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Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments

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HARASSING "GIRLS" AT THE HARD ROCK: MASCULINITIES IN SEXUALIZED ENVIRONMENTS

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Masculinities theory explains that masculinity is constructed in relation to a dominant image of gender difference, ultimately defining itself simply as what "femininity" is not. In the workplace, masculinities comprise both a structure that reinforces the superiority of men over women, and a series of practices associated with masculine behavior (performed by men and women) that maintain men's superior position over women at work, yet specific masculinities differ according to the type of workplace. This article applies masculinities theory to analyze whether Title VII should protect women employees in highly sexualized workplaces from sex- or gender-based hostile work environments, created by customers and tolerated by the employer. To this end, the author employs a case study of the Hard Rock Hotel and Casino in Las Vegas, Nevada. Through its advertisements and policies, the Hard Rock creates a highly sexualized workplace for its female blackjack dealers, producing an atmosphere imbued with aggressive masculinities that create a stressful working environment for women dealers. The Hard Rock promotes and ratifies this behavior by constructing this environment, yet instituting few safeguards to protect its women employees.

The Hard Rock case study raises serious questions concerning the application of Title VII to protect women working in highly sexualized workplaces from hostile work environments. Part II presents

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the Hard Rock case study, and uses advertisements and dealers' personal experiences to describe the Hard Rock's sexualized environment. Part III then analyzes whether under Title VII, the law should hold the Hard Rock, and any other casino with a similar sexualized atmosphere, responsible for customer behavior that harms its women employees. The author reaches several conclusions. First, courts should consider the context of the workplace and the job the woman performs in determining whether her employer has violated Title VII. Second, the Bona Fide Occupational Qualification (BFOQ) defense should not expand to defend an employer's failure to protect women employees from harassing behavior in a highly sexualized workplace. Finally, although employees should bear some responsibility to complain about harassment, the employer, who creates the sexualized environment and profits from it, rather than the individual employee, has the greater opportunity to control and prevent harassing behavior, and therefore should take extra precautions to assure employees are not suffering from harassment by customers. Title VII guarantees women equal job opportunities and equal treatment, even in highly sexualized workplaces. No woman should have to choose between a job that pays excellent tips and a harassment-free work environment.

I. INTRODUCTION: MASCULINITIES AT WORK IN SEXUALIZED ENVIRONMENTS

Masculinities at Work[1] recommends that courts interpret federal employment discrimination law[2] using masculinities research and theory. Masculinities comprise both a structure that reinforces the superiority of men over women and a series of practices,[3] associated with masculine behavior, performed by men or women that maintain men's superior position over women at work.[4] Masculinities differ depending on the workplace. In white collar offices, the hegemonic masculinity[5] is often invisi-

1. Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004).

2. Title VII of the 1964 Civil Rights Act makes it unlawful for an employer to discriminate against an employee on the basis of the employee's race, color, religion, sex or national origin. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000). It also forbids employers from discrimination in the terms or conditions of employment. *Id.*

3. *See* David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, 1 GENDER, WORK & ORG. 2, 13–16 (1994) (listing some of these practices as aggression, competitiveness, informal networking, and regarding women as sexual objects and care givers); Patricia Yancey Martin, *"Said and Done" Versus "Saying and Doing": Gendering Practices, Practicing Gender at Work*, 17 GENDER & SOC'Y 342, 357 (2003) (observing masculine practices that harm women at work).

4. Defining "masculinities" is controversial because it risks the possibility of employing an essentialist definition. While I am mindful of the controversy, I risk criticism in order to explain masculinities theory to an audience with an interest in the law.

5. "Hegemonic masculinity" is the dominant form of masculinity at a particular place and time that reinforces male power. For a more complete explanation of "hegemonic masculinity," see McGinley, *supra* note 1, at 366 n.24.

ble but problematic for women.[6] In some blue collar workplaces, where jobs are segregated by sex, masculinities are more visible and aggressively practiced through creation of hostile working environments for women and gender nonconforming men.[7]

This article applies masculinities theory to analyze whether Title VII should protect women in highly sexualized workplaces from sex- or gender-based hostile work environments created by customers and tolerated by employers. To this end, I employ the case study of a Las Vegas casino, the Hard Rock Hotel and Casino (Hard Rock). Although other casinos in Las Vegas may operate in a similar manner, I focus on the Hard Rock because of its apparent interest in creating a free sexualized environment. More than any other casino in Las Vegas, with the possible exception of the Palms,[8] the Hard Rock strives to attract a partying crowd.[9] Its advertisements are edgy, directed at the young, male, hetero-

6. For example, the hegemonic masculinity may include an expectation that high level employees work long hours. This expectation has a disparate negative effect on women because women often lack the support that makes it possible for married men in traditional relationships to work long hours. Many observers, however, would not consider this expectation to be gender-based because it is inextricably intertwined with the definition of work. When women cannot compete with men because of their failure to live up to this expectation, many attribute their failure to genetics or life choices, rather than the gendered structure of work. *E.g.*, Marcella Bonbardieri, *Summers' Remarks on Women Draw Fire*, BOSTON GLOBE, Jan. 17, 2005, at A1; Michael Dobbs, *Harvard Chief's Comments on Women Assailed*, WASH. POST., Jan. 19, 2005, at A2 (reporting that Harvard President Lawrence Summers attributed women's relative lack of success in academic science to genetics); *see, e.g.*, Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 1086–89 (1995) (attributing the glass ceiling and gender gap to women's choices resulting from their biological differences from men in temperament, including women's unwillingness to take risks and their less aggressive and competitive natures); Richard A. Epstein, *Liberty, Patriarchy and Feminism*, 1999 U. CHI. LEGAL F. 89, 106–11 (explaining that women's tendency toward and devotion to child rearing influences their educational and career choices).

7. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998) (noting that plaintiff alleged that his coworkers assaulted him in the shower and attempted to push a bar of soap into his anus); Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 526 (M.D. Fla. 1988) (detailing pornography on bulletin boards and other graphic treatment). Law professor Vicki Schultz explains that harassing behavior in blue collar jobs undermines the confidence and competency of women and gender nonconforming men who strive to do a "man's job," and reinforces the male identity of the job as male, and the men who do it as masculine. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1776 (1998).

8. Highlights of the Palms include the Ghostbar, a night club called "Rain," and a restaurant called "Nine." Advertisements for these establishments are obviously sexual in nature. A recent ad for the Ghostbar shows a woman from the neck down, half-lying, half-sitting. The woman wears a white brassiere-like top with a bare midriff and a white lace garter belt with lace and fish net stockings. The ad, which shows Las Vegas Boulevard ("the Strip") in the background, states, "Always on Top," a play on words referring to sexual position and the location of the Ghostbar in the hotel. An ad for Rain nightclub, which appears below the Ghostbar ad, shows a woman from the lips to her waist. Her breasts are prominently displayed with a low, v-neck halter top. *See* Advertisement, LAS VEGAS WKLY., Mar. 10–16, 2005, at 47.

Other casinos are opening nightclubs and lounges whose advertisements are also highly sexual in nature. The Aladdin Resort has, for example, the "Curve" ultra lounge. One ad for the Curve shows a woman on all fours in an obviously sexual position, dressed in black with her midriff, arms and legs exposed. *See* Advertisement, LAS VEGAS WKLY., Apr. 14–20, 2005, at 46.

9. *See* Adrienne Packer, *Racy Billboards to Be Discussed*, LAS VEGAS REV.-J., Mar. 11, 2004, at B5 (reporting that Hard Rock President Kevin Kelley stated that the Hard Rock is competing for the

sexual clientele who are drawn to Las Vegas because "what happens in Vegas, stays in Vegas."[10] Hard Rock's advertising characterizes women as men's pleasure objects, cheating (on one's wife or at the gaming tables, or both) as a pleasurable pastime, and (prescription) drug use as a "Monday night right."[11] Hard Rock customers are not disappointed. Once they arrive at the Hard Rock, they are immersed in a sexualized, alcohol-soaked environment, where, it appears, almost "anything goes."[12]

For this project, I interviewed male and female blackjack dealers[13] who worked at the Hard Rock for a combined total of over thirty years,[14] a member of the Nevada Gaming Control Board, the Vice President of Human Resources at the Hard Rock Hotel & Casino, dealers, cocktail waitresses, a clown, and other personnel who have worked at other casinos in Las Vegas and Reno, Nevada, as well as customers who frequent the casinos. I visited the Hard Rock and other Las Vegas casinos on various occasions to observe the atmospheres. This research suggests that aggressive masculinities at the Hard Rock create a stressful working environment for at least some of the women dealers.[15] In particular, the

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business of affluent young people between the ages of twenty-one and forty); Chris Jones, *Hard Rock to Pay Fine for Risqué*, LAS VEGAS REV.-J., Apr. 23, 2004, at 1A (noting that Kevin Kelley said that he hoped the "Hard Rock will be able to continue its often-edgy ad campaigns").

10. This is the slogan used by the City of Las Vegas to advertise to tourists. *See* Jack Sheehan, SKIN CITY 9–11 (2004).

