Faragher v. City of Boca Raton: An Analysis of the Subjective Perception Test Required by Harris v. Forklift Systems, Inc.

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The term "sexual harassment" is appearing more often both in the media and in common speech. Unfortunately, not all who use the term are quite sure what constitutes sexual harassment. Both men and women in the workplace live in increasing fear that a comment or gesture will be misinterpreted by a co-worker or subordinate.¹ Recent incidents involving "sexual harassment" at the elementary and junior high school levels reflect the pervasiveness of the fear of this phenomenon in our society.² As the number of sexual harassment claims continues to rise, employers and authority figures are beginning to take steps to ensure that they are insulated from liability. Employers have begun to educate their employees on the adverse effects of certain sexually harassing behaviors on other employees and the workplace.³ Since not all sexually oriented conduct rises to the level of actionable sexual harassment,⁴ guidance often comes from judicial decisions that deal with sexual harassment.

The courts have defined a test for determining whether an employee has suffered sexual harassment.⁵ Simply put, for behavior to rise to the level of legal

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¹. See generally Margaret S. Stockade, The Role of Sexual Misperceptions of Women's Friendliness in an Emerging Theory of Sexual Harassment, J. Vocational Behav. 42, 84-101 (1993).
². There have been many recent incidents involving school-age children and sexual harassment claims. Recent cases include a fifth-grader suspended for sexual harassment (see Lily Dizon, 5th Grader Suspended for Sexual Harassment, Los Angeles Times, Oct. 11, 1996, at B4); a first-grader punished for kissing a classmate (see Pamela Warrick, The Buss Fuss With a Simple Kiss, a First-Grader Has Sparked a Debate on How to Teach Kids to Respect One Another, Los Angeles Times, Sept. 27, 1996, at El).
³. The five-prong test for determining whether sexual harassment has occurred is used for "hostile work environment" sexual harassment cases. This form of sexual harassment can be distinguished from quid pro quo sexual harassment. Quid pro quo sexual harassment ("something for something") occurs when the employer withholds an economic benefit in exchange for a favor which is sexual in nature. This paper will focus on hostile work environment sexual harassment, its effects on employees, and the problems in applying this five-prong test.
⁴. Sexually oriented behavior may be offensive without meeting all of the criteria necessary to prevail on a hostile work environment sexual harassment claim. See Louise F. Fitzgerald et al., Measuring Sexual Harassment: Theoretical and Psychometric Advances, 17(4) Basic and Applied Soc. Psychol. 425, 429-30 (1995).
⁵. In order to prove that sexual harassment has occurred, a claimant must prove: 1) the employee was in a protected group; 2) the employee was subject to unwelcome sexual harassment; 3) the harassment was based on sex; 4) the harassment affected a "term, condition, or privilege" of employment; and 5) if recovery is sought against any entity other than the directly abusive person, respondeat superior. See infra text accompanying notes 37-40.
sexual harassment, the conduct must be unwelcome and must alter the conditions of employment. The current test judges the behavior from both an objective and subjective standpoint: the conduct must be such that a reasonable person would find that the conduct created an abusive environment, and the claimant herself must have subjectively perceived the conduct to be abusive.6

This paper analyzes a recent Eleventh Circuit case, Faragher v. City of Boca Raton,7 which raises the question of what moment in time an employee must subjectively perceive the abusiveness of her environment in order to prevail on a Title VII sexual harassment claim. It examines the policies behind Title VII and the inclusion of the subjective prong, and the functions that the subjective prong play in the hostile work environment sexual harassment claim. It also examines the psychological effects of sexual harassment on women and how these effects impact women's perceptions of the sexually hostile workplace. Finally, it explores the possibility of modifying or eliminating this requirement as an element of the prima facie claim.

I. FACTS: FARAGHER v. CITY OF BOCA RATON

Plaintiffs, two former city lifeguards, brought action against the city of Boca Raton for sexual harassment under section 1983,8 with one plaintiff claiming sexual harassment under Title VII.9 Of the forty to fifty lifeguards employed by the City, only four to six were female.10 Plaintiffs shared locker rooms and showers with their male co-employees, a situation which led to a "rambunctious atmosphere" in the tight working quarters.11 Plaintiffs claimed they were subjected to various incidents of sexual harassment perpetrated by two supervisors of the lifeguards. Incidents included "uninvited and offensive touching," (pressing up of supervisor against plaintiff's buttocks while simulating sexual movement), as well as offensive comments and gestures (examples include: "If you had tits I would do you in a minute" and "There are a lot of tits on the beach today.").12 Neither plaintiff complained to the Parks and Recreation Department; however,
both decided to speak to one supervisor about the incident because they held him in high repute. Since plaintiffs did not speak to him on a "subordinate to superior basis," the supervisor did not report the incidents to the City. 14

In time, plaintiff Ewanchew left her job as lifeguard for other employment, but later requested re-employment on a part-time basis. Plaintiff Faragher also left her job, but her decision to leave was unrelated to the sexual harassment she experienced. 15 After she left, Faragher did not discourage her sister from seeking employment as a lifeguard for the City. Some time later, based on the incidents they experienced during their employment, both women sued the City, claiming sexual harassment, battery, and negligent retention and supervision of one of the offenders. 16

The district court found for plaintiffs on their battery claims, and upheld Faragher's section 1983 claim against her harassers. 17 Ewanchew, on the other hand, was out of luck. Finding her request for re-employment made it "illogical to find a perception of hostility in the work environment," the court held that Ewanchew had not subjectively perceived her work environment to be abusive and, therefore, was not entitled to recovery. 18

The Eleventh Circuit affirmed, finding the district court did not err in finding that Ewanchew had not shown she had subjectively perceived the conduct as harassing at the time of her employment. 19 Because Ewanchew did not "perceive her environment to be abusive . . . [the] conduct did not alter the conditions of her employment." 20

Held: An after-the-fact realization of the offensiveness of certain conduct was "irrelevant to whether the employee's conditions of employment were altered," and therefore plaintiff Ewanchew had not subjectively perceived her conduct to be abusive. 21

II. BACKGROUND LAW: MERITOR SAVINGS BANK, FSB v. VINSON, HARRIS v. FORKLIFT SYSTEMS, INC. AND THE RISE OF THE "SUBJECTIVE PRONG"

A. The Establishment of the Title VII "Hostile Work Environment" Claim

The basis of sexual discrimination in the workplace as a viable cause of action is found in Title VII of the Civil Rights Act of 1964. 22 The purpose of

14. Id.
15. She eventually found her way to law school.
17. Id. at 1164-68.
18. Faragher, 76 F.3d at 1161 (11th Cir. 1996).
19. Id. at 1155.
20. Id. at 1161.
21. Id.
22. The pertinent section reads: "It shall be an unlawful employment practice for the employee—(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
Title VII is to "assure equality in the quality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments . . . ."

Sexual discrimination under Title VII is divided into claims based on gender and claims based on sex. Claims based on gender arise when a person is denied a privilege of employment because of his or her gender. Sexual harassment claims (claims based on sex) involve sexual conduct directed toward an employee. Sexual harassment claims (which are far more prevalent than claims based on gender) are divided into two groups, quid pro quo claims and hostile work environment claims.

In 1976, the D.C. Circuit decided Williams v. Saxbe, the first case to recognize a sexual harassment claim under Title VII. Williams and its progeny dealt with quid pro quo harassment claims. Quid pro quo claims deal with situations in which the employee is asked to give "something" (usually in the form of sexual favors) in return for job-related benefits (promotion, retention of job, etc.). By the end of the 1970s, the quid pro quo claim was generally accepted as actionable under Title VII.

The courts were slower in recognizing a more subtle form of discrimination—discrimination where the plaintiff did not allege a "tangible" economic loss in a "quid pro quo" harassment claim, but alleged harassment resulting from a discriminatory work environment that affected the conditions of employment.

The first discrimination claims alleging a discriminatory work environment arose because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a) (1994). Ironically, the original bill proposed did not include "sex." Its inclusion was part of a last-minute effort on the part of several senators who wished to defeat the bill and its anti-race discrimination provisions. The bill, as we know, passed anyway, leaving room for speculation as to Congress' intent in including "sex" in Title VII. See generally B. Glenn George, The Back Door: Legitimizing Sexual Harassment Claims, 73 B.U. L. Rev. 14 n.12 (1993); Lori A. Mazur, Comment, Harris v. Forklift Systems, Inc.: Keeping the Status Quo, 47 Rutgers L. Rev. 291 (1994).

George, supra note 22 at 1 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800, 93 S. Ct. 1817 (1973)).


Zalucki, supra note 24, at 147-48.

Id.

See Zalucki, supra note 24.

413 F. Supp. 654 (D.C. Cir. 1976). For other examples of early sexual harassment claims, see Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977). For a good overview of the history of the sexual harassment claim, see Zalucki, supra note 24.

