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You've Come a Long Way, Baby: Stripping Pornography from America's Workplace

Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991)

by Tara R. Price

In *Robinson v. Jacksonville Shipyards, Inc.*,[1] the United States District Court for the Middle District of Florida became the first court in the country to hold that the presence of pornography in the workplace—by itself—could constitute a hostile working environment for women,[2] actionable under Title VII of the Civil Rights Act of 1964.[3] Prior to *Robinson*, courts frequently concluded that Title VII offered no protection to women who felt victimized by the presence of "sexually-oriented pictures and sexual remarks" in the workplace, so long as overt actions targeting particular female employees did not also exist.[4] The opinion—written by

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1 760 F. Supp. 1486 (M.D. Fla. 1991).

2 *Id.* at 1523; Tamar Lewin, *Nude Pictures are Ruled Sexual Harassment*, N.Y. TIMES, Jan. 23, 1991, at A14.

3 42 U.S.C. §§ 2000e.

4 *Robinson*, 760 F. Supp at 1525.

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Judge Howell W. Melton, Sr.[5]—was quickly lauded[6] and criticized.[7] This Comment considers the groundbreaking aspects of Judge Melton's opinion in *Robinson* and analyzes how Congress and the courts have responded in the twenty-one years that have elapsed since the decision.

"Hey, Pussycat:" Robinson's Story

Lois Robinson was one of only a few female skilled craftworkers employed by Jacksonville Shipyards, Inc. (JSI).[8] JSI was known as "a boys club" and "more or less a man's world,"[9] and it never employed a woman in a leadership role.[10] In this male-dominated environment, pictures of nude and partially nude women were posted throughout the workplace in several forms, including: photographs ripped from magazines, plaques on the wall, and advertising tool supply calendars.[11] These pictures typically featured

5 The Honorable Howell W. Melton, Sr., was nominated to the United States District Court for the Northern District of Florida by President Jimmy Carter on March 29, 1977, and confirmed by the U.S. Senate on April 25, 1977. Judge Melton assumed senior status on February 1, 1991. History of the Federal Judiciary, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=1617&cid=53&ctype=dc&instate=fl&highlight=null (last accessed July 6, 2012).

6 *See, e.g.*, Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 406 & n.17 (1991) (citing news articles and stating that *Robinson* "was immediately hailed in the national news media as a milestone for women's rights" and "a ground-breaking decision for women in male-dominated trades").

7 *See, e.g.*, Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 540 (1991) (criticizing the court for "not tak[ing] the [F]irst [A]mendment issue seriously"); Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 624 (1993) ("[T]he judge abandoned his role as trier of fact on the most critical issue in the case and turned it over to social experts. . . . [T]he judicial overkill that took place in Judge Melton's courtroom cannot be justified.").

8 *Robinson*, 760 F. Supp. at 1491. Robinson began working for JSI in 1977 as a third-class welder and was promoted to a second- and first-class welder by 1991. *Id.*

9 *Id.* at 1493.

10 *Id.* (stating that no woman ever worked as a leaderman, quarterman, assistant foreman, foreman, superintendent, coordinator, vice-president, or president of the company).

11 *Id.*

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"women in various stages of undress and in sexually suggestive or submissive poses."[12]

The pornography posted by JSI employees was "a visual assault on the sensibilities of female workers . . . that did not relent during working hours."[13] The pictures depicted women with their breasts, buttocks, and pubic areas exposed.[14] One of the pictures depicted two nude women "engaged in lesbian sex."[15] Male JSI employees also wrote sexually suggestive graffiti and drew pictures of nude women on the walls.[16] One of the drawings was "a frontal view of a nude female torso with the words 'USDA Choice' written on it."[17] Phrases scribbled on the walls included: "'lick me you whore dog bitch,' 'eat me,' and 'pussy.'"[18]

JSI employees also routinely made comments of a sexual nature while Robinson was in the presence of the pornography, including "Hey pussycat, come here and give me a whiff," "The more you lick it, the harder it gets," "Black women taste like sardines," and "I'd like to have some of that."[19] After Robinson complained to her supervisors about the pictures and comments, her complaints became the subject of ridicule.[20] Some of her coworkers nicknamed her "boola-boola," an apparent "reference to sodomous rape," and even yelled it at her in a parking lot.[21]

Robinson's supervisors made her feel embarrassed over her complaints.[22] Even her female coworkers asked her to stop complaining because the male coworkers had begun to bring

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12 *Id.* Conversely, JSI employees stated that they would not have tolerated the distribution of calendars with pictures of nude or partially nude men, as such items would "probably [be] throw[n] . . . in the trash." *Id.*

13 *Id.* at 1495. The pictures were so pervasive that Robinson was unable to recount every one. *Id.*

14 *Id.* at 1495-96 (providing a plethora of examples, including one "picture of a woman's pubic area with a meat spatula pressed on it").