11. For a description of the ads, see *infra* Part II.B.4.

12. The Hard Rock uses drug use as a theme throughout the casino. The auditorium in which visiting bands and groups perform music is called "The Joint." On the Hard Rock Web site the question "Who smoked the Joint?", an obvious reference to marijuana use, refers to the bands playing in the auditorium. Hard Rock Hotel, http://www.hardrockhotel.com/rock_thejoint.php (last visited July 31, 2006).

13. In this research, I use "feminist standpoint theory" in conducting my interviews. Feminist standpoint theory uses women's perspectives to describe men's behavior at work. This viewpoint provides the perspective of someone who is often in a position of less power at work. Patricia Yancey Martin, *'Mobilizing Masculinities': Women's Experiences of Men at Work*, 8 ORG. 587, 592–93 (2001). Dr. Dorothy E. Smith originally proposed feminist standpoint theory to remedy the failure of sociology to recognize its masculinist assumptions. *See* DOROTHY SMITH, THE EVERYDAY WORLD AS PROBLEMATIC: A FEMINIST SOCIOLOGY 85–86, 98 (1987).

14. I do not name some of the interviewees in this article in order to protect them from retaliation for speaking with me.

15. I do not claim this to be an empirical study. I did not question all or even most of the blackjack dealers at the Hard Rock. Rather, I interviewed dealers who were willing to speak to me. Some dealers were either afraid to speak to me or found it too burdensome. Others may not have known about my interest. A hostile work environment occurs in the Ninth Circuit, however, where a reasonable woman would find the atmosphere sufficiently severe or pervasive to alter the terms or conditions of her employment, and an employee subjectively finds the atmosphere sufficiently hostile to alter the terms and conditions of her employment. It is not necessary that all, or even most, of the women working in the environment find it offensive. Assuming that the information the interviewees told me is correct, and I have no reason to doubt its accuracy because they corroborated each others' stories, it appears that the atmosphere at the Hard Rock meets the test of the hostile work environment established by the courts. For elaboration on the law of hostile work environment, see *infra* Part III. The interviews took place in 2005–2006, and this article makes no claim that the behavior continues until the date of publication.

interviews suggest that the Hard Rock permits its "high rollers"[16] to engage in extreme behavior toward its women employees.[17]

The study results raise serious questions concerning the application of Title VII to protect women working in highly sexualized workplaces from hostile work environments. These questions include: (1) whether courts should distinguish among different types of workplaces and jobs in determining whether a hostile work environment exists; (2) whether courts should apply the Bona Fide Occupational Qualification (BFOQ) defense, which permits discrimination if sex is a "bona fide occupational qualification" of the job;[18] and (3) what responsibility individual employees and employers bear in protecting the employees from harmful harassment.

The answers to these questions are complicated. Many agree that casino owners should be able to define their businesses freely. To draw customers, these businesses rely on carefully crafted images that may include explicit or implicit sexual messages. As my research shows, however, when these messages encourage harassment of employees by customers and the business owner does not control the patrons' behavior, employees may suffer serious harm.

This article reaches several conclusions. First, courts should consider the context of the workplace and the job the woman performs in determining whether the employer has violated Title VII. Both are relevant to the question of whether the behavior is sufficiently severe or pervasive to create a hostile work environment that alters the terms or conditions of the employee's job. Second, the BFOQ defense should not expand to defend an employer's failure to protect women employees from harassing behavior in a highly sexualized workplace. Third, although individual employees should bear responsibility to complain to their immediate supervisors or to casino security, the business owner, who creates the sexualized environment and profits from it, rather than the individual employee, has the greater opportunity to control and prevent harassing behavior, and is better able to bear the risk of harassment by insuring against the risk. Therefore, the owner of a casino or other business operating in a sexualized setting should take precautions to assure that its employees are not suffering harm from harassing behavior. In fact, because the business owner consciously creates a sexualized environment and profits from it, he or she should take extra precautions to avoid liability for sexual harassment.

16. "High rollers" are casino patrons who spend significant amounts of money at the gaming tables. The casinos treat these clients specially, often providing them free rooms, meals, and alcohol as well as access to Las Vegas shows and clubs.

17. Valerie Smith, the Vice President of Human Resources, denies that the "high rollers" can get away with engaging in harassing behavior that is objectionable to the women dealers. Interview with Valerie Smith, Vice President of Human Resources, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 15, 2006).

18. 42 U.S.C. § 2000e-2(e)(1) (2000).

These conclusions are consistent with Title VII, which promises equal employment opportunity and equal treatment regardless of gender, race, color, religion, or national origin. Failing to hold employers liable for a customer-induced hostile work environment from which the employer benefits imposes upon women employees a Hobson's choice between jobs that pay excellent tips and a discrimination-free environment. No woman should have to make this choice.

II. CASE STUDY IN SEXUAL HARASSMENT: THE HARD ROCK HOTEL AND CASINO

A. Workers Negotiating Between Two Realities

1. The Interviews of Blackjack Dealers[19]

The women dealers I interviewed are young, smart, and strong but vulnerable to sexual harassment. Some come from impoverished backgrounds; others are single mothers. All harbor the same "American dream": to own their own homes and give their children good lives. They have few options if they desire middle-class lifestyles. The Hard Rock offers one of the best jobs for blackjack dealers because of the considerable income earned through tips.[20] Some of the dealers simply endure the harassment, but others leave the Hard Rock to return to professional school, to deal at another casino, or to take up another career. The women tell very similar stories about repeated, intentional customer harassment of women employees and the management's acquiescence to the behavior.

2. Customer Harassment of Employees

The Hard Rock markets to young, hip customers through advertising and promotions. Young patrons, predominantly men, pay for the adventure in the "bubble of fantasy."[21] This fantasy includes free booze, cigars, tickets to Las Vegas shows, and access to women. The casino offers all of these pleasures to high rollers twenty-four hours a day.

Rock music blasts. Young, pretty cocktail waitresses whose skimpy costumes bulge from surgically enhanced breasts circulate throughout

19. Much of the information in Part II comes from interviews with employees or former employees unless otherwise noted in the text or footnotes. I include in this section only the information that was corroborated by more than one interviewee, unless otherwise noted.

20. Others include the Bellagio, Caesar's Palace, the Venetian, Green Valley Ranch Station Casino and the Wynn Resort. One dealer admitted that she could not afford to trade her job for a job with a casino located off the Strip where tips are reputably lower than those at the Hard Rock. Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

21. One interviewee described the casino as a "bubble" which represented the unreal world in which she worked as opposed to her real life. Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005); *see infra* Part II.C.

the casino.[22] When the "gentleman's club" across the street closes, exotic dancers enter the Hard Rock looking to make more money. Advertisements on billboards outside the doors of the casinos imply, not so subtly, that everything is for sale.

Patrons, high on drugs and/or alcohol,[23] comment to the women dealers, asking them "How much will you cost if I make a large amount of money," "I bet you would be good in bed," "Are your tits real," and "You take good care of yourself. I bet you trim your pubic hairs. I'd like to see your pubic hairs."[24] Patrons lose large sums of money at the gaming tables. As they lose money, they show anger and frustration by lashing out at the dealers. Whereas patrons subject male dealers to general harassment, the expressions of anger described by women dealers go beyond those aimed at the men and bear a uniquely gendered quality. Frequently, patrons stare, yell, and mutter at the women dealers, calling them "cunt" and "bitch."[25] On at least one occasion, an interviewee reports, a patron threatened to rape her.

For Asian women, frequent racial slurs magnify this behavior. Patrons comment on their being "oriental" and express the stereotypical belief that Asian women are bad luck or that they like the men to lose money. Women who speak with accented English suffer more harassment than women who speak English with an American accent.[26]

22. While this article focuses on harassment of women dealers, my interviews suggest that the cocktail waitresses endure considerable verbal and physical harassment. Interviewees told me that cocktail waitresses put up with comments and offensive touching by customers. Sometimes waitresses take the matter into their own hands. One interviewee witnessed a cocktail waitress who had been grabbed between her legs turn around, grab her tray, and hit the offender over the head with the tray. In this instance, the supervisor called a security guard and the offending customer was ushered out of the casino. Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 19, 2005).

