No. 92-1168

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

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TERESA HARRIS,
*Petitioner,*

v.

FORKLIFT SYSTEMS, INC.,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF NEITHER PARTY

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## BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF NEITHER PARTY

### INTEREST OF AMICUS CURIAE [1]

The American Psychological Association ("APA"), a voluntary, nonprofit, scientific, and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 114,000 members and includes the vast majority of psychologists holding doctoral degrees from accredited universities in this country. APA's major purposes are to promote psychological research, to improve research meth-

[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court.

ods, and to promulgate information regarding human psychological behavior.

APA has participated as an *amicus* in many cases in this Court involving mental health and social science issues. APA contributes *amicus* briefs only where it has special knowledge to share with the Court. For example, APA submitted briefs in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977 (1988); *Maryland v. Craig*, 497 U.S. 836 (1990); and *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

APA regards this as a case in which it can make a significant contribution to the Court's consideration of two issues raised by this case, which are of particular interest to APA and its members. First, appellant challenges the Sixth Circuit's requirement that the victim of an alleged hostile work environment prove, as elements of the Title VII claim, that the work situation would seriously affect a reasonable victim's psychological well-being and that it psychologically injured the plaintiff. Second, the case potentially presents the question whether a court reviewing a hostile work environment claim should consider the conduct complained of from the point of view of a "reasonable victim" or a "reasonable person."

Since the late 1970s, sexual harassment has been the subject of scientific inquiry, most of which has been undertaken by APA members. The growing body of social science data provides insight into harassing behavior, its impact on its targets and on the workplace, workplace conditions more and less conducive to sexual harassment, the differences between men's and women's perceptions of interactions between the sexes in the workplace, and other factors which would inform this Court's determination of the appropriate legal standard for hostile work environment actions grounded in sexual harassment. This data bears on whether psychological injury is an appropriate



and effective measurement of sexual harassment and the extent to which "reasonable victim" and "reasonable person" standards would be likely to yield different results.

APA believes no other *amicus*, and certainly neither party, is in a position to provide the Court with this important information.[2]

## INTRODUCTION AND SUMMARY OF ARGUMENT

"Sexual harassment is a problem with a long past but a short history."[3] The growing body of evidence amassed since the late 1970s, when psychologists began studying the problem, demonstrates that sexual harassment is a serious and pervasive barrier to women's full enjoyment of employment opportunities. At least half of all working women have been sexually harassed at the workplace during their careers.[4] The proportion is even higher for women in jobs traditionally held by men.[5]

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[2] Counsel gratefully acknowledges the assistance of APA staff member Gwendolyn Keita, Ph.D., and APA members Louise F. Fitzgerald, Ph.D., Karla Fischer, Ph.D., J.D., Barbara Gutek, Ph.D., John Pryor, Ph.D., and Bruce Sales, Ph.D., J.D., in the preparation of this brief.

[3] Fitzgerald & Shullman, *Sexual Harassment: A Research Analysis and Agenda for the 1990s*, 42 J. of Vocational Behav. 5, 23 (1993).

[4] *See* Terpstra & Baker, *A Hierarchy of Sexual Harassment*, 121 J. of Psych. 599, 599 (1987) (citing studies showing 42 to 90 percent of working women surveyed reported being sexually harassed at work; variation reflected time period covered by study and sampling strategy); B. Gutek, *Sex and the Workplace* 46 (1985) (53 percent of female Los Angeles area workers interviewed reported experiencing sexual harassment at their workplace); Martindale, *Sexual Harassment in the Military: 1988* xiii (Sept. 1990) (64 percent of Navy women surveyed reported experiencing sexual harassment).

[5] *See* Fitzgerald & Shullman, *supra* note 3, at 7, 15; Gruber, *The Sexual Harassment Experiences of Women in Non-traditional Jobs, Results from Cross-National Research* 126-27 (March, 1992)

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986), this Court held that Title VII provides redress for sexual harassment that creates an intimidating, hostile, or offensive working environment. The Court did not specifically undertake to resolve whether such a claim requires a showing of psychological injury. APA submits that requiring plaintiffs to prove psychological injury would undermine the goals of Title VII without providing a useful measurement by which to gauge the severity of sexual harassment, or to separate workplace conduct that adversely affects equal employment opportunity from conduct that does not.

