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## Consider the Source: When the Harasser Is the Boss

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## ESSAY

### CONSIDER THE SOURCE: WHEN THE HARASSER IS THE BOSS

*Susan Grover\**

*Kimberley Piro\*\**

*In Consider the Source, Susan Grover and Kim Piro argue for a change in the analysis that courts apply to determine whether actionable workplace harassment has occurred. They identify a gap in current doctrine, which allows courts to ignore the status of the harasser as co-worker or supervisor. The authors argue that harassment at the hands of a supervisor is necessarily more severe and pervasive than the same harassment by a co-worker. As a result, they recommend that the harasser's identity as a supervisor or co-worker be treated as a necessary consideration when courts assess whether actionable harassment has occurred.*

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\* Susan Grover is an Associate Professor of Law at the William and Mary School of Law. Professor Grover wishes to thank the students in her Fall 2008 Employment Discrimination class and her Spring 2009 Equal Opportunity Practicum for helping her to think about these issues.

\*\* Kimberley Piro received her J.D. in May 2009 from the William and Mary School of Law. She is a Trial Attorney with the Antitrust Division of the United States Department of Justice.

## INTRODUCTION

What is the difference between these two experiences?

Scenario 1: You are an unskilled office worker. A coworker tells you that you are not a valued employee. The coworker then opines that people of your national origin are stupid.

Scenario 2: You are an unskilled office worker. Your immediate supervisor tells you that you are not a valued employee. The supervisor then opines that people of your national origin are stupid.

Most people find abuse<sup>1</sup> inflicted by the boss to be more painful than abuse inflicted by a coworker.<sup>2</sup> The difference<sup>3</sup> between a supervisor's and a coworker's power to injure means that the harasser's identity should be a pivotal factor in every harassment case.<sup>4</sup> The power to injure and the degree of the resulting injury matter because harassment is actionable only if the target experiences abuse serious enough to "alter the conditions of [the target's] employment."<sup>5</sup> Courts thus should distinguish between supervisors and other<sup>6</sup> categories of abusers when gauging whether a target's experience of abuse is serious enough to qualify as harassment.

Although the victim's experience of the conduct as abusive is an essential facet of proving that harassment occurred, and although the supervisory status of the harasser exacerbates that experience, the current analytic framework for assessing workplace harassment does not require courts to consider whether the harasser is the target's supervisor.<sup>7</sup> Ignoring the

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1. This Essay uses the terms "abuse" and "abuser" to refer to hostile workplace conduct generally and one who perpetrates it. The term "harassment" is used to refer to conduct relating to the legal action of harassment. The term "harasser" is used to connote the individual accused of harassment, even though the individual may be innocent.

2. See *infra* Part III (describing studies that found abuse from supervisors to be more harmful than abuse from coworkers).

3. See *infra* Part III; notes 96–105 and accompanying text.

4. In this Essay, "harassment" refers to discriminatory harassment on any of the grounds prohibited under the federal antidiscrimination laws, including race, sex, national origin, religion, color, disability, and age.

5. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The law requires that the plaintiff meet this standard both subjectively and objectively: the plaintiff actually experienced the treatment as abusive and a reasonable person in the plaintiff's situation would have experienced the treatment as abusive. See *id.* at 21–22.

6. There are, of course, several types of third-party abusers, including customers and members of the general public. The law analyzes co-worker abuse much as it analyzes other third-party abuse. Thus, the distinctions this Essay draws between supervisor abuse and coworker abuse may also be drawn between supervisor abuse and third-party abuse. For examples of abuse by customers and the general public, see *Galdamez v. Potter*, 415 F.3d 1015 (9th Cir. 2005) and *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998).

7. See *infra* Part III. The harasser's status as a supervisor figures prominently at the stage after harassment has been assessed, when courts are determining whether the employer should be held vicariously liable for proven harassment. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998). The formal inclusion of that status as a factor at the liability phase does nothing to obviate the need to consider it at the harassment assessment phase.

harasser's supervisory role skews results in favor of employers.<sup>8</sup> Nothing in U.S. Supreme Court doctrine precludes consideration of harasser identity when the victim's experience is assessed, and some courts have expressly taken harasser identity into account.<sup>9</sup> Most courts do not,<sup>10</sup> however, and this Essay argues that they should.

Part I of this Essay outlines the standard for hostile work environment harassment as defined by the Supreme Court, with particular emphasis on the "severe or pervasive" totality of the circumstances test. Part II discusses recent cases from lower courts, which purport to apply the totality test, but reach erroneous results because of a failure to consider the harasser's supervisory role. Part III explains why abusive conduct is inherently both more severe and more pervasive when initiated by supervisors than when initiated by coworkers, and proposes that courts should consistently consider the status of the harasser as supervisor or coworker when evaluating the severity or pervasiveness of the alleged harasser's conduct. In conclusion, Part IV advocates that the harasser's status as supervisor be incorporated as an essential factor in the determination of whether harassment has occurred.

#### I. SUPREME COURT STANDARD

Title VII does not mention discriminatory harassment,<sup>11</sup> and more than twenty years passed between Title VII's enactment in 1964 and the Supreme Court's first recognition of a harassment cause of action in 1986.<sup>12</sup> The analytic framework for discriminatory harassment was another ten years in the making and continues to be a work in progress.<sup>13</sup>

During Title VII's early years, there was disagreement about if and when harassment claims were actionable under Title VII.<sup>14</sup> The typical Title VII case involved official employer actions, such as pay discrimination or

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8. *See, e.g.*, *Murphy v. City of Aventura*, 616 F. Supp. 2d 1267, 1277 (S.D. Fla. 2009) (finding that conduct at issue "lack[ed] severity" despite harasser's supervisory role); *Enriquez v. U.S. Cellular Corp.*, No. 06 C 3135, 2008 WL 4925012, at \*10–15 (N.D. Ill. Nov. 14, 2008) (holding no hostile work environment created by supervisor harasser); *Akonji v. Unity Healthcare, Inc.*, 517 F. Supp. 2d 83, 96–99 (D.D.C. 2007) (granting defendant's motion for summary judgment because acts of harassment by supervisor were not sufficiently severe).

9. *See, e.g.*, *Steck v. Francis*, 365 F. Supp. 2d 951, 966–75 (N.D. Iowa 2005); *Hargrave v. County of Atlanta*, 262 F. Supp. 2d 393, 416 (D.N.J. 2003).

10. This is most evident when courts cite coworker cases to support a conclusion that abuse by a supervisor did not constitute actionable harassment. *See, e.g.*, *Enriquez*, 2008 WL 4925012, at \*11; *Akonji*, 517 F. Supp. 2d at 98.

11. *See* 42 U.S.C. § 2000e (2006).

12. *See generally* *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

13. This framework has been the work of U.S. Supreme Court jurisprudence as well as congressional action in 1991. The 1991 Civil Rights Act added compensatory damages for cases of environmental harassment. 42 U.S.C. § 1981a.

14. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 818–23 (1991) (discussing the early debates surrounding the inclusion of sexual harassment as an actionable claim under Title VII).

termination.<sup>15</sup> Because harassment did not always involve concrete employer action, it was not clear whether harassment fell within the purview of Title VII's prohibition against discrimination in the "terms, conditions, or privileges of employment."<sup>16</sup> Most courts did allow a sex discrimination cause of action where employees were penalized for declining supervisors' sexual advances.<sup>17</sup> Such "quid pro quo" cases were deemed to meet the statutory criterion of discrimination "because of [the victim's] sex"<sup>18</sup> because they involved concrete action taken against the victim, arguably motivated by the victim's sex.<sup>19</sup> Some courts went beyond quid pro quo cases and also recognized discriminatory hostile environment claims, even in the absence of concrete employment action taken against the target, as long as the harassment was motivated by a protected trait, such as race or sex.<sup>20</sup> Nevertheless, until 1986, there was much uncertainty about

15. *Meritor*, 477 U.S. at 67–68 (casting aside the lower court's more traditional view that an economic effect on the plaintiff's employment was necessary to establish a claim under Title VII).

16. 42 U.S.C. § 2000e-2(a)(1); see *Meritor*, 477 U.S. at 67 (citing *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

17. See *Meritor*, 477 U.S. at 68. "It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a condition to obtain employment or to maintain employment or to obtain promotions falls within protection of Title VII." *Id.* (quoting *Vinson v. Taylor*, No. 78-1793, 1980 U.S. Dist. LEXIS 10676, at \*23 (D.D.C. Feb. 26, 1980)); see also B. Glenn George, *Employer Liability for Sexual Harassment: The Buck Stops Where?*, 34 WAKE FOREST L. REV. 1, 3–4 & nn.13–22 (1999) (discussing the greater ease with which courts accepted a quid pro quo harassment cause of action under Title VII than a hostile environment cause of action).

18. 29 C.F.R. § 1604.11 (2010).

19. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). Schultz has written,

Although this sexual desire-dominance paradigm represented progress when it was first articulated as the foundation for quid pro quo sexual harassment, using the paradigm to conceptualize hostile work environment harassment has served to exclude from legal understanding many of the most common and debilitating forms of harassment faced by women (and many men) at work each day. The prevailing paradigm privileges conduct thought to be motivated by sexual designs—such as sexual advances—as the core sex- or gender-based harassment. Yet much of the gender-based hostility and abuse that women (and some men) endure at work is neither driven by the desire for sexual relations nor even sexual in content.

*Id.* at 1686–87 (citations omitted). For a discussion of "courts' initial reluctance to hold that supervisors' demands for sexual favors occurred 'because of sex' within the meaning of the statute," see *id.* at 1689.

It should be noted that there is good reason to believe that sexual advances by a superior against an inferior employee originate from a goal of oppression of the subordinate, exerting power and maintaining a status quo of subordination, rather than from motivation based upon sex. See John W. Whitehead, *Eleventh Hour Amendment or Serious Business: Sexual Harassment and The United States Supreme Court's 1997–1998 Term*, 71 TEMP. L. REV. 773, 784–86 (1998) (discussing sexual harassment as an abuse of authority rooted in dominance rather than desire). Nevertheless, most courts assume hostile conduct of a sexual nature to be "because of sex." See Veronica Diaz, Note, *Playing Favorites in the Workplace: Widespread Sexual Favoritism as Actionable Discrimination Under Miller v. Department of Corrections*, 16 S. CAL. REV. L. & SOC. JUST. 165, 189–90 (2006) (citing relevant cases).

20. The courts' ultimate acceptance of sexually hostile environment claims was predicated on their well-established acceptance of racially hostile environment claims. See

allowing a Title VII claim for hostile environment harassment in the absence of economic harm.<sup>21</sup> In the 1986 case of *Meritor Savings Bank, FSB v. Vinson*,<sup>22</sup> the Supreme Court recognized the hostile environment cause of action.<sup>23</sup>

Mechelle Vinson sued under Title VII for discriminatory harassment, even though her harassing supervisor had not taken official adverse action against her.<sup>24</sup> Vinson complained that her supervisor, Sidney Taylor, “made repeated demands upon her for sexual favors . . . fondled her in front of other employees, followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions.”<sup>25</sup> The defendant bank<sup>26</sup> argued that harassment claims were cognizable only if the plaintiff had experienced economic harm.<sup>27</sup> The Supreme Court rejected that argument, concluding that a hostile environment is injury enough to violate the Title VII prohibition against discrimination in the terms or conditions of employment.<sup>28</sup> The Court distinguished such environmental claims from “quid pro quo” harassment cases, in which a supervisor threatens to take job-related action against the victim, but recognized both as actionable under Title VII.<sup>29</sup>

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Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (citing race and national-origin cases upon which the *Meritor* Court predicated recognition of an environmental sexual harassment claim).

21. See *Bundy v. Jackson*, 641 F.2d 934, 938–39 (D.C. Cir. 1981) (reversing lower court’s holding that “sexual harassment does not in itself represent discrimination ‘with respect to . . . terms, conditions, or privileges of employment’ within the meaning of Title VII”). Prior to *Meritor*, although courts had recognized hostile environment racial harassment cases, they had not uniformly recognized hostile environment sex-motivated harassment. See, e.g., *Rogers*, 454 F.2d at 238 (“One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of [racial] minority group workers, and I think . . . Title VII was aimed at the eradication of such noxious practices.”).

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

23. *Id.* at 73.

24. *Id.* at 64.

25. *Id.* at 60.

26. Under Title VII, claims are cognizable against the employer, not the individual wrongdoer. See *Wilson v. Wayne County*, 856 F. Supp. 1254, 1264–65 (M.D. Tenn. 1994).

27. *Meritor*, 477 U.S. at 64. Interestingly, Vinson took indefinite sick leave because of the harassment and then was discharged by the bank for excessive use of that leave, but there were no allegations of constructive discharge. *Id.* at 60. For later Supreme Court case law on constructive discharge in harassment cases, see *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). Title VII makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2006). The *Meritor* Court concluded that “terms, conditions, or privileges of employment” include the environment in which employees work and therefore if that environment is discriminatorily hostile or abusive, Title VII is violated. *Meritor*, 477 U.S. at 63–67.

28. *Meritor*, 477 U.S. at 73.

29. *Id.* at 65–67. In modern parlance, most discriminatory harassment is of the hostile environment variety. The alternative theory, “quid pro quo” harassment, is actionable when the employee undergoes adverse employment action for failing to submit to a supervisor’s

In *Meritor*, the Court thus began the process of delineating the contours of actionable harassment. Specifically, the Court established the “severe or pervasive” standard that endures as an essential element of the hostile environment claim.<sup>30</sup> It tied this standard directly to the statutory language of Title VII, announcing 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.’”<sup>31</sup>

Some lower courts construed this new standard grudgingly. They required plaintiffs to prove both severity *and* pervasiveness (even though the test had been articulated in the disjunctive), document psychological injury, or show some other additional harm.<sup>32</sup> Additionally, courts often refused to recognize gender-motivated harassment unless it was sexual in nature.<sup>33</sup> Summary judgment for an employer was common when a plaintiff’s allegations did not involve “unwelcome sexual advances or other verbal or physical conduct of a sexual nature.”<sup>34</sup>

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sexual demands. See Diaz, *supra* note 19, at 183 (explaining the differences between “quid pro quo” claims and hostile environment claims).