There is also a reverse form of "quid pro quo" claim that consists of the employer denying an employee an employment benefit because employee refuses to engage in sexual conduct. See Mazur, supra note 22, at 300.

See generally Zalucki, supra note 24.

See Mazur, supra note 22, at 293-95.
in the context of race discrimination, which was the primary concern of Title VII when passed.\(^3\) This form of discrimination, which is now called "hostile work environment," was first recognized in *Rogers v. EEOC.*\(^3\) In *Rogers,* plaintiff, a Hispanic-American employee of Texas State Optical, brought a claim against her employer, alleging that she was exposed to "abuse" by co-employees, and that she was required to attend to patients only of a certain ethnic origin. The Fifth Circuit found that the abusive environment and systematic segregation of Hispanic patients sufficiently altered the "terms, conditions, or privileges of employment" so as to constitute a valid discrimination claim.\(^3\) The court found that Title VII of the Civil Rights Act of 1964 was to be accorded a "liberal interpretation" so as "to effectuate the purpose of Congress" of eliminating ethnic discrimination.\(^3\) If such conduct was not discouraged, "[o]ne could readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . . ."\(^3\)

The courts gradually expanded the concept of the "hostile work environment" claims to Title VII sex discrimination claims.\(^3\) In 1982, the Eleventh Circuit, in *Henson v. City of Dundee,*\(^3\) systematically defined the elements necessary to prevail in a hostile work environment claim. According to *Henson,* an employee must prove: (1) the employee was in a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition, or privilege" of employment; and, if recovery is sought against the employer, (5) the employer knew or should have known of the discriminatory conduct (respondeat superior).\(^3\) These factors were adopted in other circuits and became the test for determining whether plaintiffs could recover on hostile work environment sexual harassment claims.\(^4\)

The viability of the hostile work environment sexual harassment claim was established definitively in the Supreme Court's first decision on any sexual

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\(32\). *Id.*

\(33\). 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957, 92 S. Ct. 2058 (1972).

\(34\). *Id.* at 238.

\(35\). *Id.*

\(36\). *Id.*

\(37\). See *e.g.*, Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), for court's expansion of hostile work environment claim to sexual harassment.

\(38\). 682 F.2d 897 (11th Cir. 1982).

\(39\). *Henson,* 682 F.2d at 903-05. Many of the factors the Eleventh Circuit developed in *Henson* were taken from the Equal Employment Opportunity Commission's Guidelines.

The fifth element of this test is a complex one, consisting of both an agency basis of liability and a notice basis. For a discussion of this element see *Faragher v. City of Boca Raton,* 76 F.3d 1155, 1163-67 (11th Cir. 1996). For a discussion of the confusion created by the Supreme Court in *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399 (1986) and the standards used to impose employer liability in a hostile work environment sexual harassment cases, see David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors,* 81 Cornell L. Rev. 66 (1995).

\(40\). See Mazur, *supra* note 22, at 305-07.
harassment claim, *Meritor Savings Bank, FSB v. Vinson.* 41 In an opinion written by Justice Rehnquist, the Court relied on the Guidelines promulgated by the Equal Employment Opportunity Commission to find that Title VII encompassed claims for a hostile work environment. 42 The Court stated that “[s]ince 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.” 43

*Meritor* involved a suit by a bank employee, Vinson, against her former employer in which the employee alleged that “she had ‘constantly been subjected to sexual harassment’” by Taylor, her supervisor, in violation of Title VII. 44 Over a period of four years, Vinson estimated that she had submitted to Taylor’s sexual demands forty to fifty times, endured his exposing himself to her, and even suffered forcible rape on several occasions. 45 The bank argued, and the district court agreed, that since Vinson’s submission to Taylor’s sexual advances was “voluntary,” Taylor’s conduct was not “unwelcome,” 46 and thus plaintiff had failed to establish one element of the hostile work environment claim. 47

The Court rejected this argument, stating that the lower court had “erroneously focused on the ‘voluntariness’ of respondent’s participation in the sexual conduct.” 48 Admitting that the question of whether the conduct was unwelcome or not would normally be a difficult one, based largely on credibility determinations, the Court stated that the correct inquiry was “whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.” 49 The Court further held that the determination of whether the conduct was unwelcome or not, and thus the determination of the validity of plaintiff’s claim, became a question to be evaluated by the “totality of the circumstances” of the working environment. 50

The Court in *Meritor* clarified another issue that had been troubling the courts in sexual harassment cases: what effect (damage) was necessary to show that the harassment had altered a “term, condition, or privilege” of employment. 51 The bank had argued that ‘Congress’ intent in using the phrase had

42. The role of the EEOC in promulgating guidelines was established by Congress in the Civil Rights Act of 1964. The EEOC regulations have played an important role in the development of Title VII claims. Since the legislative intent was clear that these guidelines should determine the scope of Title VII, the courts have generally looked to these guidelines to determine the standards for sexual harassment. See supra note 39 for a discussion of *Henson v. City of Dundee.*
43. 477 U.S. at 64, 106 S. Ct. at 2404.
44. *Id.* at 60, 106 S. Ct. at 2402.
45. *Id.*
46. *Id.* at 61, 106 S. Ct. at 2402-03.
47. *Id.*
48. *Id.* at 69, 106 S. Ct. at 2406.
49. *Id.*
50. *Id.* at 67, 106 S. Ct. at 2405.
51. *Id.* at 64, 106 S. Ct. at 2404.
been to prevent "tangible loss of an economic character" resulting from sexual harassment, and not "purely psychological aspects of the workplace environment." The Court rejected this argument, finding that the language of Title VII did not limit its application to "economic or tangible discrimination," stating 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."

Meritor, in adopting the five-prong test from the EEOC guidelines on sexual harassment, firmly established and defined the "hostile work environment" claim under Title VII. It represented the culmination of the evolution of the sexual harassment claim from exclusively "quid pro quo" claims to "hostile work environment claims," and from the tangible economic effects resulting from the quid pro quo claim to psychological and emotional effects of the hostile environment claim.

B. From Meritor to Harris v. Forklift Systems, Inc.

Although Meritor listed the elements of the "hostile work environment" sexual harassment claim, differences in interpretation soon arose among the circuits on the standard to be used in evaluating the factors set forth in Meritor. The fourth prong of the test set forth in Meritor, that the conduct in question altered "a term, condition, or privilege of employment," was the center of debate. The federal circuits divided on two issues: (1) from whose viewpoint the offensive conduct should be evaluated; and (2) the effect of the conduct on the plaintiff (or injury plaintiff suffered).

This division was reflected in two cases: Rabidue v. Osceola Refining Co. and Ellison v. Brady. The court in Rabidue determined whether the conduct affected a "term, condition, or privilege of employment" (the fourth prong of the test set forth in Henson) from both an objective and subjective standpoint. According to Rabidue, the plaintiff would be required to show that not only was she "actually offended by the defendant's conduct," but also that a "hypothetical reasonable individual's work performance ... and

52. Id.
53. Id.
57. Id.
59. 924 F.2d 872 (9th Cir. 1991).
60. 805 F.2d at 620.
psychological well-being" would be affected. Thus, Rabidue created a two-prong standard by which to judge whether the conduct was severe enough to alter the work environment. Once the conduct was found to be so severe as to have altered a "term, condition, or privilege of employment," the plaintiff, according to the court in Rabidue, must also show that she suffered "some degree of injury" in order to recover.

In Ellison v. Brady, the Ninth Circuit expressly rejected Rabidue's two-prong test for determining the severity of the harassment and adopted in its place the "reasonable victim's perspective." Ellison also rejected Rabidue's requirement that the plaintiff suffer psychological injury before recovering on a sexual harassment claim. Rabidue and Ellison set off an intense debate among scholars on the proper standard for judging sexual harassment cases. It became apparent, by 1993, that there was a pressing need for the Supreme Court to clarify inconsistencies that had developed among the circuits after Meritor.

The Supreme Court's response came in the long-awaited Harris v. Forklift Systems, Inc. There, plaintiff Harris was the target of frequent unwanted sexual innuendoes by Hardy, the company's president. In front of others, Hardy would comment: "You're a woman, what do you know" and "We need a man as the rental manager." He also told her that she was a "dumbass woman," and on one occasion suggested that the two of them "go to the Holiday Inn to negotiate

61. Id.
62. Id.
63. 924 F.2d 872 (9th Cir. 1991).
64. Id. at 879.
65. Id. at 877.
66. After Rabidue, there was an explosion of literature pushing for the "reasonable woman" standard (see, e.g., Penny L. Cigoy, Comment, Harmless Amusement or Sexual Harassment?: The Reasonableness of the Reasonable Woman Standard, 20 Pepp. L. Rev. 1071 (1993); Sally A. Piefer, Comment, Sexual Harassment from the Victim’s Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard, 77 Marq. L. Rev. 85 (1993)); the "reasonable victim" standard (see, e.g., Jolynn Childers, Note, Is There Place for a Reasonable Woman in the Law? A Discussion of Recent Developments In Hostile Environment Sexual Harassment, 42 Duke L.J. 854 (1993); Martha Chamallas, Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation, 1 Tex. J. Women & L. 95 (1992)); as well as literature supporting the "reasonable person" standard (see, e.g., 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 (1993)).
68. Id. at 19, 114 S. Ct. at 369.
After Harris confronted him about the conduct, Hardy promised to stop such behavior, but a month later made similar comments. Harris quit her job.

