act of the employer.[52] Furthermore, an employer will be responsible for any "tangible employment action [that] constitutes a significant change in employment status, such as: hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[53] Undoubtedly, tangible employment action by a supervisor is actionable under Title VII. However, tangible employment action is often absent in hostile work environment claims. In those instances, the inquiry into the employer's liability becomes less certain. Because there may be no tangible evidence (i.e., no paper trail indicating demotions or other significant changes in an employee's benefits) that a hostile work environment has been created by an employee's supervisor, the hostile environment claim can catch the employer unaware that any problems existed.

The Court noted this potential problem in stating that "[w]hether the agency relation aids in commission of supervisor harassment which does not culminate in a tangible employment action is less obvious."[54] If no tangible employment action was taken (as in a hostile environment claim), the Supreme Court has offered the employer a two-pronged affirmative defense: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably

47. *See id.*
48. *See id.* at 75 (Marshall, J., concurring).
49. 524 U.S. 775 (1998).
50. 524 U.S. 742 (1998).
51. *See Faragher*, 524 U.S. at 807.
52. *See Ellerth*, 524 U.S. at 763.
53. *Id.* at 761.
54. *Id.* at 763.

failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[55]

In order for an employer to assert an affirmative defense, the employer must make a showing that it took reasonable measures to educate its employees on proper conduct (prevention) and to monitor its workplace to address complaints by its employees (correction).[56] The second prong of the affirmative defense requires the employer to show that the plaintiff did not unreasonably take advantage of the available preventive measures.[57] These are conjunctive requirements because the second prong could not reasonably exist without the first. Therefore, an employer can insulate itself from a Title VII hostile work environment claim if the employer is reasonably diligent in educating its employees and policing the workplace for instances of improper conduct. However, potential problems still exist for an employer. For instance, in the Sixth Circuit, courts will allow a claim based on an aggregation of acts even if no single instance is actionable under Title VII.[58] In that situation, an employer could be sitting on a potential time bomb—the employer would have virtually no notice that actionable behavior was accumulating because no individually actionable conduct had ever occurred.

D. The Prima Facie Case

The circuit courts of appeals use different variations of four factors to define the essential elements of a prima facie hostile work environment claim.[59] These factors are: "(1) plaintiff was a member of a protected class; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment was based on plaintiff's sex; and (4) the harassment created a hostile work environment."[60] In *Harris*, the Su-

55. *Id.* at 765.

56. *See id.*

57. *See id.*

58. *See* Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999) (holding that Title VII can still be violated by an aggregate of acts when no single act itself would have been actionable).

59. *See, e.g.*, O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001); Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001); Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 193 (4th Cir. 2000); Gregory v. Daly, 243 F.3d 687, 691–92 (2d Cir. 2001); Little v. Windermere Relocation, Inc., 265 F.3d 903, 910–11 (9th Cir. 2001). Some courts include a fifth element: that the plaintiff prove the employer's harassing actions were foreseeable or part of the scope of the offending supervisor's duty, and that the employer failed to reasonably respond. However, that element goes more to the degree of employer liability and not to the establishment of the prima facie hostile work environment claim, and has largely been addressed by the Court's *Faragher* and *Ellerth* decisions.

60. *Williams*, 187 F.3d at 560.

preme Court fine-tuned the fourth prong to require conduct severe or pervasive enough to create a hostile work environment.[61] *Harris* mandated a two-part approach to the severe or pervasive determination indicating that the courts should use both a totality of the circumstances test and an objective-subjective test.[62] *Oncale* refined *Harris* by combining the totality of circumstances and objective-subjective tests and added that the social context needs to be considered when doing the analyses.[63] While the courts are willing to follow these holdings, they are currently split as to whether it should make a difference whether the alleged conduct occurred in the context of an office or a shop, or some other location.[64]

The courts that follow *Williams* and its progeny, mostly in the Fourth and Sixth Circuits, refuse to take the existing work environment into consideration.[65] Taking a contrary approach, the courts following *Gross v. Burggraf*[66] and its progeny, mostly in the Eighth and Tenth Circuits, consider the work environment as a factor in making their determination.[67]

II. The Circuit Split

A. *Williams v. General Motors Corporation*

In *Williams*, the Sixth Circuit Court of Appeals refused to consider the work environment as a factor when determining whether the totality of the circumstances surrounding Williams's claim sufficiently established a hostile working environment.[68] The plaintiff, Marilyn Williams, worked for General Motors Company ("GMC") for thirty years.[69] The events leading up to her lawsuit occurred while she was working the midnight shift in the tool crib between May 1995 and May

61. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993).

