Roger Williams University Law Review

Volume 10
Issue 2 *Symposium: Religious Liberty In America and Beyond: Celebrating the Legacy of Roger Williams on the 400th Anniversary of his Birth*

Article 9

Spring 2005

Sexual Pattern: Why a Pattern or Practice Theory of Liability is not an Appropriate Framework for Claims of Sexual Harassment

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Notes and Comments

Sexual Pattern: Why a Pattern or Practice Theory of Liability is not an Appropriate Framework for Claims of Sexual Harassment

[T]he notion of a "sexual harassment class action" is an oxymoron. By their nature – indeed, by definition – sexual harassment claims usually only can be resolved case by case, plaintiff by plaintiff. The elements of the cause of action demand individualized treatment.[1]

INTRODUCTION

The class action theory of "pattern or practice" liability has recently been extended by some federal trial courts to claims of sexual harassment.[2] Despite the intrinsically individualized nature of sexual harassment claims, these courts have held that a pattern or practice theory of liability is an appropriate framework to pursue claims of sexual harassment.[3] This extension of the pat-

1. Kenneth M. Willner et al., *Multiplaintiff Litigation and Class Actions: A Defense Perspective*, *in* LITIGATING THE SEXUAL HARASSMENT CASE 158, 158 (Matthew B. Schiff & Linda C. Kramer eds., 2d ed. 2000).

2. *See* EEOC v. Dial Corp., 156 F. Supp. 2d 926, 934 (N.D. Ill. 2001); EEOC v. Mitsubishi Motor Mfg. of Am., 990 F. Supp. 1059, 1069 (C.D. Ill. 1998); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 861 (D. Minn. 1993). The class action theory of "pattern or practice" liability refers to cases of broad-scale discrimination on the basis of race, color, sex, religion or national origin. *See* Willner et al., *supra* note 1, at 168. The pattern or practice theory is an efficient means of handling the prima facie and pretext issues for the individual claims being aggregated in such cases. *See id.*

3. *See Dial Corp.*, 156 F. Supp. 2d at 934; *Mitsubishi Motor Mfg. of Am.*,

tern or practice theory has resulted in substantial settlements over the past few years between employers and classes of plaintiffs claiming that they have been victims of sexual harassment at their workplace.[4] While several federal district courts have ruled on certain issues in sexual harassment pattern or practice cases,[5] few cases have reached trial because, like all class action claims, "[t]he procedure for litigating pattern or practice cases is . . . cumbersome and expensive."[6] The expense and possible repercussions of litigating these claims are so overwhelming that they frequently settle before reaching trial.[7] In addition, the issue of whether sexual harassment cases can proceed under a pattern or practice framework has yet to reach the Supreme Court, and has received virtually no attention in the federal courts of appeals.[8]

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990 F. Supp. at 1069; *Jenson*, 824 F. Supp. at 861.

4. *See, e.g.*, Press Release, Equal Employment Opportunity Commission (EEOC), Judge Grants EEOC's and Dial's Request to Enter Joint Consent Decree in Harassment Case (Apr. 29, 2003), *available at* http://www.eeoc.gov/press/4-29-03.html (announcing that the parties reached a settlement involving Dial paying $10 million); Press Release, EEOC, Mitsubishi Motor Mfg. and EEOC Reach Voluntary Agreement to Settle Harassment Suit (June 11, 1998), *available at* http://www.eeoc.gov/press/6-11-98.html (announcing a $34 million settlement reached between Mitsubishi Motor Mfg. of Am., Inc. and the U.S. EEOC); *see also Settlement Ends Women's Class Action Against Eveleth Mines in Minnesota*, 12 Employment Discrimination Rep. (BNA) 1 (Jan. 6, 1999); *EEOC Reaches $1 Million Settlement of Claims Against Supermarket Chain*, Employment Policy and Law Daily News (BNA) (Nov. 3, 1998); *Female Casino Workers File Class Suits Against Three Chicago-Area Gaming Places*, Employment Policy and Law Daily News (BNA) (July 24, 1998); *Judge Approves $1.9 Million Settlement for Female Dockworkers in Tacoma, Washington*, Employment Policy and Law Daily News (BNA) (Jan. 2, 1998); *Judge Approves $635,000 Suit Against California Agency*, Employment Policy and Law Daily News (BNA) (Aug. 19, 1997); *Corrections Workers Awarded $1.4 Million on Sex Harassment and Retaliation Claims*, Employment Policy and Law Daily News (BNA) (Apr. 27, 1995).

5. *See supra* note 3. The issues that trial courts have ruled on in these cases originated based on defendants' motions for summary judgment. All trial courts that have decided these issues held that a pattern or practice framework was an appropriate framework for bringing sexual harassment claims. *See Dial Corp.*, 156 F. Supp. 2d at 934; *Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1069; *Jenson*, 824 F. Supp. at 861.

6. Michael Delikat, *"Pattern or Practice" Discrimination Litigation*, *in* LITIGATING EMPLOYMENT DISCRIMINATION & SEXUAL HARASSMENT CLAIMS 2003, at 47, 55 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-693 2003).

7. *Id.* at 55.

8. *See id.*

This Comment argues that the precedent set by the federal trial courts extending a pattern or practice theory of liability to sexual harassment claims should not be followed because of the inherently individualized nature of sexual harassment claims, and the procedural problems involved with bringing such claims. These procedural problems include: (1) The tensions in private class actions that plaintiffs have in meeting Rule 23 of the Federal Rules of Civil Procedure;[9] (2) Proving allegations of specific conduct in sexual harassment cases as opposed to using statistical data as in traditional pattern or practice cases;[10] and (3) Whether it is appropriate to shift the burden of proof to the defendant in the second phase of a sexual harassment pattern or practice case.[11] When considering the inherently individualized nature of sexual harassment claims and these procedural problems as a whole, it is evident that a pattern or practice theory of liability is an inappropriate framework for bringing sexual harassment claims.

Part I of this Comment analyzes the traditional approach to pattern or practice litigation and discusses *Int'l Bhd. of Teamsters v. United States*,[12] the seminal case in the area of pattern or practice litigation.[13] In Part II, Title VII and the origin of sexual har-

9. Currently, there is a split among the circuit courts as to whether a class of plaintiffs seeking monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2). *See id.*; Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 (5th Cir. 1998). Moreover, it is much more difficult to certify a class under Federal Rule of Civil Procedure 23(b)(3). *See* FED. R. CIV. P. 23(b)(2), (3).

10. This raises questions as to whether sexual harassment claims are appropriate for pattern or practice treatment because of the number of individual issues involved, including the severity or pervasiveness of the harassment, the affirmative defenses to claims of sexual harassment, the subjective unwelcome nature of harassment claims, and the issue of employer liability.

11. Traditional pattern or practice cases shift the burden to the defendant in the second phase of the proceeding. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977). However, in individual sexual harassment cases a plaintiff must prove that the alleged conduct was subjectively unwelcome. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993). Shifting the burden of production regarding this issue raises questions as to the fairness of the proceeding. This is especially true where plaintiffs may not have to prove an essential element of the cause of action, as they would if they had brought the claim on an individual basis.

12. 431 U.S. 324 (1977).

13. Pattern or practice cases under Title VII allege group-wide acts of in-

assment law is discussed, and the requirements for a prima facie sexual harassment case are analyzed with special attention paid to the inherently individualized nature of such claims.[14] In Part III, pattern or practice sexual harassment cases are discussed, including *Jenson v. Eveleth Taconite Co.*,[15] *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*,[16] and *EEOC v. Dial Corp.*[17] Part IV analyzes why a pattern or practice framework is not an appropriate vehicle for bringing sexual harassment claims, and why the approaches taken by trial courts that have decided issues in sexual harassment pattern or practice cases are incorrect.

I. PATTERN OR PRACTICE LITIGATION

The theory of pattern or practice liability originated in cases of "broad-scale discrimination" where a class of plaintiffs was seeking injunctive relief.[18] Prior to the amendments to Title VII of the Civil Rights Act of 1991, all relief under Title VII, including back-pay relief, was considered equitable in nature.[19] Before 1991, pattern or practice theory was an efficient way to aggregate individual claims and handle the prima facie issues involved in those claims.[20] The 1991 amendments, however, allowed plaintiffs to seek compensatory and punitive damages, and allowed for jury trials in cases of intentional discrimination.[21] The additional remedies that the 1991 amendments introduced have complicated Title VII litigation in general because of the greater complexity of

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tentional discrimination. These cases "are generally divided into two phases: liability and remedial." Meghan E. Changelo, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 COLUM. J. L. & SOC. PROBS. 133, 136 (2003).

14. In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. *Id.* at 66. The *Meritor Sav. Bank* Court laid out the framework for establishing a prima facie sexual harassment case. *Id.* at 64-66.

15. 824 F. Supp. 847 (D. Minn. 1993).

16. 990 F. Supp. 1059 (C.D. Ill. 1998).

17. 156 F. Supp. 2d 926 (N.D. Ill. 2001).

18. Delikat, *supra* note 6, at 55.

19. *Id.*

20. *Id.*

21. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (codified at 42 U.S.C. § 2000e (Supp. III 1991)). This amendment became effective on November 21, 1991. 105 Stat. at 1099, 1100.

individualized issues involved with those remedies.

The pattern or practice theory of liability has been an essential tool in combating widespread, institutional discrimination.[22] This approach to litigation has become such an indispensable aspect of class litigation for discrimination claims because the commonality necessary under Rule 23 of the Federal Rules of Civil Procedure is often satisfied by establishing a pattern or practice of discrimination.[23] However, the Equal Employment Opportunity Commission (EEOC) has the ability to litigate pattern or practice claims as a representative of the class without meeting the requirements of Rule 23, even though pattern or practice cases partake of most of the aspects of class litigation.[24]

Pattern or practice cases under Title VII claim that an employer has intentionally engaged in a pattern or practice of discrimination against a protected group.[25] "These claims are generally divided into two phases: liability and remedial."[26] The liability phase involves establishing proof of a pattern or practice of discrimination by the employer.[27] Traditionally, pattern or practice cases have involved objectively measurable facts of employment selection or exclusion.[28] Generally, in those cases, actions that are readily identifiable (e.g., hiring, promotions, transfers)

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22. *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 409 (5th Cir. 1998) ("[W]e have recognized that the class action device could be implemented effectively to eradicate widespread or institutional-scale discrimination.").

23. Under Federal Rule of Civil Procedure 23(a), a private class of plaintiffs must meet four prerequisites in order to be certified. *See* FED. R. CIV. P. 23(a). One of these prerequisites is that there are questions of law or fact that are common to the class. FED. R. CIV. P. 23(a)(2).