In an opinion written by Justice O'Connor for a unanimous Court, the Court found that Harris was entitled to recover under Title VII in this "close case." More importantly, the Court responded to many of the questions that had been debated in the circuits for years. First, it affirmed the two-prong objective/subjective standard of Rabidue. The conduct in question must be severe enough to create a work environment that a "reasonable person" would find hostile or abusive. But if "the victim does not subjectively perceive the environment to be abusive, [then] the conduct has not actually altered the conditions of the victim's employment." Having thus enunciated the standard by which to judge the conduct, the Court addressed the factors to consider when determining whether the conduct has affected, according to Title VII terminology, "terms, conditions, or privileges of employment." Rejecting Rabidue's requirement of psychological injury, the Court stated that

[c]ertainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive... there is no need for it also to be psychologically injurious.

The Court rejected the idea that a precise mathematical formula could be found to evaluate sexual harassment, and stated that the environment could be evaluated only by "looking at all the circumstances." The factors to be considered 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."

Justices Scalia and Ginsburg concurred in separate opinions. In his opinion, Justice Scalia presented the problems inherent in defining the vague term "abusiveness." He compared the vagueness of the term "abusiveness" with

70. Id.
71. Id.
72. Id. at 20, 114 S. Ct. at 369.
73. Id. at 21, 114 S. Ct. at 370.
74. Id. at 21, 114 S. Ct. at 370.
75. Id.
76. Id. at 21, 114 S. Ct. at 370.
77. Id. at 21, 114 S. Ct. at 370 ("Title VII comes into play before the harassing conduct leads to a nervous breakdown.").
78. Id. at 21, 114 S. Ct. at 371.
79. Id. at 23, 114 S. Ct. at 371.
80. Id.
81. Id. at 24, 114 S. Ct. at 372.
“negligence” by stating that “what constitutes ‘negligence’ (a traditional jury question) is not much more clear and certain than what constitutes ‘abusiveness.’” However, as he pointed out, recovery for negligence is “limited to those who have suffered harm.” In the Title VII context, “abusiveness” itself becomes “the test of whether legal harm has been suffered, [thus] opening more expansive vistas of litigation.” The idea that an employer would be punished just for the abusiveness of the environment, and not just the harm suffered, was a chief concern for Justice Scalia.

Justice Ginsburg, in her concurrence, focused on what effect the harassment must have on the plaintiff in order for her to recover. Citing Davis v. Monsanto, she determined that the plaintiff “need not prove that his or her tangible productivity has declined as a result of the harassment,” but merely that the conduct so alters working conditions as to “make it more difficult to do the job.” Justice Ginsburg, like Justice Scalia, was concerned with what actual harm must be suffered by the plaintiff in order to recover. While Justice Scalia was wary of the idea of using a vague concept of “abusiveness” of environment to determine liability at all, Justice Ginsburg adopted a broad definition of an abusive work environment that would open the vistas of litigation that Scalia so feared.

Harris established the objective/subjective test for evaluating the abusiveness of the environment as the standard in judging whether conduct is sufficiently severe or pervasive so as to be actionable under Title VII. However, the Court did not make it clear when a Title VII plaintiff must subjectively perceive the environment to be hostile or abusive. Several post-Harris cases raise the issue of how and when the subjective prong can be fulfilled.

C. Post-Harris Cases and the Subjective Prong

Two cases, Hirase-Doi v. U.S. West Communications, Inc., and Kimzey v. Wal-Mart Stores, Inc., address the role of the subjective prong in determin-
ing whether the plaintiff’s work environment has been altered. The issues presented by these cases include: (1) whether subjective perception of conduct directed toward other women can sufficiently alter the “terms, conditions, and privileges” of employment (what the victim must perceive); and (2) whether an after-the-fact subjective realization of the offensiveness of the conduct can satisfy the subjective perception prong required by Harris (when the victim must perceive the harassing conduct).93

In Hirase-Doi v. U.S. West Communications, Inc.,94 plaintiff sued for sexual harassment based on the actions of one of defendant’s employees.95 The employee, Coleman, not only engaged in sexually offensive behavior towards plaintiff (including incidents in which he made verbal and written remarks, propositioned plaintiff, and attempted to touch her breast) but he also “engaged in sexually offensive behavior towards numerous ... women in the [work] area”96 during the same period. U.S. West argued that evidence of incidents involving other women should not have been presented as plaintiff could not rely on evidence of harassment of other workers in establishing a “hostile work environment” claim.97

The court, however, disagreed. While pointing out that such evidence in the case at hand was unnecessary, as plaintiff Hirase-Doi had herself been harassed, the court stated that “evidence of a general work atmosphere, including evidence of harassment of other women, may be considered in evaluating a claim.”98 Use of such evidence was limited to incidents of harassment of which “she was aware during the time she was allegedly subject to a hostile work environment.”99 As the court stated, “Doi could not subjectively perceive Coleman’s behavior towards others as creating a hostile work environment unless she knew about the behavior.”100 But since the plaintiff in Hirase-Doi was aware of the behavior of others, she could rely on evidence of harassment of other women in the workplace “to the extent that it affected her general work atmosphere.”101

The court in Hirase-Doi makes it clear that actual, subjective perception of the acts that create the hostile work environment is a must under the Harris test. If not, a hostile workplace is not created. However, the acts in question need not necessarily be directed at the plaintiff herself. To recover for an alteration of the workplace environment, it is enough that the plaintiff subjectively perceive the whole work environment, which includes comments made to co-workers, as abusive.

93. See Kimzey, 907 F. Supp. at 1312-13; Hirase-Doi, 61 F.3d at 782.
94. 61 F.3d 777 (10th Cir. 1995).
95. Hirase-Doi, 61 F.3d at 780.
96. Id. at 780-81.
97. Id. at 782.
98. Id.
99. Id. (emphasis added).
100. Id.
101. Id.
While Hirase-Doi addressed the issue of what plaintiff must actually perceive, *Kimzey v. Wal-Mart Stores, Inc.* 102 dealt with the question of time of perception of such conduct. In *Kimzey*, the plaintiff brought a hostile work environment claim, alleging that her manager treated men "as friends and with respect while women were treated as inferior." 103 She testified that she often felt "humiliated," "stupid," "degraded," and "offended" because of his behavior. 104 Defendant argued that the plaintiff should not prevail on her claim as her comments and conduct suggested that she did not subjectively believe that a hostile work environment existed. 105 More specifically, defendant relied on plaintiff's own testimony that plaintiff enjoyed the atmosphere prior to a certain date and "saw nothing sexually offensive or hostile about the receiving department." 106 as proof that plaintiff did not subjectively perceive the conduct to be harassing. The court rejected the defendant's argument, finding that plaintiff was not required to "form a well-defined, subjective belief of hostility at the exact moment when an incident occurs." 107 In doing so, the court speculated on the reasons for plaintiff's delayed realization of the abusiveness of the conduct:

One could easily imagine a victim at first not wanting to believe that an employer was engaging in hostile behavior, or even wanting to ignore the situation hoping it was merely a misunderstanding, and then upon reflection or after a series of events determining that she was indeed a victim of harassment. 108

This is significant as it shows the court's willingness to consider why the victim did not immediately perceive the conduct to be abusive, and its consideration of the psychological process which leads a victim to conclude that a sexually harassing workplace exists.