62. *See id.*

63. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998).

64. *See* Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999) ("[W]e reject the view that the standard for sexual harassment varies depending on the work environment. Thus we disagree with the Tenth Circuit decision in *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995)").

65. *See Williams*, 187 F.3d at 564 and its progeny (*e.g.*, *O'Rourke*, 235 F.3d at 729; Raniola v. Bratton, 243 F.3d 610, 617 (2d Cir. 2001); Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 193 (4th Cir. 2000)).

66. 53 F.3d 1531 (10th Cir. 1995).

67. *See Gross*, 53 F.3d at 1538; Smith v. Northwest Fin. Acceptance, Inc., 129 F.3d 1408, 1414 (10th Cir. 1997); Sprague v. Thorn Am., Inc., 129 F.3d 1355, 1366 (10th Cir. 1997); Scusa v. Nestle U.S.A. Co., Inc., 181 F.3d 958, 967 (8th Cir. 1999).

68. *See Williams*, 187 F.3d at 560.

69. *See id.* at 559.

1996.[70] Williams cited fifteen separate incidents that she alleged constituted a hostile working environment.[71] The district court grouped the incidents into four categories: "(1) foul language in the workplace; (2) mean or annoying treatment by co-workers; (3) perceived inequities of treatment; and (4) sexually related remarks directed toward [Williams]."[72] Considering the context of the workshop environ-

70. The tool crib is "a warehouse used to store materials and components used at the plant, from which materials were distributed by an attendant to assemblers who requested them." *Id.*

71. *See id.* The fifteen instances of alleged harassment were listed as follows:

1. Don Giovannoe, an hourly tool crib employee, constantly used the "F-word" as part of his vocabulary.
2. In June of 1995, as Giovannoe approached the window at the counter of the tool crib, Appellant [Ms. Williams] heard him say, "Hey slut."
3. In July of 1995, Pat Ryan, her general supervisor, while talking to Williams' co-worker, Dodie, looked at Williams' breasts and said something to the effect of "You can rub up against me anytime." He also said, "You would kill me, Marilyn. I don't know if I can handle it, but I'd die with a smile on my face."
4. A few days after the incident alleged in No. 3, Williams was bending over and Ryan came up behind her and said, "Back up; just back up," or "You can back right up to me," or words to that effect.
5. On another occasion, in July of 1995, Williams was sitting at her desk writing the name "Hancock Furniture Company" on a piece of paper. Ryan came up behind her, put his arm around her neck and leaned his face against hers, and said, "You left the dick out of the hand."
6. Workers conspired against her: she was forced to take the midnight shift when Steve Bivolesky retired, even though Don Giovannoe had originally agreed to take the job.
7. In September of 1995, when she came in for her midnight shift, she discovered a box of tool crib release forms glued to the top of her desk.
8. Later on the same day she discovered the box glued to her desk, Williams claims to have heard Giovannoe say, "I'm sick and tired of these fucking women." As Williams waited on people at the crib window, Giovannoe came over to the desk and threw a box on it. Williams and Giovannoe got into a verbal altercation ending with Giovannoe throwing another couple of boxes, the last of which grazed Williams' [sic] hip, but did not hurt her.
9. Williams claimed that she was denied overtime.
10. She complained that she was the only person who did not have a key to the office.
11. Williams stated that she was the only person denied a break.
12. She was not allowed to sit at the table at the window of the crib, but had to go to the back instead.
13. One night when Williams came to work she found a buggy (a motorized cart used to haul supplies) sitting on a wooden skid and blocking the other buggies. She had to find a co-worker to help her move it.
14. On one occasion a female hourly worker, Shalimar Kufchak, padlocked the crib's main entrance while Williams was inside.
15. On a couple of occasions materials were stacked in front of the alternate exit, blocking access in and out.

