THE AFTERSHOCK OF *HARRIS V. FORKLIFT SYSTEMS, INC.* IN TITLE VII DISCRIMINATION AND HOSTILE ENVIRONMENT CLAIMS

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 forbids an employer to discriminate against any employee because of the employee's race, color, religion, sex, or national origin.[1] The Act encompasses discrimination arising from a hostile work environment in addition to traditional forms of discrimination.[2]

A Title VII hostile environment claim is one tool minority and female employees can use to guard against harassing conduct by fellow employees and employers. This Article will focus on the evolution of Title VII hostile environment claims in the context of *Harris v. Forklift Systems, Inc.*[3] The United States Supreme Court in *Harris* held an employee is not required to show serious psychological impairment or other injury to prevail in a Title VII hostile environment claim.[4] The extent of abuse an employee must prove to prevail on a hostile environment claim remains unclear.[5] This Article will provide an

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1. 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. III 1991).

2. *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1993) (including hostile environment sexual harassment within the definition of discrimination based on sex under Title VII); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (recognizing a hostile racial environment as actionable under Title VII).

3. Harris v. Forklift Sys. Inc., 114 S. Ct. 367 (1993); *see infra* parts II-IV.

4. *Id.* at 371.

5. Justice Scalia stated the Court failed to clarify what an employee must prove to constitute an abusive or hostile environment with its "objective" and "reasonable person" test. *Id.* at 372 (Scalia, J., concurring).

overview of the factors lower courts are likely to consider when deciding hostile environment claims.[6]

II. REVIEW OF *HARRIS V. FORKLIFT SYSTEMS, INC.*

Harris v. Forklift Systems, Inc. involved a sexual harassment claim by Theresa Harris, an employee of Forklift Systems, against Charles Hardy, the company's president.[7] Harris claimed Hardy created a hostile work environment because of Harris's gender.[8]

Harris was a rental manager at Forklift Systems for two and one-half years.[9] During this time, Hardy subjected Harris to many gender-based insults which prompted Harris to confront Hardy about his offensive and abusive behavior.[10] Although Hardy promised to stop the harassment, it continued until Harris quit her job in October 1987.[11]

Harris brought an action against Forklift Systems, claiming Hardy's conduct created a sexually hostile and abusive work environment.[12] The trial court disagreed.[13] The court found that Hardy's comments were rude and discriminatory.[14] The court also found his conduct offended Harris and would offend a reasonable person.[15] The court nevertheless concluded Hardy's conduct, however distasteful, was not so severe as to seriously affect Harris's psychological well-being and did not interfere with Harris's work performance.[16] Although Hardy's conduct offended Harris, Harris failed to prove she subjectively suffered any injury.[17] She also failed to prove the work environment was "so poisoned as to be intimidating or abusive."[18] The trial court followed Sixth Circuit precedent

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6. *See infra* parts V-VII.
7. Harris v. Forklift Sys., Inc., 114 S. Ct. at 369.
8. *Id.*
9. *Id.*
10. *Id.* Harris cited a variety of abusive comments. *Id.* For example, Hardy commented to Harris several times in the presence of other employees: "You're a woman, what do you know," and "We need a man as the rental manager." *Id.* According to Harris, Hardy told her on at least one occasion that she was "a dumb ass woman." *Id.* Hardy insulted Harris in front of others when he suggested that he and Harris negotiate Harris's raise together at the Holiday Inn. *Id.* Hardy also asked Harris and other females to reach into his pants pocket for coins, threw objects on the ground in front of Harris and other females and had them pick up the objects, and made sexual innuendoes about Harris's and other women's clothing. *Id.*
11. *Id.* For example, while Harris was arranging a deal with a Forklift Systems customer, Hardy, in front of other employees, asked Harris, "What did you do, promise the guy . . . some [sex] Saturday night?" *Id.*
12. *Id.*
13. *Id.*; *Harris* was initially heard by a United States Magistrate Judge who issued a report and recommendation to the United States District Court Judge. *Id.*
14. *Id.* at 369-70.
15. *Id.*
16. *Id.* at 370.
17. *Id.*
18. *Id.*

requiring an employee to prove the harassment seriously affected the employee's psychological well-being or physically injured the employee.[19]