Both *Hirase-Doi* and *Kimzey* illustrate a recent trend in the post-*Harris* cases—the trend by the defendant to attack plaintiff's claim on the basis that plaintiff did not subjectively perceive the conduct to be harassing. *Hirase-Doi* makes it clear that the conduct must be perceived first-hand by the plaintiff; however, the conduct perceived need not be directed at plaintiff. The holding in *Kimzey* makes it clear that the subjective perception of abusiveness need not be contemporaneous with the harassing conduct, but may occur at some point later in the employment. The question left open after *Kimzey* is whether an after-the-fact determination that harassing conduct rose to the level of sexual

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103. *Id.* at 1313.
104. *Id.*
105. *Id.* at 1312.
106. *Id.*
107. *Id.*
108. *Id.* at 1312-13.
harassment may occur after the victim has left her employment.\textsuperscript{109} This is precisely the issue presented in \textit{Faragher v. City of Boca Raton}.\textsuperscript{110}

III. DISCUSSION

As seen in the earlier discussion of the facts of the case, the Eleventh Circuit held that an after-employment subjective realization of the offensiveness of the harassing conduct is \textit{not} sufficient to satisfy the subjective prong of the \textit{Harris} test.\textsuperscript{111}

In the district court opinion,\textsuperscript{112} Ewanchew was deemed not to have sufficiently shown that the “uninvited touching on the buttocks and on one breast” had affected a “term, condition, or privilege of employment.”\textsuperscript{113} The court believed her account of her supervisors’ behavior, but found “her present assertion” that she found such conduct intolerable at the time “not credible.”\textsuperscript{114} “Indeed, Ewanchew’s request for a part-time job after she left the City’s employ makes it illogical to find a perception of hostility in the work environment on her part.”\textsuperscript{115} Citing \textit{Harris}, the court stated that unless the plaintiff subjectively perceives the work environment to be hostile, the offensive conduct has not actually altered a “term, condition, or privilege of employment” necessary to prevail on a Title VII claim.\textsuperscript{116}

The Eleventh Circuit, in affirming the decision of the trial court, referred to \textit{Kimzey v. Wal-Mart Stores, Inc.}.\textsuperscript{117} The court noted that \textit{Kimzey} interpreted \textit{Harris} as not requiring a “well-defined, subjective belief of hostility at the exact moment when an incident occurs.”\textsuperscript{118} Stating that “[a]n employee’s conditions of employment are not affected by what happens after she resigns,”\textsuperscript{119} the court held that an “[a]fter-the-fact realization of the offensiveness of conduct thus does not satisfy \textit{Harris}; it is irrelevant to whether the employee’s conditions of employment were altered.”\textsuperscript{120} In affirming the district court, the Eleventh Circuit refused to expand the holding in \textit{Kimzey} (that an after-the-fact realization of the abusiveness of the conduct may satisfy the subjective prong of the \textit{Harris} test) to after-the-fact realizations that occur after the employment is terminated.
However, the court sustained the district court's finding that plaintiff Faragher's subjective perception of the workplace was sufficient to alter the "terms, conditions, and privileges of employment." It did so despite the City's contentions that Faragher's "apparent nonchalance" about her supervisors' conduct, her failure to complain, and her failure to caution her sister about applying for a job as a lifeguard with the City illustrated that she could not have found the environment abusive. Since the district court had come to this decision by relying extensively on the credibility of Faragher's testimony, the appellate court was unwilling to find manifest error in this factual determination.

The court's finding that one plaintiff subjectively perceived the workplace to be hostile while the other did not illustrates the difficulty in making such determinations. As seen above, much of this determination ultimately centers on a credibility call by the factfinder. The district court in Faragher believed Ewanchew's allegations of the conduct of the harassers, but did not find credible her "then' feeling of intolerability." However, Faragher is significant not just because it illustrates such difficulties, but also because it raises some important questions on the role of the subjective prong in the hostile work environment sexual harassment claim. The court's assertion in Faragher that post-employment realization of the abusiveness of harassing conduct is "irrelevant" to whether the employee's workplace was altered should be examined in light of the policies underlying the Title VII claim and the subjective prong itself.

A. The Hostile Work Environment Claim and the Subjective Prong

As the history of the Title VII hostile work environment claim illustrates, the search for the correct standard to evaluate harassing conduct was the subject of much debate in the period between the Supreme Court's decisions in Meritor and Harris. As the debate mainly concerned the correct objective standard to be used, the subjective prong was not given much attention. The recent cases of Kimzey, Hirase-Doi, and Faragher have opened the discussion of the place of the subjective prong and the purposes this prong serves. The purposes of the subjective prong must be analyzed in light of: (1) the evolution and gradual "tortification" of the Title VII claim; and (2) the policy considerations for including the subjective prong. Once the subjective prong is considered in these contexts, the focus will shift to the inquiry of whether the subjective prong accurately serves the purposes for which it was included, and whether these

121. Id. at 1162.
122. Id.
123. Id. at 1162.
125. 76 F.3d at 1161.
126. See supra discussion in notes 66-67.
127. See supra text accompanying notes 91-110.
128. See infra text accompanying notes 130-156.
purposes will still be served if the subjective prong is expanded or eliminated from the hostile work environment claim.\(^{129}\)

I. The "Tortification" of Title VII and the Hostile Work Environment Sexual Harassment Claim

Much of understanding why the subjective prong was included in the Supreme Court's hostile work environment claim depends on understanding the nature of the hostile work environment claim itself. The fundamental change in the nature of the hostile work environment claim can be seen in the changes in the nature of the claims brought and the expansion of the monetary awards available under Title VII.

Originally, the Title VII claim was viewed as a vehicle for protecting a class of persons from discriminatory practices at the workplace.\(^{130}\) Title VII claims of the 1960s and 1970s were seen as "a form of political expression to vindicate important social rights."\(^{131}\) The courts regularly certified class action suits, illustrating the view that such violations affected a class of people as a whole, and were not "personal, private, claims."\(^{132}\) Individual claimants were seen as "private attorney general[s]" vindicating an important Congressional policy,\(^{133}\) not merely as plaintiffs seeking individual relief. Victim compensation, nevertheless, was also a policy concern, since the victim could recover compensatory damages in the form of backpay for the individual harm suffered in addition to injunctive relief.\(^{134}\) However, the focus on deterrence as well as compensation in allowing such damages,\(^{135}\) coupled with the conspicuous absence of damages (both compensatory and punitive) available to tort victims, illustrates the basic deterrent, class-based nature of the early Title VII claim. The concern that a hostile working environment hindered productivity in the workplace, which had been a major consideration in the enactment of Title VII, was reflected in the early harassment cases.\(^{136}\)

\(^{129}\) See infra text accompanying notes 217-230.


\(^{131}\) Id.

\(^{132}\) Id. at 193.

\(^{133}\) Id. at 189 (citing Newman v. Piggie Park Enters., 390 U.S. 400, 402, 88 S. Ct. 964, 965 (1968)).

\(^{134}\) The Supreme Court case of Abermarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362 (1975), discusses the back pay provision of the Civil Rights Act of 1964. Abermarle recognized that the back pay provision helped "achieve equality of employment opportunities and remove barriers that have operated in the past" as well as accomplishing the "make whole" purpose (compensation) which was also a goal of Title VII. Abermarle, 422 U.S. at 417-18, 95 S. Ct. at 2371-72.

\(^{135}\) Id. at 421, 95 S. Ct. at 2373.

\(^{136}\) See George, supra note 22, at 4-5. That this was a major concern of Title VII is also reflected in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), cited in George, supra note 22.
However, by the 1980s the Title VII class action had begun to disappear, partially because suits under Title VII focused less on employers' failure to hire and more on promotion and termination decisions. The deterrent purpose behind the back pay provisions was obscured by the harm to individual dignity that a victim may have suffered. In short, the Title VII plaintiff began to resemble a tort plaintiff.

The gradual shift in focus from deterrence to victim compensation culminated in the Civil Rights Act of 1991. For all cases to which this Act applies, compensatory and punitive damages are available to employees who suffered injury due to a hostile work environment. Victims thus are compensated not only for the economic injury they suffered from sexual harassment, but also for any psychological injury. Essentially, after the 1991 Act, the Title VII hostile work environment plaintiff can receive the same damages as an intentional tort plaintiff.

The goal of tort law, "the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests," has been adopted as the goal of Title VII. While the professed goal of Title VII discrimination claims is still protection of a certain class from workplace discrimination, the emphasis is now on compensation to individual victims for harm suffered from intentional conduct (by the harasser) and negligent conduct (by the employer in allowing such working conditions to exist). The objective/subjective prongs of the Harris test reflect both the original goal (protection of a class) and the more recent goal (compensation of the individual). The "reasonable person" standard judges the conduct from a group standard (reflecting society's judgment

137. Zemelman, supra note 130, at 195-96.
138. Id.
139. Id.
140. 42 U.S.C. § 1981(a) provides:
   In an action brought by a complaining party under . . . [42 U.S.C. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under . . . [42 U.S.C. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)], from respondent. Congress made it express in the act that compensatory damages "shall not include backpay (or interest on backpay," 42 U.S.C. § 1981(a)(b)(1) (1994). Thus, the compensatory damages envisioned are all damages which do not include backpay.
141. Id.
142. Zemelman, supra note 130, at 196-97.
144. Zemelman, supra note 130, at 196.
145. 42 U.S.C. § 1981(a) makes the remedies exclusive to those who have suffered an injury due to a civil rights violation.
146. Harris was decided in 1993, two years after the Civil Rights Act of 1991.
of the conduct of harasser against a member of a protected class) and protects
the class of victims from economic harm, while the subjective standard measures
the effect of the "abusiveness" on the individual victim. 147