72. *Id.* at 562 (quoting the district court's unpublished order).

ment, the district court found that the conduct alleged was more like oafish pranks and foul language than sexual harassment because of sex, and as such, it did not satisfy the totality of circumstances test.[73] In an unpublished opinion, the lower court found the conduct neither severe nor pervasive enough to sustain William's claim and granted summary judgment to GMC.[74]

The Sixth Circuit Court of Appeals disagreed.[75] It stated that the district court misapplied the totality of the circumstances test and further emphasized that the Sixth Circuit "reject[s] the view that the standard for sexual harassment varies depending on the work environment."[76] Furthermore, the court refused to consider the work environment as a factor because "women working in the trades do not deserve less protection from the law."[77]

The *Williams* court reasoned that its test was appropriate because it comports with the Supreme Court's interpretation of Congress's intent in enacting Title VII (i.e., to eradicate hostile work environments)[78] and because an assumption of risk defense is inappropriate in the context of a hostile work environment claim.[79]

The Supreme Court stated that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women in employment.'"[80] The *Williams* court seemed to believe that its approach of not considering workplaces that are traditionally hostile was the way to eradicate this entire spectrum of disparate treatment. Furthermore, the court opined that taking into account the pre-existing work environment is tantamount to allowing employers to claim that the employee assumed the risk by seeking employment in such an environment.[81] The *Williams* court reasoned that allowing employers an assumption of risk defense is inappropriate in a sexual harassment action because a woman who chooses to work in a male-dominated field should not have to relinquish her right to be free from sexual harassment.[82]

73. *See id.*
74. *See id.* at 563.
75. *See id.*
76. *Id.* at 564.
77. *Id.*
78. *See id.* at 563–64.
79. *See id.* at 564.
80. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 64 (1986) (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
81. *See Williams*, 187 F.3d at 564.
82. *See id.*

1. The Intent of Title VII

The *Williams* court reasoned that its holding is consistent with the intent of Title VII to prevent workplaces from using the defense that they have a history of hostility toward women, to excuse hostile work environment harassment.[83]

The *Williams* approach serves the purpose of Title VII because it provides a victim with recourse for discrimination brought about by severe or pervasive conduct that creates a hostile work environment.[84] The *Williams* court insists that allowing an employer to claim that the environment has always been rough or hostile merely perpetuates the problem.[85] Furthermore, allowing such a defense gives an employer no incentive to discipline the conduct or make the environment less hostile. According to the *Williams* court, "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."[86]

Realistically, employers will rarely claim that their work environment has traditionally been hostile; the employer may point to boorish behavior and language that by itself could not be considered *actionably* hostile, but will not rely on an assertion that their workplace is *traditionally* "hostile." In its attempt to broaden the reach of Title VII, *Williams* misses the point. The point is not whether a hostile environment should be considered as a threshold question, but whether the *pre-existing* environment should be considered. Whether or not the environment is "hostile" for Title VII purposes is a question of fact.[87] The *Williams* approach theoretically prevents the trier of fact from accurately determining what constitutes severe or pervasive conduct because the approach prevents an initial determination of the pre-existing work environment. Workplaces vary greatly, and a court or a jury will not be able to determine what is severe or pervasive in a particular environment without first considering what conduct is normal in that environment.

In *Oncale*, the Supreme Court held that the "inquiry requires careful consideration of the *social context* in which particular behavior occurs and is experienced by its target."[88] In its application of *Oncale*,

83. *See id.*
84. *See id.*
85. *See id.*
86. *Id.*
87. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998).
88. *Id.* at 81 (emphasis added).

the *Williams* court gave ample weight to the perception of the target element of the analysis, yet it completely ignored the social context element of the inquiry.[89] However, any consideration of the social context is impossible without first considering the particular work environment. *Williams* properly focuses on the perception of the conduct by its target element,[90] but by completely ignoring the social context element of the rule, a court could subject employers to liability for conduct that was essentially the norm (but not hostile) in that field if one person perceived the conduct to be severe or pervasive.

2. The Assumption of Risk Defense

The assumption of risk defense "is based on the plaintiff's express or implied agreement to shift the legal responsibility for possible injury from the negligent defendant onto the plaintiff."[91] While normally a tort defense, assumption of risk in the employment context assumes that an employee who is not forced to stay at her job implicitly consents to the work environment by her willingness to stay.[92] Therefore, the assumption of risk defense implies that a single employee may waive her Title VII rights. This would have the effect of allowing some employees to opt out of protections Title VII was designed to provide, "which may be contrary to the goal of Title VII."[93]

The assumption of risk defense, however, is not meant to require an employee to relinquish Title VII rights. The assumption of risk defense will never immunize male-dominated trades from being liable for conduct that amounts to sexual harassment because conduct that is severe or pervasive enough to alter the conditions of employment will always be actionable. In *Williams*, the court stated "[w]e do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment."[94] While this is true, there is a difference between male-dominated trades and conduct that is severe or pervasive enough to alter the terms and conditions of employment. A woman who decides to work in a male-dominated trade may be assuming the risk of witnessing boorish behavior or hearing language that is unfit for the courthouse,

89. *See Williams*, 187 F.3d at 566.