30. *Meritor*, 477 U.S. at 67. Today, in order to establish a case of hostile environment discriminatory harassment, the plaintiff must prove four elements. First, the plaintiff must have been subjected to unwelcome conduct. See *id.* at 68 (“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”). Second, the conduct must have been sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Third, the work environment must have been objectively hostile or abusive and the victim must have subjectively perceived the environment as hostile or abusive. See *id.* at 21–22. Fourth, the victim must have possessed a trait protected by Title VII and the conduct must have been based on this trait. See *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

The elements are the same regardless of whether the motive for the harassment is the victim’s sex, race, age, disability, or other protected trait. See, e.g., *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002) (applying the standard in a harassment claim by Mexican-Americans). Doctrines developed under Title VII are generally transferable to all traits protected by Title VII and also to traits protected by other statutory schemes. Courts sometimes move the order around a bit—for example, the U.S. Court of Appeals for the Fifth Circuit has required the employee to show that (1) she belongs to a protected group, (2) she was subjected to unwelcome sexual harassment, (3) the harassment was based on sex, (4) the harassment affected a term, condition, or privilege of her employment, and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. See *Harvill v. Westward Commc’ns, L.L.C.*, 433 F.3d 428, 434 (5th Cir. 2005); see also *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc).

31. *Meritor*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). The Court concluded that Vinson’s allegations, which included acts of rape, stated a claim for “hostile environment” sexual harassment. *Id.*

32. See Heather L. Kleinschmidt, Note, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L.J. 1119, 1124–29 (2005) (discussing the U.S. Court of Appeals for the Seventh Circuit’s interpretation of the standard as “severe and pervasive” rather than “severe or pervasive”); see also *Harris*, 510 U.S. at 22 (finding error in the lower court’s requirement of demonstrating psychological harm to establish a hostile work environment cause of action).

33. See Schultz, *supra* note 19, at 1716–20.

34. *Id.* at 1718 (citation omitted).

The Supreme Court revisited the legal standards for harassment in 1993 in *Harris v. Forklift Systems, Inc.*<sup>35</sup> *Harris* affirmed *Meritor*'s severe or pervasive standard.<sup>36</sup> As with the *Meritor* holding, however, lower courts have sometimes exaggerated the limits that *Harris* imposes on the plaintiff's case.<sup>37</sup>

Theresa Harris's supervisor repeatedly insulted Harris because she was a woman. His verbal abuse included calling Harris "a dumb ass woman" and making statements such as, "You're a woman, what do you know?" and "We need a man as the rental manager."<sup>38</sup> In addition to these nonsexual (but gender-motivated) insults, the supervisor engaged in inappropriate sexual antics and comments.<sup>39</sup> He publicly suggested to Harris that the two of them should "go to the Holiday Inn to negotiate [Harris's] raise."<sup>40</sup> He asked "female employees to get coins from his front pants pocket" and "threw objects on the ground, [asking the women] to pick the objects up."<sup>41</sup> He also made sexual innuendos about the clothing worn by Harris and other women.<sup>42</sup>

The lower court rejected Harris's claim of hostile environment harassment because the abuse had not caused secondary effects.<sup>43</sup> The court found that "some of [the supervisor's] comments 'offended [Harris], and would offend the reasonable woman,'" but were not severe enough to constitute harassment.<sup>44</sup>

The Supreme Court reversed, rejecting the lower court's requirement that secondary effects be shown.<sup>45</sup> Although psychological harm and interference with work performance may be *relevant* to a showing of harassment, the Court stated, they are not *necessary* to that showing.<sup>46</sup> The

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35. 510 U.S. 17 (1993).

36. *Id.* at 21–22.

37. *See, e.g.,* Lakshman v. Univ. of Me. Sys., 328 F. Supp. 2d 92, 112 (D. Me. 2004) (finding the facts in the case "different in degree and kind" from the *Harris* case); Stoeckel v. Envtl. Mgmt. Sys., Inc., 882 F. Supp. 1106, 1115 (D.D.C. 1995) (declining to find the harasser's conduct sufficiently egregious).

38. *Harris*, 510 U.S. at 19 (citation and internal quotation marks omitted).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 20 (describing secondary effects as harm to Harris's psychological well-being or interference with her work performance).

44. *Id.* (quoting the appendix to the plaintiff's petition for certiorari). The U.S. Court of Appeals for the Sixth Circuit affirmed the district court in an unpublished opinion. *See generally* *Harris v. Forklift Sys., Nos. 91-5301, 91-5871 and 91-5822*, 1992 WL 229300 (6th Cir. Sept. 17, 1992).

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

46. *Id.* at 23. Prior to *Harris*, some had argued that a showing of interference with work performance should be required. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986). In *Harris*, Justice Scalia noted that such a test would have been preferable, but was not consistent with precedent. *See Harris*, 510 U.S. at 24–25 (Scalia, J., concurring). Like psychological injury, however, a showing of interference with work performance might be a sufficient, though not necessary, condition to finding that harassment had occurred. *See id.* at 22–23 (majority opinion).

*Harris* Court emphasized that the environment itself—without any showing that the environment caused secondary effects—constitutes a violation of Title VII.<sup>47</sup> To assess the environment, the Supreme Court explained, courts should ask simply whether the harassment was sufficiently severe or pervasive to cause the target to have reasonably experienced the challenged conduct as abusive such that it altered the conditions of employment.<sup>48</sup>

To determine whether treatment is sufficiently severe or pervasive to be experienced as abusive, the Court admonished lower courts to consider “all the circumstances,”<sup>49</sup> in essence reiterating the “totality of the circumstances” test of *Meritor*.<sup>50</sup> Although the Supreme Court emphasized that courts should focus on a myriad of factors,<sup>51</sup> the Court also itemized some specific factors for courts to consider: “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.”<sup>52</sup>

Although the *Harris* Court offered these as merely exemplary, some lower courts have treated them as a list of requirements, the absence of any one of which can defeat a plaintiff’s claim.<sup>53</sup> This practice of requiring that

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47. The Court stated:

A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality. The appalling conduct alleged in *Meritor*, and the reference in that case to environments “so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers,” merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.

*Harris*, 510 U.S. at 22 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

48. *See id.* at 21. Otherwise, the Court wrote, “the conduct has not actually altered the conditions of the victim’s employment.” *Id.* at 21–22.

49. *Id.* at 23.

50. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986).

51. *See Harris*, 510 U.S. at 23. In *Meritor*, the Court cited with approval language from the Equal Employment Opportunity Commission (EEOC) guidelines regarding the need to look at the “totality of the circumstances” when evaluating a claim for sexual harassment. *Meritor*, 477 U.S. at 69.

52. *Harris*, 510 U.S. at 23.