Harris appealed, and the United States Court of Appeals for the Sixth Circuit affirmed the trial court's decision.[20] The United States Supreme Court reversed, choosing to follow the Ninth Circuit, which does not require injury to the employee's psychological well-being.[21] According to the Court, the phrase "terms, conditions, or privileges," as used in the Civil Rights Act of 1964,[22] was intended to "'strike at the entire spectrum of disparate treatment.'"[23] The Court defined hostile environment as one in which "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[24] The Court characterized its standard of review as a "middle path" between the conservative approach, requiring psychological injury, and the liberal approach, which does not require any injury.[25]

In an attempt to establish the parameters of the conduct proscribed by Title VII, the Court created a two-part test. The first part requires the employee claiming to be harassed to perceive the work environment to be so hostile and abusive that employment conditions are actually altered.[26] Although this subjective test does not require severe injury, it does require that the discriminatory conduct personally affect the employee.[27] The second, objective, part of the test requires that the harassment affect a reasonable employee's work environment.[28] The Court listed several factors to consider when determining whether the employer has created a hostile environment: "The frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[29]

Justice Scalia, in his concurring opinion, correctly pointed out that although the majority set forth several factors for determining whether an employee's work environment is hostile, it did not say "how much of each is necessary (an impossible task) nor identifie[d] any single factor as determinative."[30] Justice Ginsburg, in her concurring opinion, stated that "a reasonable

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19. *Id.* (citing Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989)).

20. *Id.* The Sixth Circuit decision was not published. *Id.*

21. *Id.* (citing Ellison v. Brady, 924 F.2d 872, 877-78 (9th Cir. 1991)).

22. 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. III 1991). The Civil Rights Act of 1964 forbids employers from discriminating against employees based on their race, color, religion, gender, or national origin regarding levels of pay, terms, conditions, or privileges. *Id.*

23. Harris v. Forklift Sys. Inc., 114 S. Ct. 367, 370 (1993) (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 64 (1986) (quoting City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978))).

24. *Id.* (citations omitted).

25. *Id.*

26. *Id.* at 370.

27. *Id.* at 371.

28. *Id.* at 370.

29. *Id.* at 371.

30. *Id.* at 372 (Scalia, J., concurring).

person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.' "[31] Justice Ginsburg seemed to disagree with the Court's objective test by suggesting an employee who does not feel that a work environment is affected by discrimination is unreasonable.[32]

Trial courts and litigants must reconcile *Harris* with prior case law. Iowa and the Eighth Circuit did not require victims of sexual harassment to prove psychological injury; *Harris* has not changed existing law in that respect.[33] *Harris* has, however, changed the law in other aspects of hostile environment sexual harassment. This Article will discuss the future of sexual harassment law.[34]

III. REVIEW OF *MERITOR SAVINGS BANK V. VINSON*

Meritor Savings Bank v. Vinson[35] is the leading case involving hostile work environment sexual harassment under Title VII of the Civil Rights Act of 1964.[36] All Title VII sexual harassment and discrimination claims must be analyzed in light of *Meritor*. In *Meritor*, the Court thoroughly discussed Title VII sexual harassment,[37] whereas in *Harris* the Court addressed the specific issue of whether sexual harassment victims may recover damages without proving severe psychological injury.[38]

In *Meritor*, Michelle Vinson was hired by Meritor Savings Bank as a teller and was eventually promoted to branch manager.[39] The bank discharged Vinson after four years of service for "excessive use of leave."[40] Vinson sued the bank and one of its vice presidents, Sidney Taylor, alleging Title VII sexual harassment.[41] Taylor and the bank denied all allegations; the bank claimed it was unaware of Taylor's actions.[42]

The district court found Vinson was not sexually harassed because any sexual relationship between her and Taylor was voluntary and unrelated to her employment.[43] The appellate court reversed and remanded, finding Vinson's allegations fell within the second type of sexual harassment under Title VII:

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31. *Id.* (Ginsburg, J., concurring) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989)).

32. *Id.* (Ginsburg, J., concurring).