15 *Id.* at 1496.

16 *Id.* at 1495.

17 *Id.*

18 *Id.* at 1499.

19 *Id.* at 1498; *see also id.* at 1500 (providing examples of sexually harassing comments heard by one of Robinson's few female coworkers, including that a female worker would "go to hell for culling pussy" or that a measurement was "a cunt hair off").

20 *Id.* at 1498-99. Many of JSI's employees felt that their behavior fell outside the definition of sexual harassment because they felt that such harassment was limited to propositioning a woman for sexual favors. *E.g.*, *id.* at 1498.

21 *Id.* at 1499.

22 *Id.* at 1513.

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"hard pornography" into the JSI office to show female workers.[23] After Robinson made a formal complaint in January 1985, she was told that the "nudity on television was as bad as the pictures at JSI, and [that] she should [just] look the other way"[24] She was also informed that it was her choice to work at JSI and that "the men had 'constitutional rights' to post the pictures."[25] Robinson then filed a complaint with the local Equal Employment Opportunity Commission (EEOC), which performed only a "cursory" investigation before determining that "being subject to sexually explicit pornography" was not a cause for discrimination.[26] The EEOC's rejection gave Robinson the right to sue in federal court.

Robinson filed suit in the United States District Court for the Middle District of Florida, focusing her claim on her male coworkers' demeaning comments about women and JSI's tolerance and refusal to remove the nude and partially nude pictures.[27] She sought damages for her losses and injunctive relief requiring JSI to adopt and enforce an expansive sexual harassment policy.[28] Judge Melton held that Robinson had an actionable claim under Title VII of the Civil Rights Act of 1964[29] because the presence of pornography alone could constitute a sexual harassment claim based on a hostile work environment.[30]

The Evolution of Sexual Harassment Claims

Congress passed the Civil Rights Act of 1964 to outlaw a variety of discriminatory practices.[31] Title VII, as it was amended in 1972,

23 *Id.* at 1514.
24 *Id.* at 1515. Additionally, one supervisor made it expressly clear that "the shipyards were a man's world and that the rules against vulgar and abusive language did not apply to the 'cussing' commonly heard" at JSI. *Id.* A union representative told Robinson that she "was spending too much time attending to the pictures and not enough time attending to her job." *Id.* at 1516. Union leadership forcibly withdrew a union grievance Robinson filed about the pictures. at 1516-17.
25 *Id.* at 1515. In a subsequent meeting, the Vice-President of one of JSI's shipyards told Robinson that none of the posted pictures were pornographic because only pictures "depicting intercourse, masturbation, or other sexual activity" fell within that definition. *Id.* at 1516.
26 *Id.* at 1517.
27 *Id.* at 1490.
28 *Id.* at 1519.
29 42 U.S.C. §§ 2000e.
30 *Robinson*, 760 F. Supp. at 1523.
31 42 U.S.C. §§ 2000e.

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prohibited employment discrimination "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."[32] Title VII also prohibited the "limit[ation], segregat[ion], or classification of a person's] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [the individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin."[33] Title VII did not explicitly state that sexual harassment on the basis of sex was considered discrimination; however, the EEOC—which is responsible for enforcing federal laws against discrimination[34]—had issued guidelines recognizing that sexual harassment claims were prohibited forms of discrimination under Title VII.[35]