53. *See, e.g., Kleinschmidt, supra* note 32, at 1129 (discussing courts’ requirement of both severity and pervasiveness). *See generally* Elisabeth A. Keller & Judith B. Tracy, *Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-Examining Supreme Court Precedent*, 15 DUKE J. GENDER L. & POL’Y 247 (2008). The U.S. Court of Appeals for the Eighth Circuit has found that a plaintiff’s claim against her employer could not survive summary judgment because “a few inappropriate comments and an unwanted slow dance do not amount to particularly severe conduct that was threatening or humiliating.” *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 738 (8th Cir. 2000). While the supervisor’s behavior may not have altered the plaintiff’s work environment, the Eighth Circuit clearly misstated the appropriate standard by requiring conduct to be threatening or humiliating. *See Keller & Tracy, supra*, at 258–59

the case meet each factor as if they were elements in a claim has been used to support a finding of no harassment in very severe cases and very pervasive cases. Courts, for example, determine that abuse was severe, but reject the claim because it is not also pervasive.<sup>54</sup> Sometimes courts have rejected claims of harassment where the abuse was clearly severe because the abuse was not physically threatening or humiliating.<sup>55</sup> In fact, the third and fourth items in the *Harris* list are logical, relevant factors to consider in deciding whether the first two factors have been met.<sup>56</sup> Requiring a plaintiff to prove every item in this list of factors imposes a burden far heavier than the Court intended in either *Meritor* or *Harris*,<sup>57</sup> and it distracts from the actual totality of the circumstances test for assessing whether abuse was severe or pervasive. *Harris* did nothing to alter the *Meritor* requirement that actionable harassment be found as long as the abuse is severe or pervasive, although it has been treated as narrowing it. The crucial question of the harasser's supervisory status has been one casualty of the courts' disinclination to apply a true totality of the circumstances test.

In the Supreme Court's next encounter with the issue, the Court reemphasized the breadth and malleability of the totality test. In *Oncale v. Sundowner Offshore Services, Inc.*,<sup>58</sup> the Court recalled that it had previously

emphasized . . . that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances" [in an] inquiry requir[ing] careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances,

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(stating that the *Harris* Court "listed factors which *may* be considered," including "whether it is physically threatening or humiliating").

54. See Keller & Tracy, *supra* note 53, at 258 & n.78; see also *id.* at 262 (courts use pervasiveness as a threshold before getting to the severity issue).

55. See *Webb-Edwards v. Orange Cnty. Sheriff's Office*, 525 F.3d 1013, 1016–17, 1027–28 (11th Cir. 2008) (awarding summary judgment to defendant where supervisor told plaintiff she "looked hot" and "should wear tighter clothes" and told her husband that he was eating her for lunch, finding that the conduct was neither physically threatening nor humiliating and not sufficiently severe).

56. It is risky to parse the language of a court decision the way we parse statutory text, since the former has not run the gauntlet designed to achieve the precision of meaning that lawyers ascribe to the latter. Nevertheless, the text of *Harris* is both inconsistent with *Meritor* and also internally incongruous (since the plain meaning of severe encompasses the notion of physically threatening). For this reason, what are ostensibly four co-equal factors, separated by semicolons, should be read so that the last two items are examples of ways that the elements of (1) pervasiveness and (2) severity may be met. *But cf.* Keller & Tracy, *supra* note 53, at 257 (stating that the Supreme Court precedents provide "explicit guidance"). The *Harris* factors listed all go to the question of whether the conduct is severe or pervasive—i.e., the punctuation is erroneous. See Keller & Tracy, *supra* note 53, at 259.

57. Perhaps some of the confusion has arisen from the use of semicolons to separate the four listed items—two of those items being the alternative requirements of severe or pervasive, and the other two being ways of assessing severe or pervasive.

58. 523 U.S. 75 (1998).

expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common 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.<sup>59</sup>

Although the Court espoused a broad, context-sensitive approach, it did not expressly impose a requirement that courts consider the status of the abuser as the target's supervisor.<sup>60</sup>

In a slightly different context, the Supreme Court has recognized the qualitative distinction between abuse by coworkers and abuse by supervisors.<sup>61</sup> The distinction is a crucial factor in the Court's determination of whether employers should be liable for harassment once the harassment itself has been proven.<sup>62</sup> In cases where the harasser is a supervisor, the employer is automatically liable for that harassment (unless there is an applicable affirmative defense),<sup>63</sup> in cases where the harasser is a coworker, the employer is liable only if the plaintiff proves that the employer was negligent in failing to discover and correct the harassment.<sup>64</sup> The Court's decision to treat liability in this fashion hinged largely on principles of agency law.<sup>65</sup>

In the more preliminary context of gauging whether harassment has occurred to begin with, however, the Court has been silent on the distinction between supervisors and coworkers. Instead, as described above, its doctrine is put more broadly, in the "totality of the circumstances" test.<sup>66</sup> This Essay argues that the totality of the circumstances test cannot be applied without considering whether the alleged harasser is the target's supervisor. The courts' consideration of harasser identity at the subsequent phase of assessing employer liability for

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59. *Id.* at 81–82.

60. *Id.* at 81.

61. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998) (“[A] supervisor’s power and authority invests his or her harassing conduct with a particular threatening character . . .”).

62. There are several distinct questions at issue. First, the courts look to whether a plaintiff has established that harassment occurred. The courts next ask whether the harasser is someone for whose acts the employer or institution may be held legally responsible. This inquiry determines whether there are any defenses the employer or institution may assert, as different defenses apply for supervisory and coworker harassment. This Essay focuses on the first question, the determination of whether harassment has occurred.

63. *Burlington*, 524 U.S. at 745–46, 766.

64. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998) (noting that lower courts “uniformly judg[e] employer liability for co-worker harassment under a negligence standard”).

65. *See, e.g., Burlington*, 524 U.S. at 754–55 (stating that Congress intended for the use of agency principles in applying Title VII); *Faragher*, 524 U.S. at 797 (applying basic principles of agency law to determine whether harassing conduct falls within the “scope of employment”).

66. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986).

proven harassment does not obviate the need to weigh harasser identity at the juncture when the court determines whether harassment took place.

## II. LOWER COURTS' APPLICATION OF THE STANDARD—FINDING NO SEVERITY IN SEVERE CASES AND NO PERVASIVENESS IN PERVASIVE CASES

The *Hancock v. Barron Builders*<sup>67</sup> case is a good example of supervisor harassment that clearly is both severe and pervasive, but that is found by the trial court to be neither.<sup>68</sup> *Hancock* involved three female plaintiffs who alleged that their supervisor created a hostile work environment.<sup>69</sup> Over periods ranging from three to six months, the supervisor made over 100 offensive comments and gestures to the plaintiffs.<sup>70</sup> According to the plaintiffs, the supervisor described the use of sex toys, demonstrated which sexual positions he preferred, discussed the sexual relations he had with his wife, talked about videotaping his sexual encounters, talked about the number of sex partners he had and the occasions on which he had sex, graphically described situations in which he date-raped women in college, and asked for money to use at an exotic dancing establishment.<sup>71</sup> Two of the victims resigned from their positions in response to the harassment.<sup>72</sup> Yet, the court found that the abuse was not sufficiently severe or pervasive to meet the *Meritor/Harris* standard.<sup>73</sup>

The egregiousness of the abuse that the court found not to constitute harassment makes *Hancock* remarkable, but the case is especially noteworthy for another reason. In concluding that the abuse by a supervisor was not sufficiently severe or pervasive to constitute harassment, the *Hancock* court relied on precedent involving harassment by a coworker.<sup>74</sup> The court was oblivious to the reality that what may be legally acceptable at the hands of a coworker very often is not acceptable coming from the boss.

Equally interesting is *Webb-Edwards v. Orange County Sheriff's Office*.<sup>75</sup> Shortly after Richard Mankewich was assigned to supervise Elaine Webb-Edwards, Mankewich began making inappropriate

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67. *Hancock v. Barron Builders & Mgmt. Co.*, 523 F. Supp. 2d 571 (S.D. Tex. 2007).