33. *See* Hall v. Gus Constr. Co., 842 F.2d 1010, 1015 (8th Cir. 1988); Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 525-26 (Iowa 1990).

34. *See infra* part V.

35. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

36. *Id.* at 59.

37. *Id.* at 66-68.

38. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993).

39. Meritor Savings Bank v. Vinson, 477 U.S. at 59-60.

40. *Id.* at 60.

41. *Id.* The alleged sexual harassment began with a request for sexual relations, which Vinson initially refused. *Id.* Fearing loss of her job, Vinson agreed to have intercourse with Taylor, and did so approximately 40 to 50 times during her employment. *Id.* Vinson testified Taylor fondled her in front of co-employees and raped her several times. *Id.* Because Vinson was afraid of Taylor, she did not report his conduct to the bank. *Id.* at 61.

42. *Id.*

43. Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42-43 (D.C. 1980).

"[H]arassment that, while not affecting economic benefits, creates a hostile or offensive working environment."[44] The court held the bank liable for sexual harassment by a supervisor "whether or not the employer knew or should have known about the misconduct."[45] Certiorari was granted[46] after rehearing en banc was denied.[47] The Supreme Court affirmed for different reasons.[48]

The Court found a hostile or abusive work environment constituted discrimination based on sex under Title VII.[49] "For 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.'"[50]

The employee must initially prove the alleged harassing conduct was unwelcome.[51] The Eleventh Circuit defined unwelcome conduct as conduct "the employee did not solicit or incite . . . and the employee regarded as undesirable or offensive."[52] The fact that the employee was not forced to engage in sexual relations was not a defense to a Title VII sexual harassment suit.[53] The district court erred because it did not focus on whether the conduct was unwelcome.[54]

The Court found Vinson's "sexually provocative speech and dress" relevant in determining whether the conduct was unwelcome.[55] The appellate court erroneously found such testimony "'had no place in this litigation.'"[56] The Supreme Court rejected the appellate court's finding that employers are "always automatically liable for sexual harassment by their supervisors."[57] Although the

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44. Meritor Savings Bank v. Vinson, 477 U.S. 57, 62 (1986) (citing Vinson v. Taylor, 753 F.2d 141, 145 (D.C. Cir. 1985)). The first type of sexual harassment involved "the conditioning of concrete employment benefits on sexual favor." *Id.* (citing Vinson v. Taylor, 753 F.2d at 145). In support of its finding, the court relied on the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1993). *Id.* (citing Vinson v. Taylor, 753 F.2d at 145).

45. *Id.* at 63 (citing Vinson v. Taylor, 753 F.2d at 150).

46. PSFS Savings Bank v. Vinson, 474 U.S. 815 (1985).

47. Vinson v. Taylor, 760 F.2d 1330 (D.C. Cir. 1985).

48. Meritor Savings Bank v. Vinson, 477 U.S. 57, 63 (1986).

49. *Id.* at 66.

50. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

51. *Id.* at 68 (citing 29 C.F.R. § 1604.11(a) (1993)).

52. Henson v. City of Dundee, 682 F.2d at 903. Iowa courts have adopted *Henson*'s definition of "unwelcome." *See, e.g.*, Lynch v. City of Des Moines, 454 N.W.2d 827, 833-34 (Iowa 1990); Chauffeurs, Local Union 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d 375, 378 (Iowa 1986).

53. Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986).

54. *Id.*

55. *Id.* at 69. An employee's conduct outside the workplace may not be relevant in determining whether conduct is unwelcome in the workplace. *See* Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 963 (8th Cir. 1993) (stating a nude photograph of plaintiff published in a magazine was not material to whether she welcomed sexual taunting in the workplace). In Iowa, a plaintiff's conduct of participating in sexual speech and jokes is relevant in determining "unwelcome" conduct. Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990). A plaintiff's claim will not be defeated when plaintiff occasionally used "crass language" if the employee shows the harassing conduct is offensive. *Id.*

56. Meritor Savings Bank v. Vinson, 477 U.S. at 69 (quoting Vinson v. Taylor, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985)).

57. *Id.* at 72.