In *Meritor Savings Bank, FSB v. Vinson*, the United States Supreme Court first recognized that sexual harassment that created a hostile working environment was an actionable claim under Title VII.[36] Mechelle Vinson filed a sexual harassment suit against her employer and supervisor, alleging that her supervisor's demands for sexual favors created a hostile environment.[37] Vinson's supervisor denied that he ever made sexually suggestive remarks or had a sexual relationship with her.[38] The district court denied Vinson relief, stating that any sexual relationship "was a voluntary one having nothing to do with her continued employment . . . or her advancement or promotions."[39] On appeal, the Court of Appeals for the District of Columbia Circuit reversed the district court's holding, finding that Congress intended two avenues of relief under Title VII: 1) loss of employment due to refusal of unwelcome sexual advances; and 2) relief from a pervasive sexual harassment at work.[40]

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32 *Id.* at § 2000e-2(a)(1).
33 *Id.* at § 2000e-2(a)(2).
34 For more information about the EEOC, see *About EEOC*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/index.cfm (last visited March 30, 2012).
35 *See* Meritor Savings Bank, FSB, v. Vinson, 477 U.S. 57, 64-65 (1986) (citing 29 C.F.R. § 1604.11(a) (1985)).
36 *Id.* at 66.
37 *Id.* at 60.
38 *Id.* at 61.
39 Vinson v. Taylor, No. 78-1793, 1980 WL 100, at *7 (D.D.C. Feb. 26, 1980), *rev'd by* 753 F.2d 141 (D.C. Cir. 1985), *aff'd and remanded by* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).
40 *Vinson*, 753 F.2d at 144-145.

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After the U.S. Supreme Court granted certiorari, the bank asserted that under Title VII, Congress was only concerned with prohibiting discrimination that resulted in an economic loss and not "purely psychological aspects of the workplace environment."[41] Chief Justice William Rehnquist, writing for the majority and rejecting the bank's argument,[42] found that there was not much legislative history to guide the Court's interpretation of discrimination—based on sex—under Title VII.[43] However, the Court reasoned that Title VII was intended "'to strike at the entire spectrum of disparate treatment of men and women.'"[44] The court also recognized that EEOC guidelines—while not "controlling upon the courts"—also considered sexual harassment resulting in noneconomic injury a violation under Title VII.[45] Noting that several courts had recognized Title VII claims where discriminatory practices resulted in a hostile environment,[46] the Court held that a plaintiff would have an actionable claim if the sexual harassment was so "severe or pervasive" as to "create[] a hostile or abusive work environment."[47] So long as the plaintiff could demonstrate that the

41 *Meritor*, 477 U.S. at 64.

42 *Id.* at 59.

43 *Id.* at 64 (noting that the prohibition of discrimination on the basis of sex "was added to Title VII at the last minute on the floor of the House of Representatives").

44 *Id.* (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

45 *Id.* at 65. The EEOC guidelines stated that sexual conduct would be considered prohibited sexual harassment under Title VII where "such conduct has the purpose or effect of unreasonably interferring with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* (quoting 29 C.F.R. § 1604.11(a)(3)(1985)).

46 *Id.* (citing cases involving actionable claims of harassment based on race, religion, and national origin).

47 *Id.* at 66-67. The Court also cited with approval an Eleventh Circuit Court of Appeals' opinion stating the same. *Id.* (citing Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982)). The *Henson* Court stated that—based on EEOC guidelines and legal precedent—the five elements necessary for proving a claim of sexual harassment that creates a hostile work environment were:

> (1) The employee belongs to a protected group. . . .
> (2) The employee was subject to unwelcome sexual harassment. . . .
> (3) The harassment complained of was based upon sex. . . .
> (4) The harassment complained of affected a term, condition or privilege of employment. . . . [and]
> (5) Respondeat Superior. Where . . . the employer knew or should have known of the harassment and failed to take prompt remedial action.

Henson, 682 F.2d at 903-905 (citing cases and EEOC guidelines).

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actions "alter[ed] the conditions of [] employment," the employee did not need to show economic loss.[48]

Only a few months after *Meritor*, the Sixth Circuit Court of Appeals addressed in *Rabidue v. Osceola Refining Company*[49] whether sexual comments by a coworker and nude or partially nude pictures of women in the workplace were sufficiently severe or pervasive enough to create a hostile workplace.[50] Vivienne Rabidue had filed a complaint alleging sexual discrimination and harassment under Title VII after she was terminated from her employment.[51] Her complaint centered on the comments of a male supervisor and the actions of male coworkers.[52] The supervisor was "a crude and vulgar man," who often made obscene comments about women and used "words like 'cunt,' 'pussy,' and 'tits.'"[53] Other male employees routinely posted pictures of nude or partially nude women in their offices or around the common areas.[54] The district court determined that these actions did not constitute an actionable claim under Title VII, finding that while they may have been "a problem, [they were] not so pervasive a problem as to substantially interfere with [Rabidue's] employment."[55]