68. See generally *id.* For similarly egregious abuse found not to be harassment, see *Gibson v. Potter*, 264 F. App'x 397 (5th Cir. 2008); *Thornhill v. Finley, Inc.*, No. CIV.A.07-1033, 2008 WL 4344887 (W.D. La. Sept. 23, 2008); *Davenport v. City of Columbus*, No. 4:06-CV-150 (CDL), 2008 WL 2902077 (M.D. Ga. July 23, 2008); *Akonji v. Unity Healthcare, Inc.*, 517 F. Supp. 2d 83 (D.D.C. 2007); *Smith v. America Online, Inc.*, 499 F. Supp. 2d 1251 (M.D. Fla. 2007).

69. See *Hancock*, 523 F. Supp. 2d at 572.

70. *Id.* at 574. The supervisor in question was both the company president and owner. *Id.* at 572.

71. *Id.* at 573–74.

72. *Id.* at 572.

73. *Id.* at 575.

74. *Id.* at 576 (citing *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874 (5th Cir. 1999)). In *Shepherd*, plaintiff alleged that a coworker had harassed her through sexually explicit comments and physical contact. The Fifth Circuit concluded that the coworker's behavior did not create a hostile working environment. *Shepherd*, 168 F.3d at 874.

75. 525 F.3d 1013 (11th Cir. 2008).

comments.<sup>76</sup> On at least a weekly basis, Mankewich commented that Webb-Edwards “‘looked hot’” and should wear tighter clothing.<sup>77</sup> On one occasion, when the plaintiff and Mankewich were driving to take a witness’s statement, Mankewich made a comment about “eating Ms. Webb-Edwards for lunch.”<sup>78</sup> When plaintiff told Mankewich “that his comments made her feel uncomfortable,” he told her that if she reported him, she would not “be getting any other position.”<sup>79</sup> The court agreed that Mankewich’s comments “were taunting and boorish,” but, relying on the *Harris* list of factors, concluded that the comments did not constitute harassment because “[t]hey were not . . . physically threatening or humiliating” and did not involve physical touching.<sup>80</sup> The court, fifteen years after the Supreme Court’s *Harris* decision, also relied on the absence of any showing that the abuse interfered with the plaintiff’s work performance and noted that most of the comments did not refer to sexual activity.<sup>81</sup> The *Webb-Edwards* court clearly set the bar for plaintiffs too high. What might have been merely “taunting and boorish” coming from a coworker becomes harassment when the source has the power to tell the target that she “will not be getting any other position” if she reports the abuse.

Other examples of supervisors’ verbal statements that federal courts have deemed not severe enough to alter the conditions of employment include direct sexual propositions in exchange for money,<sup>82</sup> use of the words “hooker,” “slut,” and “whore” to describe an employee’s appearance,<sup>83</sup> and other sexually suggestive inquiries (e.g., whether plaintiff was the “fooling around type”<sup>84</sup> and how wide plaintiff could open her mouth<sup>85</sup>). Coming from a coworker, such comments are, at a minimum, offensive. Coming from a supervisor, they are—for the reasons set forth below—legal harassment.

Among the most egregious harassment cases, those involving unwanted physical contact, the federal courts often fail to recognize the heightened

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76. *Id.* at 1016.

77. *Id.*

78. *Id.* at 1027. This comment was actually made by telephone to plaintiff’s spouse. Plaintiff’s “husband telephoned her, and asked her if she had lunch plans. Before she could reply, Sgt. Mankewich grabbed the telephone and told her husband: ‘I don’t know what you’re saying, but I’m eating your wife.’” *Id.* at 1017. Mankewich had also commented that he thought that “women who dye their hair have issues at home.” *Id.* at 1027.

79. *Id.* at 1017.

80. *Id.* at 1027.

81. *Id.* at 1027–28.

82. See *Thornhill v. Finley, Inc.*, No. CIV.A.07-1033, 2008 WL 4344887, at \*1 (W.D. La. Sept. 23, 2008) (denying defendant’s motion for summary judgment regarding the plaintiff’s quid pro quo claim and granting the motion regarding the plaintiff’s hostile work environment claim).

83. See *Murphy v. City of Aventura*, 616 F. Supp. 2d 1267, 1277 (S.D. Fla. 2009) (no quid pro quo claim asserted in this case, only hostile work environment and retaliation).

84. See *Thornhill*, 2008 WL 4344887, at \*1.

85. See *Davenport v. City of Columbus*, No. 4:06-CV-150 (CDL), 2008 WL 2902077, at \*7 (M.D. Ga. July 23, 2008).

severity from the employee's perspective when the physical assault comes from a supervisor, rather than a coworker. In these, as in verbal abuse cases, courts frequently rely on precedents involving coworker physical harassment situations.<sup>86</sup>

The case of *Enriquez v. United States Cellular Corp.*<sup>87</sup> is a good example. There, the U.S. District Court for the Northern District of Illinois awarded the employer summary judgment against four female employees who brought a hostile environment claim against their employer.<sup>88</sup> The plaintiffs alleged that their supervisor made three attempts to kiss two of them in his office, lifted one of them "by the outside of her thighs and called her 'juicy'" on two occasions, and lifted one of the plaintiffs off a table and pulled her legs around his waist at a coworker's Christmas party.<sup>89</sup> In concluding that such behavior failed to alter the conditions of employment, the court relied, in part, on precedents involving coworker harassment.<sup>90</sup>

Similarly, in *Akonji v. Unity Healthcare, Inc.*,<sup>91</sup> the U.S. District Court for the District of Columbia failed to distinguish between supervisor and coworker conduct. The *Akonji* court concluded that a supervisor's conduct was not sufficiently severe where the male supervisor allegedly hugged and tried to kiss his female subordinate on two occasions, touched her behind once, and touched her thigh on another occasion.<sup>92</sup> In its severity analysis, the *Akonji* court cited the case of *Adusumilli v. City of Chicago*,<sup>93</sup> where "four isolated incidents in which a coworker briefly touched the plaintiff's fingers, arm, or buttocks did not amount to a hostile work environment."<sup>94</sup>

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86. See, e.g., *Enriquez v. U.S. Cellular Corp.*, No. 06 C 3135, 2008 WL 4925012 (N.D. Ill. Nov. 14, 2008). Jurisdictions are split as to whether one instance of inappropriate physical contact is sufficient to establish severity. Compare *Brooks v. City of San Mateo*, 229 F.3d 917, 921, 926-27 (9th Cir. 2000) (holding that one incident where a coworker fondled the plaintiff's breasts at work was not sufficient to support a hostile work environment claim), with *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1072 (10th Cir. 1998) ("disagree[ing] with defendants' assertions that a single incident of physically threatening conduct can never be sufficient to create an abusive environment").

87. No. 06 C 3135, 2008 WL 4925012 (N.D. Ill. Nov. 14, 2008).

88. See *id.* at \*1.

89. See *id.* at \*1-3.

90. See *id.* at \*11 (finding that defendant supervisor's conduct toward one of the plaintiffs did not rise to the level of severity required to establish a hostile working environment and supporting this finding with three cases involving coworker harassment claims).

91. 517 F. Supp. 2d 83 (D.D.C. 2007).

92. See *id.* at 88, 91. The U.S. District Court for the District of Maine recently cited this case for support. The opinion noted, however, that the *Akonji* decision was "surprising." See *Lacadie v. Town of Milford*, Civ. No. 07-101-B-W, 2008 WL 1930410, at n.11 (D. Me. May 1, 2008).