24. *See* 42 U.S.C. § 2000e-5(f)(1) (2000).

25. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 329 (1977).

26. Changelo, *supra* note 13, at 136; *see, e.g.*, Morgan v. United Parcel Serv. of Am., Inc., 169 F.R.D. 349, 358 (E.D. Mo. 1996) (bifurcating the trial and severing the liability and damages phases of the litigation); Griffin v. Home Depot, Inc., 168 F.R.D. 187, 191 (E.D. La. 1996) (separating the trial into two phases where the first determines class-wide damages and injunctive relief and the second resolves individual compensatory damage claims); Butler v. Home Depot, Inc., 70 Fair Employment Practice Cases (BNA) 51, 55-56 (N.D. Cal. 1996) (opting to bifurcate liability and damages phase of trial).

27. Changelo, *supra* note 13, at 136.

28. *See, e.g., Int'l Bhd. of Teamsters,* 431 U.S. at 329; *see also* Changelo, *supra* note 13, at 136.

are typically the basic information subjected to pattern or practice analysis.[29] An employer will be found liable if there "is a statistically significant difference between the actual and 'ideal' treatment of a protected group."[30] Such a showing of liability engenders a presumption that each individual in the protected class was affected by the pattern or practice of discrimination.[31] Upon the establishment of a pattern or practice of discrimination, in most cases, the burden of any individual plaintiff is reduced to showing simply that he or she is a member of the class affected by the pattern or practice of discrimination, and that he or she has incurred damages as a result thereof that can be proven.[32] Once a court determines that an employer is liable because there is a pattern or practice of discrimination in the workplace, a presumption arises that every member of the class is entitled to relief in the remedial phase.[33] The burden of going forward then shifts to the employer "to establish that the challenged employment practice serves a legitimate, non-discriminatory business objective."[34] Thus, this presumption entitles each individual class member to relief unless the employer can demonstrate that its action toward an individual class member was not related to its policy of discrimination.[35] Any nondiscriminatory reason offered by the employer is then subject to rebuttal by the individual plaintiff that the justification was actually a pretext for unlawful discrimination.[36]

A. *Phase I: The Liability Phase, Proving a Pattern or Practice*

In the liability phase of the proceeding, plaintiffs must show that "a policy, pattern, or practice of intentional discrimination

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29. *See, e.g., Int'l Bhd. of Teamsters*, 431 U.S. at 329.

30. Changelo, *supra* note 13, at 136. Changelo also cites *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977), stating that the judges in that case "not[ed] [that] 'a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race." *Id.* at 136 n.15 (quoting *Hazelwood Sch. Dist.*, 433 U.S. at 312 n.17 (citing Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977))).

31. *See* EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274-75 (11th Cir. 2000).

32. *See id.* at 1276.

33. *See Int'l Bhd. of Teamsters*, 431 U.S. at 362.

34. *Joe's Stone Crab, Inc.*, 220 F.3d at 1275.

35. *See Int'l Bhd. of Teamsters*, 431 U.S. at 362.

36. *See id.*

against a 'protected group,'"[37] or against a "protected class,"[38] existed. In *Int'l Bhd. of Teamsters v. United States*,[39] the Supreme Court established the framework for bringing a pattern or practice lawsuit. In that case, the Attorney General brought suit on behalf of the government alleging that the Teamsters Union and a trucking company had engaged in a pattern of discriminating against blacks and Hispanics.[40] The Attorney General argued that discrimination was present because blacks and Hispanics who had been hired were placed in lower paying, less desirable jobs, and were later discriminated against with regard to promotions and transfers.[41] The Supreme Court held that in order to prove a pattern or practice of discrimination, the government must demonstrate more than isolated or sporadic discriminatory acts.[42] The government must establish "that racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice."[43] In addition, the Court quoted Senator Hubert H. Humphrey's remarks from the Senate floor regarding Title VII: "[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, spo-

37. Changelo, *supra* note 13, at 136.

38. "Protected class" refers to a class of people (for purposes of this Comment, employees) who face discrimination because of their race, sex, religion or national origin. BLACK'S LAW DICTIONARY 266 (2004).

39. 431 U.S. 324 (1977).

40. *Id.* at 328-29. The Attorney General brought suit under section 707(a) of the Civil Rights Act of 1964, which states:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, . . . the Attorney General may bring a civil action . . . requesting such relief . . . as he deems necessary to insure the full enjoyment of the rights herein described.

Civil Rights Act of 1964, Pub. L. No. 88-352, § 707(a), 78 Stat. 261-62 (codified as amended at 42 U.S.C. § 2000e-6(a) (2000)); *see Int'l Bhd. of Teamsters*, 431 U.S. at 328. Section 707 was amended by Section 5(e) of the Equal Employment Opportunity Act of 1972 to give the EEOC, rather than the Attorney General, the authority to bring "pattern or practice" suits under that section against private-sector employers. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 707, 78 Stat. 261-62 (codified as amended at 42 U.S.C. § 2000e-6(a) (2000)), *amended by* Equal Opportunity Act of 1972, Pub. L. No. 92-261, § 5(e), 86 Stat.107 (codified at 42 U.S.C. s 2000e-6(c) (Supp. V 1970)).

41. *Int'l Bhd. of Teamsters*, 431 U.S. at 329.

42. *Id.* at 336.

43. *Id.*

radic incident, but is repeated, routine, or of a generalized nature."[44]

In *Int'l Bhd. of Teamsters*, the government relied on strong statistical evidence to demonstrate that discrimination against blacks and Hispanics was the standard operating procedure.[45] At the time that the government filed its complaint, the company employed 6,472 employees: 314 (5%) were black, and 257 (4%) were Hispanic.[46] However, only eight of the 1,828 higher paid line drivers (0.4%) were black, and only five (0.3%) were Hispanic.[47] Moreover, all of the African-American line drivers were hired after the Attorney General filed the action.[48] In addition to its statistical evidence, the Attorney General also offered testimony from employees who cited over forty specific instances of discrimination.[49] The Court found that the government had proved, through its statistical evidence and the individual testimony, that blacks and Hispanics were discriminated against.[50]

The importance of a strong statistical showing to establish a prima facie case of pattern or practice discrimination is highlighted in several older cases. In *Jones v. Lee Way Motor Freight Inc.*,[51] the court utilized statistical evidence to establish a prima facie proof of a pattern or practice.[52] The United States Circuit Court of Appeals for the Tenth Circuit held that statistics have the ability to be more powerful than the testimony of several witnesses, and that they should be accorded proper weight by the courts.[53] Similarly, in *Sagers v. Yellow Freight Systems, Inc.*,[54] the plaintiffs utilized statistical information to demonstrate an overwhelmingly disparate treatment of minorities.[55] The common issue in these private plaintiff cases which were held to have demonstrated prima facie cases of a pattern or practice of dis-

44. *Id.* at 336 n.16 (quoting 110 CONG. REC. 14270 (1964)).
45. *See id.* at 337.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 338.
50. *Id.* at 342-43.
51. 431 F.2d 245 (10th Cir. 1970).
52. *Id.* at 247.
53. *Id.*
54. 529 F.2d 721 (5th Cir. 1976).
55. *Id.* at 729-30.

crimination was statistical evidence, which showed the exclusion of virtually all minorities or women. Discrimination was the employer's standard operating procedure, "the regular rather than the unusual practice" of the employer.[56]

EEOC v. Joe's Stone Crab, Inc.,[57] a recent case decided by the United States Court of Appeals for the Eleventh Circuit, held that plaintiffs' demonstration that an employer acted out of "malice" toward the protected group is not necessary to be successful in a pattern or practice case.[58] However, a plaintiff must demonstrate that the employer deliberately discriminated because of the protected characteristic (i.e., because of race, sex or other traits).[59] The Eleventh Circuit stated: "[I]f Joe's deliberately and systematically excluded women from food server positions based on a sexual stereotype . . . it then could be found liable under Title VII for intentional discrimination regardless of whether it also was motivated by ill-will or malice toward women."[60] Thus, a plaintiff must only demonstrate that the employer discriminated due to the protected characteristic.

B. *Phase II: The Remedial Phase*

If a class of plaintiffs can prove that there is a pattern or practice of discrimination, they enter the second phase of the trial with a presumption in their favor that all employment decisions, made while the discriminatory policy was in effect, were made in furtherance of that policy.[61] Once a court determines that there is a pattern or practice of discrimination in the workplace, every member of the class is entitled to relief, unless the employer can demonstrate that its action toward an individual class member was not related to its policy of discrimination.[62] This presumption lessens the burden each class member must meet "relative to that which would be required if the employee were [to proceed] separately with an individual disparate treatment claim."[63] This pre-

56. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).
57. 220 F.3d 1263 (11th Cir. 2000).
58. *Id.* at 1283-84.
59. *Id.* at 1284.
60. *Id.*
61. *See Int'l Bhd. of Teamsters*, 431 U.S. at 362.
62. *See id.*
63. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 159 (2d

sumption carried over to all of the members of the protected class in *Int'l Bhd. of Teamsters*, not just those who had applied for the line driver positions.[64] The defendants in *Int'l Bhd. of Teamsters* argued that unless a minority group employee actually applied for a line driver job, he has not suffered any injury because of the company's discriminatory policy as did those employees who had actually applied for the positions.[65] The Supreme Court, however, disagreed with the defendant's argument, and explained its reasoning:

> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. . . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.[66]

This presumption in the employee's favor is rebuttable, however, and the employer is given the opportunity to present a defense that it did not discriminate against that particular plaintiff.[67] Any justification offered by the employer is then subject to rebuttal by the plaintiff that the conduct amounted to unlawful discrimination.[68]

II. SEXUAL HARASSMENT LAW

A. *Title VII*

Since the Civil War and the enactment of the Fourteenth Amendment to the United States Constitution, America's marginalized citizens have endured countless struggles in all facets of life

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Cir. 2001).

64. *See Int'l Bhd. of Teamsters*, 431 U.S. at 365-66.

65. *Id.* at 363.

66. *Id.* at 365-66.

67. *Id.* at 362.

68. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

to obtain equality.[69] One such struggle has been the challenge of bringing equality to the American workplace. As a landmark step in attempting to eliminate discrimination in the workplace, Congress enacted Title VII of the Civil Rights Act of 1964.[70] Title VII was enacted to prohibit employers from acting based on the status or characteristics of an employee rather than on the employee's ability or job performance.[71] Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[72]

B. *The Prima Facie Case:* Meritor Sav. Bank v. Vinson

Not until 1986 did the Supreme Court recognize that sexual harassment was included in the provision prohibiting discrimination based on sex in Title VII. In *Meritor Sav. Bank v. Vinson*,[73] the Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex created a hostile or abusive work environment.[74] The case involved a woman who claimed that she had sex with her boss because she feared losing her job if she did not comply with his demands.[75] The plaintiff's boss asked for sexual favors, touched her in front of other employees, and raped her.[76] The Court set aside any doubt that

69. Examples of some such struggles are the civil and women's rights movements.

70. Pub. L. No. 88-352, 78 Stat. 261-62 (codified as amended at 42 U.S.C. § 2000e-6(a) (2000)).

71. Susan Silberman Blasi, *The Adjudication of Same-Sex Sexual Harassment Claims Under Title VII*, 12 LAB. LAW. 291, 295 (1996).

72. 42 U.S.C. § 2000e-2(a)(1) (2000). It is important to note, however, that sex was not originally proposed as one of the protected classes under Title VII until just before the bill passed in Congress. Blasi, *supra* note 71, at 297. The addition of the word "sex" to the bill was offered by Congressman Howard W. Smith of Virginia to demonstrate the absurdity of Title VII as a whole. *Id.* Smith hoped that tying the controversial 1960s issue of women's rights to the bill would lead to the demise of the legislation. *Id.* While Smith's attempt obviously backfired, it provides an explanation as to why there is scarcely any legislative history regarding discrimination based on sex in Title VII. *Id.* at 297-98.

73. 477 U.S. 57 (1986).

74. *Id.* at 66.

75. *Id.* at 60.

76. *Id.*

sexual harassment was included in Title VII's prohibition of discrimination based on sex, stating: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[77] The Court held that the plaintiff's allegations were "plainly sufficient to state a claim for 'hostile environment' sexual harassment."[78] In holding as it did, the Court adopted the elements necessary to prevail in a hostile work environmental claim.[79] In order to assert a prima facie hostile work environment claim of sexual harassment, a plaintiff must demonstrate:

> (1) that the employee belongs to a protected class; (2) that the employee was subjected to unwelcome sexual harassment, including sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) that the harassment was based on sex; (4) that the harassment affected a term, condition, or privilege of employment; and (5) that the doctrine of respondeat superior applies.[80]

More simply put, for conduct to constitute actionable sexual harassment, the conduct must be unwelcome and must "alter the conditions of the victim's employment and create an abusive working environment."[81] The test to determine if conduct was unwelcome and amounts to actionable sexual harassment utilizes both an objective and subjective approach: the conduct must be of such a character that the plaintiff subjectively viewed the conduct as abusive, and also such that a reasonable person would find that the conduct created an abusive environment.[82] In addition, the

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77. *Id.* at 64.

78. *Id.* at 67.

79. Dianne Avery, *Overview of the Law of Sexual Harassment and Related Claims*, *in* LITIGATING THE SEXUAL HARASSMENT CASE, *supra* note 1, at 5.

80. *Id.* at 5. These elements were first established in *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982). *See also Meritor Sav. Bank*, 477 U.S. at 66-67 (adopting the *Henson* court's approach). These elements have been reiterated by a number of federal courts analyzing sexual harassment claims. *See, e.g.*, Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 1326 (S.D. Miss. 1986).

81. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank*, 477 U.S. at 67).

82. *Harris*, 510 U.S. at 21-22.

conduct must alter a term of the plaintiff's employment.[83]

1. *Protected Class*

To satisfy the first element of a prima facie claim for hostile work environment under Title VII, a plaintiff must show that he or she is a member of the "protected class."[84] In the context of sexual harassment claims, the plaintiff's membership in a protected class simply means that the plaintiff is either male or female.[85] All that is required is a stipulation as to the plaintiff's gender to prove he or she is a member of the protected class.[86]

2. *Unwelcome Sexual Conduct*

Next, in order for conduct (e.g., sexual advances, requests for sexual favors, or verbal or physical conduct) to constitute sexual harassment, it must be unwelcome.[87] Factors that establish that certain conduct was unwelcome include the victim's outright rejection of sexual behavior or subsequent notification once a previously consensual sexual behavior is no longer welcome.[88] This unwelcome sexual conduct requirement makes the complainant's conduct pertinent, "including the complainant's sexually provocative speech or dress, and [the complainant's] objective, as opposed to subjective, reaction to the harassment."[89] In a situation where

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83. *See id.*; *Meritor Sav. Bank*, 477 U.S. at 67.

84. Avery, *supra* note 79, at 5; *see also Henson*, 682 F.2d at 903; *supra* note 38 and accompanying text.

85. The protected classes applicable in sexual harassment claims under Title VII are the classes of "male" and "female." *See Henson*, 682 F.2d at 903. *But cf.* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (holding that same-sex sexual harassment is actionable under Title VII).

86. *Henson*, 682 F.2d at 903; Barbara L. Zalucki, *Discrimination Law: Defining the Hostile Work Environment Claim of Sexual Harassment Under Title VII*, 11 W. NEW ENG. L. REV. 143, 154 (1989).

87. *See Henson*, 682 F.2d at 903.

88. FRANCIS ACHAMPONG, WORKPLACE SEXUAL HARASSMENT LAW: PRINCIPLES, LANDMARK DEVELOPMENTS, AND FRAMEWORK FOR EFFECTIVE RISK MANAGEMENT 41 (1999); *see* Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 1326-27, 1327 n.8 (S.D. Miss. 1986) (holding that the plaintiff failed to prove the second element of sexual harassment creating a hostile work environment because she failed to report to any supervisors or coworkers regarding once perceivably welcome conduct that later became unwelcome).

89. ACHAMPONG, *supra* note 88, at 41; *see also* Zalucki, *supra* note 86, at 157 (quoting *Henson*, 682 F.2d at 903). Zalucki points out that "courts focus on the behavior between the harasser and the victim to determine if it is 'un-

sexual harassment plaintiffs have participated in sexually explicit language and jokes, a hostile environment may be difficult to establish.[90]

3. *Conduct Based on Sex*

Third, a plaintiff must demonstrate that "but for" his or her gender, he or she would not have been subject to sexual harassment.[91] In a situation where a work environment viewed in its totality is "charged with sexual behavior not directed toward a particular plaintiff or gender, a court may find that the harassment was not based on sex."[92] However, a plaintiff may still be successful if he or she can demonstrate that the conduct "is disproportionately more offensive or demeaning to one sex."[93]

4. *Harassment that Affects a Term, Condition or Privilege of Employment*

Fourth, the Supreme Court has held that for sexual harassment to be actionable, the conduct involved must be so "severe or pervasive" that it alters "the conditions of [the victim's] employment and create[s] an abusive working environment."[94] The Court has "held that this not only covers 'terms' and 'conditions' in the

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welcome in the sense that the employee did not solicit' the undesirable conduct." *Id.*

90. *See, e.g.*, *Loftin-Boggs*, 633 F. Supp. at 1327 (holding that the plaintiff had not shown that the alleged conduct was unwelcome where she admitted during trial that she had participated in discussions about sex and used vulgar language in the workplace); Ukarish v. Magnesium Elektron, 31 Fair Employment Practice Cases (BNA) 1315, 1319 (D.N.J. 1983) (noting that as far as anyone working with the plaintiff could tell, she "appeared to accept [the allegedly harassing conduct] and joined in it as one of the boys and did not complain to anyone"); Gan v. Kepro Circuit Sys., 28 Fair Employment Practice Cases (BNA) 639, 640 (E.D. Mo. 1982) ("Plaintiff was not subjected to unprovoked propositions and sexually suggestive remarks, as she alleges. Any such propositions that did occur were prompted by her own sexual aggressiveness and her own sexually explicit conversations.").

91. *Henson*, 682 F.2d at 904.

92. ACHAMPONG, *supra* note 88, at 42.

93. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991); *see also* ACHAMPONG, *supra* note 88, at 42.

94. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting *Henson*, 682 F.2d at 904); *see also* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (noting that "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to a sufficiently significant degree to violate Title VII).

narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'"[95] When a plaintiff's place of employment "is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of a victim's employment and create an abusive working environment,' Title VII is violated."[96] However, the Court has also noted that the conduct must be extreme to be viewed as affecting a term or condition of employment.[97] The Court has emphasized that simple teasing or offhand remarks that are isolated incidents do not meet the standard of affecting a term or condition of employment.[98]

In *Harris v. Forklift Systems, Inc.*,[99] the Supreme Court discussed factors that should be considered when determining whether or not the conduct reached the severe or pervasive threshold. [100] These "include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[101] A plaintiff must also satisfy both an objective and subjective test in order to prove that sexual harassment was "severe" or "pervasive."[102] The Supreme Court held that for discriminatory harassment to be viewed as "abusive work environment" harassment, there must be: (1) an objectively hostile or abusive work environment; as well as (2) a victim's subjective perception that the environment is abusive:[103]

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95. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank*, 477 U.S. at 64).

96. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank*, 477 U.S. at 65, 67) (citations omitted).

97. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (stating that the Court has made it "clear that conduct must be extreme to amount to a change in the terms and conditions of employment.").

98. *Id.* (emphasizing that occasional use of gender-related jokes and teasing will not suffice to amount to a change in the terms and conditions of employment).

99. 510 U.S. 17 (1993).

100. *Id.* at 23.

101. *Id.*

102. *Id.* at 21-22; *see also Faragher*, 524 U.S. at 787.

103. *Id.* (defining an objectively hostile or abusive work environment as an environment that a reasonable person would find hostile or abusive and that

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.[104]

Thus, a plaintiff must demonstrate that the conduct was subjectively unwelcome, and that a reasonable person of that gender would find that the environment was hostile and abusive.

5. *Employer Liability*

a. *Harassment by a Supervisor: Vicarious Liability*

The fifth prong of the sexual harassment test under Title VII requires that the doctrine of respondeat superior applies.[105] In *Meritor Sav. Bank*, the Supreme Court did not define a clearly delineated standard for determining when an employer should be liable for sexual harassment in the workplace regarding this element of the claim.[106] The Court instead held that courts should use common-law agency principles to resolve questions about employer liability.[107]

In 1998, however, the Supreme Court granted certiorari to address the standard for determining employer liability for a supervisor's "hostile environment" sexual harassment both in *Burlington Indus., Inc. v. Ellerth*,[108] and in *Faragher v. City of Boca*

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the victim subjectively perceives as hostile or abusive).

104. *Id.*; *see also Faragher*, 524 U.S. at 787.

105. *See* Avery, *supra* note 79, at 5. Respondeat superior is a "doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 609 (2d pocket ed. 2001).