The Sixth Circuit agreed, stating that sexually hostile environments were characterized by the frequent occurrence of harassing incidents and conduct.[56] While the court found the supervisor's comments "annoying," it concluded that they were "not so startling to have affected seriously the psyches of [Rabidue] or other female employees."[57] The court concluded that the

48 *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904). Chief Justice Rehnquist wrote that "'a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.'" *Id.* (quoting *Henson*, 682 F.2d at 902).

49 805 F.2d 611 (6th Cir. 1986), *abrogated by* Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

50 *Id.* at 623.

51 *Id.* at 615.

52 *Id.* The supervisor led another section of the company and did not exercise authority over Rabidue. *Id.*

53 Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 423 (E.D. Mich. 1984), *aff'd by* 805 F.2d 611 (6th Cir. 1986), *abrogated by* Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). The supervisor also called Rabidue a "fat ass" on at least one occasion *Id.*

54 *Rabidue*, 805 F.2d at 615.

55 *Rabidue*, 584 F. Supp. at 423.

56 *Rabidue*, 805 F.2d at 620.

57 *Id.* at 622.

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pictures of nude women had only "a de minimis effect" on female employees when society at large "condones and publicly features and commercially exploits . . . pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places."[58] The court discounted other cases where harassment was found to have created sexually hostile workplaces as involving "more compelling circumstances" than Rabidue presented and noted that the instant case could not be a violation because it "involved no sexual propositions, offensive touchings, or sexual conduct of a similar nature."[59] Further, the Sixth Circuit found that Title VII served a very limited purpose:

> Sexual jokes, sexual conversations and girlie magazines may abound [in some work environments]. Title VII was not meant to-or can-change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.[60]

Judge Keith, however, dissented and criticized the majority for its failure to see Rabidue's workplace as "an anti-female environment."[61] The dissent wrote— that in using the standard of the reasonable *person*—the majority failed to recognize the "wide divergence" between women's and men's perspectives on appropriate sexual conduct.[62] Rather, the proper standard was that of the reasonable victim, in this case, the "outlook of the reasonable *woman*."[63] Finally, Judge Keith strongly disagreed that because society condoned similar behavior, nude pictures and

58 *Id.*

59 *Id.* at 622 n.7 (citing cases).

60 *Id.* at 620-21 (quoting *Rabidue*, 584 F. Supp. at 430).

61 *Id.* at 623 (Keith, J., dissenting). Judge Keith alluded to several harassing and discriminatory incidents not detailed within the majority opinion, including the male supervisor's comment about Rabidue: "All that bitch needs is a good lay." *Id.* at 624-25.

62 *Id.* at 626.

63 *Id.* (emphasis added). The dissent also criticized the majority for suggesting that women assumed the risk of working in sexually hostile environments through their voluntary choice to accept employment. *Id.* "[N]o woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally, or physically assaulted as a matter of prevailing male perogative." *Id.* at 626-27.

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sexual comments in the workplace had only a minimal effect on women workers.[64] Noting that society also condoned slavery, the dissent rejected that society's opinion of the conduct was the controlling analysis.[65]

Judge Melton's Groundbreaking Holding

By sharply diverging and criticizing the standards established in *Rabidue*, the Middle District in the instant case became the first court in the country to hold that nude pictures in the workplace—alone—could constitute an actionable sexual harassment claim under Title VII.[66] Following the lead of *Meritor* and *Henson v. City of Dundee*,[67] Judge Melton analyzed the five elements necessary to prove a discrimination claim of sexual harassment that creates a hostile work environment.[68] Judge Melton quickly concluded that, under the first element, Robinson belonged to a protected category.[69] Additionally, under the second element, the evidence was clear that Robinson did not welcome, and in fact took offense, to the complained of conduct.[70] In considering the third element—whether Robinson could show that she was harassed because of her gender—Judge Melton held that behavior could, but did not have to include sexually explicit conduct or demonstrate an animus toward one gender.[71] Instead, the Court held that behavior would also be considered harassment based upon sex where it demonstrated that it was "disproportionately more offensive or demeaning to one sex," even if the intent of the behavior was not to