90. *See id.*

91. Kelly Ann Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1117 (1995).

92. *See id.* at 1120.

93. *Id.* at 1148.

94. Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999).

but she does not assume the risk of actionable conduct under Title VII.

Furthermore, ignoring an assumption of risk defense is impractical because doing so would eliminate employment where women are currently free to market their sexuality and receive economic benefit from their sex appeal.[95] It would eliminate the recognition that women have the capacity "to make voluntary choices about where they work and to take responsibility for those choices."[96] Eliminating the assumption of risk defense would "perpetuate the perception of women as unable to make rational decisions about their sexuality and encourages the state to protect women from themselves."[97] Therefore, barring an assumption of risk defense would be regressive and would defeat Title VII's goal of putting women and men on equal footing in employment situations.

B. *Gross v. Burggraf Construction Co.*

In *Gross*, the Tenth Circuit Court of Appeals stated that to determine whether the plaintiff put forth a viable Title VII sexual harassment claim a court "must first examine her work environment."[98] The plaintiff, Patricia Gross, was a truck driver on a construction site in Wyoming.[99] Gross drove a water truck for Burggraf Construction Company during the 1989 construction season and was hired again in mid-May of 1990 to work that year's season.[100] Gross was laid off in October 1990 because the water truck was no longer needed.[101] Gross filed a Title VII action claiming that she had been subjected to hostile environment gender discrimination and listed ten instances that she alleged were actionable.[102] The district court granted Burggraf sum-

95. *See* Cahill, *supra* note 91, at 1144–45. Cahill further states that an "assumption of risk defense recognizes that women can voluntarily choose to work in establishments that promote their sex appeal and holds women responsible for that choice by not allowing them to recover for harassing conduct they knew was likely to occur when they accepted the job." *Id.* at 1146.

96. *Id.* at 1145.

97. *Id.* at 1147.

98. *Id.* at 1537.

99. *See id.* at 1535.

100. *See id.*

101. *See id.*

102. *See id.* at 1536, listing the ten instances of alleged harassment as follows:

> Anderson [her supervisor] 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 she left her truck, Anderson yelled at her: "What the hell are you doing? Get your ass back in the truck and

mary judgment on the Title VII claim "based upon its determination that there were no genuine issues of material fact" regarding her claim.[103] The Tenth Circuit's issue on appeal was whether the employer's conduct and statements created a hostile work environment.[104]

In applying the totality of circumstances test from *Harris*, the Tenth Circuit Court of Appeals determined that the instances of discrimination alleged in Gross's complaint were not sufficiently severe or pervasive to rise to the level of discrimination, as based on her sex.[105] Citing its holding in *Stahl v. Sun Microsystems, Inc.*,[106] the court stated "[i]f the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination as a result of that environment."[107] Furthermore, in applying the objective-subjective test from *Harris*, the court evaluated Gross's claim "in the context of a blue collar environment where crude language is commonly used by male and female employees."[108] After hearing Ms. Gross's deposition testimony that she, herself, "contributed to the use of crude language on the job site,"[109] the court determined that the defendant's conduct was neither objectively nor subjectively severe or pervasive enough to be actionable.[110] By examining the context of the work environment, the court determined that a hostile work environment claim was improper.[111]

Three important reasons support using the *Gross* approach over the *Williams* approach. First, stare decisis requires a court to consider the work environment in order to adhere to the Supreme Court's to-

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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 forty 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.