The courts that have interposed a psychological injury requirement have done so ostensibly to differentiate between inconsequential and discriminatory harassment in the workplace.[6] The requirement has not simplified the inquiry, from a legal perspective. Courts have promul-

(Proceedings of Sex and Power Issues in the Workplace, Bellevue, WA); LaFontaine & Trudeau, *The Frequency, Sources and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 Sex Roles 423 (1986); Mansfield, Koch, Henderson, Vicary, *et al.*, *The Job Climate for Women in Traditional Male Blue Collar Occupations*, 25 Sex Roles 63 (1991).

[6] Initially, the courts of appeals that discussed the potential psychological impact of workplace harassment on workers did so to explain why hostile work environment actions were cognizable under Title VII, even in the absence of any specific economic detriment. *See, e.g., Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981). Some courts later appropriated the language of psychological injury to interpose a requirement in *all* cases that plaintiffs bringing such actions must show that the workplace psychologically injured the plaintiff and/or would have injured a reasonable employee. *See, e.g., Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986) (sexual harassment); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1271-73 (7th Cir. 1991), *cert. denied*, 481 U.S. 1041 (1987) (racial harassment).



gated various formulations, which describe quite different levels of injury.[7] Further complicating the profusion of "psychological injury" formulations is their application. Of the courts of appeals adopting some kind of psychological injury requirement, only two—the Sixth and Seventh Circuits—appear to have relied on the requirement to deny recovery in a sexual harassment case.[8] None has relied on the requirement to deny recovery to a plaintiff asserting *racial* harassment.

Scientific research suggests that a psychological injury requirement is not an adequate or even useful measure of what the courts of appeals use it to measure: sexual harassment sufficiently severe or persistent to alter conditions of employment.[9] The research further indicates that requiring proof of psychological injury is likely to impede

[7] The Sixth Circuit defines a hostile work environment as one that would "affect seriously the psychological well-being of [a] reasonable person under like circumstances" and has in fact inflicted "some degree of injury" on the plaintiff. *Rabidue*, 805 F.2d at 620. The Third Circuit has said an actionable work environment is one that actually injured the plaintiff and would affect "the psychological stability" of a reasonable employee. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482-83 (3d Cir. 1990). The Seventh Circuit initially adopted a test requiring "such anxiety and debilitation to the plaintiff that working conditions were 'poisoned'." *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986). More recent decisions have muddied that circuit's standard. *See Brooms v. Regal Tube Co.*, 881 F.2d 412, 418-19 (7th Cir. 1989) (embracing *Scott* and *Rabidue* standards simultaneously). The Federal Circuit has held that harassers may not be punished for violating Title VII absent proof that the plaintiff suffered "serious psychological damage." *Downes v. FAA*, 775 F.2d 288, 295 (Fed. Cir. 1988). And in *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1509-10 (11th Cir. 1989), the Eleventh Circuit adopted as interchangeable both the "affect seriously the psychological well-being of [an] employee" test and the "affect the psychological stability of [an] employee" test.

[8] *See Scott*, 798 F.2d at 214; *Rabidue*, 805 F.2d at 622.

[9] *See, e.g., Scott*, 798 F.2d at 213; *Rabidue*, 805 F.2d at 620.

discovery and correction of conditions that genuinely interfere with equal employment opportunity and is also likely to reduce significantly Title VII's efficacy in eradicating a major barrier to equal employment opportunity.

For these reasons, APA urges the Court to rule that "psychological injury" is *not* an element of a hostile work environment claim and to hold that harassing conduct is actionable if it is severe and/or pervasive enough to provide different conditions and privileges of work to members of a protected class than to other employees. Point I.

In addition, APA submits social science data about men's and women's differing perceptions of sexual harassment as a factor the Court may find helpful in fashioning an objective test for determining whether a work environment is actionable under Title VII. Point II.

## I. INCLUDING PSYCHOLOGICAL INJURY AS AN ELEMENT OF A HOSTILE WORK ENVIRONMENT CLAIM FRUSTRATES TITLE VII'S PURPOSES AND DOES NOT EFFECTIVELY IDENTIFY CASES IN WHICH EQUAL EMPLOYMENT OPPORTUNITY IS DENIED.

### A. A Psychological Injury Requirement Insulates from the Reach of Title VII Many Instances in Which Equal Employment Opportunity is Denied.

Congress intended Title VII's proscription of discrimination on the basis of gender "to strike at the entire spectrum of disparate treatment of men and women in employment." *Vinson*, 477 U.S. at 64. The law "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65. This rule plainly serves Title VII's overriding purpose of equal employment opportunity for women and men.