The increasing similarity of Title VII claims to tort claims is reflected in the
language and logic of hostile work environment sexual harassment opinions.
Justice O'Connor noted the link between sexual harassment and tort law in her
dissent in United States v. Burke: "[T]he purposes and operation of Title VII
are closely analogous to those of tort law, and that similarity should determine
excludability of recoveries for personal injury . . ." 148 However, the similarity
between the hostile work environment claim and tort claims has also prompted
some to question the inclusion of the claim under Title VII. In Vinson v.
Taylor, 150 Judges Bork, Scalia and Starr dissented from a denial of rehearing en
banc of a decision holding an employer vicariously liable for the sexually harassing
acts of a supervisor. In an opinion written by Judge Bork, the judges contended that
the panel's decision had gone too far in holding that an employer is vicariously
liable for an employee's alleged sexual harassment, 151 and that such a rule "was
at odds with traditional practice which was not to hold employers liable at all for
their employee's intentional torts involving sexual escapades." 152 The majority
panel had conceded that in tort the employer would not be vicariously liable, but
nonetheless felt that the EEOC's Guidelines on Discrimination Because of Sex
mandated vicarious liability in Title VII sexual harassment cases. 153 In a
footnote, the judges stated that "some of the doctrinal difficulty in this area is due
to the awkwardness of classifying sexual advances as "discrimination,"" 154 and
suggested that if harassment were to be classified as discrimination under Title VII,

147. Indeed, this phenomenon has led to criticism of the place of the sexual harassment claim
in anti-discrimination law. Scholars have noted that the unique nature of the sexual harassment claim
and its requirement that the complained-of conduct be "unwelcome." For a good discussion of the
scholarship surrounding the criticism of the sexual harassment claim and its place in anti-
discrimination law, see Anita Bernstein, Law, Culture, and Harassment, 142 U. Pa. L. Rev. 1227,
1242-51 (1994). Some scholars note the inappropriateness of Title VII remedies and the "rigidity
of state tort law" and call for a new independent cause of action in tort for sexual harassment. Krista
J. Schoenheider, Comment, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134
U. Pa. L. Rev. 1461 (1986). For another article criticizing the sexual harassment claim as sex
discrimination and calling for an independent tort of sexual harassment, see Ellen F. Paul, Sexual
Others, while stopping short of an independent tort for sexual harassment, have nonetheless called
for an overhaul of the sex discrimination laws. See Michael D. Vhys, Comment, The Harms of
149. Id. at 249, 112 S. Ct. at 1878 (O'Connor, J., dissenting).
150. 760 F.2d 1330 (D.C. Cir. 1985) (Bork, Scalia, and Starr, Judges, dissenting). The claims
of Mechelle Vinson in Vinson v. Taylor were ultimately decided in Meritor Savings Bank, FSB v.
151. Id. at 1332.
152. Id. at 1333 n.6.
153. Id.
154. Id.
"that decision at least demands adjustments for its subsidiary doctrines [i.e. employer liability]." The judges' uneasiness is prompted by the fact that the Title VII harassment claim, while similar to an action in tort, results in a "strict vicarious liability" standard that is not imposed on employers whose employees engage in intentional misconduct in the workplace. Whatever the criticism of the "tortification" of Title VII may be, the similarity of tort claims to Title VII helps explain the inclusion and role of the subjective prong in the hostile work environment claim. As the following discussion shows, the purposes for which the subjective prong was included reflect the Court's more recent emphasis on compensation for the individual under Title VII.

2. The Role of the Subjective Prong—Alteration of the Workplace

As discussed earlier, the Supreme Court in *Harris* created a dual objective/subjective test to evaluate the harasser's conduct. The objective prong evaluated the conduct from a "reasonable person" standard, concentrating on whether the conduct is severe enough, according to what society would define as "hostile" or "abusive." It did so to prevent "making actionable any conduct that is merely offensive," thus protecting employers from the claims of hypersensitive employees. The Supreme Court required the subjective prong as a way of determining whether the harassing conduct actually altered a "term, condition, or privilege" of employment for the particular plaintiff. This is clear in its statement: "[I]f 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." The gradual "tortification" of the Title VII claim discussed above helps explain why the *Harris* Court required a subjective perception of the abusiveness of the environment. The record of the oral arguments before the Supreme Court

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155. *Id.* (referring to Bundy v. Jackson, 641 F.2d 934, 951 (D.C. Cir. 1981)).

156. *Id.* at 1333 n.7. Scalia's uneasiness can be seen later in *Harris*, where the idea of requiring only a subjective perception of the abusiveness of the environment, and not actual harm as a tort claim would require, preoccupied the justice. This is reflected in his statement in *Harris* that "the class of plaintiffs seeking to recover in negligence is limited to those who have suffered harm, whereas under this statute [Title VII] 'abusiveness' is to be the test of whether legal harm has been suffered." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 372 (1993). The resulting "expansive vistas of litigation" would include Title VII claims where the employer would be required to compensate victims merely for an abusive environment, and not for their actual injuries suffered from such an environment. Justice Scalia, however, did not fault the majority's requirements. Given the "inherently vague statutory language" of Title VII, he could find no alternative to the course the Court had taken.

157. See supra text accompanying notes 68-80.

158. *Harris*, 510 U.S. at 21, 114 S. Ct. at 370.

159. *Id.* at 21, 114 S. Ct. at 370.


161. *Id.*

162. See supra text accompanying notes 130-147.
reveals that the subjective prong was added to ensure that the individual plaintiff actually suffered from the abusive environment.\textsuperscript{163} The objective requirement without a subjective requirement could result in what one Justice termed "negligence in the act."\textsuperscript{164} The subjective prong can thus be seen as fulfilling the "damage" element in tort. Ironically, the Court, in requiring \textit{only} subjective perception of the hostility of the workplace, was rejecting the requirement of \textit{Rabidue}\textsuperscript{165} that the victim suffer actual "damage."\textsuperscript{166} For those like Scalia, Bork, and Starr who feel that the harassment paradigm needs "adjustments," the use of the subjective prong alone in determining injury may be inadequate.\textsuperscript{167}

\textbf{3. The Role of the Subjective Prong—Unwelcomeness}

The subjective prong, however, serves purposes other than just ensuring that the individual claimant suffer injury requiring compensation.\textsuperscript{168} Although it was not expressed in \textit{Harris}, the subjective prong also influences whether conduct will be perceived as "unwelcome" or not.\textsuperscript{169} \textit{Meritor} required that the plaintiff prove, as part of her \textit{prima facie} case, that the harassing conduct was "unwelcome."\textsuperscript{170} If the employee must find the harassing conduct unwelcome,

\textsuperscript{163.} In the arguments before the Court, Jeffrey P. Minear, representing the United States as amicus curiae, argued for \textit{only} an objective standard. The exchange between Minear and the Justices includes:

\begin{quote}
\textbf{QUESTION:} Do you have both an objective and a subjective component to "make more difficult"?

\textbf{MR. MINEAR:} For that standard, Your Honor, we have only an objective component. . . .

\textbf{QUESTION:} Why isn't that predicing liability with an injury? You're saying—I mean, isn't that the equivalent of saying anyone who drives a car without due care is going to be liable whether or not he bumps into somebody or not?

\textbf{MR. MINEAR:} No. The injury here, Your Honor, is with respect to being denied the right to a discrimination-free employment place, and our test goes to whether or not there is discrimination in the workplace. The person can be injured even though the person does not have compensable damages. . . .

\textbf{QUESTION:} I take it the unwelcome component of the test, which is not involved here, is to satisfy some subjective—

\textbf{MR. MINEAR:} That is correct.

\textbf{QUESTION:} —requirement, and makes this not just like negligence in the act.


The fact that the Supreme Court subsequently included the subjective prong can be seen, in light of this exchange, as a reflection of its concern that the victim personally suffer harm from the workplace.

\textsuperscript{164.} \textit{See supra} note 163.

\textsuperscript{165.} 805 F.2d 611 (6th Cir. 1986).

\textsuperscript{166.} \textit{Rabidue} v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986).

\textsuperscript{167.} \textit{See supra} note 156.

\textsuperscript{168.} \textit{See infra} notes 169-170.