Court did not issue a definitive ruling on employer liability, it did conclude Congress intended courts to apply general agency principles.[58] Further, grievance procedures and antidiscrimination policies did not insulate employers from liability, even if employees did not use the procedures and policies.[59]

Meritor will continue to be the leading case in Title VII sexual harassment law. *Harris* addressed a specific controversy in Title VII claims, but did not encroach on the framework established in *Meritor*.

IV. PRE-*HARRIS* CONFLICT AMONG CIRCUITS

The Supreme Court granted certiorari in *Harris* to resolve the question of whether an employee bringing a hostile working environment action must prove the conduct seriously affected the employee's psychological well-being.[60] In deciding *Harris*, the district court followed a line of cases that required employees to show the harassment caused serious psychological injury in order to prevail.[61] Other circuits, however, had rejected the psychological injury requirement in favor of a lesser standard of proof.[62]

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58. *Id.*

59. *Id.*

60. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).

61. *Id.*; *see* Woods v. Graphic Communications, 925 F.2d 1195, 1203 (9th Cir. 1991) (upholding a race-related hostile environment claim where the employee suffered severe mental, emotional, and physical harm); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (requiring the harassment be severe enough to affect the psychological stability of the employee); Brooms v. Regal Tube, Co., 881 F.2d 412, 418-19 (7th Cir. 1989) (holding the plaintiff successfully proved the supervisor's repeated instances of offensive conduct toward employee interfered with her work performance and seriously affected her psychological well-being); Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) (holding the employee must show that harassment interfered with ability to perform work or significantly affected psychological well-being); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989) (stating the harassment must be severe enough to affect employee's psychological well-being); Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (holding the plaintiff may not prevail on a sexual harassment claim unless the plaintiff's psychological well-being was seriously affected); Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 650 (6th Cir. 1986) (holding that the employee must show a reasonable person's reaction to the harassment would seriously affect psychological well-being); Downes v. FAA, 775 F.2d 288, 292 (Fed. Cir. 1985) (holding the employee must show the harassment caused serious psychological injury).

62. *See* Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992) (explaining the following elements of a sexual harassment claim: (1) the employee was part of a protected class, (2) the employee was subjected to unwelcome harassment, (3) the harassment was based upon sex, race, religion or national origin, (4) the harassment affected the employee's condition or privilege of employment, and (5) the employer knew or should have known of the harassment and failed to take proper remedial action); Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) ("Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation."); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 192 (1st Cir. 1990) (holding the alleged sexual harassment was not a violation of Title VII because it did not interfere with the plaintiff's work performance or cause psychological injury); Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988) (stating hostile environment sexual harassment "occurs when one or more supervisors or co-workers create an at-

In *Harris*, the Supreme Court settled the dispute between the circuits by adopting the position that sexual harassment victims did not have to prove severe psychological injury under Title VII.[63] From a practitioner's point of view, the psychological injury an employee may have suffered is relevant to proving damages, but otherwise plays no part in establishing liability. Post-*Harris* decisions will likely treat psychological injury as emotional distress damages, similar to how courts consider pain and suffering as a damage element in personal injury cases.[64] An employee who has not suffered some emotional distress, however, would not likely bring an action under Title VII alleging hostile environment. If such an action were filed, recovery would probably be nominal.

V. POTENTIAL EFFECTS OF *HARRIS* ON FUTURE LITIGATION

"Today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages."[65] Justice Scalia, in his concurrence, acknowledged the vagueness of the ruling and the lack of definite alternatives to guide juries.[66]

The Court resolved the conflict among the circuits by concluding that conduct does not have to "'seriously affect [an employee's] psychological well-being' or lead the plaintiff to 'suffe[r] injury'" in order to be actionable.[67] If a plaintiff is not required to suffer serious psychological injury by another's conduct, then what are the parameters for defining hostile environment claims?

Instead of providing specific guidance, the Court reaffirmed the standard set out in *Meritor Savings Bank v. Vinson*: "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create

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mosphere so infused with hostility toward members of one sex that they alter the conditions of employment for them"); Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988) (stating an employee need only show the harassment made job performance more difficult).