The psychological injury requirements adopted by the Sixth Circuit and others undermine that overriding purpose. Requiring protected classes of workers to endure intimidation and insult unless and until they become psychologically debilitated, destabilized, or seriously injured subverts Congress' goal.



Scientific research demonstrates that workplace sexual harassment inflicts substantial non-psychological injuries on its targets. Studies of the effects of sexual harassment on employees have established that the cost in employment opportunities for the worker (and in added costs to the employer) is high. Victims of sexual harassment frequently change jobs, transfer, or abandon efforts to obtain jobs in order to avoid harassment. In the process, they may lose income, confidence, seniority, references, work alliances, and the advantage of an established work reputation.[10] Thus, these victims lose an employment opportunity due to precisely the kind of disparity Congress intended to eliminate—typically without receiving any remedy under Title VII.[11]

Workers who remain and continue to undergo harassment report adverse effects on their work performance

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[10] *See* Koss, *Changed Lives: The Psychological Impact of Sexual Harassment*, in Ivory Power: Sex and Gender Harassment in the Academy 78, 80 (M. Paludi, ed.) (1990); Coles, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 Sex Roles 81, 86-92 (1986) (study of California Fair Employment Department); Crull, *Stress Effects of Sexual Harassment on the Job*, 52 Am. J. of Orthopsych. 539, 541 (1982); Hamilton, Alagna, King & Lloyd, *The Emotional Consequences of Gender-Based Abuse in the Workplace*, in Women, Power and Therapy 155, 165-170 (M. Braude ed.) (1987); Gutek, *supra* note 4, at 54; Hesson-McInnis & Fitzgerald, *A Preliminary Test of an Integrative Model* (Nov. 1992) (Paper presented to the 2nd APA/NIOSH Conference on Stress and the Workplace, Washington, DC).

[11] While Title VII does provide a remedy for constructive discharge, recovery is predicated on much more extreme conduct, and in some jurisdictions, proof that the employer intended to drive the employee away. *See, e.g., Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987).

from deteriorated interpersonal relations at work, decreased feelings of competence and self-esteem, loss of motivation, distraction, and negative performance evaluations from harassers.[12] When harassment excludes women from informal associations with co-workers and supervisors, they lose access to information, feedback, and support, hampering their work performance in subtle but effective ways.[13] The magnitude of the damage to these victims is reflected in the extent to which sexual harassment also harms their employers. A 1988 United States Merit Systems Board (USMSB) study estimated the cost of sexual harassment to the government (as employer) in just a two-year period at $267 million.[14]

A "psychological injury" requirement thus presents many women with a Hobson's choice: surrender employ-

[12] *See* Baker, *Sexual Harassment and Job Satisfaction in Traditional and Nontraditional Industrial Occupations* (1989) (unpublished doctoral dissertation, California School of Professional Psychology, Los Angeles); Gutek, *supra* note 4, at 79-82; O'Farrell & Harlan, *Craftworkers and Clerks: The Effects of Male Coworker Hostility on Women's Satisfaction with Nontraditional Jobs*, 29 Soc. Problems 252, 260 (1982); Bandy, *Relationships Between Male and Female Employees at Southern Illinois University* (1989) (unpublished doctoral dissertation, College of Education, Southern Illinois University); Culbertson, Rosenfeld, Booth-Kewley & Magnusson, *Assessment of Sexual Harassment in the Navy: Results of the 1989 Navy-wide Survey* (San Diego, CA NPRDC 1992); Scott, *Long Term Emotional Reactions to Workplace Impact of Sexual Harassment* 70 (March, 1992) (Proceedings of Sex and Power Issues in the Workplace, Bellevue, WA); Gruber, *supra* note 5, at 125-29: Benson & Thomson, *Sexual Harassment on a University Campus*, 29 Soc. Problems 236, 246 (1982).

[13] *See* Gutek & Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. of Vocational Behav. 28, 31-32 (1993); S. Martin, *Breaking and Entering: Women on Patrol* 205 (1980); Martin, *Sexual Politics in the Workplace*, 1 Symbolic Interaction 55, 58 (1978); Summers, *Determinants of Judgments and Responses to a Complaint of Sexual Harassment*, 25 Sex Roles 379, 379 (1991).