64 *Id.* at 627.
65 *Id.* Judge Keith stated that "I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture." *Id.*
66 Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).
67 682 F.2d 897 (11th Cir. 1982).
68 *Robinson*, 760 F. Supp. at 1522-1532 ("(1) [The P]laintiff belongs to a protected category; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition or privilege of employment; and (5) respondeat superior, that is, defendants knew or should have known of the harassment and failed to take prompt, effective remedial action." (citing cases)); *see also supra* note 47 (detailing the five elements).
69 *Robinson*, 760 F. Supp. at 1522-23.
70 *Id.*
71 *Id.* at 1522.

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offend persons of that gender.[72] Under this standard, the pictures of nude or partially nude women—by themselves—sufficiently constituted harassment based upon sex.[73]

Under the fourth element—the impact of the harassment on Robinson and the work environment—Judge Melton concluded that the working environment should be evaluated under a totality of the circumstances test, requiring subjective and objective elements.[74] Under the subjective analysis, Robinson would have to show that she was as or more affected than a "reasonable person under like circumstances"; under the objective analysis, Judge Melton adopted the "reasonable woman" standard articulated by Judge Keith's *Rabidue* dissent.[75] Criticizing *Rabidue* for minimizing the impact of pornographic pictures by inappropriately considering "social context," Judge Melton stated that the Sixth Circuit overestimated society's opinions on pornography and failed to understand that women may be more threatened by pornography in the workplace than in society at large.[76] Further, Judge Melton held that Title VII was enacted to reduce hostility and ensure that women would be treated fairly in the workplace.[77] Judge Melton concluded that Title VII would become a meaningless promise if it failed to protect women who were not willing to accept abuse in historically sexually hostile workplaces.[78]

Finally, under the fifth element of liability, Judge Melton refused to allow JSI to employ an "ostrich defense" that it had no knowledge of Robinson's and other female employees' complaints.[79]

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72 *Id.* at 1522-23. The Court found a variety of harassing behaviors in the instant case demonstrating sexually explict conduct, showing an animus toward women, and presenting a disproportionately offensive and demeaning impact on women. *Id.* at 1523.

73 *Id.*

74 *Id.* at 1524.

75 *Id.* The evidence was clear that Robinson was as, or more, affected than a reasonable person under the same circumstances. *Id.*

76 *Id.* at 1526 (citing Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1212 .118 (1989)). When a woman is not at work, she has the option of protesting or avoiding pornography. *Id.* Inside the office, the posted pictures are the unavoidable daily speech of her supervisor or coworkers. *Id.*

77 *Id.*

78 *Id.* The Court held that to implement Title VII protections properly, courts must take into account "women's sensitivity to behavior once condoned as acceptable." *Id.*

79 *Id.* at 1529-30.

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Personal participation in sexual harassment was not required if the employer failed or refused to act when its employees complained of inappropriate behavior.[80] Despite Robinson's meeting all five of the required elements, Judge Melton was only able to award her nominal damages—one dollar—because Robinson's estimated losses were not sufficiently precise under the requirements of Title VII.[81]

The Court did, however, provide Robinson with injunctive relief, mandating that JSI adopt and enforce a comprehensive sexual harassment policy.[82] Judge Melton also engaged in a detailed analysis of the First Amendment's free speech requirements and held that, despite the objections of the defendants, the First Amendment did not bar the Court from issuing the injunction.[83] Importantly, Judge Melton found no less than six reasons why the First Amendment did not protect defendants' desires to post pornographic pictures in the workplace.[84]

Robinson Changes the Future of Sexual Harassment Law

The publicity of *Robinson*, along with her economic recovery of only one dollar, helped lead to Congress's enhancement of the remedy provisions of actions under Title VII.[85] *Robinson* illustrated that economic damages were only available to replace actual financial loss, and only if the plaintiff had well-documented

80 *Id.* at 1528. The Court found that JSI did not adequately respond to the complaints of sexual harassment that it received and in fact handled complaints in such a way as to discourage future reporting. *Id.* at 1530-31.

81 *Id.* at 1519-21, 1532-33.

82 *Id.* at 1534; *see also id.* at 1538-39 (detailing JSI's requirements).