63. Harris v. Forklift Sys., Inc., 114 S. Ct. at 371.

64. In the post-*Harris* environment, emotional distress in Title VII and Chapter 216 cases is the equivalent of pain and suffering in an automobile negligence case. For example, an employee may not have suffered emotional distress but may still have been subjected to a hostile environment such that the employer's conduct altered the terms of employment. The court in such a case looks at the conduct of the employer. It is possible a finder of fact could award nominal damages without awarding damages for emotional distress or awarding damages for the economic impact the conduct caused. This would be equivalent to awarding property damage in an automobile negligence case without awarding pain and suffering damages. For an overview of damages recoverable in an Iowa common law negligence case, see Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985) (discussing past pain and suffering); Long v. McAllister, 319 N.W.2d 256, 259-60 (Iowa 1982) (discussing property damages in automobile collision cases); Schnebly v. Baker, 217 N.W.2d 708, 708 (Iowa 1974) (discussing future pain and suffering); Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525-26 (Iowa Ct. App. 1977) (discussing past pain and suffering).

65. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993) (Scalia, J., concurring).

66. *Id.* at 372 (Scalia, J., concurring). Justice Scalia stated: "I know of no test more faithful to the inherently vague language than the one the Court today adopts." *Id.* (Scalia, J., concurring).

67. *Id.* at 371.

an abusive working environment,' . . . Title VII is violated."[68] Title VII does not require that the plaintiff suffer severe psychological harm as long as "the environment would reasonably be perceived, and is perceived, as hostile or abusive."[69]

The Court attempted to define this vague standard by listing several factors courts should consider when determining whether a workplace is hostile or abusive: "[1] the frequency of the discriminatory conduct; [2] its severity; [3] whether it is physically threatening or humiliating, or a mere offensive utterance; and [4] whether it unreasonably interferes with an employee's work performance."[70] These factors may reflect a jury's perception of a hostile work environment and indicate how the employee perceived the environment. A jury may find an employee not alleging psychological harm, yet reasonably perceiving the environment as hostile or abusive, deserves an award of damages.[71]

VI. THE BURDEN OF PROOF

An employee who brings a hostile environment claim must not only prove the elements of the cause of action,[72] but also satisfy a reasonableness test.[73] Although the Supreme Court implied a subjective standard,[74] it is unlikely courts will adopt such a standard.[75] The courts will focus on the reasonableness standard because a plaintiff bringing a Title VII claim alleging hostile and abusive work environment would subjectively perceive the environment as such.

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68. *Id.* at 370 (quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 65, 67 (1986) (citations omitted)).

69. *Id.* at 371 (citing Meritor Savings Bank v. Vinson, 477 U.S. at 65, 67).

70. *Id.*

71. Nominal damages and, in some cases, attorney's fees are appropriate when the jury is unable to place a monetary value on the harm the plaintiff suffered from the violation of his rights. Dean v. Civiletti, 670 F.2d 99, 101 (8th Cir. 1982); *see also* Edwards v. Jewish Hosp. of St. Louis, 855 F.2d 1345, 1345 (8th Cir. 1988) (holding punitive damages need not be proportionate to nominal damages and awarding $25,000 in punitive damages and only $1 in nominal damages).

72. Five elements must be proven: (1) The employee must belong to a protected group; (2) the employee must be subjected to unwelcome harassment; (3) the harassment must be based on sex; (4) the harassment must affect a term, condition, or privilege of employment; and (5) the employer knew or should have known about the harassment and did not take proper remedial action. Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982); *see* Kopp v. Samaritan, 13 F.3d 264, 269 (8th Cir. 1993).

73. The Supreme Court in *Harris* stated: "So long as the environment would reasonably be perceived and is perceived as hostile or abusive . . . , there is no need for it also to be psychologically injurious." Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993).

74. The Supreme Court stated that if the employee does not subjectively perceive the environment to be hostile, the harassing conduct has not actually altered the conditions of employment and is not actionable under Title VII. *Id.* at 370.

75. If the employee is exposed to disadvantageous terms of employment, psychological impact has little relevance. If the employee is exposed to harassment which alters the conditions of employment, such harassment is actionable under Title VII, and psychological harm is relevant, but not essential. *See id.* at 371-72. A more important factor overshadowing the psychological impact of the harassment is whether the harassment is sufficiently severe or pervasive. *See* Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985).