[14] *See Ellison v. Brady*, 924 F.2d 872, 880 n.15 (9th Cir. 1991).



ment opportunities or remain in the kind of environment Congress intended to eliminate unless or until they suffer psychological injury—in several jurisdictions, "serious" injury or even instability. Surely, Congress cannot have intended for victims of sexual harassment to endure that abuse "until their psychological well-being is seriously affected." *Ellison*, 924 F.2d at 878. "Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric [or psychological] assistance." *Id.*

In addition, Congress cannot have intended that victims possessing personal traits permitting them to endure even the most poisoned work conditions without visible psychological deterioration would be denied recourse under Title VII entirely. Although psychological research firmly supports the conclusion that sexual harassment negatively affects the psychological well-being of significant numbers of victims,[15] it does not support the conclusion that the presence and degree of psychological injury effectively measures the severity of the harassment. Indeed, what research exists suggests that other determinative factors

[15] Many studies document that sexual harassment victims frequently experience depression, anxiety, a sense of helplessness, sleep disorders, constriction of affect, gastrointestinal disorders, teeth grinding, eating disorders, and in some cases post traumatic stress disorder. *See* Malovich & Stake, *Sexual Harassment on Campus*, 14 Psych. of Women Q. 63, 64 (1990); Gutek & Koss, *supra* note 13, at 32-35; Koss, *supra* note 10, at 78-84; Crull, *supra* note 10, at 541-43; Hesson-McInnis & Fitzgerald, *supra* note 10.

The American Psychiatric Association has taken the official position that "sexual harassment and other forms of irrational gender-based employment discrimination are potentially severe occupational stressors." Hamilton & Dolkart, *Working Paper on Legal Reform in the Area of Sexual Harassment* 182, 184 (March, 1992) (Proceedings of Sex and Power Issues in the Workplace, Bellevue, WA).

make such an equation unreliable.[16] A great variety of factors, in addition to severity, influence whether or not a victim will develop psychological injury.

For example, a victim's social support can, to some degree, insulate some victims of harassment from psychological harm. Research on other forms of sexual victimization has shown that victims who receive support from friends and family show better adjustment than those who lack it.[17] A victim's own coping mechanisms may also affect whether she experiences psychological injury as a result of sexual harassment.[18]

Other data suggest that women with low self-esteem may experience sexual harassment as more frightening and traumatic.[19] In addition, factors such as prior victimization substantially affect the likelihood of developing

[16] *See* March, *What Constitutes a Stressor? The "Criterion A" Issue*, in Foa & Davidson, Post-Traumatic Stress Disorder: DSM-IV and Beyond (Washington, DC: American Psychiatric Press 1993) (no one-to-one correspondence between severity of stressor and the psychological effect of the stressor).

[17] *See* Atkeson, Calhoun, Resick & Ellis, *Victims of Rape: Repeated Assessment of Depressive Symptoms*, 50 J. of Consulting and Clinical Psych. 96 (1982); Ruch & Chandler, *Sexual Assault Trauma During the Acute Phase*, 24 J. of Health and Soc. Behav. 174 (1983); Sales & Shore, *Victim Readjustment Following Assault*, 37 J. of Soc. Issues 5 (1984).

Conversely, victims without social support are more likely to demonstrate poor adjustment. *See* Davis, Brickman & Baker, *Supportive and Unsupportive Responses of Others to Rape Victims*, 19 Am. J. of Community Psych. 443 (1991).

[18] *See generally* Crocker & Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 Psych. Review 608 (1989) (discussing coping mechanisms used by stigmatized groups to preserve self-esteem); Folkman, Lazarus, Gruen & DeLonges, *Appraisal, Coping, Health Status, and Psychological Symptoms*, 50 J. of Personality and Soc. Psych. 571 (1986) (discussing "escape-avoidance coping strategies").

[19] *See* Malovich & Stake, *supra* note 15, at 80.



psychological injury as the result of a subsequent traumatic event.[20]

Thus, the presence and degree of psychological injury to the victim may be more reflective of the *victim's* characteristics than of the severity of the offending conduct, or the extent of injury to equal employment opportunity. At the very least, research indicates that the characteristics of the victim are factors that significantly detract from the value of psychological injury as a means of gauging the severity of harassment.

The psychological injury requirement thus shifts the focus of Title VII's protection to the victim's psychological wherewithal to sustain abuse, rather than the nature of the harasser's conduct. This shift in focus is ill-conceived and incompatible with Congress' clear intention to eliminate the "arbitrary barrier[s] to sexual equality at the workplace." *Vinson*, 477 U.S. at 67.

Focusing on the victim's psychology rather than the harasser's conduct is also inconsistent with the standard promulgated in *Vinson*. To be sure, this Court held that the conduct must be "unwelcome," *id.* at 68, but that serves simply to distinguish sexual harassment from acceptable expressions of personal and sexual interest. The threshold standard set for actionable unwelcome conduct was conduct that is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67. This inquiry is properly centered on the *conduct* of the *harasser*.