23. The interviewees believed that patrons' drinking causes much of the harassment. They noted that patrons who are friendly at the beginning of the evening become hostile as the evening progresses, because they drink too much alcohol. One of the women dealers noted that when she works the graveyard shift the drunken customers stare at her buttocks, making comments such as, "This money is for her ass." All of the interviewees alleged that management continues to serve drinks to drunken customers even after the dealers request management not to serve them. Interviews with blackjack dealers, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

24. Interviews with blackjack dealers, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

25. One woman dealer stated, "If you had to stop at every [harassing] comment, you could never make it through a day at work." Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

26. A number of the dealers mentioned that there was harassment of women employees by male employees as well. One dealer mentioned that a floor man pats the women employees' buttocks. Other dealers mentioned insulting, gender-based comments made by employees. They also mentioned, however, that some of the comments made between friends may not be considered sexual harassment by the recipients. Interviews with blackjack dealers, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

B. Management Behavior Encouraging Harassment

1. Acquiescence to Please the Customers

As described by the interviewees, the hostile behavior occurs in full view of management,[27] but little is done to stop the abuse. The interviewees perceive that the Hard Rock places its customers' comfort over that of its employees. They characterize the Hard Rock attitude as, "If the employee can't take it, there are applicants waiting in line to deal at the Hard Rock." One of the interviewees explained:

> Many times I endured hours of threats, cursing, and glares from the same gambler(s). The highest of the high rollers, those who bet the most money—are allowed more latitude when the casino defines inappropriate behavior. High rollers are rarely asked to leave the casino for merely abusing the employees. The casino resolves abusive situations by switching the tormented dealer with a fresh dealer, eventually.[28]

The interviewees described verbal abuse by the high rollers. One patron who is a "regular" high roller instills fear in the women dealers. He regularly demands that management remove a dealer from the table, screaming, "Get me another fucking dealer right now! Get this bitch out of my sight." Management scurries to comply. Another high roller often stands up and yells, "douche bag" at the women.[29] Some women try not to take the name calling personally. Others cannot get used to the abuse.

Although most of the harassment is verbal, it strays at times to physical battery. One of the women dealers described being grabbed in the crotch:

> I was once grabbed between the legs by a "high roller." He had dropped some gaming chips on the ground, and while crawling around under the blackjack table retrieving them, he reached up and grabbed me. The supervisor advised the gambler that touching the dealer was forbidden but the player was permitted to continue gambling on my tablegame. I was mute from the shock but like an

27. During the time period studied, the Hard Rock employed the following supervisors: General Manager, Casino Manager, Shift Boss, Pit Boss, and Floor Man. The dealers are supervised directly by the floor men. The dealers work one hour on and twenty minutes off the gaming tables throughout their shift. While they are "on," dealers may not leave the gaming tables to which they are assigned. Floor men stand behind the gaming tables and resolve disputes between patrons and the dealers; they support the dealers by getting things they need. The pit boss supervises the floor men and handles the larger disputes that floor men cannot manage.

28. *See* Jin Kim, Can an Employer Create a Hostile Working Environment Through Its Advertisements? 3 (Apr. 14, 2005) (unpublished manuscript, on file with the author). This sentiment that complaining too much would lead to bad relations with management and lower one's income was echoed by all the interviewees.

29. One dealer stated that she had seen a player smack one of the women dealers in the buttocks. Although he was ejected for this behavior, he returned to the tables within a week. Another player called this dealer "bitch," and " cunt" in front of management, but was never told to stop. Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

automaton, I kept dealing. Humiliating as that experience was, it was not the worst offense I encountered.[30]

A male dealer agrees. He explained that he regularly witnesses customers' abusive comments to women dealers. Customers proposition the women dealers regularly.[31] One customer told a woman dealer in a not-so-veiled threat, "I know you park on the sixth floor and I will be waiting for you." When the woman walked alone to her car that evening, she was terrified.

The dealers I interviewed believe that management could curtail much of the abuse but does not. They alleged that although management has a policy of permitting each customer one warning before asking the customer to leave the premises, when customers repeat the offensive behavior, management refuses to enforce its own policy, permitting constant harassment of its employees by the most "special" customers.[32] One dealer recounted:

> Mr. D came into HRH [Hard Rock Hotel] for years and he was known to bet big and reduce some dealers to tears. I dealt to him two or three times a week for years and he was always verbally abusive. He would assault me with profanity and a couple of times, he threatened to shoot me. While the abuse from Mr. D began to blur from one day to the next, one incident was unforgettable.
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> One evening the cards were running very badly for Mr. D. That night, when Mr. D called me a "cunt" and threatened to rape me, a former General Manager . . . and an assistant shift boss were sitting next to Mr. D on the table. Immediately following Mr. D's outburst, the two managers turned to one another and pretended to be engrossed in another conversation. They never addressed Mr. D or me and acted as if the insult and threat never happened. I helplessly endured Mr. D's tirade for another twenty minutes. All the while, he pounded the table with his fists and glared at me. I was eventually replaced with another dealer at his request. The exact words were "get this fucking bitch off my game."
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> I was shocked . . . at the inaction and indifference from [the Hard Rock managers] . . . . [T]he silence from the management spoke volumes. My well being was not a priority or even an issue but keeping Mr. D gambling and happy was. . . . That night, I felt

30. *See* Kim, *supra* note 28, at 3.

31. A male dealer stated that customer harassment of women employees "happens all of the time." He said that a woman dealer who complains about a customer's behavior reduces her income because the Hard Rock will remove her from working at the most lucrative tables. One comment he often hears customers make is, "If I win enough money, how much will you cost? I bet you would be good in bed." Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

32. One dealer told me that a regular high roller "packs a pistol," revealing the gun when he bends over. She complained that even though firearms are forbidden in the casino, the management does not require him to disarm. Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

> hatred for D . . . and every boss at HRH who knew what D was putting me through.[33]

The Vice President of Human Resources explained that no dealer has to endure this treatment. She said that in the case of egregious guest behavior, such as physical battery, the casino either expels the patron or moves him to a private table where a male dealer deals to him. In the case of less serious, but offensive behavior, the dealer has the option of being removed from the table and replaced with a willing dealer. Because the high rollers are the biggest tippers, she noted, there are always women dealers willing to deal to them, despite their abusive behavior. She expressed a concern that if high rollers are evicted from the casino, the dealers lose tips. She concluded that customer behavior is not too offensive because even though she has heard of some occasional bad customer behavior, no one has complained to her personally or has made a complaint on the General Manager's hotline.[34]

2. *Punishing Women*

The dealers complained that the Hard Rock retaliates against women dealers who do not conform to the stereotype of a compliant, sexual object. Refusing to deal to an abusive patron risks a negative effect on work schedules, time off requests, and future assignments.[35]

Although some dealers flirt with customers for greater tips, others refuse to flirt but treat customers in a friendly way. At least one woman refuses to comply with the stereotype of a friendly, sexually inviting woman dealer. She often gets angry at customers who call her "honey" and "baby." A beautiful young woman, this dealer has developed the reputation of "ice woman." Although she is an excellent card handler, her unwillingness to conform to sexual stereotypes and to ignore abusive behavior, makes her supervisors uncomfortable. One dealer wrote:

> [Jill][36] was [a] young, attractive, and technically good dealer. She was fast and made few errors but the management still considered her a trouble maker or unfriendly because [Jill] did not tolerate harassment. She voiced resentment at being called "baby" and "honey" and refused to flirt or fraternize with the customers. [Jill]

33. *See* Kim, *supra* note 28, at 29–31. When I explained this scenario to the Vice President of Human Resources, she said that she had never heard of a threat of rape. She mentioned that the general manager would never sit at a blackjack table. *See* Interview with Valerie Smith, *supra* note 17. A different interviewee mentioned that at times, the management also participates in the harassment itself. She told me that once at the end of the day a supervisor approached her as she was dealing to a table full of people. He said, referring to her body, "When are you going to give me some of that?" Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

34. *See* Interview with Valerie Smith, *supra* note 17.

35. *See* Kim, *supra* note 28, at 3–4, 23. The Vice President of Human Resources denied that there was any detrimental effect on the women's assignments when they complained. She noted that dealers complain to her about many things, including the behavior of coworkers, but they do not complain about customer harassment. *See* Interview with Valerie Smith, *supra* note 17.

36. I have substituted a fictitious name for the dealer's real name.

> insisted on professionalism from patrons and other employees. Her insistence earned her a bad reputation at HRH.
>
> Customers, managers, and other dealers considered [Jill] to be cold and bitchy. Some people, including other female employees, speculated about [Jill]'s sexual orientation because she resented male attention. [Jill]'s non-conformity to the sex stereotype of the "friendly, flirty, and inviting" female earned her a reputation as a bitch and a troublemaker.[37]

3. *Dress Codes and Makeup*

Hard Rock management keeps strict control over the appearance of women dealers in order to promote the image of a young, stylish, sexy, hip casino. These appearances include a uniform for women dealers that differs from the men's, and a makeup requirement for women. Women dealers wear a tight-fitting, stretchy black shirt with vertical stripes, buttons down the front, and three-quarter length sleeves. The shirts and slacks are supplied by the Hard Rock, and some of the shirts fit so tightly across the bust that they gap, showing the woman's brassiere.[38] Two of my interviewees expressed an intent to wear a black shell under those shirts, but also mentioned that they were fearful that the management might punish them for wearing the shell underneath. The slacks, which are either low slung or waist-high, are Lycra, tight fitting, and black. A thick, silver-colored chain hangs from the side pocket of the slacks.[39]

Women dealers are required to wear lipstick and eye shadow. The interviewees believe that the makeup requirement is enforced sporadically and only against some of the women. The dealers also complained that some women dealers are reprimanded for their appearance. If the owner of the Hard Rock does not like the "look" of a dealer, the dealer is told to change it. One woman dealer who has long, naturally curly hair is often called off the floor and told to pull her hair back. She has straightened her hair at considerable expense. At least three interviewees told me that the curly haired woman looks neat and clean, but that the casino owner hates her hair because it is dated. They conclude that management's frequent correction of their colleague's appearance is unrelated to her ability to deal.