\textsuperscript{170.} \textit{Id.}
it follows that she must, at some point, perceive the conduct to be such. Thus the subjective perception of the offensiveness of the behavior can be seen to some extent as co-extensive with the requirement that the conduct was unwelcome.\textsuperscript{7}

The requirement of "unwelcomeness" was included in the prima facie hostile work environment claim so that consensual sexual conduct between employees would not come under the purview of Title VII.\textsuperscript{111} It was also included to serve as a "signal" to the harasser that the employee found the conduct offensive.\textsuperscript{113} If the reason for including the subjective prong was to show that this employee found the conduct offensive, then the unwelcomeness prong is the requirement that the victim manifest this offensiveness (or, at least, her unwillingness to participate in the sexually offensive conduct) to the harasser. Why this is important can be seen in the \textit{Harris} case itself. At trial,\textsuperscript{114} defendant offered testimony that the other female Forklift employees did not find the harasser's behavior to be offensive.\textsuperscript{115} This behavior, though, was later found to be objectively "hostile" by the Supreme Court.\textsuperscript{116} In a situation where one employee is offended by the hostility of the workplace and others are not, a manifestation of "unwelcomeness" by the offended employee is especially important.\textsuperscript{117}

Unfortunately, whether conduct is "unwelcome" is not always apparent at first glance. Even a relationship that is voluntary, as in \textit{Meritor}, is not necessarily

\begin{itemize}
\item \textsuperscript{7} \textit{See United States Supreme Court Official Transcript of Harris v. Forklift Systems, Inc., supra note 163.} The United States argued that the "unwelcomeness" requirement took care of the subjective requirement and therefore advocated the adoption of the objective prong only. The Court's question that the unwelcomeness prong would take care of "some subjective requirement" acknowledges that it sees the unwelcomeness prong as requiring some form of subjective perception.
\item \textsuperscript{111} \textit{That the subjective prong and the unwelcomeness prong are interrelated is also reflected in \textit{Balletti v. Sun-Sentinel Co.}, 909 F. Supp. 1539 (S.D. Fla. 1995), which defines the subjective prong in terms of the unwelcomeness requirement (correct inquiry in determining whether employee subjectively perceived work environment as abusive is whether employee by his or her conduct indicated that complained-of behavior was unwelcome).}
\item \textsuperscript{113} \textit{Harris v. Forklift Systems, Inc., No. 3-89-0557, 1991 WL 487444 (M.D. Tenn. Feb. 4, 1991).}
\item \textsuperscript{114} Id. at 4.
\item \textsuperscript{115} \textit{Harris v. Forklift Systems, Inc., 510 U.S. 17, 22, 114 S. Ct. 367, 371 (1993).}
\item \textsuperscript{116} \textit{The district court in \textit{Harris}, in comparing \textit{Harris} with the plaintiff in \textit{Rabidue v. Osceola Refining Co.}, 805 F.2d 611 (6th Cir. 1986), stated that "[the plaintiff in \textit{Rabidue}] was able to show that the offensive conduct was severe enough to annoy her female co-workers, which Ms. Harris had been unable to show." \textit{Harris v. Forklift Systems, Inc.}, No. 3-89-0557, 1991 WL 487444 (M.D. Tenn. Feb. 4, 1991). The Supreme Court, in rejecting this argument, centers the attention of the court to the reaction of the plaintiff herself in a sexual harassment claim.}
\end{itemize}
welcome, as long as the employee indicates that it is unwelcome.178 According to Meritor, "unwelcomeness" must be judged by looking at the "totality of the circumstances."179 Recent cases show that the courts will consider a variety of factors in determining whether the conduct was unwelcome, including whether the victim used crude language,180 whether the victim registered a complaint,181 and whether the victim and the harasser interacted socially.182 And while the unwelcomeness requirement has been criticized,183 the "signaling" function it performs is crucial in a workplace. Conduct that the harasser may not intend to be offensive can rise to the level of "hostile" or "abusive" when continued over time.184 One of the reasons the unwelcomeness prong was included was to avoid penalizing an "unwitting" harasser in cases where some may not be offended and no clear signal was sent that the conduct was unwelcome.185

The importance of the "unwelcomeness" requirement makes the subjective perception of the offensiveness of the behavior even more important. The signal sent to the employer may be necessary for recovery in a hostile work environment claim.186 Thus the idea that an employee may subjectively perceive the conduct as offensive and therefore unwelcome after-the-fact or after employment becomes problematic in light of the "signaling" purpose the subjective prong provides.

B. The Role of the Subjective Prong and Post-Employment Realization

1. After-the-Fact/Post-Employment Realization

The subjective prong required by the language of Harris does not mandate that the conduct in question be perceived as offensive at the exact moment the conduct...
occurs. The court in *Kimzey v. Wal-Mart Stores, Inc.* rejected this notion, saying that "[t]he Court does not rigidly require that a plaintiff form a well-defined, subjective belief of hostility at the exact moment the incident occurs." More importantly, neither of the reasons for requiring the subjective prong is undermined by an after-the-fact realization. The employee's subjective perception of the hostility of the workplace at any time during her employment will result in the requisite altering of a "term, condition, or privilege" of employment. In addition, further offensive behavior by a harasser will be perceived, and (hopefully) manifested as "unwelcome" by the harassed. The employee will be able to "signal" her distaste of the conduct in question.

The more difficult case is that presented by *Faragher*. If the victim does not perceive the conduct to be offensive during her employment, then how can a "term, condition, or privilege" of employment be altered, as required by *Harris*? The Eleventh Circuit said that it could not. However, the language of *Harris* does not mandate that the subjective perception occur during employment. It merely says that if such a perception does not occur, then the conduct in question has not altered the conditions of employment. One could say that the employee subjectively perceived the workplace to have been abusive after the conduct occurred (which happened to be after the employment was terminated), and the employee, at that moment, also perceived the extent to which her workplace had been altered. The requisite "alteration" of the workplace can be said to have occurred.

Admittedly this interpretation is stretching the language of *Harris*. However, if the requirement of the subjective prong is to ensure that the workplace has been altered and the plaintiff in question has suffered some harm, then a showing of actual psychological damage may ensure that the purpose behind requiring the subjective prong—to show some "damage" or "injury"—is fulfilled.

More difficult to reconcile to a post-employment subjective perception is the "signaling" function the subjective prong also serves. The allowance of a post-employment realization of the offensiveness will result in allowing the employee to recover in situations where the employee did not signal the unwelcomeness of the conduct to the employer. In situations where the harassment was
intentional and the hostility of the environment was felt by others in the workplace, the signaling by one employee may not be necessary for a manifestation of the unwelcomeness of the conduct in general. The situation in Hirase-Doi v. U.S. West Communications, Inc., discussed previously, is an example of this. The court held that the plaintiff could rely on evidence of her co-employee’s harassment of other women to the extent that it affected her general work atmosphere. In cases where the co-employee’s harassment is widespread, the employer could be put on notice “even though employer may not have known that this particular plaintiff was one of perpetrator’s victims.”

More difficult is the situation like that of Harris, in which the conduct in question was not perceived as offensive by anyone other than the plaintiff herself. The harasser himself may not realize that the conduct in question offended; indeed, he may feel that such behavior is part of the “shop” atmosphere in which he works. Both harasser and employer will be shocked when the employee, who perceived no hostility and manifested no displeasure at the conduct during her employment, sues after termination for damages sustained as a result of the hostility of the environment. The idea of punishing both harasser and employer for conduct that was seemingly welcome penalizes both for engaging in any sexually charged conduct. Thus, in theory, any sexually oriented comment at the workplace could be viewed as sexual harassment and even consensual sexual repartee could later be characterized as “unwelcome,” and thus violative of Title VII.

To allow this would be to push Title VII too far. The “unwelcomeness” requirement was included to protect both men and women who engage in consensual sexual relationships at work. If this protection is eliminated, then the sexual harassment claim could potentially exist in any relationship. Employers could thus discourage or disallow any relationship among co-employees on the grounds that such conduct constitutes sexual harassment. Even worse, the sexual harassment claim could become a retaliatory tool for the jilted lover or the fired employee. Co-employees who were not the targets of “harassing” conduct could sue when they realize that other co-workers are recovering for offensive conduct (and not that they were harassed).

Such is one dark end of the spectrum in allowing a post-employment realization of the offensiveness of the workplace conduct. The other end of the spectrum—the evil of disallowing post-employment realization of the offensiveness of the conduct—must also be considered. Consider the following scenario: an employee is subjected to a workplace that is objectively “hostile.” As the court in

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195. The employer may not be able to claim that it was unaware of the hostility of the work environment. See Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777 (10th Cir. 1995).
196. Hirase-Doi, 61 F.3d 777.
197. Id. at 782.
198. Id. at 783.
199. See Vhay, supra note 185.
Kimzey v. Wal-Mart Stores, Inc.200 envisioned, the employee at first does not want to believe that the employer is engaging in hostile behavior. At first, she ignores it, then justifies it to herself. She is at the point where she is about to realize the impact that the behavior actually has on her when she is terminated. She goes to a psychologist and is found to be suffering from severe depression brought on by the harassment. She has no claim, however, as she has not, during her employment, “subjectively perceived” her workplace to be hostile.

This example illustrates how Harris’ requirement of subjective perception can limit valid claims. It shows how the Court in Harris failed to include in its analysis conduct that either causes serious psychological harm or affects the conditions of employment without the employee realizing it. The Court, in relying on the assumption that subjective perception of the conduct during employment is necessary or the employment to be affected, failed to consider the effects that sexual harassment has on a woman from a psychological standpoint, women’s varying reactions to sexual harassment, and the possibility that such conduct could affect a woman’s psychological well-being and employment without her realizing it for some time.