106. *See* 477 U.S. 57, 72 (1986) ("We . . . decline the parties' invitation to issue a definitive rule on employer liability.").

107. Avery, *supra* note 79, at 12; *see Meritor Sav. Bank*, 477 U.S. at 72 (quoting 42 U.S.C. § 2000e(b) (2000)) (citation omitted) (holding further that "Congress's decision to define 'employer' [in Title VII] to include any 'agent' of the employer, surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.").

108. *See* 524 U.S. 742, 742 (1998).

Raton.[109] The Court held that when a supervisor with immediate or successively higher authority over the victimized employee engages in sexual harassment, an employer is vicariously liable to the victimized employee for that supervisor's conduct.[110] In *Burlington Indus., Inc.* and *Faragher*, the Court states the holding of the cases using identical language which sets out the requirements for both the plaintiff's proof of vicarious liability and the defendant employer's affirmative defense:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor . . . . [A] defending employer may raise an affirmative defense to liability . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[111]

The liability/affirmative defense rule that the Court promulgated in *Burlington Indus., Inc.* and *Faragher* does not impose "automatic" liability against employers in all types of cases involving harassment by a supervisor, but only in those cases that result in a "tangible employment action."[112] Similarly, with regard to the affirmative defense sometimes available to employers, the Court does not allow for "automatic" immunity, even when the employer has a procedure to address grievances or where the employer did not receive actual notice of the sexual harassment.[113] Proof that

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109. *See* 524 U.S. 775, 775 (1998).

110. *Burlington Indus., Inc.*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

111. *Burlington Indus., Inc.*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

112. Avery, *supra* note 79, at 18; *see also Burlington Indus., Inc.*, 524 U.S. at 765 (noting that "tangible employment actions[s]" include, for example, "discharge, demotion, or undesirable reassignment"); *Faragher*, 524 U.S. at 808 (same).

113. Avery, *supra* note 79, at 18; *see Burlington Indus., Inc.*, 524 U.S. at 765 (noting that such policies must show that the employer used "reasonable care to prevent and correct promptly any sexually harassing behavior" and must be "suitable to the employment circumstances," but also that "proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm" may usually be demonstrated by "showing an unreasonable failure [by the employee] to use any complaint procedure provided by the em-

the plaintiff employee has failed to show a "tangible employment action" is necessary to trigger the availability of an affirmative defense to the defendant employer.[114] Indeed, the Court has made clear that "in all sexual harassment cases involving conduct of supervisors, the plaintiff's ability to prove evidence of a 'tangible employment action' will be critical in both the characterization of the plaintiff's substantive claim and the availability of an affirmative defense to the defendant."[115] The Court, in *Burlington Indus., Inc.*, defines a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[116] Thus, if an employee establishes a prima facie case of sexual harassment by a supervisor, including the presence of a "tangible employment action," strict liability will attach and the plaintiff will prevail without the defendant employer having gained the opportunity to present an affirmative defense.[117] On the other hand, "[i]f the plaintiff has not suffered an adverse, tangible employment action as a result of a supervisor's harassment, the employer is permitted to raise an affirmative defense" by proving the elements annunciated in *Burlington Indus., Inc.* to show that it should not be liable.[118] A failure to meet this burden will, of course, result in a judgment for the plaintiff.[119]

b. *Harassment by a Coworker: Negligence Standard*

When it is a coworker who allegedly commits sexual harassment, courts rely on a negligence standard to determine whether or not the employer is liable for its agent's actions.[120] In *Burling-*

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ployer"); *Faragher*, 524 U.S. at 807 (same).

114. *Burlington Indus., Inc.*, 524 U.S. at 765 ("When no tangible employment action is taken, a defending employer may raise an affirmative defense .... No affirmative defense is available ... when the supervisor's harassment culminates in a tangible employment action."); *Faragher*, 524 U.S. at 807 (same); *see also* Avery, *supra* note 79, at 18.

115. Avery, *supra* note 79, at 15; *see also Burlington Indus., Inc.*, 524 U.S. at 760-61, 765; *Faragher*, 524 U.S. at 807.

116. *Burlington Indus., Inc.*, 524 U.S. at 761.

117. *See* Avery, *supra* note 79, at 15.

118. *Id.* at 18; *see Burlington Indus., Inc.*, 524 U.S. at 765; *see also Faragher*, 524 U.S. at 807.

119. Avery, *supra* note 79, at 18.

120. *Burlington Indus., Inc.*, 524 U.S. at 758-59.

ton Indus., Inc., the Court, noting that "[n]egligence sets a minimal standard for employer liability under Title VII,"[121] stated that "[a]n employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."[122] Thus, rather than impose strict liability on employers for the acts of all its employees, the strict standard discussed in the preceding section is applicable only to supervisors who harass their subordinates.[123] Conversely, an employer is liable for sexual harassment by a regular coworker only if the employer had reason to know of the employee's harassment of a fellow employee and the employer did not act to prevent such harassment.

III. PATTERN OR PRACTICE SEXUAL HARASSMENT CASES

In the context of a Title VII claim of discrimination based on race, *Int'l Bhd. of Teamsters* employed statistical evidence to show that discriminatory hiring practices were the regular rather than the unusual practice of the employer.[124] Several district courts have held that a similar pattern or practice framework may be utilized in sexual harassment cases brought under Title VII.[125] What remains to be seen, however, is whether other district courts, and eventually the appellate courts, will agree that sexual harassment claims can be pursued under a pattern or practice scheme.

A. Private Class Actions: Jenson v. Eveleth Taconite Co.

The initial case that recognized pattern or practice theory as an appropriate means to pursue sexual harassment claims was *Jenson v. Eveleth Taconite Co.*[126] The case was a private class action,[127] and was certified under Rule 23 of the Federal Rules of

121. *Id.* at 759.
122. *Id.*
123. *See* discussion *supra* Part II.B.5.a.
124. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).
125. *See, e.g.*, EEOC v. Dial Corp., 156 F. Supp. 2d 926, 945-47 (N.D. Ill. 2001); EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059, 1070-73 (C.D. Ill. 1998); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 875-76 (D. Minn. 1993).
126. 824 F. Supp. 847, 875 (D. Minn. 1993).
127. *See id.* at 855-56.

Civil Procedure.[128] The named plaintiffs that represented the class were three female employees of Eveleth.[129] The plaintiffs claimed that the company had a pattern or practice of discrimination based on gender in hiring, job assignment, promotion, compensation, discipline and training.[130] The plaintiffs also alleged a pattern or practice theory of sexual discrimination in order to prove a hostile work environment.[131] The environment at Eveleth was filled with references to sex and to women as sexual objects.[132] Pornographic graffiti, photos and cartoons permeated the work environment at Eveleth.[133] In addition, there were many individual instances of harassment.[134] For example, on one occasion a male employee mimed performing oral sex on one of his female coworkers in front of other men employed in the area while the woman was sleeping on her break.[135] "Another woman returned to her locker on three different occasions to find that someone had broken into her locker and masturbated on her clothing."[136] In an effort to determine whether the sexual harassment claim was a violation of Title VII, the court examined the elements of a prima facie sexual harassment case that were discussed in *Meritor Sav. Bank*: (1) the plaintiffs in the case were all females and therefore were members of a protected group;[137] (2) after examining the plaintiffs' conduct, it was obvious that the harassment was unwelcome because it was neither solicited nor invited and the plaintiffs viewed the conduct as offensive;[138] (3) based on the great number of instances directed at women and their sexual nature, the harassment was found to be based on sex;[139] (4) the court held that a

128. Melissa Hart, *Litigation Narratives: Why* Jensen v. Ellerth *Didn't Change Sexual Harassment Law, But Still Has a Story Worth Telling*, 18 BERKELEY WOMEN'S L.J. 282, 296-97 (2003) (book review). Rule 23 explains the requirements for bringing class actions in federal court. *See* FED. R. CIV. P. 23.

129. *Jenson*, 824 F. Supp. at 857.

130. *Id.* at 856.

131. *Id.* at 856, 879-88.

132. *Id.* at 879.

133. *Id.* at 879-80; *see* Hart, *supra* note 128, at 284-85.

134. *Jenson*, 824 F. Supp. at 880; Hart, *supra* note 128, at 284-85.

135. *Jenson*, 824 F. Supp. at 880.

136. Hart, *supra* note 128, at 285.

137. *Jenson*, 824 F. Supp. at 879.

138. *Id.* at 883.

139. *Id.* at 884.

reasonable woman would find that the harassment and work environment at Eveleth altered the terms and conditions of employment and was abusive;[140] and (5) the court found that the plaintiffs had established the final requirement of respondeat superior by demonstrating that the employer had actual or constructive knowledge of the alleged conduct.[141] Therefore, the court found that the plaintiffs had "established that Eveleth Mines engaged in a pattern or practice of maintaining an environment sexually hostile to women."[142] In regard to the damages resulting to individual plaintiffs, the court reserved that subjective inquiry to be determined in the remedial phase of the trial.[143] Thus, the court found that the class of plaintiffs had established a prima facie case of sexual harassment by showing a pattern or practice of abusive and hostile behavior.