Men who are less attractive or who gain weight are treated less harshly, according to the interviewees. Unlike the overweight male supervisors, women employees are threatened with job loss if they gain too

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37. *See* Kim, *supra* note 28, at 23–24.

38. The Vice President of Human Resources told me, in contrast, that the dealers could get whatever size uniforms they desire. *See* Interview with Valerie Smith, *supra* note 17.

39. The dealers told me that management originally selected a shirt that showed the midriff and slacks that were low slung, revealing a woman's thong underwear when she bends over to collect the chips. After the women dealers protested, the management relented, permitting the shirts to go beyond the midriff and the slacks to be waist high. Interviews with blackjack dealers, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

much weight. The interviewees told me that women who are pregnant are either moved from their positions in the high limit room or are generally treated badly.[40]

4. Advertisements and Promotions

The Hard Rock markets itself through advertisements and promotions that encourage male customers to indulge in their fantasies. The promotions and advertisements provoke customer harassment of women employees. One of the promotions encouraged women employees to pose nearly nude in *Playboy* magazine's feature *The Girls of the Hard Rock Casino* in the April 2001 edition.[41] This ten-page section of *Playboy* emphasizes that sex is at the center of the casino's marketing. The section contains eleven photographs of women employees of the Hard Rock. One photograph displays a cocktail waitress who works at the Hard Rock Beach Club perched on a Harley Davidson motorcycle. She wears only jewelry, high black leather boots, and a black leather belt with a key dangling from it.[42] Another displays two women, one lying down wearing only red leather boots and a plastic belt and fondling her own breast, while another woman who wears nothing other than red platform shoes videotapes her.[43] Another displays a woman totally nude lying on a pink surface with casino chips all around her.[44] Other women employees pose nude with guitars, surf boards, a piano and a drum set.[45] The article's text heightens the sexual content. The opening paragraph states:

> In Las Vegas, the Hard Rock Hotel and Casino is where the cool kids sin the most. Everything about the place—from its guitar-shaped sign to its Mexican Restaurant, the Pink Taco—oozes sex and rock and roll. Pull up to the Hard Rock's entrance and you'll hear Guns n' Roses' *Paradise City*—or some other favorite. Inside, hundreds of beautiful women sip cocktails at the circular bar, stack chips at the piano-shaped roulette tables, shake their asses at Baby's nightclub and groove to live music in the Joint. Upstairs, the hotel room doorknob signs read I HEAR YOU KNOCKING', BUT YOU CAN'T COME IN. Then there are the women who work at the place. Subscribing to the theory that the prettier the help, the happier the patrons, Hard Rock entrepreneur Peter Mor-

40. My interviewees told me that a woman dealer who was pregnant was moved from the high limit room because, she was told, "it looks bad to be pregnant." Another woman who was near the end of her pregnancy asked to switch to another table because the men at her table were smoking cigars and the smoke bothered her. Her supervisor refused. Interviews with blackjack dealers, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005). The Vice President of Human Resources denied that pregnant women are treated any differently from women who are not pregnant. *See* Interview with Valerie Smith, *supra* note 17.

41. *The Girls of the Hard Rock Casino*, PLAYBOY, Apr. 2001, at 140–49.

42. *Id.* at 144–45.

43. *Id.* at 148.

44. *Id.* at 149.

45. *Id.* at 140, 141–42, 146–47.

ton has hired NBA dancers, homecoming queens and aspiring actresses to sling drinks.[46] Like every casino in Vegas, the Hard Rock boasts its share of sugar daddies. But here they're high rollers named Dennis Rodman, Matt Damon, Ben Affleck, Kiefer Sutherland and Kid Rock.[47]

The article quotes a cocktail waitress who works at the Beach Club:

> It's wild here. We call it Disneyland for adults.[48] I see so much sex in the cabanas. I'll walk in thinking no one is there and—whoops! Sometimes they're like, 'Come on, join in!' Guys try to get us to flash them all of the time.[49]

A food server adds, "Something crazy is always happening. I once met a guy who wanted to buy my underwear for $50 so he could wear it all night."[50] Another cocktail waitress states, "Halloween is the wildest night. My favorite costume: a white nurse's cap, Band-Aids on the nipples and a red G-string."[51] A food server for the Pink Taco states, "Our menus at the Pink Taco are made of black felt. I once saw a woman sitting in a booth with her skirt hiked up, her crotch hanging out and a menu right next to her. Her boyfriend was taking pictures of the two pink tacos."[52]

Although the women employees were encouraged, but not required, to pose for the magazine, the dealers recounted that the promotion had an adverse effect on the women who chose not to pose in *Playboy*. For six months after the promotion, customers approached women dealers to show them pictures of nude women employees in *Playboy*. The customers looked back and forth from the photographs to the clothed dealers and asked them if they were the women in the photographs. Even though these women did not participate in the promotion, they suffered a loss of dignity, and as blackjack dealers, a loss of authority, from the promotion and the patrons' reaction to it.

Other promotions, including lingerie parties, occur at the pool at the Hard Rock. A few years ago, the Hard Rock brought in a company called "Trashy Lingerie" to supply lingerie to the women dealers, who

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46. Peter Morton announced the sale of the Hard Rock Hotel & Casino on May 11, 2006, to Morgans Hotel Group Co. for $770 million. *See Peter Morton Announces Sale of Las Vegas Hard Rock Hotel & Casino for $770 Million*, LEXDON BUS. LIB., http://www.lexdon.com/article/Peter_Morton_Announces_Sale_of/50100.html (last visited Mar. 11, 2007). The information about the atmosphere and behavior in this article precedes that date.

47. *The Girls of the Hard Rock Casino*, *supra* note 41.

48. *Id.* at 141.

49. *Id.* at 144.

50. *Id.* at 141.

51. *Id.* at 143.

52. *Id.* at 148. A male dealer explained that "Pink Taco" refers to a woman's anatomy. Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Feb. 22–23, 2005). Law students whom I asked about this interpretation all agreed with the interpretation. This quote from a woman food server at the Pink Taco seems to confirm this interpretation and the Hard Rock's use of the name to promote its sexual atmosphere.

were invited to wear the see-through lingerie while dealing blackjack on the pool deck.[53]

These promotions occurred at roughly the same time as egregious customer conduct. In July 2001, surveillance tapes at Baby's nightclub, inside the Hard Rock, revealed customers participating in sexual activity at the nightclub in full view of security. On July 16, 2002, the Nevada Gaming Control Board filed a complaint for disciplinary action with the Nevada Gaming Commission.[54] The complaint alleged that on three separate occasions in July 2001 customers engaged in sex at the nightclub.[55] On at least one of these occasions, hotel security was present and aware of the activity.[56] The Hard Rock admitted these allegations and entered into a stipulation and settlement order agreeing to a $100,000 fine.[57] The stipulation also stated that the Hard Rock would establish an orientation program for new employees to stress compliance issues, would regularly remind employees upon promotion, transfer, or reassignment about the importance of compliance, that the CEO would use his leadership to communicate the importance of regulatory matters to employees and executive staff, that regular communication through e-mail messaging concerning regulatory topics would occur, and that the

53. The men dealers wore Hard Rock issued pajamas to deal at these parties. Women dealers could choose lingerie or pajamas. Interviews with blackjack dealers, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2006). An interview with Bobby Siller, a member of the Gaming Control Board, confirmed that some women employees, including management, wore revealing teddies during these promotions. Interview with Bobby Siller, Member, Nevada Gaming Control Board, in Las Vegas, Nev. (Mar. 2006). Two of the interviewees also noted that the Hard Rock had encouraged women dealers to wear bikinis while dealing at the pool. Although wearing bikinis was allegedly "voluntary," one of the women felt there was pressure to do so. She refused. When her supervisor asked her why she would not wear a bikini, she told him that it would be humiliating and degrading to wear one. Interviews with blackjack dealers, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 17, 2005). The Vice President of Human Resources told me that no one was pressured and that there are a range of options of cover-up apparel for women employees at the pool. *See* Interview with Valerie Smith, *supra* note 17.

54. While gaming is legal in Nevada, it is tightly regulated. The Nevada Gaming Control Board is an administrative agency of the State organized and existing under chapter 463 of the Nevada Revised Statutes. *See generally* NEV. REV. STAT. § 463 (2001). It is charged with the administration and enforcement of the gaming laws of Nevada. The gaming laws are set forth in Nevada Revised Statutes, title 41, and Regulations of the Nevada Gaming Commission. The Nevada Gaming Commission has the power to limit, condition, suspend, or revoke a gaming license or fine any person for a cause deemed reasonable. *Id.* § 463.310(4)(a)–(d). The Nevada Gaming Control Board is authorized by statute to observe the conduct of licensees to ensure that gaming operations are not conducted in an unsuitable manner, *id.* § 463.1405(1); Nev. Gaming Comm'n Reg. 5.040 (2006), and to conduct appropriate investigations to determine whether there have been violations of the gaming laws. NEV. REV. STAT. § 463.310(1).