2. The Subjective Perception Requirement Viewed in Light of the Psychological Implications of Sexual Harassment

Psychological studies on how women react to hostile work environment sexual harassment are still in their infancy, partly because the sexual harassment claim arose long before a coherent body of research had been done on the subject.201 That psychologists are struggling to keep up with the proliferation of the sexual harassment claim is reflected in the fact that much of the scientific research on sexual harassment has been influenced by the EEOC’s definitions of sexual harassment and the problems in assessing sexual harassment that the courts themselves faced.202

201. See Louise F. Fitzgerald and Sandra L. Shullman, Sexual Harassment: A Research Analysis and Agenda for the 1990s, 42 J. Vocational Behav. 5, 6 (1993).
202. Id. It is interesting to note that many of the studies on perception of sexual harassment in the past few years have concentrated on the differences of perception of sexual harassment according to certain “rater effects” such as gender and age. This reflects psychologists’ response to the legal debate over whether a “reasonable person” or “reasonable woman” standard would make a difference in adjudicating the behavior. For examples of such studies, see Jeanette N. Cleveland and Melinda E. Kerst, Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship, 42 J. Vocational Behav. 49 (1993); Fitzgerald et al., supra note 4; Margaret S. Stockdate et al., Acknowledging Sexual Harassment: A Test of Alternative Models, 17(4) Basic and Applied Social Psychology 469 (1995); Paula M. Popovich et al., Perceptions of Sexual Harassment as a Function of Sex of Rater and Incident Form and Consequence, 27 Sex Roles Nos. 11/12 (1992).
As psychologists have begun to understand what behaviors are perceived as sexual harassment by different groups of people, their attention is turning more to the effects that sexual harassment has on women and the coping mechanisms women use to deal with it.\textsuperscript{203} Two new areas of research have emerged—victim responses and organizational factors.\textsuperscript{204} It is within the area of victim responses to sexual harassment that future psychological studies may be helpful for courts and lawyers in determining exactly what can constitute "subjective perception" of sexual harassment.

Victims of sexual harassment respond differently. Much of how a victim reacts depends on her background, education and job position.\textsuperscript{205} One study has divided the responses into two categories: those which are internally focused (including endurance, denial, detachment, relabeling, and illusory control) and those which are externally focused (avoidance, appeasement, assertion, reporting, and seeking social support).\textsuperscript{206} Some of the internally focused responses show the tendency of some victims not to recognize the behavior of the harasser as improper and to blame themselves for the harassment.\textsuperscript{207} This is especially understandable in situations where the harassment begins with minor incidents and slowly escalates. As one leading study stated: "A woman who is harassed may be unsure at first if what she is experiencing really is harassment . . . ."\textsuperscript{208} Moreover, women may be conditioned to accept the conduct by other co-workers or family members who would blame the victim rather than the harasser.\textsuperscript{209}

Other studies of the effects of sexual harassment on the victim and her coping responses to the conduct in question have revealed that self-doubt, denial, and guilt are common reactions in the first stages of sexual harassment.\textsuperscript{210} This being so, it is quite possible that a victim may not perceive the conduct as offensive at the time it occurs, mainly because she is blaming herself for the harasser's conduct, or at least blaming herself for thinking that the harasser is out of line. The tendency of the victim to blame herself is more prevalent (and more understandable) when the harasser is a superior and not a mere co-worker.\textsuperscript{211}

\begin{footnotes}
\item[\textsuperscript{203}] See Barbara A. Gutek and Mary P. Koss, \textit{Changed Woman and Changed Organizations: Consequences of and Coping with Sexual Harassment}, 42 J. Vocational Behav. 28 (1993).
\item[\textsuperscript{204}] Fitzgerald and Shullman, \textit{supra} note 201.
\item[\textsuperscript{205}] Gutek and Koss, \textit{supra} note 203.
\item[\textsuperscript{206}] Fitzgerald and Shullman, \textit{supra} note 201, at 14 (citing a study by L.F. Fitzgerald et al., \textit{Responses to Victimization: Validation of an Objective Inventory to Assess Strategies for Responding to Sexual Harassment}).
\item[\textsuperscript{207}] Sara B. Samoluk and Grace M. H. Petty, \textit{The Impact of Sexual Harassment Simulations on Women's Thoughts and Feelings}, 30 Sex Roles, 679, 689 (1994).
\item[\textsuperscript{208}] Gutek and Koss, \textit{supra} note 203.
\item[\textsuperscript{209}] Id.
\item[\textsuperscript{210}] For a good exposition on the different stages of reactions to sexual harassment, see Robert H. Woody and Nancy W. Perry, \textit{Sexual Harassment Victims: Psycholegal and Family Therapy Considerations}, 21 Am. J. Fam. Therapy 136 (1993). For a study of the impact of sexual harassment on depression and Post Traumatic Stress Disorder, see Gutek and Koss, \textit{supra} note 203.
\item[\textsuperscript{211}] See generally Cleveland and Kerst, \textit{supra} note 202. See also Samoluk and Petty, \textit{supra} note 207, at 693-94.
\end{footnotes}
One thing that is clear from the studies is that sexual harassment negatively affects the victim both physically and psychologically, regardless of whether the victim is actually aware of how pervasive or offensive the behavior is at the time of the conduct. Many victims carry on their work numbly and only feel the onslaught of the effects of sexual harassment in the form of Post Traumatic Stress Disorder. Women often do not attribute their depression and other problems to their work environment until after they are out of it (and realize exactly what the problem was).

Research has shown that women can suffer psychological injury from sexual harassment without perceiving the hostility of the workplace during their time of employment. Since this is the case, the subjective prong of Harris must be reevaluated in light of these findings. If compensation for injury is one of the reasons for allowing compensatory damages under Title VII, it makes sense that those who actually suffer psychological injury from the hostile work environment should recover regardless of when they became aware of the nature of the harassing conduct. Indeed, the Harris Court explicitly stated that it wanted to allow recovery to victims of a hostile work environment before they got to the point of depression, Post Traumatic Stress Disorder, and other psychological injury.

C. Practical Considerations and Conclusions

The scientific research on women’s reactions to sexual harassment shows the burden that the subjective prong can impose upon some sexual harassment plaintiffs and discounts the notion that the subjective prong is “easy” for the plaintiff to satisfy. The hard question of what to do with the subjective

212. See Jennifer L. Vinciguerra, The Present State of Sexual Harassment Law: Perpetuating Post Traumatic Stress Disorder in Sexually Harassed Women, 42 Clev. St. L. Rev. 301, 316-17 (1994): “It has been found that ‘[a]ny traumatic incident challenges a victim’s belief that the world is safe and predictable, attacks the victim’s former sense of personal invulnerability, and disrupts the victim’s basic sense of self-trust and trust in the environment.’ Although sexual harassment clearly fits this definition of a traumatic event, sexual harassment has not been universally considered one of the stressors that causes PTSD.” This article makes a persuasive argument that “Sexual Harassment Stress Disorder” should be recognized as a form of Post Traumatic Stress Disorder.

213. Gutek and Koss, supra note 203, at 33-34.

214. This is true when women feel that the sexual harassment was their fault, i.e. they internalize the trauma. See Vinciguerra, supra note 212, at 323.


217. While some have criticized the subjective prong (see Jolynn Childers, Is There Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment, 42 Duke L.J. 854, 876 (1993)), others contend that the subjective prong adds no burden to the Title VII plaintiff. See Kerry A. Colson, Harris v. Forklift Systems, Inc.: The Supreme Court Moves One Step Closer to Establishing a Workable Definition for Hostile Work Environment Sexual Harassment Claims, 30 New Eng. L. Rev. 441, 472 (1996) (“The addition of the subjective component does not place a greater burden on the plaintiff. In fact, the subjective prong is easily met


prong still remains. As discussed earlier, eliminating the prong entirely would result in the elimination of the "signaling" function that is crucial in the sexual harassment claim.\textsuperscript{218} As shown above, requiring it may deny recovery to victims of sexual harassment who suffer psychological injury after their employment. The fairest solution may lie in changing the role of the subjective prong of the hostile work environment claim so that both concerns—the "signaling" of harassment and compensation of the victim of harassment—are met.

Several possibilities of how to treat the subjective prong come to mind: (1) one could continue to require a contemporaneous realization of the hostility of the conduct; (2) one could continue to require a subjective perception of the offensiveness of the conduct, but allow this to take place after the conduct has actually occurred; (3) one could require the employee to prove she subjectively perceived the conduct as offensive only if the employer offers evidence to the contrary (i.e. move the requirement from the \textit{prima facie} case to the affirmative defense); (4) one could require proof of subjective perception only to establish the amount of damages suffered by the victim; and (5) one could argue that the subjective element is already met in the unwelcomeness requirement, and eliminate the "double subjective element" from the \textit{Harris} test.