Courts hewing closely to *Vinson*'s test—without adding a psychological injury requirement—have found it workable and consonant with Congress' purposes. These courts have determined whether conduct was sufficiently

[20] *See* Burgess & Holstrom, *Rape: Sexual Disruption and Recovery*, 49 Am. J. of Orthopsych. 648 (1979); Koss, *Violence Against Women in the Community*, in No Safe Haven 12 (1993) (in publication).

severe or pervasive by analyzing the conduct in terms of invasiveness, frequency, number of participants, and other objective indicia pertaining to the harasser's conduct.[21] The Equal Employment Opportunity Commission (EEOC), in its 1990 policy guidelines, expressly rejected any psychological injury requirement as an element of a hostile work environment claim under Title VII, explaining that "it is the Commission's position that it is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the work environment of a reasonable person." [22] This approach is far more consistent with Congress' goals in Title VII than the "psychological injury" requirements added by other courts of appeals.

### B. A Psychological Injury Requirement Further Undermines Title VII's Purposes by Deterring Reporting of Severe Sexual Harassment and Discouraging Recourse to Title VII.

Psychological research also indicates that adopting a psychological injury requirement for hostile work environment claims will deter reporting of even severe sexual harassment, and will therefore result in less impetus to employers to adopt and consistently enforce workplace rules prohibiting sexual harassment.

[21] *See, e.g., Katcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59 (2d Cir. 1992); *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988). The "welcomeness" component of the inquiry has less utility when the conduct complained of belittled and insulted the plaintiff on the basis of plaintiff's gender (as in this case), race, religion, or national origin, which courts generally presume is unappreciated.

[22] *See* EEOC Policy Guidance on Sexual Harassment 28 n.20 (March 19, 1990). *See also Ellison v. Brady*, 924 F.2d at 877-78 (rejecting the *Scott* and *Rabidue* standards and holding that no showing of psychological injury is required by Title VII).



It is plain that any obstacle placed in the path of recovery will result in fewer successful suits and less concern on the part of employers. Psychological research suggests, moreover, that the impact of a psychological injury requirement may not only be greater than might be expected but particularly inimical to the purposes of Title VII. Critically, research shows that women who are most likely to experience psychological problems in response to sexual harassment—those with low self-esteem—are also the least likely to report the harassment.[23] Women with high self-esteem, on the other hand, appear to be both better able to cope psychologically with identical work environments and more likely to complain to someone in authority.[24]

This research suggests that those most likely to suffer psychological harm are most likely to do so in silence. They are less likely to seek help from authorities to put an end to the conduct that is harming them. Those least likely to actually suffer psychological damage, by contrast, are positioned to perform a valuable service by helping to end discriminatory harassment, not only for themselves but for those suffering precisely the type of psychological injury that has concerned several of the courts of appeals. But a psychological injury requirement bars such plaintiffs from recovering for their own discriminatory

[23] *See, e.g.*, Malovich & Stake, *supra* note 15, at 76, 78, 80 (finding that women with low self-esteem are most at risk to the psychological dangers of harassment and least likely to report it); Gutek & Koss, *supra* note 13, at 41 (women with low self-esteem are least likely to report sexual harassment to someone in authority); *Treatment and Counseling Needs of Women Veterans Who Were Raped, Otherwise Sexually Assaulted, or Sexually Harassed During Military Service: Hearings Before the Senate Comm. on Veterans' Affairs*, 102nd Cong., 2nd Sess. (June 30, 1992) (prepared testimony of Dean G. Kilpatrick, Ph.D.) (sexually harassed women suffering from post trauma stress disorder are least likely to have filed a complaint).

[24] *See* Malovich & Stake, *supra* note 15, at 76, 78, 80; *see also* Koss, *supra* note 10, at 77.

treatment, and thereby protects harassers who, in all probability, are also harassing and psychologically injuring women employees less willing or able to assert themselves.[25]

Research also shows that forcing victims to litigate the issue of their own psychological injury is likely to deter victims generally from pursuing remedies under Title VII. Studies of sexual harassment have shown consistently that only a small fraction of sexually harassing behavior is reported to anyone in authority.[26] Victims explain that they choose not to report harassment in order to avoid the humiliation and social stigma of showing they were not able to cope with the experience,[27] because of the traditional view that the victim is a failure,[28] and because they fear nothing will be done in any event.[29] Research has shown that the need to prove psychological injury further pressures victims to forsake help because portraying themselves as mentally ill undermines their "credibility and competence as a person and as an employee," [30]

[25] *See* Gutek, *supra* note 4, at 62 (71 percent of sexual harassment victims reported that others in the workplace were harassed by the same person).