55. Complaint for Disciplinary Action at 8–9, Hard Rock Hotel Inc., No. 02-03 (Nev. Gaming Comm'n July 16, 2002).

56. *Id.* ¶ 25.

57. Hard Rock Hotel, Inc., No. 02-03, at 1 (Nev. Gaming Comm'n July 1, 2002) (stipulation for settlement and order) [hereinafter Hard Rock 2002 Settlement]; *see also* Jeff Simpson, *Casino Facing Fine of $100,000*, LAS VEGAS REV.-J., July 19, 2002, at D1; Jeff Simpson, *Gaming Control: Hard Rock Settles Board Complaint*, LAS VEGAS REV.-J., July 26, 2002, at D1.

compliance committee[58] would take a larger role in modeling a compliance-driven organization.[59]

Although the stipulation did not specifically address advertisements, the issues negotiated between the Gaming Control Board and the Hard Rock included the hotel's failure to have procedures for screening of promotions and advertisements for propriety.[60] In negotiations with the Board, the Hard Rock presented new procedures and training and agreed that its compliance committee, which is composed of respected persons independent of the Hard Rock as well as Hard Rock officials, would screen all questionable advertisements and promotions.[61] The owner of the Hard Rock, in a letter to the Gaming Control Board, assured the Board that he personally would guarantee compliance with the new rules.[62]

Only sixteen months after the stipulation between the Gaming Control Board and the Hard Rock, a number of new advertisements appeared in *Las Vegas Weekly* magazine, on large billboards near the Hard Rock, and around Las Vegas. These advertisements raised serious issues in Las Vegas,[63] and the Nevada Gaming Control Board filed a complaint for disciplinary action against the Hard Rock, alleging that the advertisements violated Nevada Gaming Commission regulations that require that gaming institutions advertise "in accordance with decency, dignity, good taste, honesty and inoffensiveness."[64] Whereas the public controversy focused on the sexual nature of the advertisements, the Gaming Control Board cited the ads because they intimated illegal or criminal activity, including bigamy and cheating at the gaming tables,[65] and because the Hard Rock admitted that it had not used its compliance committee to approve the ads. The complaint alleged:

> On or about November 17, 2003, the Hard Rock published an advertisement in the *Las Vegas Weekly* magazine . . . which depicted a female person and a male person, unclothed on their upper bodies in a pool atmosphere. The female is depicted lying on a gaming table with cards and chips around her and a card in her

58. In order to obtain a gaming license, applicants that trade publicly must create a compliance program which governs a variety of issues, including purchasing, hiring of key employees, etc. The compliance program is enforced by a compliance committee composed of insiders and independent persons who review whether the establishment has complied with strict rules and regulations. *See* Interview with Bobby Siller, *supra* note 53.

59. Hard Rock 2002 Settlement, *supra* note 57, at 2–3.

60. *See* Interview with Bobby Siller, *supra* note 53.

61. *Id.*

62. *Id.*

63. *See* Adrienne Packer, *Panel Hears Billboard Complaints*, LAS VEGAS REV.-J., Mar. 19, 2004, at B1; Adrienne Packer, *Racy Billboards to Be Discussed*, LAS VEGAS REV.-J., Mar. 11, 2004, at B5 (discussing Las Vegas residents' concern with the offensive billboards).

64. Nev. Gaming Comm'n Reg. 5.011(4) (2006).

65. *See* Interview with Bobby Siller, *supra* note 53.

mouth. The male is posed near her. The advertisement displays the following caption: "There's always a temptation to cheat."[66]

Count Two

On or about November 17, 2003, the Hard Rock published an advertisement in the *Las Vegas Weekly* magazine . . . which depicts a male person in an undershirt standing next to a truck and contained the following caption:

"AT THE HARD ROCK, WE BELIEVE IN YOUR MONDAY NIGHT RIGHTS: LARGE QUANTITIES OF PRESCRIPTION STIMULANTS

HAVING WIVES IN TWO STATES

THE BIG SCOREFOOTBALL (SIC) ON MONDAY NIGHTS FOOTBALL, BEER, GIRLS AND OVERSIZED PARKING TELL YOUR WIVES YOU ARE GOING, IF THEY ARE HOT BRING THEM ALONG."[67]

Count Three . . .

On or about November 17, 2003, the Hard Rock on its real property displayed a billboard . . . which depicts a female person from the knees down with her underwear falling to her ankles, standing next to a bed, with a cowboy hat on the floor next to her feet and containing the following caption:

"GET READY TO BUCK ALL NIGHT

2ND ANNUAL 'BUCK OFF' IN THE VIVA LAS VEGAS LOUNGE

9:30 PM NIGHTLY DURING THE NFR—DECEMBER 5TH–14TH."[68]

On or about the summer of 2003, the Hard Rock advertised in one or more billboards at various locations in Nevada . . . which depicts a female person between the mouth and the chest, naked. The model is holding a pair of dice that cover the nipple area only on her breasts. The caption on the billboard reads: "WE SELL USED DICE."[69]

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66. Count One continues to allege that the images and words in this advertisement imply that cheating at gaming and lounging on piles of chips is acceptable behavior, that this publication demonstrates that the Hard Rock failed to exercise discretion and sound judgment, and that the advertisement is "a failure by the Hard Rock to conduct advertising in accordance with decency, dignity, good taste, honesty and inoffensiveness as required by NGC Regulation 5.011(4)." Complaint ¶¶ 12–15.

67. Count Two continues to allege that the images and words of the advertisement imply that large quantities of prescription stimulants and having more than the legal number of wives is acceptable among the Hard Rock patrons, that this advertisement demonstrates that the Hard Rock failed to exercise discretion and sound judgment, and that the advertisement is "a failure by the Hard Rock to conduct advertising in accordance with decency, dignity, good taste, honesty and inoffensiveness as required by NGC Regulation 5.011(4)." *Id.* ¶¶ 17–20.

68. This ad appeared on a billboard in Las Vegas before the National Finals Rodeo in Las Vegas. *Id.* ¶ 23.

69. *See id.* ¶ 25. The complaint also alleged that the Hard Rock had violated other gaming commission rules and had settled a dispute for $100,000 in 2002. *Id.* ¶ 28. In the settlement, the complaint alleged, HR agreed to a mandatory review by the Compliance Office and the Compliance

The ads were prominently displayed on billboards in the hotel parking lot. The dice ad was also displayed behind the registration desk and the picture was embossed on the room keys.[70]

The Gaming Commission dismissed Counts I and II of the complaint and encouraged the Hard Rock to settle the third count with the Gaming Control Board. The Hard Rock and the Control Board ultimately settled the third count.[71]

By encouraging and approving the settlement, the Gaming Commission avoided a lawsuit that would have challenged the constitutionality of the Commission's regulations.[72] Because gaming is a highly regulated industry, there is a nonfrivolous argument that the Gaming Commission may constitutionally regulate the content of nonobscene Hard Rock advertisements.[73] Moreover, the employees I interviewed noted that the customers harassed employees by referring to the substance of the ads. Although some scholars argue that the courts' enforcement of sexual harassment law where the harassment is verbal violates the speaker's first amendment right to free speech,[74] other scholars have made compelling arguments that harassing gender or race-based speech should not be protected in the employment context.[75] The courts

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Committee of any "questionable elements" contained in advertising. *Id.* The 2003 advertisements were not submitted to this review, the 2004 complaint alleged. *Id.*

70. *See* Kim, *supra* note 28, at 25.

71. The Nevada Gaming Commission granted the motion to dismiss Counts I and II and denied the motion as to Count III, encouraging the Hard Rock to settle Count III with the Gaming Control Board. Transcript of Hearing at 10–12, Hard Rock Hotel, Inc., No. 04-01 (Nev. Gaming Comm'n Sept. 24, 2004) (on file with the author); *see also* Brief of Amicus Curiae, ACLU of Nevada, Hard Rock Hotel, Inc., No. 04-01 (Nev. Gaming Comm'n Aug. 23, 2004); Motion for Leave to File Brief of Amicus Curiae, ACLU of Nevada, Hard Rock Hotel, Inc., No. 04-01 (Nev. Gaming Comm'n Aug. 23, 2004); Steve Sebelius, *Billboard Makes Case History*, LAS VEGAS REV.-J., Sept. 28, 2004, at B9 (noting that Gaming Commissioners Marshall and Bernhard stated at the Gaming Commission hearing on Friday, September 24, 2004 that the ads were not illegal). On October 25, 2004, the Hard Rock and the Nevada Gaming Control Board entered into a stipulation settling the remaining third count. The stipulation was approved by the Nevada Gaming Commission on November 18, 2004. Hard Rock Hotel, Inc., No. 04-01 ¶¶ 2–3 (Nev. Gaming Comm'n Nov. 18, 2004) (stipulation for settlement and order).

In addition to paying $100,000 in fines, the Hard Rock agreed that in the future its management would be responsible for compliance with "best practices" in adopting advertisements by its Compliance Committee. *See id.* ¶ 3. Exhibit 1 attached to the stipulation includes a "Monthly Status Report" of the Hard Rock. Exhibit 2 attached to the stipulation for settlement and order includes the Compliance Committee's rules concerning promotions, contests, and advertising.