83 *Id.* at 1534-1538.

84 The six reasons are that: 1) JSI disavowed that it sought to express itself through the pictures; 2) the pictures acted as discriminatory conduct, and thus, could not be considered protected speech; 3) regulating discriminatory speech at work is simply a time, place, manner regulation; 4) female employees at JSI were a captive audience; 5) even if the speech was fully protected, the government was allowed to regulate the speech because it had a compelling interest in ensuring female workplace equality and the regulation was narrowly tailored to this interest; and 6) analogizing public employee speech cases, the Court could require a private employer to restrict speech in the workplace to remedy a demonstrated harm on other employees. *Id.*

85 Kristen H. Berger Parker, Comment, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment*, 102 NW. U. L. REV. 945, 954-55 (2008) (stating that the "paucity of available remedies" under Title VII made vindication of rights "an empty quest").

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records; there was no provision for compensatory or punitive damages as a result of the emotional harm many plaintiffs had suffered.[86] Due to the stress surrounding her harassment, Robinson sent a letter to Congress instead of providing testimony in person about the inadequacy of the remedies available under Title VII.[87] She listed many of the terrible abuses she had suffered, and stated that she "recovered nothing to compensate [her] for the misery" she suffered and that the "whole experience ha[d] taken years out of [her] life."[88] Robinson's injuries demonstrated the necessity of reform, and in 1991, Congress amended Title VII to authorize the recovery of compensatory and punitive damages for unlawful intentional discrimination, including sexual harassment claims based on a hostile work environment.[89]

In the more than two decades since *Robinson*, courts have continued to support the principle that egregious conduct, like that of JSI's management and coworkers, can be an actionable claim of sexual harassment based on a hostile work environment.[90] The Supreme Court in *Harris v. Forklift Systems, Inc.*[91] reiterated that requiring employees to work in a discriminatory or hostile work environment was a violation of Title VII.[92] As opposed to the posting of pornography in *Robinson*, *Harris* involved repeated sexually

86 *Id.* at 954 (citing cases). "[S]exually harassed women" who suffered great harm were "rarely compensated for the actual nature and extent of the harms that they suffer[ed]." Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 300 (1991) (stating that women suffered from a number of injuries, including "stress; high blood pressure; nausea; insomnia; weight loss; anorexia; and damage to self-esteem, personal relationships, and reputation").

87 Hearings on H.R. 1, The Civil Rights Act of 1991 Before the H. Comm. On Education and Labor, 102d Cong. 590 (1991) (written statement of Lois Robinson), reprinted in 1 THE CIVIL RIGHTS ACT OF 1991: A LEGISLATIVE HISTORY OF PUBLIC LAW 102-166 77 (Bernard D. Reams Jr. & Fay Couture, eds. 1994).

88 *Id.* at 81. Robinson also stated that her award of one dollar was "a slap in the face." *Id.* at 82. She doubted the effectiveness of the Court's injunction because the order was released on a Friday, and she saw more pornographic pictures at work the following Monday. *Id.* (suggesting that without a financial penalty, "the company simply does not have much incentive to change").

89 *See* 42 U.S.C. § 1981a(a)(1)(2012) (providing that a plaintiff may recover compensatory and punitive damages in addition to any damages based on actual financial loss proven with well-documented records).

90 GEORGE RUTHERGLEN, Employment Discrimination Law: Visions of Equality in Theory and Doctrine 137 (3d ed. 2010).

91 510 U.S. 17 (1993).

92 *Id.* at 21.

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harassing comments,[93] but the principle remains the same: conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" is forbidden.[94] Further, the *Harris* Court stated that a victim is not required to show that the harassment caused psychological harm because "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[95]

The *Harris* Court, however, did appear to reject indirectly *Robinson*'s "reasonable woman" standard. The district court had analyzed Harris's claims from the viewpoint of a "reasonable woman," but the Supreme Court twice stated that the standard was how a "reasonable person" would view the work environment.[96] More recently, in *Oncale v. Sundowner Offshore Services, Inc.*,[97] a case involving male-on-male sexual harassment, the Supreme Court again used the "reasonable person" standard.[98] The *Oncale* Court did elaborate, however, that the standard was that of a "reasonable person in the plaintiff's position," meaning that courts needed to give "careful consideration of the social context in which particular behavior occurs and is experienced by its target."[99] Under this standard, the *Oncale* Court rejected—like the *Robinson* Court—the idea from *Rabidue* that sexually lewd material in the workplace could not be offensive or lead to a hostile work environment because society condoned it on television and in certain magazines.