The reasonableness standard takes into account the totality of the circumstances.[76] For instance, a fact finder may reasonably conclude an offensive comment or joke in a blue-collar environment does not alter the work environment of the employee. The same comment uttered in a white-collar environment potentially alters the work environment and accordingly would be actionable under Title VII or Iowa Code Chapter 216. Blue-collar employees may be affected by offensive comments and have actionable claims, yet be less likely to recover substantial damages because of the nature of their work environment. In any case, if an employee is affected by a coworker's offensive language, and the employer is aware of such conduct and fails to take remedial action, the employee would have an immediate cause of action against the employer.[77]

VII. EFFECT OF *HARRIS* ON IOWA LITIGATION

Iowa law prohibits discrimination and harassment in employment based on age, race, creed, color, national origin, religion, and disability.[78] The Iowa Supreme Court and the federal courts use the same definition of a prima facie claim for a hostile environment.[79] A hostile environment claim consists of five elements: (1) the employee must belong to a protected class; (2) the employee must be subjected to unwelcome harassment; (3) the harassment must be based upon race, sex, or religion; (4) the harassment must affect a term, condition, or privilege of employment; and (5) the employer must know or have constructive knowledge of the harassment and fail to take prompt remedial action.[80]

With respect to a hostile environment claim, the aim of the Iowa Civil Rights Act is the same as the aim of Title VII: to forbid conduct in the workplace which unreasonably interferes with the employee's work performance or conduct which creates an intimidating, hostile, or offensive work environment.[81] The Court in *Harris* articulated a threshold requirement of proof which falls between a single utterance and severe psychological injury.[82] The Iowa Supreme Court

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76. Harris v. Forklift Sys., Inc., 114 S. Ct. at 371; *see* Vaughn v. AG Processing, Inc., 459 N.W.2d 627, 633 (Iowa 1990); Edmunds v. Mercy Hosp., 503 N.W.2d 877, 879 (Iowa Ct. App. 1993).

77. *See* Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984).

78. *See* Iowa Code § 216.6(1)(a) (1993).

79. *See* Vaughn v. AG Processing, Inc., 459 N.W.2d at 632 (recognizing a religious hostile environment claim arising out of Iowa Code chapter 601A, which is now Iowa Code chapter 216); Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 835 (Iowa 1990) (adopting the five-part test and adding that an employee may recover damages for emotional distress without showing physical injury, severe distress, or outrageous conduct); Chauffeurs, Local Union 238 v. Civil Rights Comm'n, 394 N.W.2d 375, 378, 382 (Iowa 1986) (adopting the five-part test and stating that the Iowa Civil Rights Act must be construed liberally "to eliminate unfair and discriminatory acts and practices in employment").

80. *Id.* This five-part test was initially set out in Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

81. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-65 (1986); *see also* 29 C.F.R. § 1604.11(a)(3) (1993).

82. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).

has taken an almost identical approach.[83] This approach applies to claims brought under Title VII and the Iowa Civil Rights Act.[84]

The Eleventh Circuit Court of Appeals outlined the five-part test in *Henson v. City of Dundee*,[85] which has been adopted by the Iowa Supreme Court.[86] Iowa Supreme Court decisions have never departed from either the federal Title VII analysis or the case law interpreting it. In fact, the Iowa Supreme Court has expressed that "decisions under Title VII of the federal Civil Rights Act of 1964 may be persuasive in construing the Iowa Civil Rights Act."[87] The court reserved the right to depart from cases interpreting federal civil rights law in cases where the issue is the statutory construction of the Iowa civil rights laws.[88]

The requirement set out by the Supreme Court in *Harris* struck a middle ground between conduct which is merely offensive and conduct which produces a psychological injury.[89] Iowa case law has allowed a claimant to recover dam-