72. *See* Sebelius, *supra* note 71 (noting that Gary Peck, the executive director of the ACLU Nev., stated that the Nevada Gaming Commission should rewrite the regulations if it believes that the regulations prohibit only ads that are false or advocate illegal acts).

73. Brief of Amicus Curiae Supporting Respondents, ACLU of Nevada, *supra* note 71.

74. *See, e.g.*, Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1840 (1992).

75. *See* Jack Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1995) (applying "captive audience" doctrine to the workplace); Deborah Epstein, *Can a "Dumb Ass" Woman Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996).

have uniformly rejected the argument that the first amendment protects harassing speech in the workplace.[76]

Furthermore, even if a court were to agree that harassing workplace speech enjoys some First Amendment protection, in the Hard Rock's case, the interviews strongly suggest that the advertisements provided a catalyst for harassing speech *and conduct* by customers aimed directly at the individual women employees. Considered in the context of the Hard Rock's reputation and atmosphere, its history of violations, and the repeated complaints of the women employees about harassment, it appears that the Hard Rock knew or should have known that the ads would create a risk to the women employees of harassment by customers.[77] Indeed, the ads apparently escalated the harassment. One interviewee stated:

> While the sexual harassment was a constant at HRH, during the run of the ads, specific comments were made which linked the ads to the harassing statement. While the Rodeo Ads ran, the men shouted comments at passing women like "ride em cowgirl!" "buck this bronco," "how about a ride?"....
>
> The Dice Ad also had similar effect on the men. The craps game was almost immediately infected with comments like: "come blow on my dice," "I'd like to lick your dice" while the female craps dealers or other female players were present... The Dice Ad was also incorporated into the hotel room key.... I was propositioned at least two different times while the men prominently displayed their room keys... with the image of the partially nude woman....[78]

This employee told me that she voiced objections concerning the ads and the increased harassment to a number of her supervisors; she told me that the Hard Rock failed to prevent or correct the customer harassment that appeared to be directly linked to the ads.

C. Harm Suffered by Women Dealers

If we believe the interviews of the dealers,[79] the atmosphere at the Hard Rock adversely affected the women dealers. First, the rowdy atmosphere made it more difficult for the women dealers to maintain con-

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76. *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 530 (M.D. Fla. 1988) (holding that a workplace that was permeated with sexualized images created a hostile work environment).

77. Courts dealing with allegations of customer harassment of an employee hold the employer liable if it knew or should have known of the harassment. *See infra* Part III.A.3.

78. *See* Kim, *supra* note 28, at 25–26.

79. I have no reason to disbelieve them. They all appeared to be telling me the truth in the extended interviews. Their stories were consistent with one another. Moreover, they are not seeking to benefit economically from telling me this information. Only one of the interviewees has agreed to use her name because she is no longer a dealer. The others have asked that their names remain confidential.

trol over the games because the patrons considered them sex objects.[80] Controlling the game is a crucial aspect of job performance for a blackjack dealer.[81]

Second, the women dealers suffered a loss of dignity. They expressed the greatest outrage at comments and behavior by customers that signaled that the women were "for sale."[82] A reference to a woman's pubic hair and an expressed desire to see it raised anger and indignation in one dealer. The same woman found it humiliating and degrading when one of the patrons gave her a $100 chip to "to stand there and look pretty." As she stood there and he stared at her she felt belittled, but she also believed that she could not refuse the chip because the dealers share tips and a refusal would deprive coworkers of their tips. She told me in a sad tone, "He was very drunk. He was able to do it, so therefore he did it." This dealer's pain came from her recognition that she was to a certain extent, a commodity, "for sale."

Another dealer told me that male patrons make demeaning sexual or gender-based comments to her every day at work.[83] She ordinarily gets "quite a few" indecent proposals a night. "In this town," she noted, "they think everything is for sale."

Third, the dealers expressed anger because they believed that the Hard Rock placed its profit margins ahead of the women's well being. The women perceived that the casino breached their trust through crude advertising, by ignoring the injury caused by the customers' behavior, and by reinforcing stereotypes about women as unintelligent sexual objects. The pain was particularly acute when supervisors failed to understand or acknowledge the damage caused by the harassment. One dealer found the management's failure to discipline a patron who had threatened to rape her very painful. In fact, she told me that the management's view of her as a "nameless person" was even more painful than the threat itself.

This same woman was also outraged when a customer said that he knew that she wore polka dot underwear, intimating that they had a sexual relationship. Her manager's failure to understand her indignation made her doubly upset. When she tried to explain that the comment was degrading, her manager responded, "I thought you were tough. Why is this bothering you so much?" Her response was, "I am human too, you know."

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80. Kim, *supra* note 28, at 23.

81. *See id.*

82. This is an interesting example of the casino dealers' distancing themselves emotionally from sex. The greatest affront to their dignity is the suggestion that they are prostitutes. Interestingly, it appears that many of the customers confused them with prostitutes.

83. She often is called "bitch" and "cunt" in addition to receiving proposals for sex. She noted, "When it is a player you have to tolerate it. I don't let it affect me. Players can do whatever they want to do because they have money." Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

This dealer felt frustrated and helpless because management neither acknowledged the pain caused by the customers' behavior nor protected her from the behavior. Even though she stayed cool at work, she was affected by the atmosphere. As she left the Hard Rock to go home, she felt angry and resentful. Her anger spilled into her life outside of the Hard Rock. Many of these feelings persisted one and a half years after quitting her job as a dealer.

The dealers were particularly vulnerable to the harassment because of their impoverished backgrounds or status as single mothers.[84] One dealer, an émigré from Korea, worked as a small child for only $7.00 an hour before going to college, often having to share her salary with her father to pay the rent. There were times when she did not get enough to eat. Another arrived in Las Vegas with a husband out of work and a small child. She had no option but to take the job offered by the Hard Rock. Soon she and her husband separated, and she became a single mother who had to support her child. A third interviewee tells a similar story. A single mother, she needs to earn sufficient income to raise her daughter and send her to college.

These women have chosen to endure the conditions they describe in order to earn a comfortable income for themselves and their families. When I asked them how they cope with the daily harassment, they told me that they try to remain cool and concentrate on the job of dealing cards. One noted that she loses herself in the loud music, thinking of other things and pretending that she does not hear the insulting comments coming from the patrons. Another mentioned that she "disconnects." One of the dealers tolerates the clients by using sarcasm against them. If the client is a high roller, she admitted, "you put out your best stuff and take him down a notch."

One interviewee stated that it took her years to "get over the shock" of working in such an environment. All of the dealers agree that they do not go to the Strip on their time off. They leave the Hard Rock, take a deep breath, and move to the "reality" of their private lives. One described the job at Hard Rock as existing in a bubble. The bubble is like a (bad) fantasy that she suffers eight hours a day. When she leaves the bubble for the "real world," she gets off of the Strip, brushes it off of her shoulders, and tries to forget about it. When on vacation, a number of dealers told me, they do not even mention work.

84. I do not imply that all of the women dealers working at the Hard Rock are harmed by the harassment. The dealers interviewed told me that some of the women working there enjoyed the atmosphere—or at least they said they did. But the law is clear that the harassing environment does not have to harm all of the persons of a particular sex in order to be illegal under Title VII.

D. The Hard Rock "No Harassment Policy"

The Hard Rock has a "no harassment policy." The introduction states in part:

> No Hard Rock Hotel and Casino employee will be subjected to harassment. Therefore, any offensive physical, written or spoken conduct, including conduct of a sexual nature, is prohibited. It is a violation of this policy for any employee, supervisor, or manager, male or female, to engage in the acts or behavior categorized below.[85]

It also requests that the employee report offensive conduct and states:

> You may report offensive conduct or situation [sic] to your supervisor or manager. If your manager is the person who is responsible for the harassment, or if you have reported harassment to the manager and no action was taken, then please report such conduct or situations to your Vice President or Human Resources Director.[86]

The policy divides prohibited behavior into three categories: discrimination, harassment,[87] and sexual harassment.[88] The section on sexual harassment describes a "hostile work environment," and clarifies that

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85. Hard Rock Hotel and Casino, No Harassment Policy 1 (Mar. 15, 2006) [hereinafter No Harassment Policy] (produced to author by Valerie Smith, Vice President of Human Relations).

86. *Id.* at 1.

87. The section on harassment provides:

> Harassment, including sexual harassment, is prohibited by federal and state laws. The Policy prohibits harassment of any kind, and the office will take appropriate action swiftly to address any violations of this policy. This definition of harassment is: verbal or physical conduct designed to threaten, intimidate or coerce. Also, verbal taunting (including racial and ethnic slurs) which, in the employee's opinion, impairs his or her ability to perform his or her job.
>
> Examples of harassment are:
>
> (1) Verbal: Comments which are not flattering regarding a person's nationality, origin, race, color, religion, gender, sexual orientation, age, body disability, or appearance. Epithets, slurs, negative stereotyping.
>
> (2) Non-verbal: Distribution, display or discussion of any written or graphic material that ridicules, denigrates, insults, belittles, or shows hostility or aversion toward an individual, or group because of national origin, race, color, religion, age, gender, sexual orientation, pregnancy, appearance disability, marital or other protected status.