Following *Robinson*, a number of scholars alleged that Title VII's prohibitions on a hostile work environment conflicted with the First Amendment's free speech protections.[100] These scholars assert that

93 *Id.* at 19 (providing examples, including the company's president asking female employees to get coins from his front pocket and telling Harris to "go to the Holiday Inn" with a supervisor to renegotiate her salary).

94 *Id.* at 21.

95 *Id.*

96 *See id.* at 21-22. Both Justices Scalia and Ginsberg also concluded that "reasonable person" was the best standard available by which to analyze the conduct. *See id.* at 24 (Scalia, J., concurring); *id.* at 25 (Ginsberg, J., concurring).

97 523 U.S. 75 (1998).

98 *Id.* at 81.

99 *Id.* (stating that a football coach smacking a player on the butt after a good play would likely not be considered as abusive where smacking his secretary ("male or female") on the behind in his office would reasonably be perceived as abusive or hostile).

100 Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment, Sexual Harassment, and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995) (discussing two prominent scholars'—Eugene Volokh and Kingsley Browne—arguments in detail).

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Title VII violates the First Amendment because it makes certain types of speech illegal based on the speech's content and message.[101] The Supreme Court has not directly addressed the issue but has appeared to disregard these assertions. In *R.A.V. v. City of St. Paul*,[102] the Court used Title VII as an example of permissible regulation that did not violate the First Amendment.[103] One year later in *Harris*, the Supreme Court ignored any potential conflict between Title VII and the First Amendment, despite the fact that both parties and two amici had briefed the issue.[104] Like *Robinson*, a number of courts have concluded that Title VII prohibitions of a hostile work environment do not run afoul of the First Amendment where the government is merely regulating conduct, not the speech itself.[105] Other courts appear to remain unsatisfied with this analysis.[106]

Robinson was a crucial step toward implementing Title VII's intended promise to safeguard the workplace from harassment based on sex. *Robinson* was groundbreaking for several reasons: it held that pornography alone could sufficiently create a hostile work environment in violation of Title VII, that society's condoning the behavior on television and in other commercial media was not the appropriate standard to use to evaluate the behavior, and that

101 *Id.* at 463-64. For additional information, see Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

102 505 U.S. 377 (1992).

103 *Id.* at 389-90 (stating that "sexually derogatory 'fighting words'" may be subject to regulation because when the government does not regulate conduct on the basis of "expressive content," the fact that the conduct also expresses a "discriminatory idea" will not shield the conduct from regulation); *cf. id.* at 409-10 (White, J., concurring) (using Title VII protections as an example of laws that should not, but might run afoul of the First Amendment under the majority's ruling).

104 Sangree, *supra* note 100, at 504 n.188. The Supreme Court has subsequently recognized that it provided Title VII "as an example of a permissible content-neutral regulation of conduct" in *R.A.V.* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993).

105 *See, e.g.*, Booth v. Pasco Cnty, No. 8:09–cv–2621–T–30TBM, 2012 WL 555854, at *7-9 (M.D. Fla. Feb. 21, 2012) (citing cases and holding that threatening speech in the workplace that violates Title VII did not run afoul of the First Amendment).

106 *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 597 n.7 (5th Cir. 1995) (calling the Supreme Court's rulings "unilluminating" and as sidestepping the First Amendment issue due to a lack of sufficient evidence, even though the Fifth Circuit felt applying Title VII would have resulted in the regulation of speech because of content).

Price: You've Come a Long Way, Baby: Stripping Pornography from America'

employees could not post pictures of nude women at work by using the First Amendment as a shield and a sword to continue sexually harassing behavior. Looking back with today's perspective, it is hard to imagine that—only twenty-two years ago—these behaviors were tolerated, and in some instances entrenched, in America's workplaces. A more definitive ruling from the Supreme Court on the constitutionality of legislation banning sexual harassment remains necessary, but in the two decades since *Robinson*, the law has continued to evolve to protect both men and women from employment discrimination based on sex that creates hostile workplaces.