[26] *See* Gutek & Koss, *supra* note 13, at 39 (USMSPB 1981 study found only 2% took official action); Valentine-French & Radtke, *Attributions of Responsibility for an Incident of Sexual Harassment in a University Setting*, 21 Sex Roles 545, 545-46 (1989); Hamilton & Dolkart, *supra* note 15, at 187 (USMSPB 1988 study found 5% filed a complaint); Fitzgerald & Shullman, *supra* note 3, at 6 (less than 5%); Gutek, *supra* note 4, at 71; Reilly, Lott & Gallogly, *Sexual Harassment of University Students*, 15 Sex Roles 333, 355 (1986).

[27] *See* Koss, *supra* note 10, at 74; Gutek, *supra* note 4, at 72.

[28] *See* Koss, *supra* note 10, at 74; Hamilton & Dolkart, *supra* note 15, at 187.

[29] *See* Lee & Heppner, *The Development and Evaluation of a Sexual Harassment Inventory*, 69 J. of Counseling and Dev. 512, 512 (July/August 1991); Gutek, *supra* note 4, at 71-72.

[30] Gutek & Koss, *supra* note 13, at 30-31.



enables defendants to argue that the complainant has always been fragile or damaged,[31] and opens their entire mental health and sexual history for examination.[32]

Moreover, the process entailed in proving psychological injury may itself exacerbate any injury already suffered. Two prominent researchers in the field have concluded that "a reliance on the existence of negative outcomes as proof of the allegation of harassment has contributed to the retraumatization of harassment victims." [33] Inducing underreporting of severe or persistent sexual harassment at the workplace and inflicting unnecessary harm on victims of workplace harassment are contrary to the goals of Title VII.

### C. A Psychological Injury Requirement Weakens Title VII's Power to Eliminate Discriminatory Harassment in the Workplace.

Recent research findings strongly suggest that men who are highly likely to sexually harass women are more likely to do so in circumstances where such behavior is accepted or condoned.[34] By focusing on potential harassers instead of victims, some researchers have added a new layer to our understanding of the phenomenon. For instance, men who describe themselves as likely to engage in conduct which would be considered sexual harassment are also more likely to describe sexual relations in general as adversarial and exploitative, to espouse the opinion that women like to be dominated and subjected to physical coercion, and to express a willingness to rape if assured

[31] *See id.* at 44.

[32] *See* Hamilton & Dolkart, *supra* note 15, at 192.

[33] Gutek & Koss, *supra* note 13, at 44.

[34] *See* Pryor & Stoller, *Sexual Cognition: Men Who are High in the Likelihood to Sexually Harass*, Personality & Soc. Psych. Bulletin (accepted for publication 1993); *see also* Gutek, *supra* note 4.

that they would not be punished.[35] Survey and laboratory research indicates that sexual harassment is far less likely when organizational norms do not encourage such behavior.[36]

Although research in this area has only begun, the evidence supports the intuitively plausible view that an employer's reasonable efforts to stop harassment and provide good role models is a powerful curb. It is also consistent with more general historical experience, which indicates people are deterred by a high likelihood that they will be punished.[37] The corollary also appears to be true: crime increases when police are absent.[38] Clear indications from management that sexual harassment is not tolerated can be expected, therefore, to significantly constrain the behavior of men who in other circumstances would be harassers.

Title VII, by subjecting employers to potential liability for the acts of their employees, can be a significant impetus for employers to set and enforce strong anti-harassment policies. Many institutions developed some form of anti-harassment program after this Court's decisions that sexual harassment is a form of discrimination.[39]

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[35] *See* Pryor, *Sexual Harassment Proclivities in Men*, 17 Sex Roles 269, 277-78 (1987); Reilly, Lott, Caldwell & DeLuca, *Tolerance for Sexual Harassment Related to Self-Reported Sexual Victimization*, 6 Gender and Soc'y 122, 133-36 (March 1992).

[36] *See* Pryor, LaVite & Stoller, *A Social Psychological Analysis of Sexual Harassment*, 42 J. of Vocational Behav. 68, 70-71 (1993); Bond, *Division 27 Sexual Harassment Survey*, 21 The Community Psychologist 7, 8 (1988); Hesson-McInnis & Fitzgerald, *supra* note 10 (reanalyses of 1988 USMPB data).