Id.

88. The section on sexual harassment repeats the EEOC definition of sexual harassment, providing:

> Examples of conduct that may constitute sexual harassment are:
>
> (1) Verbal: Sexual innuendos, suggestive comments, jokes of a sexual nature, sexual propositions, lewd remarks, threats. Requests for any type of sexual favor (this includes repeated, unwelcome requests for dates). Verbal abuse or "kidding" which is oriented towards a prohibitive form of harassment, including that which is sex oriented and considered unwelcome.
>
> (2) Non-verbal: The distribution, display, or discussion of any written or graphic material, including calendars, posters, and cartoons that are sexually suggestive, or shows hostility toward an individual or group because of sex; suggestive or insulting sounds; leering; staring; whistling; obscene gestures; content in letters and notes, facsimiles, e-mail, that is sexual in nature.
>
> (3) Physical: Unwelcome, unwanted physical contact, including but not limited to touching, tickling, pinching, patting, brushing up against, hugging, cornering, kissing, fondling, forced sexual intercourse or assault.
>
> Normal, courteous, mutually respectful, pleasant, non-coercive interactions between employees, including men and women, that are acceptable to and welcomed by both parties, are not considered to be harassment, including sexual harassment.

Id. at 2.

a hostile work environment can be created "by anyone in the work environment, whether it be supervisors, other employees, or customers."[89] This is the only mention of customers in the entire document. Besides the language quoted above from the introduction about reporting harassment, the only other language concerning reporting appears in the sexual harassment section. The policy provides:

> What you should do if you are a victim of sexual harassment:
>
> a) If you are the recipient of any unwelcome gesture or remark of a sexual nature, do not remain silent.
>
> b) Make it clear to the harasser that you find such conduct offensive and unwelcome.
>
> c) State clearly that you want the offensive conduct to stop at once.
>
> d) Consider going to the supervisor or manager of the person harassing you, the employer cannot solve the problem if he or she is not aware of it. You may also do so if you find it uncomfortable to confront the individual engaging in the offensive conduct.
>
> e) If the conduct does not stop after you speak with the harasser or after you have gone to the harasser's supervisor or manager, you should then notify your supervisor or manager.[90]

This policy clearly focuses on harassment by coworkers and supervisors. It mentions only in passing that customers can create a hostile work environment, but does not set up a clear reporting mechanism for harassment by customers. By entreating that the victim report harassment to the supervisor of the harasser, the remedies assume that the harasser is an employee. Although the Vice President of Human Resources stated that a victim of customer harassment should report harassment to her manager and then to security if nothing is done to resolve the situation,[91] this policy never mentions or explains to employees that they should report harassment by customers to security. Nor does it guide managers about how to deal with harassment by customers.

According to the Vice President of Human Resources, this policy is included in the orientation packet of all new employees. Moreover, all managers receive training within ninety days of beginning work at the Hard Rock and also attend annual training on harassment.[92] My interviewees did not remember receiving the sexual harassment policy, but

89. *See id.*
90. *Id.*
91. *See* Interview with Valerie Smith, *supra* note 17.
92. *See id.*

they did recall attending occasional sexual harassment training. All stated that they had no recollection of any of the training sessions dealing with harassment by customers. The Vice President of Human Resources stated that she receives many complaints from dealers about the behavior of other dealers. From this plethora of complaints she concluded that the dealers are not shy about complaining. Although she has heard about occasional customer bad behavior, she has received no complaints about customer harassment of dealers. Therefore, she concluded, the employees are not suffering from customer harassment. When asked about the sexy environment of the Hard Rock and the danger that it may prime men's behavior to act more aggressively toward the women employees, she explained that many women dealers are willing to put up with the customer behavior because these customers are the greatest tippers. She opined that the sexy advertisements and promotions exist throughout Las Vegas and are not unique to the Hard Rock.[93]

E. Masculinities at Work at the Hard Rock

Masculinities theorists explain that little boys separate from their mothers in order to affirm their masculinity.[94] As early as the age of three, boys begin to associate consistently with same-sex playmates.[95] "Difference from girls is an integral component in the construction of dominant masculinity[;] . . . masculinity is always constructed in relation to a dominant image of gender difference and ultimately defines itself as what femininity is not."[96] Men and boys join in collective competitions of masculinity in which they oppress women, exploit them sexually, and treat them as inferiors.[97] They practice masculinities to impress other members of their group and to enhance their status in the group by assuring their manhood.[98] Michael Kimmel characterizes this behavior as "homosocial" because men employ it to attain the approval of other men. This behavior "is both a consequence of sexism and one of its chief props."[99]

Joseph Pleck concludes that men participate in this collective competition because of fear of oppression by other men.[100] Pleck explains:

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93. *Id.*

94. *See* Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity*, *in* FEMINISM & MASCULINITIES 182, 185–86 (Peter F. Murphy ed., 2004).

95. *See* Michele Adams & Scott Coltrane, *Boys and Men in Families: The Domestic Production of Gender, Power, and Privilege*, *in* HANDBOOK OF STUDIES ON MEN & MASCULINITIES 230, 236 (Michael S. Kimmel et al. eds., 2005).

96. Jon Swain, *Masculinities in Education*, *in* HANDBOOK OF STUDIES ON MEN & MASCULINITIES, *supra* note 95, at 213, 223.

97. *See* Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, *in* FEMINISM & MASCULINITIES, *supra* note 94, at 57, 61–62.

98. *See* Adams & Coltrane, *supra* note 95, at 238.

99. *See* Kimmel, *supra* note 94, at 186.

100. *See* Pleck, *supra* note 97, at 64.

> [M]en's patriarchal competition with each other makes use of women as symbols of success, as mediators, as refuges, and as an underclass. In each of these roles, women are dominated by men in ways that derive directly from men's struggle with each other. Men need to deal with the sexual politics of their relationships with each other if they are to deal fully with the sexual politics of their relationships with women. Ultimately we have to understand that patriarchy has two halves which are intimately related to each other. Patriarchy is a dual system, a system in which men oppress women, and in which men oppress themselves and each other.[101]

The atmosphere at the Hard Rock is imbued with masculinities. If the interviewees' statements are accurate, the Hard Rock consciously constructs this environment by hiring attractive women and dressing them in tight clothing, and by aggressively promoting its image as the playground on which men can display their heterosexual fantasies. With the support and approval of the Hard Rock management, groups of men compete to prove their masculinity to one another, enacted through competition at the gaming tables, heavy drinking, and sexual harassment of women.

Masculinities theory explains the patrons' behavior. Calling a woman "cunt" and "bitch" and grabbing her crotch are violent reactions to a man's fear of his own lack of control, caused by blaming women for his failures.[102] A woman does not invite, consent to, or welcome this behavior merely by agreeing to work at the Hard Rock. At the Hard Rock, men enact masculinities to gain the approval of other men and to prove that they are sufficiently "masculine."[103] The masculinities include treating women working at the Hard Rock as objects of male sexual gratification, or debasing them as inferior or stupid.[104]

The woman blackjack dealer is particularly vulnerable to these masculinities. Because blackjack dealers are not permitted to leave their tables for any reason while they are dealing blackjack, they pose an especially tempting target to would-be harassers. Moreover, because the blackjack dealers share tips with one another, the women who put up with differential treatment by the male clientele are essentially subsidizing the male blackjack dealers. If they complain, the women fear for their jobs or fear that they will lose key placement at the tables. If they do not complain, they absorb the abusive behavior, a gendered type of abuse that their male counterparts do not experience.

By constructing this environment without instituting safeguards to protect its women employees, the Hard Rock tolerates and ratifies this

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101. *Id.*

102. *See generally* MICHAEL S. KIMMEL, *Consuming Manhood*, *in* THE HISTORY OF MEN: ESSAYS ON THE HISTORY OF AMERICAN AND BRITISH MASCULINITIES 42 (2005) (citations omitted).

103. *See* Kimmel, *supra* note 94, at 186–87.

104. This behavior is very similar to the behavior described in Kimmel, *supra* note 94, at 186–87 (asserting that men use women as currency to improve their ranking on the masculinity scale).

behavior toward Hard Rock employees. The key question is whether the law should hold the Hard Rock, and any other casino with a similar atmosphere, responsible for customer behavior that harms its women employees. Part III deals with this question.

III. LEGAL THEORIES AND CASINO CULTURE

A. Requirements of Title VII

1. A Brief History of Sexual Harassment as a Legal Claim

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment because of an individual's race, color, religion, sex, or national origin. The express language of Title VII does not mention harassment.[105] Nonetheless, the Equal Employment Opportunity Commission (EEOC) issued guidelines in 1980 for Title VII liability in sexual harassment cases.[106] The guidelines distinguished between harassment that is directly linked to an economic quid pro quo and harassment that alters the terms and conditions of employment because it creates an abusive environment based on a person's sex.[107] In either case, the guidelines stated that conduct constitutes actionable sexual harassment under Title VII if it has the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[108] After the guidelines were issued, lower courts uniformly held that a cause of action existed under Title VII for a hostile work environment based on sexual harassment.[109] More recently, courts have held that a cause of action exists under Title VII for a hostile work environment because of the victim's gender[110] or failure to conform to gender stereotypes.[111]

105. *See* 42 U.S.C. §§ 2000e–2000e-17 (2000).