93. 164 F.3d 353 (7th Cir. 1998).

94. *Akonji*, 517 F. Supp. 2d at 98 (citing *Adusumilli v. City of Chicago*, 164 F.3d 353, 361 (7th Cir. 1998)). The *Akonji* court also cited *Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871, 874 (5th Cir. 1999), and *Curry v. District of Columbia*, 195 F.3d 654, 662 (D.C. Cir. 1999), both of which involve instances of coworker harassment.

Using this coworker case as support, the *Akonji* court found that the supervisor's conduct was not severe or pervasive.<sup>95</sup>

On the other hand, some courts have expressly acknowledged that abuse at the hands of a supervisor is inherently more severe than coworker abuse.<sup>96</sup> In *Dandy v. UPS*,<sup>97</sup> for example, the U.S. Court of Appeals for the Seventh Circuit acknowledged that “a supervisor’s use of [a racial epithet] impacts the work environment far more severely than use by co-equals.”<sup>98</sup> Similarly, under parallel New Jersey state law, courts expressly cite the harasser’s supervisory status as a factor weighing in favor of finding severity or pervasiveness of harassment.<sup>99</sup>

The Supreme Court has supplied guidance, but lower courts diverge from the path.<sup>100</sup> Commentators argue that lower courts are too eager to take harassment cases from the jury, both at summary judgment and after verdict.<sup>101</sup> They attribute this overzealousness to a constrained reading of the Supreme Court standards for actionable harassment.<sup>102</sup> Although courts recognize the totality of the circumstances standard, some are quick to dismiss cases that do not make a strong showing on every factor.<sup>103</sup> Yet, even among these commentators, there has been almost complete silence on the glaring absence from many court decisions of what should be the central question in harassment cases: who is doing the harassing?<sup>104</sup> Courts should be more circumspect in taking harassment cases from the jury, and

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95. *Akonji*, 517 F. Supp. 2d at 98; *see also* *Murphy v. City of Aventura*, 616 F. Supp. 2d 1267, 1277 (S.D. Fla. 2009) (also citing *Adusumilli*, 164 F.3d at 357, 361–62, to support its conclusion regarding the lack of severity of a supervisor’s conduct).

96. *See infra* Part III (demonstrating how some courts have recognized that the employer/employee power differential gives supervisors power to damage the workplace).

97. 388 F.3d 263 (7th Cir. 2004).

98. *Id.* at 271 (quoting *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)).

99. *See Hargrave v. County of Atlanta*, 262 F. Supp. 2d 393, 414 n.10 (D.N.J. 2003); *id.* at 416 (recognizing that “as the New Jersey Supreme Court has observed, a jury could reasonably conclude that the impact and severity of [the harasser]’s conduct was aggravated by the fact that he was a member of the management staff with direct responsibility for supervising Plaintiff’s work performance”); *see also Durling v. Santiago*, Civil No. 04-3777 (AET), 2007 WL 2027929, at \*5 (D.N.J. July 10, 2007) (citing *Hargrave*, 262 F. Supp. 2d at 416).

100. *See Keller & Tracy*, *supra* note 53, at 250.

101. *See id.* at 248–49, and works cited therein (notes 12 through 14 are particularly illuminating).

102. Some courts require plaintiffs to prove both severity and pervasiveness. *See Kleinschmidt*, *supra* note 32, at 1125.

103. Rather than consider the totality of the circumstances, courts seek a litmus test to resolve the issue. Frequently, that test is simply whether the conduct was physically threatening or humiliating—in essence, requiring that the plaintiff demonstrate behavior so egregious that the abuser might well be subject to criminal sanctions for it. Judith Johnson, *License To Harass Women: Requiring Hostile Environment Sexual Harassment To Be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 MD. L. REV. 85, 111 (2003).

104. Courts do make this distinction when analyzing employer liability. *See supra* note 7. However, this analysis takes place after a determination of whether harassment has occurred. While all courts consider the identity of the harasser at the liability phase of analysis, most do not take this into account in their determination of whether the harasser has created a hostile work environment for the plaintiff.

they will become more circumspect if they consistently account for the heightened harm incurred where the harasser is the target's supervisor. The most important correction needed in the application of doctrine to facts is recognition of the prominent role that the alleged harasser's identity as a supervisor plays in a target's experience of harassment.<sup>105</sup>

### III. WHY SUPERVISOR HARASSMENT IS WORSE

Many of us know intuitively that supervisory harassment exceeds coworker harassment in its capacity to harm. Most obviously, the power differential between supervisor and subordinate causes the subordinate to experience supervisor abuse as more serious than coworker abuse. In addition, the authoritative/fiduciary stature of the supervisor exacerbates the harm done. Finally, the locus in the hierarchy occupied by the supervisor generally means that supervisor harassment pervades the workplace more easily and more thoroughly than coworker harassment. It thus more readily satisfies the "pervasive" prong of the Supreme Court standard. This part of the Essay focuses on the three sources of exacerbation: power differential, authority/fiduciary factors, and locus in the hierarchy contributing to pervasiveness.

The power differential between the harassing supervisor and targeted subordinate exacerbates the harm experienced by the subordinate.<sup>106</sup> Such an impact is present whether the harassment is quid pro quo or hostile environment. Because power differentials have the capacity to worsen<sup>107</sup> the target's experience of the abuse, courts can accurately gauge the target's experience only by considering the special power that supervisors possess to harm subordinates.<sup>108</sup>

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105. The failure to account for harasser identity when actionable harassment is assessed contributes to courts' "needless discomfort with how to evaluate conduct" and "an unjustified number of summary dispositions for defendants and vacated jury determinations for plaintiffs." Keller & Tracy, *supra* note 53, at 256. Other prominent needs include that of recognizing that sex-motivated harassment need not be sexual. See Schultz, *supra* note 19, at 1716–20.

106. See Rebecca A. Thacker & Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 J. PSYCHOL. 429, 439 (1996) (supporting the idea that "sexual harassment from supervisors is a political tactic designed to assert dominance and authority").

107. Or ameliorate, if the abuser is the target's subordinate.

108. Power differentials are actually a theoretical underpinning for the harassment cause of action. The policies and theories underlying harassment doctrine grew out of the work of Catharine MacKinnon, and other feminists, whose theories envision the power differential as a hallmark of harassment at work. See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 34–35, 35 n.192 (2003) (describing theoretical approaches to power as a basis of harassment and citing articles on role of power differential in workplace harassment); Thacker & Gohmann, *supra* note 106, at 439 (citing Rebecca A. Thacker & Gerald R. Ferris, *Understanding Sexual Harassment in the Workplace: The Influence of Power and Politics Within the Dyadic Interaction of Harasser and Target*, 1 HUM. RESOURCE MGMT. REV. 23 (1991)); Louise Feld, Comment, *Along the Spectrum of Women's Rights Advocacy: A Cross-Cultural Comparison of Sexual*

In *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*,<sup>109</sup> researchers reported that “armed with organizational legitimacy, the [supervisor who harasses] has power over the target in two ways that are meaningful for a prediction of effects on individuals’ psychological states”<sup>110</sup>: (1) the target is dependent on the supervisor for performance ratings, salary increases, and flexible work scheduling,<sup>111</sup> and (2) the supervisor can threaten sanctions for the target’s refusal to submit.<sup>112</sup> Based on these factors, the researchers concluded that the responses of targets of harassment would be more negative when the harassment is from supervisors rather than from coworkers.<sup>113</sup>