The court arrived at its decision in the *Jenson* case by integrating the law of a prima facie sexual harassment case with a pattern or practice framework. At the time *Jenson* was decided, it was the sole private class action to have attempted a claim under such a framework.[144] The result was a new standard for sexual harassment pattern or practice litigation. The court in *Jenson* divided the trial into two phases:[145] in phase I, the question was whether the employer was liable;[146] phase II was the remedial phase of the trial.[147]

A finding of a pattern or practice of discrimination in violation of Title VII in the first instance ordinarily entitles each member of a class to a presumption that she was individually discriminated against by the defendant.[148] "Then in the recovery phase the bur-

140. *Id.* at 886.
141. *Id.* at 888.
142. *Id.*
143. *Id.*; *see also* Marcy O'Brien, Jenson v. Eveleth Taconite Co.*: A Legal Standard for Class Action Sexual Harassment*, 19 J. CORP. L. 417, 425 (1994).
144. *Jenson*, 824 F. Supp. at 875 ("By maintaining their sexual harassment claims as a class action, Plaintiffs seek to expand sexual harassment discrimination to a new arena; to the Court's knowledge, no *class* of plaintiffs has ever maintained through trial a claim of sexual harassment.").
145. *Id.* at 856.
146. *Id.* (stating that the first phase determines whether defendant has violated Title VII).
147. *Id.* (stating that the second phase determines whether individual plaintiffs are entitled to relief).
148. O'Brien, *supra* note 143, at 425-26; *see Jenson*, 824 F. Supp. at 860

den shifts to the defendant employer to prove a particular class member was not discriminated against by this pattern or practice."[149] However, in *Jenson* the court took a different approach than previous pattern or practice cases. The *Jenson* court held that an individual plaintiff in a sexual harassment class action is not entitled to a presumption that he or she was sexually harassed once the court determines that the employer engaged in a pattern or practice of discrimination, and therefore, the burden does not automatically shift to the defendant after a pattern or practice of sexual discrimination has been proven.[150] "Instead, the burden of persuasion remains on the individual class members; each must show . . . that she was as affected as the reasonable woman."[151]

Thus, the *Jenson* court refused to apply the normal presumption that all members of a protected class are entitled to relief in a pattern or practice sexual harassment class action. The different standard applied in *Jenson* required two further inquiries once it was determined by the court that the employer was liable to the class of plaintiffs: "1) whether any individual plaintiff could satisfy the further requirement that she found the challenged conduct unwelcome; and 2) whether any individual plaintiff was entitled to damages flowing from the violation."[152] These requirements were applied in *Jenson* to mean that once a pattern or practice is established, each individual class member seeking relief must demonstrate "by a preponderance of the evidence that she was as affected as the reasonable woman."[153] In defining this new standard for pattern or practice sexual harassment class actions, the *Jenson* court reasoned that because an individual sexual harassment plaintiff would be required to demonstrate that he or she was subjectively affected, and "[b]ecause the [individual] employee's subjective response to acts of sexual harassment is an essential part of proving a claim of hostile environment sexual harassment," demonstrating a pattern or practice of sexual harassment in the liability phase of the trial does not satisfy this requirement for each individual claimant in a class action "hostile

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149. O'Brien, *supra* note 143, at 426; *see Jenson*, 824 F. Supp. at 860 n.18.
150. *Jenson*, 824 F. Supp. at 876.
151. *Id.*
152. *See* Hart, *supra* note 128, at 294.
153. *Jenson*, 824 F. Supp. at 876.

environment" claim.[154]

B. *EEOC Pattern and Practice Sexual Harassment Litigation*

The Equal Employment Opportunity Commission (EEOC) has similarly utilized pattern or practice theory in pursuing hostile environment sexual harassment claims. The EEOC was created in 1964 under Title VII of the Civil Rights Act to enforce the antidiscrimination provisions of the Act.[155] One of the powers granted to the EEOC under Title VII is the power "to intervene in [a] civil action upon certification that the case is of general importance."[156] The EEOC must satisfy certain statutory prerequisites before it can bring a Title VII action in federal court.[157] However, the EEOC is allowed to proceed with a pattern or practice claim without meeting the requirements of Rule 23 of the Federal Rules of Civil Procedure,[158] even though pattern or practice cases share most of the characteristics of class litigation. This enables the EEOC to bring a pattern or practice case with greater ease than a private class of plaintiffs, and provides the EEOC with certain advantages in pursuing pattern or practice claims.[159] Two cases in particular, *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*,[160] and *EEOC v. Dial Corp.*,[161] are discussed below to demonstrate how

154. *Id.* (emphasis omitted).

155. 42 U.S.C. §§ 2000e-4(a), (g)(6) (Supp. 2004).

156. § 2000e-5(f)(1).

157. CHARLES S. MISHKIND & V. SCOTT KNEESE, *Big Risks and Opportunities, Class Actions and Pattern and Practice Cases*, *in* 1 30TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 403, 434 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-662 2001) ("The necessary administrative process includes (1) a charge (usually an EEOC Commissioner's charge); (2) notice of the charge; (3) investigation; (4) a reasonable cause decision; and (5) attempted conciliation. The EEOC cannot skip any of these steps or conduct any of its administrative proceedings out of the prescribed statutory sequence.").

158. *Id.* ("[Federal Rule of Civil Procedure] 23 requirements do not apply where the EEOC seeks to enforce Title VII by intervening rather than by bringing a direct action.").

159. For example, "[a]ll class members need not satisfy administrative prerequisites when the EEOC brings an action on behalf of a class. For instance, in an EEOC action under Title VII, those who were discriminated against beyond the 300-day EEOC filing period could become class members if one of them alleged a violation within the 300-day period." *Id.*

160. 990 F. Supp. 1059 (C.D. Ill. 1998).

161. 156 F. Supp. 2d 926 (N.D. Ill. 2001).

the EEOC has pursued sexual harassment claims utilizing a pattern or practice theory.

1. EEOC v. Mitsubishi

In *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, the issue was whether, under the Civil Rights Act of 1991, the EEOC could bring a pattern or practice sexual harassment claim on behalf of plaintiffs seeking compensatory and punitive damages.[162] The case dealt with sexual harassment at a single Mitsubishi automobile assembly plant.[163] The EEOC identified 289 victims of sexual harassment out of the approximately 1200 women who worked at the plant since the facility opened.[164] The EEOC claimed that the company had a "pattern or practice" of sexual harassment because it "created and maintained a sexually hostile and abusive work environment at [one of its plants] because it tolerated, from the facility's inception, individual acts of sexual harassment by its employees by refusing to take notice of, investigate, and/or discipline the workers who sexually harassed other employees."[165] Mitsubishi argued that because the essence of proving a sexual harassment claim is to show that the conduct was subjectively unwelcome, there were too many individual issues in a sexual harassment claim for a pattern or practice theory of liability to be an appropriate framework for pursuing such claims.[166] Mitsubishi thus opposed the EEOC's use of a pattern or practice theory.

The district court disagreed with Mitsubishi, holding that the requirement that a plaintiff prove subjective harassment on an individualized basis does not preclude pattern or practice litigation of sexual harassment claims by the EEOC.[167] Instead, the court held that a pattern or practice case can be established without the subjective proof of each individual plaintiff.[168] Because pattern or practice cases "target large scale, system-wide discriminatory practices and their effects,"[169] and because the EEOC

162. 990 F. Supp. at 1069.
163. *Id.*
164. Delikat, *supra* note 6, at 60.
165. *Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1069.
166. *Id.*; *see also* Delikat, *supra* note 6, at 59.
167. *Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1076.
168. *Id.*
169. *Id.*

in a pattern or practice case acts for the benefit of both the specific harassed individuals and "'to vindicate the public interest in preventing employment discrimination,'"[170] the court held that the *Meritor Sav. Bank* requirement of subjective proof is not applicable to a pattern or practice case of sexual harassment.[171] Therefore, once pattern or practice liability for sexual harassment is established, a rebuttable presumption of liability arises as to each individual victim, shifting the burden of production to the employer on subjective elements of individual claims.[172]

The court also described how to establish a pattern or practice in order to trigger this presumption of liability. The court relied heavily on *Jenson* and held that a finding of severe and pervasive sexual harassment is proper if, "based on the sum of the individual testimony by the class, the trier of fact determines that an objectively reasonable person would have to spend the work day running a 'gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.'"[173] To be deemed a pattern or practice, harassing behavior must occur: (1) "frequently enough that it is both common and continuous" so that the "company can reasonably be said to be on 'notice' of . . . [the] sexual harassment that constitutes a hostile environment. . . .";[174] (2) when there is "evidence that many of a company's first-line supervisors had actual knowledge of the harassing behaviors" and thus the company can reasonably be said to have been put on notice of the behavior;[175] or (3) when an employer is negligent in that it "has a policy or practice of tolerating a work environment that it knows or should have known is permeated with sexual harassment, but does not take steps to address the problem on a company-wide basis."[176]

In addition, the *Mitsubishi* court laid out the framework for a sexual harassment pattern or practice case:

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170. *Id.* (quoting Gen. Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 326 (1980) (citation omitted)).

171. *Id.* at 1076; *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64-67 (adopting the approach of *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982)).

172. *Id.* at 1076-77; *see also* Delikat, *supra* note 6, at 60.

173. *Id.* at 1074 (quoting *Meritor Sav. Bank*, 477 U.S. at 67).

174. *Id.*

175. *Id.* at 1074-75.

176. *Id.* at 1075.

> In Phase I, [the pattern or practice phase,] the EEOC will be permitted to establish a pattern or practice [of sexual harassment] by proving an objectively reasonable person would find (1) a pattern or practice of sexual harassment defined as a situation where individuals in the workplace, as a whole, must accept a gender hostile environment and (2) a company policy of tolerating a workforce permeated with severe and pervasive sexual harassment.[177]

As the court further explained, "the landscape of the total work environment, rather than the subjective experiences of each individual claimant, is the focus for establishing a pattern or practice of unwelcome sexual harassment which is severe and pervasive."[178] Thus, the *Mitsubishi* court agreed with the *Jenson* court that subjective "unwelcomeness" of the individual class members is not relevant in phase I (the pattern or practice phase).[179] However, the *Mitsubishi* court *disagreed* with the *Jenson* court as to whether a rebuttable presumption of liability arises in phase II for all individual class members once a pattern or practice is established in phase I.[180] Instead of holding that a presumption does not arise as the *Jenson* court did,[181] the *Mitsubishi* court held that in phase II (the relief phase), once pattern or practice liability for sexual harassment is established, the burden shifts to the defendant employer to try to prove that individual members of the class did not subjectively perceive the work environment to be hostile.[182] After the defendant brings its defenses against individual members of the class, the members of the class who are challenged by the employer possess the ultimate burden of persuading the trier of fact that they were subjectively affected by the hostile work environment.[183] "For those individuals not challenged, the presumption turns into a liability finding and the [c]ourt can then move to

177. Delikat, *supra* note 6, at 59-60; *see Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1073.

178. *Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1074 (citations omitted); Delikat, *supra* note 6, at 60.

179. *See Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1077; *see also* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 876 (D. Minn. 1993).

180. *See Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1078; *see also Jenson*, 824 F. Supp. at 876.

181. *See Jenson*, 824 F. Supp. at 876.

182. *See id.* at 1077; Delikat, *supra* note 6, at 60.

183. Delikat, *supra* note 6, at 60.

the individual damages phase."[184]

As previously noted, this approach is distinguishable from the framework laid out in *Jenson*.[185] The *Mitsubishi* court, unlike *Jenson*,[186] gave individual plaintiffs alleging "hostile work environment" sexual harassment the advantage of a rebuttable presumption once a pattern or practice of harassing conduct is established.[187] The burden of production is then shifted in the second phase of the trial to the employer defendant.[188] As the *Mitsubishi* court seemed to suggest, this burden on the employer may be difficult to meet.[189] Therefore, the *Mitsubishi* standard appears to be more favorable to individual plaintiffs than that outlined in *Jenson*.[190]

2. EEOC v. Dial Corp.

In *EEOC v. Dial Corp.*,[191] the EEOC brought a pattern or practice sexual harassment claim on behalf of 100 plaintiffs. [192] Sexual harassment of women was prevalent at the Dial Manufacturing plant:[193]

> Female employees were continuously propositioned and assaulted and grabbed by virtually every part of their bodies, including their breasts, buttocks, and genitals. . . . Pornography was openly circulated and posted in the plant. Penises carved from soap were displayed. Men

184. *Id.*; *see also Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1077.