The first option could be titled "The Status Quo." There is a certain logic to keeping the subjective requirement as is. As discussed earlier, it is a way of showing that the victim's employment was discriminatorily altered.\textsuperscript{219} In this sense, requiring the subjective prong would thus satisfy the "tort" aspect of the Title VII claim in that it would assure that the victim herself actually was offended by the hostile work environment and therefore suffered actual damage. Requiring the subjective prong also helps employers prevent sexual harassment from creating a hostile work environment as the employee is more likely to signal that the conduct is unwelcome and thus harassing. It helps the trier of fact determine, based on the manifestations of the employee, whether the employer knew or should have known of the alleged conduct. It protects employers from claims of former employees and those who voluntarily entered into a sexual relationship with a co-worker that later soured, and from claims of former employees who were not actually affected by the harassment. Finally, requiring the subjective prong may in the future reduce the burden imposed upon the judicial system by the recent multiplication of hostile work environment sexual harassment claims.\textsuperscript{220}

\textsuperscript{218} See supra text accompanying notes 194-200.
\textsuperscript{219} See supra text accompanying notes 163-166.
\textsuperscript{220} The numbers speak for themselves: 3000 hostile work environment claims were filed with the EEOC in 1991; 7000 claims were filed in 1993; 15,000+ claims were filed in 1995. See Joyce
The weaknesses of some of these arguments have already been espoused in this paper. First, if the signaling of the offensiveness of the behavior is a concern, it is unclear how this requirement adds any more towards this end than the requirement that the conduct be "unwelcome." Second, if the subjective requirement is necessary to satisfy a "damage" element of the claim, then why must the subjective perception of the hostile work environment be contemporaneous with the objectionable behavior itself? If a victim can prove that she suffered Post Traumatic Stress Disorder or other actual psychological injury, then why should she be unable to recover? In this sense, it is hard to see why a showing that the workplace has not been altered should exclude cases involving severe psychological injury. Third, while requiring a subjective element may help keep sexual harassment claims down, it is hard to see how this goal is desirable if sexual harassment is indeed prevalent in our society.

The second possibility, allowing an ex post facto realization of the offensiveness of the work environment, would allow recovery for victims who suffer psychological injury without realizing the effect of the work environment at the time. This would be in keeping with the compensatory nature of Title VII, and the goal espoused in Harris to protect those psychologically harmed by a hostile work environment. It would also be in keeping with the prophylactic scope of Title VII—an ex-employee could sue in her capacity as a representative of a protected class to eliminate discrimination where it exists. However, this approach suffers from some theoretical drawbacks. If the conduct is not perceived as offensive during the victim's employment, then the employee may not have signaled the unwelcomeness of the conduct to the harasser. As discussed previously, the danger in allowing such claims is the room for abuse by those not actually harmed by the workplace. The damage awards now available to Title VII plaintiffs will more likely make "big money" instead of the elimination of discrimination, the motivation of many Title VII plaintiffs.

The third possibility is a compromise between requiring and not requiring a subjective element. It involves shifting burdens of proof. Under this analysis, the employee would not be required to prove a subjective element in her prima facie case of sexual harassment; however, if the employer could establish some facts that would indicate a lack of subjective perception on the part of the victims, the burden would shift back to the victim to show that the conditions of


221. See United States Supreme Court Official Transcript of Harris v. Forklift Systems, Inc., supra note 163, at 9. The position of the United States as amicus curiae was that the subjective prong was not necessary, as the unwelcomeness prong included a subjective element in it.


223. See supra text accompanying note 194-200.

224. The punitive damages available to plaintiffs is incentive enough to sue. In the recent case of Kimzey v. Wal-Mart Stores, Inc., 907 F. Supp. 1309 (W.D. Mo. 1995), the trial court reduced a jury award of $50 million in punitive damages to $5 million.
her employment were actually altered by the conduct in question. Thus, while subjective perception of the conduct in question would no longer be an element of the sexual harassment claim, the lack thereof could be brought up by the defense.\textsuperscript{225} This approach would have the advantage of not limiting the effect of the harassment to cases where the victim has actually perceived the abusiveness of the conduct at the time of employment, while protecting the employer from a certain extent from frivolous claims.

However, this approach may be ineffective in practice. As cases such as Kimzey, Hirase-Doi and Faragher show, the defendant will more likely than not challenge the plaintiff's subjective perception of the workplace when there is a question of whether the employee sufficiently manifested the "unwelcomeness" of the conduct.\textsuperscript{226} Since the employee would still be required to prove that the conduct was unwelcome as part of her \textit{prima facie} case, the victim would still have the burden of proving that she perceived the conduct to be offensive and that she manifested this to her employer.

The fourth approach is a variation of the third approach. The employee would not be required to prove a subjective element in order to prove a hostile work environment. The proof of subjective realization of the offensiveness of the conduct would be required in the proof of damages. This would allow the employee to bring a claim for hostile work environment to obtain injunctive relief or compensation for economic losses, but would discourage an employee from bringing a claim for "big money" when she did not manifest any perception of the hostility of the workplace. This approach would reflect the theoretical division between discrimination and tort discussed above:\textsuperscript{227} the victim would have an anti-discrimination claim under Title VII in which she would represent the interests of a class (in this case women) in eliminating discrimination. To recover for personal injury suffered, the victim would have to prove, via the subjective requirement, actual damage (as in tort). Thus, if the plaintiff can prove an objectively hostile work environment, then she can obtain injunctive relief or backpay (the original remedies available for a Title VII claimant). If she can prove that she suffered because of the altered work environment, she can claim compensatory (and possibly punitive) damages for this injury. This would have the advantage of discouraging frivolous claims, as the employee would not have the incentive of "big money" to sue without some showing that she was either harmed by the workplace or that the conditions of her workplace were altered.

\textsuperscript{225} Interestingly enough, this "burden shifting" approach has been proposed by another author for the "unwelcomeness" requirement. Reasoning that the "unwelcomeness" requirement in the \textit{prima facie} case results in a "victim focus" effect much like what occurs in a rape trial, Glenn George proposes that this requirement be eliminated from the \textit{prima facie} case of sexual harassment and be raised, if necessary, by the defendant as an affirmative defense. \textit{See} George, \textit{supra} note 22, at 1.


\textsuperscript{227} \textit{See supra} text accompanying notes 146-147.
Finally, an argument can be made that we can do without a separate subjective prong altogether. If the argument is that the subjective prong is necessary to establish that the conduct in question was “unwelcome,” the counterargument is that a separate subjective prong is not necessary to prove unwelcomeness, as that element is already part of the *prima facie* claim. The plaintiff already has the burden of proving that the conduct (1) was unwelcome; (2) was not objectively reasonable; and (3) was known or constructively known by the employer (respondeat superior). Eliminating the subjective prong would take into account the double subjective element now present in the hostile work environment claim. The subjective prong is not necessary for “signaling” purposes if a manifestation of “unwelcomeness” is required. And if one views the injury as something other than “alteration of the workplace,” then the subjective prong may not be necessary to determine whether an injury has occurred. The United States, as amicus curiae in *Harris*, argued that the injury suffered from the hostile work environment lies not in the alteration of the workplace, but in “being denied the right to a discrimination-free employment place.” If this is injury enough for a Title VII violation, then a subjective perception of the hostility of the workplace may not be necessary, as the right would be infringed regardless of whether the employee was aware of it during the period of employment or not.

Of these alternatives, the fourth approach, requiring the subjective prong in the proof of damages, may be better than simply eliminating the subjective prong or always allowing it to be met by an after-the-fact realization of the offensiveness of the conduct. Both of these alternatives create the possibility of opening the floodgates to any former co-worker of a sexual harassment plaintiff. This might defeat one of the purposes requiring the subjective prong, as there is some literature that suggests that the subjective prong was added as a limit to such “indirect effects.” However, allowing the subjective prong to be considered after the hostile work environment has already been established will allow plaintiffs who have suffered post employment psychological injury to be compensated for their injury. This approach may also be the most theoretically consistent with the purposes of including the subjective prong. The plaintiff will still have to prove “unwelcomeness” as part of her *prima facie* claim, and thus the perception of the offensive conduct and the “signaling” function of the subjective prong will be met. Only when proving damages will the plaintiff have to rely on either her subjective perception of the alteration of the workplace or actual damages resulting from the hostile workplace.

Ultimately, the question of whether the employee perceived the conduct as offensive and unwelcome will depend on the circumstances surrounding her

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229. *See Burns*, *supra* note 172, at 357 n.436.
claim. The credibility of the plaintiff and the validity of the claim will always, no matter what test is used, be a question for the trier of fact. In \textit{Faragher}, the court believed one plaintiff's assertion that she had found the work environment hostile during the time of her employment, but did not believe the other plaintiff. Such is the case. Neither plaintiff in \textit{Faragher} presented the evidence of psychological injury resulting from the hostile work environment. Neither plaintiff, in fact, had a very compelling case on the merits.\textsuperscript{230} However, this case raised some compelling issues regarding the nature of the hostile work environment sexual harassment claim. If cases like \textit{Faragher} continue to arise, the courts will be forced to evaluate the subjective prong in light of the purposes it was meant to serve and the reality of the psychological effects of sexual harassment.

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\textsuperscript{230} At least not in this author's view. The fact that one plaintiff requested reemployment and the other did not discourage her sister from seeking employment at the same place does not bolster the argument that they found the workplace hostile during or after their employ.