In *Women’s Responses to Sexual Harassment: A Multivariate Analysis*,<sup>114</sup> researchers similarly found that targets experience harassment from a supervisor differently from how they experience that from a coworker.<sup>115</sup> Women who experience harassment from supervisors are especially limited in their responses; they not only opt for less assertive responses, but are also forced out of their jobs at a much higher rate than women harassed by peers.<sup>116</sup> The study suggested that “women are more able to adapt a wider range of responses when the source does not have more organizational power” than the target.<sup>117</sup> Thus, women are more likely to confront or report harassers who do not have supervisory power over them.<sup>118</sup> Alternatively, targets whose harassers are supervisors tend to experience “worsening . . . feelings about work”<sup>119</sup> and are ultimately more likely to leave.<sup>120</sup>

*Steck v. Francis*<sup>121</sup> is one of the few cases to have recognized the essential importance of this power differential to harassment analysis.<sup>122</sup>

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*Harassment Law in the United States and India*, 25 FORDHAM INT’L L.J. 1205, 1233–36 (2002).

109. Thacker & Gohmann, *supra* note 106.

110. *Id.* at 430.

111. *Id.*

112. *Id.*

113. *See id.* at 436–39. Although psychological injury is not a requirement in harassment cases, the degree of harm experienced is relevant to assessing whether the target experiences the abuse as interfering with the work environment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993).

114. James E. Gruber & Michael D. Smith, *Women’s Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED SOC. PSYCHOL. 543 (1995).

115. *See generally id.*

116. *See id.* at 554.

117. *Id.* at 558.

118. *Id.* at 547, 556; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998) (stating that “the victim may well be reluctant to accept the risks of blowing the whistle on a superior”); Mariejoy Mendoza, Note, *Making Friends: Sexual Harassment in the Workplace, Free Speech, and Lyle v. Warner Bros.*, 40 U.C. DAVIS L. REV. 1963, 1988 (2007) (claiming that “economic dependence” makes subordinate employees less likely to confront their harassers).

119. Thacker & Gohmann, *supra* note 106, at 436.

120. Gruber & Smith, *supra* note 114, at 554.

121. 365 F. Supp. 2d 951 (N.D. Iowa 2005).

The *Steck* court explicitly found that “status of the harasser is a ‘relevant factor’” in the “all the circumstances” test.<sup>123</sup> The court also recognized that “[a]s the harasser moves higher in the hierarchy of the employer, incidents of harassment become proportionally more severe.”<sup>124</sup> In *Steck*, the court acknowledged that a harassment victim may have more difficulty objecting to abuse from a supervisor rather than a coworker due to the nature of the supervisor-employee relationship.<sup>125</sup> The court concluded that it was fair to assume that the abuser’s high status rendered the abuse upsetting enough to interfere with plaintiff’s work.<sup>126</sup>

Similarly, the supervisor’s evaluative function exacerbates the victim’s experience of harassment at the supervisor’s hands. The employee’s future with the employer, her pay raises, promotions, and her ability to use the employer as a reference for future jobs depend on getting good evaluations. If the harasser is the boss, who is entrusted with the power to evaluate, the subordinate may reasonably fear that evaluations will be colored by the boss’s tainted opinion of the subordinate. If the harassment consists of gender or racial slurs and insults, then the subordinate may logically expect that the supervisor’s assessment of the subordinate’s performance will be colored by the low opinion the supervisor has of people in the subordinate’s racial or gender group. If the harassment involves sexual demands, the subordinate logically assumes that the supervisor does not value her for her professional contributions (but instead for her sexuality) and also that denial

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122. *See id.* at 973. As the supervisor harasser is further removed from daily contact with the victim or as the supervisor harasser rises higher in the hierarchy, harassing incidents may become the most salient feature of the relationship between the harasser and the victim, even as they may become less frequent. *See Hulse v. Pride Rests., L.L.C.*, 367 F.3d 1238, 1248 (11th Cir. 2004) (noting supervisory status of harasser and concomitant power to fire target as important considerations in the totality test); *Ferris v. First Nat’l of Neb.*, No. 4:04CV3286, 2006 WL 1720488, at \*7 (D. Neb. June 20, 2006) (relying on *Faragher* for the proposition that supervisors who harass have power to inflict greater harm than coworkers); *cf. Grafton v. Sears Termite & Pest Control*, No. 3:98-CV-2596-R, 2000 WL 422911, at \*7 (N.D. Tex. Apr. 17, 2000) (“Age-related comments by a coworker who has no authority to make employment decisions, although rude and inappropriate, are not sufficient to effect a term condition or privilege of Plaintiff’s employment . . .”).

123. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1266 (11th Cir. 1999) (Tjoflat, J., dissenting); *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993); *Steck*, 365 F. Supp. 2d at 973–74 (citing *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 552 n.14 (7th Cir. 2002)); *Radtke v. Everett*, 501 N.W.2d 155 (Mich. 1993); *Taylor v. Metzger*, 706 A.2d 685 (N.J. 1998)).

124. *Steck*, 365 F. Supp. 2d at 973.

125. *See id.* at 972–73 (“This court suggests that victims are and are reasonably perceived to be more vulnerable to supervisor harassment, because when the harasser is a supervisor, the harasser may, and often does, find it easier to target and harass the victim. For example, the harasser can control the circumstances under which the victim must be in his or her presence and can inflict retribution if the victim does not respond as desired. The victim could also find it harder, and could reasonably be thought to find it harder, to object to supervisor harassment, either to the harasser or through other channels. A victim of coworker harassment often is, and is reasonably perceived to be, much more able to object to harassment to a co-worker’s face, because the victim has less fear of personal, social, or professional consequences.”).

126. *See id.* at 975.

of those demands may yield a negative evaluation or termination of employment.<sup>127</sup>

Supervisors have the power to affect subordinates' professional reputation and personal definition of professional self. If the supervisor thinks negatively of the victim, then the victim, as well as others, may doubt her own merit. Employees who doubt the boss's good esteem of them feel defensive and less able to be assertive about performing the functions of the job.<sup>128</sup> Abuse naturally causes the victim to withdraw from the abuser. If the abuser is the victim's evaluator, the victim is incapable of performing with the strength and assertiveness likely to garner high marks in a professional evaluation.<sup>129</sup> Furthermore, if the employee avoids the supervisor in order to avoid harassment, the employee misses the opportunity to display capabilities and accomplishments that otherwise might lead to advancement.

Supervisors have the power to do damage with biased or inaccurate information about the subordinate, and the subordinate knows that. It is, after all, the supervisor's job to assess the victim's performance and contributions. Unlike insults from a coworker, "[a]ny remark from [a supervisor] carries with it the power and authority of the office."<sup>130</sup> The subordinate feels disempowered to object to the supervisor's improper conduct because of reluctance to criticize an individual who both has authority in the workplace and exerts control over the subordinate's employment.<sup>131</sup> For this reason, the subordinate feels defenseless—forced simply to submit to the bad treatment or else to leave.