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83. *See* Vaughn v. AG Processing, Inc., 459 N.W.2d 627, 633 (Iowa 1990) (stating that continuous, severe, and pervasive religious slurs constitute a violation of the Iowa Civil Rights Act); Lynch v. City of Des Moines, 454 N.W.2d 827, 835 (Iowa 1990) (holding that complainant, under the Iowa Civil Rights Act, may recover damages for emotional distress without showing physical injury, severe distress, or outrageous conduct); *see also* Hy-Vee v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 526 (Iowa 1990) (holding a civil rights plaintiff may recover damages for emotional distress without showing physical injury, outrageous conduct or severe distress); Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 357 (Iowa 1989) (holding a plaintiff need not prove emotional distress to recover for retaliatory discharge); Amos v. Prom, Inc., 115 F. Supp. 127, 132 (N.D. Iowa 1953) (holding a plaintiff may recover damages for emotional distress without showing of physical injury as long as the act was willful and intentional). *See generally* Chauffeurs, Local Union 238 v. Civil Rights Comm'n, 394 N.W.2d 375, 383 (holding plaintiff may recover damages for emotional distress for racial discrimination); RESTATEMENT (SECOND) OF TORTS § 46 (1965).

84. The Iowa Civil Rights Act states:

> It shall be an unfair or discriminatory practice for any . . . [p]erson to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation.

IOWA CODE § 216.6(1)(a) (1993).

Title VII of the Civil Rights Act of 1964 states: "It shall be 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) (1988); *see also* Lynch v. City of Des Moines, 454 N.W.2d at 833 (holding federal hostile environment analysis should apply to claims brought under the Iowa Civil Rights Act).

85. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).

86. *See, e.g.*, Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993); Vaughn v. AG Processing, Inc., 459 N.W.2d at 632; Lynch v. City of Des Moines, 454 N.W.2d at 833; Chauffeurs, Local Union 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d at 378.

87. Lynch v. City of Des Moines, 454 N.W.2d at 833 n.5 (citing Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 474 (Iowa 1983)).

88. *Id.*

89. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).

ages for infliction of emotional distress without showing physical injury.[90] Nonetheless, Iowa courts have consistently held employees must prove the distress was severe and the conduct was outrageous.[91]

In the post-*Harris* environment, the employee may recover compensatory damages for an emotional distress claim even if the injury is not severe, and the conduct complained of is not so outrageous that it would be actionable under the tort of intentional infliction of emotional distress. The only time the supplemental claim of intentional infliction of emotional distress would be necessary is in the rare case where the plaintiff is likely to exceed the punitive damage cap.[92]

The Supreme Court in *Harris* provided automatic relief when a reasonable person would find the environment hostile if the employee could show the workplace was altered due to the wrongdoer's conduct.[93] From a practitioner's standpoint, an employee who brings a hostile environment action is expected to claim the employee personally perceived the environment as hostile. As a subjective element, disproving the employee was affected by the hostile environment is almost impossible. To take matters further, an Iowa employee who files suit under both the federal statute and the state statute can recover damages if the employee can show the work environment has been altered by witnessing other employees being subjected to discriminatory conduct.[94] If the employee's reac-

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90. *See* Paulsen v. Russell, 300 N.W.2d 289, 297 (Iowa 1981); Meyer v. Nottger, 241 N.W.2d 911, 918 (Iowa 1976); RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1965).

91. The Iowa Supreme Court has set out the elements of the tort of intentional infliction of emotional distress as:

(1) Outrageous conduct by the defendant;
(2) The defendant's intentional causing, or reckless disregard of the probability of causing emotional distress;
(3) Plaintiff suffered severe or extreme emotional distress; and
(4) Actual or proximate causation of the emotional distress by the defendant's outrageous conduct.

Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 n.3 (Iowa 1993) (citing Vaughn v. AG Processing, Inc., 459 N.W.2d 627, 635-36 (Iowa 1990)). *See* Harsha v. Savings Bank, 346 N.W.2d 791, 800 (Iowa 1984) (requiring a showing of outrageous conduct and severe or extreme emotional distress to recover on a claim for intentional infliction of emotional distress); Paulsen v. Russell, 300 N.W.2d 289, 296 (Iowa 1981) (holding that a prima facie claim of emotional distress requires the plaintiff to show severe distress as well as outrageous conduct, including that the conduct caused highly unpleasant mental reactions); *see also* Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 198 (Iowa 1985) (stating outrageous conduct requires more than hurt feelings). *See generally* Vaughn v. AG Processing, Inc., 459 N.W.2d 627, 635-36 (Iowa 1990) (defining intentional infliction of emotional distress); Callahan v. State, 385 N.W.2d 533, 539 (Iowa 1986) (holding conduct must be intentional or reckless); RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1965).