185. *Compare Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1077, *with Jenson*, 824 F. Supp. at 876.

186. *See Jenson*, 824 F. Supp. at 876.

187. *See Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1077.

188. *Id.* at 1077-78; *see also* Maureen S. Binetti et al., *Multiplaintiff Litigation and Class Actions: Plaintiffs' Perspective*, *in* LITIGATING THE SEXUAL HARASSMENT CASE, *supra* note 1, at 139, 151.

189. *See Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1077; *see also* Binetti et al., *supra* note 188, at 151.

190. *See* Binetti et al., *supra* note 188, at 151 ("The [*Mitsubishi Motor Mfg. of Am.*] court noted that once a pattern or practice of sexual harassment is established in phase one, the likelihood is great that a class member would be able to prove the subjective element of his or her claim in phase two.").

191. 156 F.Supp.2d 926 (N.D. Ill. 2001).

192. Plaintiff EEOC's Memorandum in Opposition to Defendant Dial's Motion for Summary Judgment at 2, EEOC v. Dial Corp., 156 F. Supp. 2d 926 (N.D. Ill. 2001) (No. 99C3356) (on file with author).

193. *Id.* at 1.

> stalked women inside the plant, in the employee parking lot, and by automobile driving home from work.[194]

As in *Mitsubishi*,[195] the *Dial* defendant argued

> that the pattern or practice theory of liability was never viable in sexual harassment cases because such claims were inherently individualized and because it had no identifiable policy in favor of harassment which adversely affected a class of readily identifiable victims; hence the EEOC was not challenging a policy or practice of general application but was simply attempting to aggregate a large number of highly individualized claims which were not susceptible to class-type treatment.[196]

Like the court in *Mitsubishi*,[197] the *Dial* court denied Dial's motion for summary judgment and held that pattern or practice liability depended on the "'landscape of the total work environment, rather than the subjective experiences of each individual claimant.'"[198] The court concluded that the basis for establishing pattern or practice liability was Dial's policy of tolerating sexual harassment and not the gathering of individual sexual harassment claims.[199]

IV. WHY A PATTERN OR PRACTICE THEORY OF LIABILITY IS NOT AN APPROPRIATE FRAMEWORK FOR PURSUING SEXUAL HARASSMENT CLAIMS

As discussed earlier,[200] while some federal trial courts have extended a pattern or practice theory of liability to sexual harassment claims, to date no appellate court has accepted this application of a pattern or practice theory. Extension of the theory to all Title VII sexual harassment hostile work environment cases raises serious questions regarding: (1) the ability of private plain-

194. *Id.*
195. *See* EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059, 1069 (C.D. Ill. 1998).
196. Delikat, *supra* note 6, at 61; *see also* EEOC v. Dial Corp., 156 F. Supp. 2d 926, 949 (N.D. Ill. 2001).
197. *See Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1076.
198. *Dial Corp.*, 156 F. Supp. 2d at 946 (quoting *Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1074).
199. *Id.* at 946.
200. *See* discussion *supra* Introduction.

tiffs to meet Rule 23 of the Federal Rules of Civil Procedure; (2) whether it is appropriate to treat sexual harassment claims as class actions considering the distinct individuality of sexual harassment claims where a plaintiff must prove that there was an objectively hostile work environment, and that he or she was subjectively affected by the sexual harassment; and (3) if sexual harassment claims are appropriate for class treatment, how the courts should handle the burden shift in the remedial phase of the trial.[201]

A. *Tensions Involved in Meeting Rule 23 for Private Class Actions*

The first concern with the extension of pattern or practice theory to all Title VII sexual harassment hostile work environment cases is related to class certification under Rule 23 of the Federal Rules of Civil Procedure. In private class actions, a class

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201. There are a number of other issues that may present problems with pursuing claims of sexual harassment under a pattern or practice framework; however, they are beyond the scope of this Comment. Among them is whether all of the plaintiffs in the class can comply with the statute of limitations, and whether the application of the theory in such situations is being used merely to bootstrap time-barred claims. Victims of harassment have a 300-day limitations period to bring a claim under Title VII. *See* 42 U.S.C. § 2000e-5(e)(1) (2000). However, some courts permit plaintiffs to attempt to bring claims that may otherwise not meet the statute of limitations by relying upon the continuing violation doctrine. *See, e.g.*, Anderson v. Reno, 190 F.3d 930, 936 (9th Cir. 1999) (describing the "continuing violation doctrine" as a doctrine allowing courts to consider conduct that would ordinarily be time-barred "as long as the untimely incidents represent an ongoing unlawful employment practice").

In addition, the bifurcating of proceedings in sexual harassment class actions may potentially cause Seventh Amendment violations. *See* Robert M. Brava-Partain, *Due Process, Rule 23, and Hybrid Class Actions: A Practical Solution*, 53 HASTINGS L.J. 1359, 1376 (2002). The Seventh Amendment to the United States Constitution states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the rightof trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexaminedin any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII. A violation of the Seventh Amendment "can occur when different juries are asked to decide the same issue or when a subsequent jury is asked to reexamine issues decided by the previous jury, thus violating the so-called reexamination clause." Brava-Partain, *supra*, at 1376. To the extent that a remedial phase jury must reexamine the factual findings of a liability phase jury, this violates the Seventh Amendment right to have a single jury pass on a common issue of fact. *See id.*

of plaintiffs may have a difficult time meeting the requirements of Rule 23. Currently, there is a split among the circuit courts as to whether a class of plaintiffs seeking monetary relief can be certified under Rule 23(b)(2),[202] and it is much more difficult to certify a class under Rule 23(b)(3).[203] To bring a class action in federal court, a class of plaintiffs must be certified according to the requirements of Rule 23 of the Federal Rules of Civil Procedure.[204] Under Rule 23(a), the class must meet four prerequisites in order to be certified:

> (1) the class is so numerous that joinder of all class members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[205]

In addition to these prerequisites, the class must fit into one of the categories in Rule 23(b).[206] Courts generally will categorize a class of plaintiffs in an employment discrimination case under either Rule 23(b)(2) or 23(b)(3).[207] Rule 23(b)(2) states that it is appropriate to certify a class when a defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[208] Rule

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202. *See* Delikat, *supra* note 6, at 55; Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001); Allison v. Citgo Petroleum Corp. 151 F.3d 402, 411 (5th Cir. 1998).

203. *See* FED. R. CIV. P. 23(b).

204. *See* FED. R. CIV. P. 23. Rule 23(f) is a recent amendment to Rule 23 that allows immediate appeal of district court rulings certifying or denying a class. FED. R. CIV P. 23(f); *see also* Binetti et al., *supra* note 188, at 146. Both plaintiffs' and defendants' attorneys have applauded the rule. Plaintiffs' lawyers like the rule because "rather than being forced to await the outcome of litigation, plaintiffs will seek to immediately appeal the denial of certification, thus preserving the hope that a classwide settlement or verdict may be obtained." Binetti et al., *supra* note 188, at 146. Defense lawyers like "the new rule because it provides them with an avenue by which to immediately challenge class certification and thus delay the almost inevitable road to class settlement discussions." *Id.*

205. FED. R. CIV. P. 23(a); *see also* Binetti et al., *supra* note 188, at 142.

206. *See* FED. R. CIV. P. 23(b).

207. Hart, *supra* note 128, at 296.

208. FED. R. CIV. P. 23(b)(2).

23(b)(3) provides a provision for classes that do not fit neatly into the other categories in Rule 23(b):[209] certification is appropriate under Rule 23(b)(3) after a court has determined "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[210]

The plaintiffs in *Jenson* were certified under Rule 23(b)(2).[211] At the time *Jenson* was certified, it was the general practice of courts to certify a class of plaintiffs claiming employment discrimination under Rule 23(b)(2).[212] This was because employment discrimination cases often involved a situation where the employer has "acted or refused to act on grounds generally applicable to the class."[213] Since the enactment of the Civil Rights Act of 1991, which allowed class members to seek compensatory and punitive damages,[214] courts have been skeptical about certifying employment classes seeking these remedies under Rule 23(b)(2).[215] Prior to the 1991 Civil Rights Act, Title VII class actions focused almost exclusively on obtaining some form of equitable relief, "such as back pay, reinstatement, or modification of discriminatory policies or practices, because equitable relief was the only relief available."[216] In *Ticor Title Ins. Co. v. Brown*,[217] the Supreme Court stated that there is "at least a substantial possibility" that "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3)."[218] This is because "class members' constitutional due process rights must be protected by allowing them to opt out of the class and pursue their individual damages claims."[219] However, the Supreme Court's opinion only denied the

209. Hart, *supra* note 128, at 296.
210. FED. R. CIV. P. 23(b)(3).
211. Hart, *supra* note 128, at 297.
212. *Id.*
213. FED. R. CIV. P. 23(b)(2).
214. Hart, *supra* note 128, at 297.
215. *See id.* at 296-98.
216. Katherine H. Parker, Emerging Standards for Certification of Title VII Pattern or Practice Class Claims and Other Changes to Rule 23 Practice 5 (May 2, 2003) (unpublished manuscript, on file with author).
217. 511 U.S. 117 (1994).
218. *Id.* at 121; *see also* Hart, *supra* note 128, at 297.
219. *See* Hart, *supra* note 128, at 297; *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846-47 (1999).

grant of a writ of certiorari;[220] therefore, it did not create a rule of law for lower courts to apply.