[37] *See* Sellin, *The Law and Some Aspects of Criminal Conduct*, in Aims & Methods of Legal Research 113, 119-120 (1955).

[38] *See* F. Zimring & G. Hawkins, *Deterrence: The Legal Threat in Crime Control* 158-172 (1973).

[39] *See, e.g.*, Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 Am. Psychologist 497, 497-500 (May 1991); Gutek & Koss, *supra* note 13, at 36.



Including a psychological injury requirement as an element of a Title VII hostile work environment claim, however, substantially weakens the impact of Title VII by rendering recovery less likely and less predictable.

In addition, such a requirement may weaken the impact of Title VII by inducing women to abandon jobs where sexual harassment is not curtailed instead of acting to change the situation. Empirical research suggests that male-dominated workplaces have the highest incidence of sexual harassment, and work environments containing roughly equal numbers of male and female employees have the least.[40] This suggests that the employment conditions leading Congress to prohibit discrimination on the basis of sex will be significantly ameliorated if Title VII itself is applied with sufficient force and consistency that women will be encouraged to enter and remain in workplaces initially dominated by men.

## II. WOMEN AND MEN DIFFERENTLY PERCEIVE BEHAVIOR THAT CAN BE CHARACTERIZED AS SEXUAL HARASSMENT.

Many courts of appeals, in determining whether particular conduct is sufficiently severe or persistent to alter conditions of employment, have expressly applied an objective test to hostile work environment claims. They have done so to protect employers from liability for the reactions of hypersensitive or eccentric employees. There is not, however, complete agreement among the circuits as to the nature of the objective standard to be applied. Consistent with ordinary tort principles, some courts have

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[40] *See* Baker, *supra* note 12; Konrad & Gutek, *Impact of Work Experiences on Attitudes Toward Sexual Harassment*, 31 Admin. Sci. Q. 422, 437 (Sept. 1986) (citing 1982 study by Gutek & Morasch); Ellis, Barak & Pinto, *Moderating Effects of Personal Cognitives on Experienced and Perceived Sexual Harassment of Women at the Workplace*, 21 J. of Applied Soc. Psych. 1320, 1322 (1991); *see also* note 5, *supra*.

taken the victim's gender into account in evaluating the conduct; others have not.[41] In deciding which test to adopt, the Court may wish to consider data suggesting that men and women tend to evaluate sexual behavior in the workplace dissimilarly.

Survey and laboratory research has generally shown that women are more likely than men to label sexually aggressive behavior at work as harassment.[42] There is a gap between men's and women's perceptions with respect to every category of sexual harassment, but the gap is most pronounced with respect to gender-based insults and ridicule and less explicit forms of sexual advances.[43] Studies also show that men are more likely to be tolerant

[41] The alternatives are often described as a reasonable victim standard versus a reasonable person standard. Some have proposed a reasonable woman standard instead of a reasonable victim standard. The phrase "reasonable victim standard," however, takes into account that, although women are overwhelmingly the victims of sexual harassment, *see* Fitzgerald & Shullman, *supra* note 3, at 6, harassment of men by other men or by women is not unknown.

[42] *See* Fitzgerald & Ormerod, *Perceptions of Sexual Harassment: The Influence of Gender and Context*, 15 Psych. of Women Q. 281, 289-90 (1991); Gutek, *supra* note 4, at 43, Hartnett, Robinson & Singh, *Perceptions of Males and Females Toward Sexual Harassment and Acquiescence*, 4 J. of Soc. Behav. and Personality 291, 295 (1989); Valentine-French & Radtke, *supra* note 26, at 552; Kenig & Ryan, *Sex Differences in Levels of Tolerance and Attribution of Blame for Sexual Harassment on a University Campus*, 15 Sex Roles 535, 537-38 (1986); Padgitt & Padgitt, *Cognitive Structure of Sexual Harassment*, 27 Student Personnel 34, 38 (1986). A few studies have not replicated these findings. Non-representative samples may account for these results. *See* Terpstra & Baker, *supra* note 4, at 604 (attributing the result to exclusive use of college students as subjects); Malovich & Stake, *supra* note 15, at 78 (attributing the result to sample controlled for equivalent numbers of men and women with traditional or liberal sex role attitudes).