As figures of authority, moreover, supervisors command trust and respect. Our culture socializes people to look to supervisors to administer justice when disputes arise, to allocate resources fairly, and to maintain a workplace that is hospitable or at least workable. Workers seek to live up to their supervisors' expectations and win their approval. They expect supervisors to deserve the trust the employer has bestowed—to be fair and equitable in managing the workplace. Because of that, harm at the supervisor's hands causes injury greater than harm at the hands of a stranger or co-equal. There is a breach of trust, just as there is a breach of trust when parents abuse their children. Thus, there is a double harm in abuse—

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127. In fact, if there is a negative evaluation, the victim may have a claim for quid pro quo harassment, which would be entirely distinct from her hostile environment claim.

128. See Caroline W. Jacobus, *Legislative Responses to Discrimination in Women's Health Care: A Report Prepared for the Commission to Study Sex Discrimination in the Statutes*, 16 WOMEN'S RTS. L. REP. 153, 321 (1995) (indicating that harassment leads to self-doubt).

129. Phoebe Weaver Williams chronicles the devastating effect that any harassment can have on professional performance. See Phoebe Weaver Williams, *Performing in a Racially Hostile Environment*, 6 MARQ. SPORTS L.J. 287, 308 & n.86 (1996).

130. *Steck*, 365 F. Supp. 2d at 970 (quoting *Taylor v. Metzger*, 706 A.2d 685, 692 (N.J. 1998)).

131. See generally *id.*

the abuse itself and the loss of faith in someone employees thought they could trust.

Because it is usually the supervisor who is responsible for work conditions, there is a vast difference between the power of a supervisor to alter work conditions (and finding work conditions altered is what makes abuse actionable as harassment) and the power of a coworker without such responsibility.<sup>132</sup> Whether the supervisor's obligation to safeguard the workplace and its occupants is real or perceived does not matter. What matters is that the supervisor has some control over the work environment,<sup>133</sup> and by virtue of that control, more readily "alter[s] the conditions of the workplace" by harassing the target.<sup>134</sup>

The harasser's status as a supervisor renders abuse pervasive. When a supervisor is on-site and responsible for all that goes on in the workplace, it is impossible for the target to ignore or escape the abuse.<sup>135</sup> It is often much easier to ignore or otherwise escape abuse from a coworker. An effort to escape an abusive boss always entails the risk that the victim will be found to be—or actually will be—insubordinate when the boss wants to speak. The victim has no way of knowing whether the boss is giving a legitimate assignment or subjecting the victim to further abuse. And, the victim will not know the answer to that question until she stands still to listen, by which time she will have experienced the abuse, if that is what the supervisor intends. Because the supervisor has both an illegitimate and a legitimate function in interacting with the victim, the victim cannot just turn away from the supervisor whenever the supervisor approaches. This makes the experience of abuse by a supervisor inescapable and pervasive.

Because of the supervisor's stature, abuse by a supervisor is more likely to be emulated by others in the workplace than would abuse by a coworker. Supervisor abuse "seems to authorize or condone like conduct by subordinates, thereby fostering a perception that the environment as a whole is hostile."<sup>136</sup> By giving permission for coworkers to harass and otherwise disrespect the target, supervisor abuse is likely to lead to abuse by coworkers. This multiplication effect can taint the entire workplace.

Coworkers may feel entitled to harass if they see the boss engage in such behavior.<sup>137</sup> When such emulation occurs, harassment spreads and

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132. Cf. Thacker & Gohmann, *supra* note 106, at 440.

133. See Estrich, *supra* note 14, at 855 (claiming that supervisors are "delegated the power to define the acceptable working conditions of the workplace").

134. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62 (2006).

135. See Mendoza, *supra* note 118, at 1987–88 (citing Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511, 519 (Ct. App. 2004), which indicates that victims of workplace harassment are essentially held "captive" given the existing employment relationship). Furthermore, "the disparity in power between the harasser and the victim exacerbates the employee's captivity." *Id.* at 1988.

136. Steck, 365 F. Supp. 2d at 972.

137. Thacker & Gohmann, *supra* note 106, at 440 ("Ultimately, a culture is created in which acceptance of sexually harassing behavior is the norm, and this culture further serves to affect psychological and emotional states of the targets who are uncomfortable with such behavior.").

becomes commonplace, destroying the workplace for the target.<sup>138</sup> Because the supervisor may be ubiquitous from the target's perspective, and because the supervisor empowers other harassers, supervisor abuse typically meets the pervasiveness requirement.

The character of supervisor-subordinate abuse, then, necessarily yields greater harm to the subordinate target than coworker abuse is capable of yielding. Because of power differentials, because of the supervisor's fiduciary role, and because the supervisor is a role model in the workplace, it is safe to assume that supervisor harassment causes more harm. For this reason, any assessment of the severity or pervasiveness of workplace harassment must consider whether the harasser is the supervisor.

#### IV. PROPOSAL—COURTS SHOULD CONSISTENTLY CONSIDER THE HARASSER'S IDENTITY IN ASSESSING WHETHER ABUSE IS SUFFICIENTLY SEVERE OR PERVASIVE TO CONSTITUTE HARASSMENT

This proposal would increase—from one to two—the stages in harassment litigation when the harasser's status as a supervisor is a required component of the analysis. As explained above,<sup>139</sup> analysis in harassment cases proceeds in two stages:

Stage One: Determination of whether harassment has occurred

Stage Two: Determination of whether the employer should be liable for proven harassment.

Under current law,<sup>140</sup> the identity of the harasser is a decisive factor at the second stage, when employer liability for proven harassment is assessed. If the plaintiff proves harassment by a coworker, the employer is liable for that harassment only if the plaintiff also proves that the employer was negligent in responding or not responding to the harassment.<sup>141</sup> If the plaintiff proves harassment by a supervisor, by contrast, the employer is presumptively liable, with the possibility of escaping liability only in the absence of a tangible employment action and only if the *employer* proves, in effect, that it was not negligent.<sup>142</sup> Harasser identity is thus of paramount importance at the employer liability phase:

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138. *Id.*

139. *See supra* note 7 and accompanying text.

140. *See supra* note 7 and accompanying text. As explained above, whether the harassment is proven to have occurred turns on whether the plaintiff proves that the challenged behavior was (a) unwelcome, (b) motivated by the plaintiff's national origin, sex, or other protected trait (race, age, etc.) and (c) sufficiently severe or pervasive to (d) alter a term, condition, or privilege of employment. *See supra* note 30. As argued above, the severe or pervasive analysis requires consideration of whether the harasser is the victim's supervisor.

141. *See Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 338 (6th Cir. 2008) (citing *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 518 (6th Cir. 2001)).

142. *See Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 767 (2d Cir. 1998). That presumption is rebuttable only if the harassment did not culminate in a tangible employment action, an analysis not relevant here. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760–61 (1998).

If harasser is a coworker, employer is liable only if negligent.

If harasser is a supervisor, employer is liable, though may sometimes invoke an affirmative defense.

The primacy given to harasser identity at the liability phase does not obviate the need to give it a pivotal role in Stage One, in the analysis of whether harassment has occurred. Frequently, failure to consider the harasser's identity as supervisor results in a finding that harassment has not occurred. Such cases never reach the employer liability phase, so the question of harasser identity never receives scrutiny. The two analyses are thus entirely independent of each other, and the strength of a showing on one cannot compensate for weakness in the other. The proposal of this Essay is that supervisory status of the abuser should be given strong weight at the first part of the analysis, when occurrence of harassment is assessed.