Courts have since been split as to whether a class of plaintiffs seeking individual monetary relief can be certified under Rule 23(b)(2).[221] In *Allison v. Citgo Petroleum Corp.*,[222] for example, the Fifth Circuit held that this inclusion of individual claims for compensatory and punitive damages made certification under Federal Rule of Civil Procedure 23(b) inappropriate, "because individual claims predominated over class claims and rendered class treatment unwieldy and unworkable."[223] The court in *Allison* indicated that the purpose of a class action is to preserve the resources of the courts and the parties.[224] The court believed that classes of plaintiffs that are seeking substantial monetary remedies will more likely consist of members with divergent interests that overwhelm claims common to the class.[225] A few other circuit courts have followed this same logic in refusing to permit class certification under Rule 23(b)(2) where substantial monetary or punitive damages were sought. [226]

However, in *Robinson v. Metro-North Commuter Railroad Co.*,[227] the Second Circuit rejected the Fifth Circuit's reasoning in *Allison*.[228] Unlike the *Allison* court, the *Robinson* court held that "the changes made by the 1991 [Civil Rights] Act are not fatal to

220. *See Ticor Title Ins. Co.*, 511 U.S. at 117.
221. *See* Hart, *supra* note 128, at 297.
222. 151 F.3d 402 (5th Cir. 1998).
223. Parker, *supra* note 216, at 2.
224. *See Allison*, 151 F.3d at 409.
225. Parker, *supra* note 216, at 10 (citing *Allison*, 151 F.3d at 413).
226. For another example of a circuit court that followed logic similar to the *Allison* court's analysis in refusing to permit class certification under Rule 23(b)(2) for a Title VII claim, see *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999), where the Seventh Circuit approved the Fifth Circuit's analysis of predominance and vacated class certification of a Title VII claim under Rule 23(b)(2). *Id.* at 898. Similarly, in *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001), the Eleventh Circuit also approved of the Fifth Circuit's incidental damages test and adopted it in holding that the plaintiff class's damages claim predominated over its claims for equitable relief, and thus the district court had abused its discretion when it failed to exempt the damages claims from class treatment under Rule 23(b)(2). *Id.* at 812. In *Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002), the Sixth Circuit expressed similar logic. *Id.* at 448; *see also* Changelo, *supra* note 13, at 138.
227. 267 F.3d 147 (2d Cir. 2001).
228. *Id.* at 164.

class treatment of employment discrimination claims."[229]

> [T]he Second Circuit stated that district courts should use an 'ad hoc' test to determine the appropriateness of class certification. Under this test, the District Court must 'assess whether (b)(2) certification is appropriate in light of the relative importance of the remedies sought' and may allow certification under Rule 23(b)(2) if it finds in its 'informed, sound judicial discretion' that (1) 'the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed,' and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.[230]

The court in *Robinson* recognized that a claim for monetary damages that are not incidental under Rule 23(b)(2) may pose a due process risk because it does not allow procedural protections, such as notice or the option to withdraw from the class.[231] However, the court noted that these due process risks could be addressed by a district court allowing notice and opt-out rights to absent class members.[232] Therefore, with the present split in the circuit courts as to whether a class of plaintiffs seeking monetary relief can be certified under Rule 23(b)(2),[233] it is unclear at this juncture whether courts will allow certification of a class of plaintiffs seeking primarily monetary damages in a sexual harassment case under Rule 23(b)(2), or require a class of plaintiffs to meet the requirements of Rule 23(b)(3).

Certification of a class under Rule 23(b)(3) is much more difficult "because of [the] additional requirements that common issues predominate over individual ones and that a class action be the superior method for resolving claims."[234] Issues regularly posed that are common to all members of the classes in sexual harassment class action suits focus on "whether the work environment

229. *Id.* at 157.
230. Parker, *supra* note 216, at 19 (quoting *Robinson*, 267 F.3d at 164).
231. *Robinson*, 267 F.3d at 166.
232. *Id.*
233. *See* Hart, *supra* note 128, at 297.
234. *Id.*; *see also* FED. R. CIV. P. 23(b)(3).

was objectively hostile and whether the employer's policy for addressing harassment was inadequate."[235] On the other hand, individual plaintiffs' issues in a sexual harassment suit usually include "whether each woman [or man] found the work environment subjectively unwelcome; whether the standards for employer liability for the conduct have been met as to each plaintiff; and what damages each particular plaintiff may be entitled to receive."[236] With issues weighing so equally on both sides of the Rule 23(b)(3) balance, it is likely to be difficult to discern whether it is the class issues or the individual plaintiffs' issues that predominate in a particular case. It is unclear how courts will decide whether or not the common issues predominate over the individual questions as required for certification under Rule 23(b)(3),[237] but the fact that courts must do this balancing test at all substantially lessens the possibility that a class will be certified. Thus, it is ironic that the Civil Rights Act of 1991, which was meant to strengthen Title VII law by allowing greater damage awards and jury trials,[238] may have diminished the likelihood of successful class certification.

B. *Distinct Individuality of Sexual Harassment Claims and Proof Problems*

Another problem with extending pattern or practice theory to all Title VII sexual harassment hostile work environment cases is that the issues raised in sexual harassment suits are often intensely personal and individualized in nature. Sexual harassment claims should not be litigated using a pattern or practice framework because of the distinct individuality of such claims as compared to other types of Title VII claims. In most types of pattern or practice litigation, plaintiffs rely on statistical data to establish an inference of intentional discrimination by their employer: "In order to establish such an inference, plaintiffs must present statistical evidence demonstrating that there is a 'long lasting' and 'gross' disparity in the representation of members of the class from what would be expected from employment decisions made without re-

235. Hart, *supra* note 128, at 297.
236. *Id.* at 298.
237. *See* FED. R. CIV. P. 23(b)(3).
238. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (codified at 42 U.S.C. § 2000e (Supp. III 1991)).

gard to the class members' protected status."[239] Plaintiffs may prove a pattern or practice of employment discrimination by demonstrating, through statistical evidence of hirings, promotions or other employment benefits, that a certain protected group was intentionally discriminated against; a fact that will be evident where there is a gross disparity in the statistical evidence contrasting benefits denied to the protected group versus all employees.

The inherent individuality of sexual harassment claims also presents a problem for those individual sexual harassment plaintiffs compelled by courts to not only prove a pattern or practice of harassment, but also that they were subjectively affected by such conduct. In traditional pattern or practice cases, it does not matter what a plaintiff's subjective feelings were about the intentional discrimination; all that matters for phase I liability is that the plaintiff was in the protected group.[240] A presumption arises after the first phase of traditional pattern or practice claims that each individual plaintiff was discriminated against and is entitled to damages.[241] For example, "in a case challenging a failure to promote, it does not matter what the employee's reaction was to not being promoted. All that is relevant is whether the employer was motivated by discriminatory animus in making the employment decision."[242] This example describes the circumstances in *Int'l Bhd. of Teamsters*, as well as in most other Title VII pattern or practice claims.[243]

However, other courts have held that this presumption does not automatically arise with a showing of pattern or practice, and the individual plaintiffs in a sexual harassment class action also must prove that they were subjectively affected by the pattern or

239. Fred W. Alvarez et al., *Class Actions and Pattern and Practice Claims: Overview of Theories, Defenses, Settlements and the Government's Activist Role*, *in* 27TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 280, 303-04 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-591 1998) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977), as utilizing statistical evidence presented by the class of plaintiffs)).

240. *See* discussion *supra* Part III.B; *see also* EEOC v. Mitsubishi Motor Mfg. of Am., 990 F. Supp. 1059, 1077 (C.D. Ill. 1998).

241. *See* discussion *supra* Part III.B.

242. Hart, *supra* note 128, at 293 (citations omitted).

243. *See* 431 U.S. 329, 362 (1977).

practice of harassment to prevail.[244] In a sexual harassment pattern or practice context, plaintiffs often do not have proof that harassment occurred in their workplace. This is due to the often private and secretive nature of such harassment. Moreover, subjective feelings are more difficult to prove than objective facts. Thus, an individual plaintiff often must prove not only that there was an objectively hostile work environment affecting the class, but also that he or she was subjectively affected by the sexual harassment, with little real evidence to rely upon.[245] This aspect of sexual harassment pattern or practice claims distinguishes them from other types of Title VII pattern or practice claims. Plaintiffs attempting to demonstrate a pattern or practice of sexual harassment usually do not rely on statistical data, but instead must prove allegations of established events, which makes liability much more difficult to prove. Therefore, a plaintiff in a sexual harassment suit will likely have problems proving the subjective and individualized elements of a prima facie case, such as demonstrating that he or she "was subjected to objectively offensive conduct because of gender, which was unwelcome and so severe and pervasive as to alter the conditions of employment."[246]

1. *Conduct that was Severe or Pervasive as to Alter the Conditions of Employment*

When a fact-finder determines whether a plaintiff has met the "severe and pervasive" prong of the sexual harassment claim, he or she must look at all of the circumstances. These include the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's

244. *See, e.g.*, Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 876 (1993) ("[A] determination that the employer engaged in a pattern or practice of discrimination by maintaining a hostile environment does not entitle every member of the plaintiff class to a presumption that they were sexually harassed – the burden of persuasion does not shift to the employer.").

245. *See id.* (holding that sexual harassment claimants must provide evidence of both an objective pattern of harassment and subjective effects of the alleged hostile work environment on individual plaintiffs in order to prevail). *But see Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. at 1076 (holding that an individual plaintiff need not show that he or she was subjectively affected by a hostile work environment to prevail).

246. Willner et al., *supra* note 1, at 159.

work performance."[247] The answers to these questions depend on each employee's individual experience and therefore must be resolved on an individual basis. In traditional pattern or practice cases, such as *Int'l Bhd. of Teamsters*,[248] there may be dueling over the statistical data and what it means, but there is at least data of established events. Sexual harassment cases, on the other hand, are merely allegations that need to be proved by examining the individual issues as to each individual's work environment and experience.

2. *Unwelcomeness*

Similarly, sexual harassment claims are distinguishable from other types of Title VII pattern or practice claims because of the subjective "unwelcomeness" that the plaintiff must prove in a sexual harassment claim. Courts refer to sexual harassment as "very individual and varied,"[249] and "they often focus on the plaintiff's burden to prove that the challenged workplace conduct was 'unwelcome.'"[250] This is distinguishable from most Title VII pattern or practice claims because most claims focus on the behavior of the employer. In most Title VII claims, a plaintiff must demonstrate only that the employer discriminated based on the protected characteristic. By contrast, in sexual harassment cases, even though conduct may be objectively unreasonable a plaintiff will not be successful unless he or she can prove that the conduct was subjectively unwelcome.[251] For instance, if an individual has participated in sexually explicit language and jokes, subjective "unwelcomeness" may be difficult to establish.[252] Therefore, sexual harass-

247. Faragher v. Boca Raton, 524 U.S. 775, 787-88 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

248. *See* 431 U.S. at 362.

249. Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. LTV Aerospace and Def. Co., 136 F.R.D. 113, 130 (N.D. Tex. 1991) (declining to certify a class of plaintiffs alleging sexual harassment because the court concluded that the sexual harassment claims were "too individualized" and "not amenable" to class treatment).