103. *Id.* at 1535.
104. *See id.*
105. *See id.* at 1547.
106. 19 F.3d 533, 538 (10th Cir. 1994).
107. *Gross*, 53 F.3d at 1537 (quoting *Stahl*, 19 F.3d at 538).
108. *Id.* at 1537–38.
109. *Id.* at 1538.
110. *See id.* at 1547.
111. *See id.*

tality of the circumstances test. Second, the *Gross* approach comports with the Court's objective-subjective test because it requires an objective person's assessment of the work environment in question. Finally, public policy dictates that a court should assess the work environment when making a hostile environment determination because the courts were not "commissioned by Congress to force a heightened level of civility upon the blue collar workplace—or any other, for that matter—by redefining workplace sex discrimination far more broadly than . . . Title VII."[112]

1. The Work Environment Element and the Totality of the Circumstances Test

The Supreme Court clearly stated that the particular work environment must be evaluated when examining the totality of the circumstances. The Court analogized that 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 . . . back at the office."[113] As the conduct in the analogy changes two variables—the locus of the conduct and the target of the conduct—it is unclear which is the determining factor in the analogy.[114] *Williams* concentrates strictly on the target and ignores the locus,[115] whereas *Gross*, which predates the *Oncale* analysis, determines the conduct in relation to the locus.[116] In any case, the Court seems to mandate that the work environment be a factor in determining whether conduct is sufficiently severe or pervasive to amount to an actionable Title VII claim.[117]

The *Gross* approach is consistent with the totality of the circumstances test because it applies equally to all work environments. The Tenth Circuit's analysis does not operate merely to excuse boorish

112. Williams v. Gen. Motors Corp., 187 F.3d 553, 572 (6th Cir. 1999) (Ryan, J., dissenting).

113. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

114. In other words, if the coach were to smack the football player in the buttocks as he was leaving the coach's office, would this be considered sexual harassment; or if the secretary were on the field during the game and the coach were to smack her on the buttocks, would that be sexual harassment? This illustrates the importance of the social context in which the conduct occurs *and* that it must be examined in conjunction with the subjective and objective analysis to determine if the player or the secretary actually perceived the conduct as severe and pervasive as to alter his or her working conditions.

115. *See Williams*, 187 F.3d at 564.

116. *See Gross*, 53 F.3d at 1538.

117. *See id.*

behavior. For example, in *Smith v. Northwest Financial Acceptance, Inc.*,[118] another Tenth Circuit decision, the court found it proper to lower the threshold behavior for a plaintiff because she did not work "where the rough and tumble surroundings . . . make vulgarity and sexual epithets common and reasonable conduct."[119] Thus, only by considering the work environment can a court properly assess the severity and pervasiveness of the conduct to determine whether a hostile environment exists. By contrast, the approach to the totality of the circumstances test used by the Sixth Circuit in *Williams*, which refuses to take into consideration the work environment, falls short of the Supreme Court's mandate because it fails to provide the jury with the context of any relevant incidents as indicated in *Oncale*.[120]

2. The Work Environment Element and the Objective-Subjective Test

The *Gross* approach is also consistent with the Supreme Court's objective-subjective test. The objective-subjective test requires that the court determine whether "the environment would be reasonably perceived, and is perceived, as hostile or abusive."[121] A court cannot accurately determine the conduct as hostile or abusive by focusing on the words or acts outside of the context of the work environment. In *Oncale*, the Court stated that "[t]he 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."[122] Thus, the Court mandates that the work environment be a factor in the determination of what constitutes a hostile work environment. The *Gross* approach, while predating *Oncale*, is true to that requirement.[123]

3. The Work Environment Element and Public Policy

Public policy supports the *Gross* approach requiring an assessment of the workplace because Title VII does not commission the courts "to force a heightened level of civility upon the blue-collar

118. 129 F.3d 1408, 1414 (10th Cir. 1997).
119. *Id.*
120. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998).
121. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).
122. *Oncale*, 523 U.S. at 82.
123. *Id.* at 81.

workplace."[124] Nor does it prohibit all of the verbal or physical harassment that takes place at one's work;[125] rather "it is directed only at '*discriminat[ion]* . . . because of . . . sex.'"[126] People deserve to be protected from discriminatory conduct that interferes with conditions of their employment. However, a national standard of workplace conduct is neither feasible nor necessary. The Supreme Court has "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[127] The reality is that there are people who have marketable skills but either lack social skills or are merely unpleasant to be around. Inevitably, employers will have some employees working with others whose behavior they find disagreeable, but this does not create a hostile work environment under Title VII. It is imperative for the employer, not Congress or a court, to ensure that the conduct of boorish or offensive employees does not rise to the level of affecting another employee's terms and conditions of employment. Furthermore, when a Title VII claim is brought, the court must first consider the underlying circumstances surrounding the alleged conduct and assess the work environment to prevent Title VII from becoming a "general civility code for the American workplace."[128]

By examining the alleged conduct in its context, the *Gross* approach allows courts and juries to determine what conduct crosses the Title VII threshold and becomes actionable as a hostile work environment. The Supreme Court noted that "[c]ommon sense and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[129] Therefore, the Court has indicated that the social context (i.e., the work environment where the conduct took place) must be assessed by the trier of fact, who must distinguish between proper and improper social conduct within the context of its environment.