[43] *See* Fitzgerald & Shullman, *supra* note 3, at 12; Hartnett, Robinson & Singh, *supra* note 42, at 293; Fitzgerald & Ormerod, *supra* note 42, at 291.



of sexual harassment than women.[44] One study, for example, concluded that men were four times more likely than women to predict they would be flattered by sexual overtures at work and four times less likely to predict they would be insulted.[45]

Although there is considerable empirical data establishing the differential, there is less understanding of why such a differential exists. The Ninth Circuit has suggested that the unprecedented levels of rape and sexual assault in this country may cause many women to worry whether a harasser's conduct is a prelude to violence. *Ellison v. Brady*, 924 F.2d at 879. Konrad and Gutek have suggested that women may view sexual overtures as threatening to their positions at work.[46] Studies show that women are nine times more likely to have quit a job than men because of sexual harassment, five times more likely to have transferred, five times more likely to have stopped looking for a job, and three times more likely to have been fired.[47] It also appears that sexual liaisons with coworkers raise a man's status in the work organization but lower a woman's status.[48] Malovich and Stake have suggested that a major factor explaining perceptions

[44] *See* Lott, Reilly, & Howard, *Sexual Assault and Harassment*, 8 Signs 296, 312-13 (1982); Reilly, Lott, Caldwell & DeLuca, *supra* note 35, at 132.

[45] *See* Gutek, *supra* note 4, at 96; Konrad & Gutek, *supra* note 40, at 423.

[46] Consistent with this assertion, research has found that sexual advances from a person in authority are viewed as more personally threatening to women than to men. *See* Pryor & Day, *Interpretations of Sexual Harassment: An Attributional Analysis*, 18 Sex Roles 405, 409, 414 (1988).

[47] *See* Konrad & Gutek, *supra* note 40, at 432.

[48] *See* Quinn, *Coping with Cupid*, 22 Admin. Sci. Q. 30, 51 (1977); Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (1978).

of harassment is sex role attitudes, and that more men have traditional sex role attitudes than women.[49]

Related studies have shown that men are significantly more likely to attribute the causes of harassing behavior to characteristics of the victim, while women are more likely to attribute the causes to characteristics of the perpetrators.[50] Men are also more likely than women to attribute harassment complaints to an external factor, such as career competition between the complainant and the alleged perpetrator.[51] Several researchers have suggested that these results are consistent with notions of harm avoidance and blame avoidance. More women fear victimization and more men fear being accused of harassment.[52]

The courts of appeals are split on the appropriate reasonableness standard for assessing whether given conduct is sufficiently severe and pervasive to violate Title VII.[53] Evidence from social science research indicates that the choice of a reasonableness standard will measurably affect the results generated.

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[49] Malovich & Stake, *supra* note 15, at 78.

[50] *See* Jensen & Gutek, *Attributions and Assignment of Responsibility in Sexual Harassment*, 38 J. of Soc. Issues, 121, 124-26 (1982); Summers, *supra* note 13, at 389; Valentine-French & Radtke, *supra* note 26, at 380-81.

[51] *See* Summers, *supra* note 13, at 380-81, 389.

[52] *See, e.g.*, Valentine-French & Radtke, *supra* note 26, at 552-53; Riger, *supra* note 39, at 499.

[53] The Seventh Circuit has said that the conduct is to be viewed from the point of view of a reasonable person. *See Brooms*, 881 F.2d at 418, 420. The Third, Fifth, Sixth, and Ninth Circuits have expressly adopted a reasonable victim standard, as has the EEOC. *See* EEOC Policy Guidance, *supra* note 22, at 28; *Andrews*, 895 F.2d at 1482-83; *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989); *Yates*, 819 F.2d at 637; *Ellison*, 924 F.2d at 878-79.



## CONCLUSION

For the foregoing reasons, APA respectfully submits that a psychological injury requirement is inconsistent with the purposes of Title VII. Congress designed Title VII to bring about the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Social science research provides considerable support for the efficacy of imposing legal sanctions on employers for creating or tolerating an "intimidating, hostile, or offensive working environment." *Vinson*, 477 U.S. at 65. Hinging sanctions on a psychological injury requirement, however, substantially subverts their effectiveness. Differentiation between actionable harassment and trivial misconduct can be and should be determined on the basis of the nature and pervasiveness of the conduct itself. Hostile or offensive conduct which is severe or persistent is an "arbitrary barrier to sexual equality at the workplace," *Vinson*, 477 U.S. at 67, regardless of the victim's psychological condition or willingness to display it.

Respectfully submitted,

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