250. Hart, *supra* note 128, at 293.

251. *See* Avery, *supra* note 79, at 5; *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66-67 (1986) (adopting the elements of sexual harassment claims from *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982)).

252. *See supra* note 90.

ment cases do not lend themselves to a pattern or practice framework as neatly as other types of Title VII claims because the issue as to whether the conduct was unwelcome may vary from employee to employee. It may thus be difficult (or perhaps even impossible in some instances) to show that the entire pattern of harassment was unwelcome to the entire class of plaintiffs. This individualized issue makes it difficult to assert sexual harassment claims under a pattern or practice framework.

3. *Employer Liability*

Another individualized issue arising specifically in sexual harassment claims as opposed to other forms of Title VII litigation concerns the fifth factor enunciated in *Meritor Sav. Bank*: whether an employer should be liable for sexual harassment in the workplace.[253] The standards used to determine whether the employer is liable for the conduct of the employee are different depending on who the party guilty of sexually harassing the plaintiff happens to be. If the harassment is by a supervisor, there is a vicarious liability standard.[254] If the harassment is by a coworker, the standard is one of ordinary negligence.[255] It is possible that, within a given class of plaintiffs, the standard of employer liability may vary from employee to employee depending on who was the perpetrator of the harassing conduct as to each individual plaintiff. Due to these individual issues that must be proven in sexual harassment claims, such claims do not lend themselves to a pattern or practice framework as easily as do other Title VII pattern or practice claims that rely principally on statistical evidence to establish liability.

4. *Affirmative Defense*

Another issue that presents problems with utilizing pattern or practice treatment is the fact-based affirmative defense that the Supreme Court established in *Faragher v. City of Boca Raton*[256] and *Ellerth v. Burlington Indus., Inc.*[257] The Supreme Court held

253. *See* Avery, *supra* note 79, at 5; *see also Meritor Sav. Bank*, 477 U.S. at 66-67 (1986).
254. *See* discussion *supra* Part II.B.5.a.
255. *See* discussion *supra* Part II.B.5.b.
256. *See* 524 U.S. 775 (1998).
257. *See* 524 U.S. 742 (1998); *see also* discussion *supra* Part II.B.5.a.

that as long as the harassment did not cause a tangible employment action, "[t]he defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[258] While a pattern or practice sexual harassment claim may be an appropriate avenue for determining whether an employer maintained adequate anti-harassment policies and procedures, it is not an appropriate means to determine if each employee was subject to a tangible employment action, or whether each employee unreasonably failed to report the alleged harassment. This is another issue which must be resolved case by case, plaintiff by plaintiff, making the pattern or practice framework inappropriate for sexual harassment claims for yet another reason.

C. *Problems Involving the Burden Shift in the Remedial Phase*

A third concern with the extension of pattern or practice theory to all Title VII sexual harassment hostile work environment cases lies with the presumption that arises after phase I liability is shown, shifting the burden of persuasion as to the lack of subjective feelings by individual plaintiffs to the employer. This presumption and burden shift is likely to lead to unfairness to the defendant employer in such cases. However, having no burden shift does not necessarily solve the problem. Without allowing the burden to shift to the defendant once a pattern or practice of harassment has been demonstrated, any utility that the pattern or practice framework may have had regarding sexual harassment claims may be lost. This further emphasizes the inappropriateness of a pattern or practice framework in the contest of Title VII sexual harassment claims.

In *Mitsubishi Motor Mfg. of Am.*, the court held that once phase I liability is established by showing a pattern or practice of harassment, the burden of production shifts to the employer.[259] At that point, the employer has the ability to bring evidence showing that individual members of the class of plaintiffs did not subjec-

258. *Faragher*, 524 U.S. at 778.
259. 990 F. Supp. 1059, 1077 (C.D. Ill. 1998).

tively perceive the environment as a sexually hostile environment.[260] After the defendant brings its defenses against individual members of the class, the members of the class who are challenged by the employer possess the ultimate burden of proving to the trier of fact that they were subjectively affected by the harassment. For those individual plaintiffs that the defendant does not challenge, the presumption turns into a finding of liability and the court moves to the individual damages phase.[261] This procedure is inherently unfair to the employer because, by the conclusion of the phase I liability portion of the case, the employer has been found liable to the class despite the absence of proof of the essential element of subjective harm that a plaintiff would have to prove in an individual sexual harassment case.[262] The *Mitsubishi* and *Dial* courts attempted to make the cases resemble a traditional pattern or practice case in terms of burden shifting;[263] however, in doing so the courts shifted the burden of production of one of the essential elements of the sexual harassment claim. Defendant employers appear to be required to prove an element of sexual harassment that was indicated initially as part of the plaintiff's prima facie case in *Meritor Sav. Bank*.[264] This is patently unfair because it forces the defendant to bring forth evidence that an individual plaintiff was not subjectively harmed by the pattern of sexual harassment that has already been proven. This relieves a plaintiff from proving an essential element of its case and places the bur-

260. *See id.*; *see also* Delikat, *supra* note 6, at 60.

261. Delikat, *supra* note 6, at 60.

262. As noted previously, a plaintiff in an individual sexual harassment case would have to prove that he or she was subjectively affected by the harassment. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66-67 (1986) (adopting the elements of sexual harassment claims from *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982)); *see also* Avery, *supra* note 79, at 5. Even the *Mitsubishi Motor Mfg. of Am.* court realized the double standard this creates. The court acknowledged the inappropriateness of the presumption and burden shift for the second phase of the trial where individual plaintiffs would have to prove that they are entitled to individual monetary damages, 990 F. Supp. at 1077, but kept the presumption and burden shift for proving a wide-spread pattern or practice of harassment with a request only for injunctive relief as to the hostile work environment in general. *See id.* at 1077.

263. *See* discussion *supra* Part III.

264. *See Meritor Sav. Bank*, 477 U.S. at 66-67 (adopting the elements of sexual harassment claims from *Henson*, 682 F.2d at 903-05); *see also* Avery, *supra* note 79, at 5.

den on the defendant to bring forth evidence that is unlikely to be accessible to it. Ultimately, this is where the pattern or practice sexual harassment claim fails.

Moreover, failing to apply this presumption and burden shift does not solve the problem. In *Jenson*, the court recognized that bifurcation of a sexual harassment class action does not operate as neatly as it does for other types of Title VII litigation.[265] Ordinarily, in a traditional pattern or practice class action the class of plaintiffs must prove that the discrimination was the "standard operating procedure" of the employer.[266] If the plaintiffs prove their case, there is a presumption that every member of the plaintiff class was subject to discrimination.[267] This shifts the burden to the defendant in phase two of the litigation to show that an individual plaintiff was not affected by the conduct of the employer and should not be entitled to relief.

In *Jenson*, the Court articulated a different framework from that in *Mitsubishi*, *Dial* and other Title VII cases. The Court held that the burden is not shifted to the defendant in the second phase of the trial. As previously discussed, the first phase in *Jenson* was analyzed the same as in *Mitsubishi* and *Dial*, by asking whether the employer engaged in a pattern or practice of exposing women to a sexually hostile environment that was objectively so severe or pervasive that it would change the terms or conditions of employment from the perspective of a reasonable person.[268] In *Jenson*, however, the court took a different approach than those courts when applying the burden of persuasion in the second phase.[269] The court in *Jenson* held that a finding of liability in the first phase

> does not entitle every member of the plaintiff class to a presumption that they were sexually harassed – the burden of persuasion does not shift to the employer. . . . Instead, the burden of persuasion remains on the individual class members; each must show by a preponderance of

265. *See* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 875-76 (D. Minn. 1993).

266. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1976).

267. *Id.* at 362.

268. *See id.*; *see also* discussion *supra* Part III.

269. *See* discussion *supra* Part III.

the evidence that she was as affected as the reasonable woman.[270]

If the burden remains on the plaintiff in the second phase to show that he or she was subjectively affected, the question then becomes whether a pattern or practice theory actually accomplishes *anything* in these cases. If there is no presumption that the employer discriminated against an individual class member because there was a pattern or practice of discrimination, this does stop an employee from bypassing an essential element of his or her sexual harassment claim. However, it also limits the effectiveness and efficiency of a pattern or practice sexual harassment case because each employee must prove that he or she was as affected as the reasonable person. Therefore, while applying the presumption and shifting the burden may be inherently unfair to defendants who lack the available evidence to prove individual plaintiffs' subjective states of mind, failing to apply the presumption may nullify the reasons courts chose to allow pattern or practice proof in sexual discrimination cases in the first place.

CONCLUSION

Despite the inherently individualized nature of sexual harassment claims, some federal trial courts have held that a pattern or practice theory is an appropriate framework for pursuing claims of sexual harassment. This extension of a pattern or practice theory has resulted in substantial settlements over the past few years between employers and classes of plaintiffs claiming that they have been victims of sexual harassment at their workplace.[271] Historically, class claims under Title VII of the Civil Rights Act of 1964 have been well-suited to treatment under a pattern or practice scheme. However, sexual harassment claims are unique forms of Title VII litigation due to their inherently individualized nature. These claims do not fit as neatly into a pattern or practice framework as do other types of Title VII litigation.

There are a number of problems with bringing pattern or practice claims of sexual harassment. These include: (1) whether the private class actions can meet the requirements of Rule 23 of the Federal Rules of Civil Procedure; (2) whether it is appropriate

270. *Jenson*, 824 F. Supp. at 876.
271. *See supra* note 4.

to treat sexual harassment claims as a class action considering the distinct individuality of sexual harassment claims where a plaintiff must prove that there was an objectively hostile work environment and that he or she was subjectively affected by the sexual harassment; and (3) whether it is appropriate to shift the burden to the defendant in the second phase of a sexual harassment pattern or practice case and, if it is not appropriate to shift the burden, whether a pattern or practice framework is an efficient and effective means of bringing sexual harassment cases at all. Because of these problems, sexual harassment claims should not be brought using a pattern or practice scheme.

The term "sexual harassment class action" is an oxymoron. The very nature of a sexual harassment claim dictates that it should be litigated on an individual basis. The essential elements of the sexual harassment claim "demand individualized treatment."[272] The individualized treatment that is necessary for sexual harassment claims dictates that a pattern or practice framework is not an appropriate means to pursue claims of sexual harassment. The precedent set by the federal trial courts extending a pattern or practice theory of liability should not be followed and the precedent should not be widely adopted. When considering the inherently individualized nature of sexual harassment claims and all of the procedural problems as a whole, it is evident that a pattern or practice theory of liability is not an appropriate framework for bringing sexual harassment claims.

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272. Willner et al., *supra* note 1, at 158.