92. The Civil Rights Act of 1991 allows a sexual harassment victim to recover punitive damages; Congress, however, placed caps on the amount that may be recovered depending on the size of the employer. *See* 42 U.S.C. § 1981a (Supp. III 1991).

93. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).

94. The Iowa Supreme Court held that evidence of a hostile atmosphere "is relevant in considering a discrimination claim and 'it is not rendered irrelevant by its failure to coincide precisely with the particular actors or time frame involved in the specific events that generated a claim of discriminatory treatment.'" Hammer v. Iowa Civil Rights Comm'n, 472 N.W.2d 259, 262 (Iowa 1991) (quoting Conway v. Electro Switch Corp., 825 F.2d 593, 597 (1st Cir. 1987)).

tion to third party harassment makes the employee fearful of such harassment, the employee may recover damages for emotional distress.[95]

By allowing an employee to recover damages without showing severe psychological injury, the *Harris* decision will have an effect on how the employee pleads the case and how the employee will litigate the cause of action. For example, an employee is allowed to present evidence of historical discrimination which falls outside of the time period required by the Equal Employment Opportunity Commission (EEOC) or Iowa Civil Rights Commission (ICRC).[96] Although the court lacks jurisdiction to compensate an employee for conduct falling outside the requisite time period, the court may still consider past discrimination as evidence of the validity of the claim.[97] As a result, employees have a unique opportunity to influence the factfinder with historical information which will undoubtedly affect court decisions.

VIII. CONCLUSION

Harris v. Forklift Systems, Inc. is one more link in the evolutionary chain of Title VII hostile environment litigation. *Harris* will have a significant impact on how practitioners of Title VII discrimination and hostile environment claims plead and litigate their cases. A claimant who brings an action under Title VII alleging hostile environment sexual harassment will no longer be required to prove the discriminatory conduct resulted in any psychological injury. Once the employee has proven a reasonable person would perceive the discriminatory conduct altered the work environment, the employee may or may not claim emotional distress as a measure of damages. The decision in *Harris* significantly reduces the employee's burden of proof, leaving the employer in a somewhat precarious position.

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95. In theory, an employee's claim of hostile environment may be defended on the grounds that the employee was not affected by the hostile environment even if a reasonable person would have been. Because an employee need only show that the conditions of employment were altered, the defense would have to create an image of a "super plaintiff" to convince the factfinder that the complainant was not affected, while other similarly reasonable employees were affected.

96. Prior to filing a federal or state civil rights law suit alleging hostile environment in the workplace, the employee is required to file a complaint with the EEOC and the ICRC. *See* 2 ARTHUR LARSON, EMPLOYMENT DISCRIMINATION § 48.00 (1994). The complaint is limited to discriminatory conduct 180 days prior to filing the complaint. *See* Delaware State College v. Ricks, 449 U.S. 250, 255 (1980); Lynch v. City of Des Moines, 454 N.W.2d 827, 831 (Iowa 1990). Neither the ICRC nor the district court have authority to consider the complaint. *See* City of Des Moines Police Dep't v. Iowa Civil Rights Comm'n, 343 N.W.2d 836, 840 (Iowa 1984).

97. The fact that evidence of discrimination falls outside of the 180-day window does not preclude the employee from introducing historical discrimination. The Iowa Supreme Court in *Lynch* stated that "[s]pecific incidents of sexual harassment are evidence of the validity of the claim, but they are not claims in themselves in the sense that each incident must have been pointed out to the commission before it may be considered by the court." Lynch v. City of Des Moines, 454 N.W.2d at 831. The court went on to state that "[a]s long as the discriminatory practice continued within the limitations period, the claim is timely and may be proven, at least in part, by evidence of specific incidents of sexual harassment which occurred outside the limitations period." *Id.* at 832 (citing Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 527 (Iowa 1990)).