Ultimately, *Gross* is more consistent than *Williams* in its application of the Supreme Court test as refined by *Oncale*. Furthermore, in

124. Williams v. Gen. Motors Corp., 187 F.3d 553, 572 (6th Cir. 1999) (Ryan, J., dissenting).

125. *See Oncale*, 523 U.S. at 80.

126. *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1) (1994)).

127. *Id.*

128. *Id.*

129. *Id.* at 82.

its application, the *Williams* approach creates major problems for an employer in light of the *Faragher* and *Ellerth* decisions on the issue of vicarious liability because of the employer's narrow defenses as discussed in Part I.[130]

III. The Circuit Split's Effect on Employer Liability—The *Williams* Time Bomb

This Comment's first issue is whether an employer can reasonably anticipate a Title VII hostile environment suit where no single act is actionable. That determination depends on the circuit where the case is filed, because if a court is unwilling to consider the work environment as a factor, then the employer's affirmative defense under *Ellerth* and *Faragher* may not be sufficient.[131] There may be potential conduct in the workplace that is considered normal by employees that, taken out of context, would be found offensive. Even though the conduct does not, by itself, cross the threshold of being actionable under Title VII, if it is persistent, it *may* cross that line. Therefore, the circuit split as to whether to consider the work environment is critical in the analysis because an employer needs to reasonably know if the environment is one that may be considered hostile.

The *Williams* decision is a potential time bomb for both employers and employees. Its ruling cannot be reconciled with the Supreme Court's holdings in *Faragher* and *Ellerth.* The *Williams* decision states "a work environment viewed as a whole may satisfy the legal definition of an abusive work environment, for purposes of a hostile environment claim, even though no single episode crosses the Title VII threshold."[132] However, the employer's affirmative defense provided by the Supreme Court in *Faragher* and *Ellerth* requires that an employer satisfy two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of

130. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

131. *Id. Compare* Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1538 (10th Cir. 1995) (affirming summary judgment stating that the court should evaluate the plaintiff's claim in the context of a blue-collar environment) *with* Williams v. Gen. Motors Corp., 187 F.3d 553, 572 (6th Cir. 1999) (stating that the court should not vary the standard depending on the work environment). The affirmative defense requires the employer to take reasonable measures to prevent and address harassment. *See Ellerth,* 524 U.S. at 765. However, what may seem reasonable in a blue-collar environment may not provide enough protection in an office and thus, may be considered unreasonable.

132. *Williams,* 187 F.3d at 564.

any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[133] So how should an employer address, or why would an employee report, conduct that is not perceived as actionable?

The *Williams* holding puts both the employer and employee at risk of losing a lawsuit. For example, in the hypothetical situation presented in the Introduction, if Kathy Brady is a plaintiff in a *Williams* district and she brings a hostile environment suit against Diamond Construction alleging that the hostile environment was caused by a supervisor or immediate superior, but no single act crossed the Title VII threshold, Diamond can be liable under *Ellerth/Faragher.* Diamond could lose its affirmative defense without ever realizing that a single sexual harassment incident occurred. Diamond would not fulfill its responsibility on the first *Ellerth/Faragher* prong simply because it had no knowledge of the incidents. Furthermore, if Brady was reasonable in not reporting the incidents as they occurred (for example, if the incidents were minor and were not individually actionable, an employee's failure to report such incidents could be found reasonable),[134] then the employer, Diamond, loses its *Ellerth/Faragher* defense.

Similarly, Brady may put up with harassing behavior, none of which individually crosses the Title VII threshold, without complaining, even though the behavior bothers her and affects her work environment. Collectively, those claims may amount to sexual harassment in a *Williams* jurisdiction. However, because of the *Ellerth/Faragher* affirmative defense, Brady would be at risk of losing her entire cause of action under Title VII if she never reported the incidents. In the absence of a single incident crossing the Title VII threshold, how will an employee know what uncomfortable behavior is actionable, or even reportable, in order to protect his or her rights? In addition, this scenario raises another important question: At what point will a number of acts that would not individually be actionable under Title VII, collectively become actionable as a Title VII claim?

133. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). *See also* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

134. *See Williams,* 187 F.3d at 567.

IV. The Proposed Solutions

A. Distinguish Sex-Based or Discriminatory Conduct From Uncomfortable Behavior Absent a Sex-Based Nexus

Undoubtedly, Title VII proscribes gender-based harassment. In addition, courts should interpret the *Harris* "totality of circumstances" test to allow a plaintiff to include incidences of *sexual harassment* or hostile acts *based on the employee's sex* or motivated by some *anti-gender animus.* In the aggregate, however, courts should be hesitant to admit the plaintiff's allegations of hostile or uncomfortable behavior absent a sex-based nexus. In this respect, the *Williams* approach is too broad. It does not comport with the Supreme Court's affirmative defense provided in *Ellerth/Faragher,* nor with the *Oncale* opinion stating that "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat[ion]* . . . because of . . . sex.'"[135] The court's emphasis on the term "discrimination" is important because absent some kind of workplace discrimination, Title VII is inapplicable.[136] Therefore, claims of offending behavior alleged by a plaintiff should not be actionable, even in the aggregate, unless they are sex-based or discriminatory.

B. Employer Prevention Programs

The solution for employers is prevention. The employer should take affirmative steps to ensure that there are no Title VII sexual harassment claims budding among its employees.

> If an employer takes reasonable steps to discover and rectify the harassment of its employees . . . it has discharged its legal duty. An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time that the allegations are made.[137]

The message is clear. To avoid going to trial and losing a Title VII sexual harassment suit, employers must take preventive measures. "Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, [and] developing appropriate sanctions

135. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

136. *See id.* at 80–81.

137. Berry v. Delta Airlines, Inc., 260 F.3d 803, 811 (7th Cir. 2001) (quoting McKenzie v. Illinois Dep't of Transp., 92 F.3d 473, 480 (7th Cir. 1996)).

. . . ."[138] Employers need to keep the channels of communication open, take the time to investigate all incidences of tangible employment action and conduct that satisfies the sex-based nexus or discriminatory-based nexus to preserve their affirmative defense in the event of a sexual harassment suit. Employers must take the lead in their respective fields to eradicate any disparate treatment in the workplace.

C. Employee Education

Employers should educate their employees on the difference between proper and improper conduct for the workplace. Absent any clear statutory guidelines, employers and employees are free to determine the norms for their individual and collective work environments. With employee input and employer guidelines, employee handbooks can be developed to put both employers and employees on notice concerning their rights under the law and expected conduct at the workplace. The employer should "inform[ ] employees of their right to raise and how to raise the issue of harassment under title VII, and develop[ ] methods to sensitize all concerned."[139] In addition, a proper workplace orientation and a sufficient probationary period allow employers and employees to learn whether that work environment is appropriate or comfortable for them.

By following prevention guidelines and using common sense, Title VII will not become a general civility code. It does, however, compel employers to adopt policies that do not tolerate discrimination in any form. By adopting such policies, the employer can show that it used reasonable care in its prevention and correction practices to assert the narrow defenses offered by *Ellerth* and *Faragher.*

Conclusion

Returning to the hypothetical situation posed at the beginning of this Comment, the result of Kathy Brady's appeal against Diamond Construction should not depend on which circuit court of appeals hears her case. Currently, if Brady's case is brought in the Fifth or Sixth Circuits, she will probably get a trial at the district court, but if she is in the Eighth or Tenth Circuits, she likely will not. It makes little sense that under a federal law such as Title VII, a plaintiff would be allowed to present her case to a jury in one circuit, while in another

138. 29 C.F.R. § 1604.11(f) (2002).
139. *Id.*

circuit, under the same facts, she would not survive summary judgment.

Either judicially or legislatively, the totality of the circumstances test should be nationally refined to avoid regional disparity in the treatment of American employees and employers. For employers to have fair warning, the test needs to retain the ability for an employee to allege incidences that are sex-based or discrimination based, but not to allow peripheral claims that fall short of Title VII's purview. Furthermore, the pre-existing work environment must be rationally reviewed by the court or the jury. Only by considering normal circumstances or "social context" can the finder of fact determine whether an employee's work environment has been sufficiently altered to warrant a Title VII claim. Finally, with employer prevention and education policies implemented, the workplace will better reflect societal norms, making an objective analysis of actionable conduct much easier while still preserving the affirmative defense for the good faith employer.