106. 29 C.F.R. § 1604.11(a) (1985).

107. *Id.*

108. *Id.*

109. *See, e.g.*, Katz v. Dole, 709 F.2d 251, 254–55 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

110. Gender-based harassment, as opposed to sexual harassment, describes harassment that is not sexual in nature but that operates because of a person's biological sex or gender. "Biological sex," refers to the sex of a person based on genitals and/or genetic makeup. "Gender" refers to the sexual identity of an individual or the manifestation of that identity. *See* McGinley, *supra* note 1, at 369–78, 412–13. "Gender" may also include the sexual orientation of an individual. The courts, however, have not interpreted Title VII to apply to discrimination based on sexual orientation. *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc); Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000).

111. *See* McGinley, *supra* note 1, at 402; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 228 (1989) (concluding in a nonharassment sex discrimination case that discrimination "because of sex" includes discrimination based on sexual stereotyping).

2. *Elements of a Sexual Harassment Cause of Action*

A plaintiff proves a hostile work environment by demonstrating that she is subject to unwelcome conduct because of her sex or gender that is sufficiently severe or pervasive to alter the terms or conditions of her employment.

a. Unwelcomeness

In *Meritor Savings Bank, FSB v. Vinson*,[112] the U.S. Supreme Court rejected the defendant's argument that a woman who voluntarily engages in sexual behavior cannot recover for sexual harassment. The Court held that the standard is unwelcomeness, not involuntariness.[113] Under this standard, if a woman agrees to have sexual intercourse with her supervisor or coworker, but the sexual relationship is unwelcome, she may have a cause of action,[114] even though her acquiescence is voluntary.[115]

In the narrow factual context of *Meritor Savings Bank*, where a consensual sexual relationship exists between a supervisor and a coworker, requiring proof of unwelcomeness arguably serves the purpose of establishing that the plaintiff interpreted the behavior as harassing and submitted to it because she believed it was necessary to protect her job.[116]

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112. 477 U.S. 57 (1986).

113. *Id.* at 68–69 ("[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'").

114. *Id.* at 68.

115. *Meritor Savings Bank* also overturned the lower court's decision that a woman's "sexually provocative speech or dress" is irrelevant as a matter of law to the determination of whether she found the sexual advances unwelcome. *Id.* at 68–69. The Supreme Court ruled that the trier of fact must determine whether sexual harassment existed in "in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'" *Id.* at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)). Federal Rule of Evidence 412, which was amended to extend the "rape shield law" to civil cases, has partially overruled this portion of *Meritor*. FED. R. EVID. 412. Although Rule 412 is technically a rule of evidence, the rule informs the discovery process. *Id.* advisory committee's note; *see, e.g.*, A.W. v. I.B. Corp., 224 F.R.D. 20, 23 (D. Me. 2004) (noting the majority view is that Rule 412 informs decision making concerning discovery); Howard v. Historic Tours of Am., 177 F.R.D. 48, 53 (D.D.C. 1997) (refusing to order plaintiff to answer defendant's interrogatory requesting whether she had sexual relations with other employees relying on Rule 412); Barta v. City & County of Honolulu, 169 F.R.D. 132, 135 (D. Haw. 1996) (holding that evidence of behavior and relationships within the workplace is discoverable whereas evidence of relationships outside of the workplace is not). Rule 412 places the burden on the defendant to make the necessary showing that the materials relating to a plaintiff's behavior at work are relevant to its defense. *See* A.W. v. I.B. Corp., 224 F.R.D. at 23 ("Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery." (quoting FED. R. EVID. 412 advisory committee's notes to 1994 amendments)).

116. *See, e.g.*, THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 62–96 (2005); Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 735 (2002) (arguing that the unwelcomeness requirement is inappropriate in hostile work environment cases based on gender-based comments or behavior).

This fact pattern, however, represents a small minority of the cases in which sexual harassment is alleged.[117] Many of the reported hostile work environment cases entail treatment that resembles violence more than romance.[118] Defining the coworkers' behavior in these cases where sexuality is used as a method of engaging in violent behavior as "welcome" strains credulity.[119]

The harassment described by the Hard Rock dealers illustrates this concept. Yelling, grabbing genitals, and calling women gender-based epithets bears little relation to romantic advances. This behavior resembles violent, misogynist, even criminal, behavior used to affirm the masculinity of the actor in the eyes of other men. To conclude that the dealers "welcome" this behavior would reinforce the stereotypical view that women who work in a sexually charged environment must welcome rough, sexual, and gender-based offensive behavior.[120] This view relies on the gender stereotypes that absolve the harassers of responsibility for abusive behavior and the employer for its role in creating the conditions for the behavior without taking the necessary precautions to prevent it. Assuming that women who work in sexualized environments welcome violent misogynist behavior harms working women by inviting harassment and refusing to credit the women's explanations of harm.

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117. *See* BEINER, *supra* note 116, at 67.

118. *See, e.g.*, Hocevar v. Purdue Elec. Co., 223 F.3d 724, 736 (8th Cir. 2000) (upholding the lower court's grant of summary judgment to the defendant on a hostile work environment claim even though her supervisor engaged in hostile behavior toward her over a two-year period including distributing sexually explicit material at business meetings, making threats of violence toward women staff, and constantly referring to women as "bitches," "fucking bitches," and "fat bitches."); Reed v. Shepard, 939 F.2d 484, 491–92 (7th Cir. 1991) (concluding that severely violent behavior such as use of a cattle prod on the plaintiff was "welcome" as a matter of law).

119. A good example of this phenomenon is the Seventh Circuit's decision in *Reed*. In *Reed*, the plaintiff, a civilian jailer, testified that:

> [S]he was handcuffed to the drunk tank and sally port doors, . . . [and] subjected to suggestive remarks . . . . [C]onversations often centered around oral sex. . . . [S]he was physically hit and punched in the kidneys. . . . [H]er head was grabbed and forcefully placed in members [sic] laps, and . . . she was the subject of lewd jokes and remarks. . . . [S]he had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs, and . . . they frequently tickled her. She was placed in a laundry basket, handcuffed inside the elevator, handcuffed to the toilet and her face pushed into the water and maced.

Reed, 939 F.2d at 486. Although the plaintiff was subjected to extreme harassment by her coworkers, the Seventh Circuit concluded that the plaintiff had welcomed the behavior as a matter of law by using foul language at work. *Id.*; *see also* Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1561, 1564 (M.D. Fla. 1990) (concluding that plaintiff's use of crude language and sexual innuendo demonstrated that she welcomed egregious behavior, including an employee's placing of his penis in plaintiff's hand, asking her several times a week to "suck him," threatening to "bang her head into the ground," grabbing her in the breasts and the crotch, and shoving her into a file cabinet and holding a knife to her throat). *But see* Carr v. Gen. Motors Corp., 32 F.3d 1007, 1011 (7th Cir. 1994) (emphasizing the context in which the behavior occurred and the difference between the plaintiff's behavior and that of her coworkers, and noting that the plaintiff's use of foul language in the workplace did not demonstrate that she welcomed the men's offensive behavior); Swentek v. US Air, Inc., 830 F.2d 552, 556–57 (4th Cir. 1987) (concluding that plaintiff's past conduct or use of foul language in a consensual setting does not demonstrate that the particular conduct in the workplace was welcome).

120. For further explanation of this principle, *see* Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 97–100 (2006).

Moreover, even if the women employees participate in the environment by using crude language or flirting with the customers, their participation does not necessarily demonstrate that they welcome the harassment. In *Gender Myths v. Working Realities*, law professor Theresa Beiner explains that some courts have difficulty understanding women who respond to vulgar environments with their own vulgarity.[121] Beiner documents studies showing that a significant percent of women faced with a vulgar environment will respond by using vulgar language.[122] In these rough situations, some courts misinterpret the woman's "unladylike" behavior as welcoming coworkers' harassing behavior. As Beiner suggests, however, this interpretation relies on the stereotype of the decent woman who acts in a passive, ladylike fashion. If the woman does not conform to this stereotype, these courts conclude that the woman is "unharassable."[123]

Social science research suggests that a substantial number of women who work in highly sexualized environments attempt to conform to the environment by "playing along."[124] In the highly sexualized environment, "playing along" includes sexual banter and flirtation for some women.[125] But engaging in sexual banter or flirtation with customers does not demonstrate that the offensive behavior that customers exhibit at the Hard Rock is welcome.

b. Severe or Pervasive

A plaintiff proves a violation of Title VII by showing that the harassment is sufficiently severe or pervasive by objective[126] and subjective measures.[127] A woman who alleges sexual harassment must demonstrate that she subjectively found, and that the reasonable person under the circumstances would find, the harassment sufficiently severe or pervasive to

121. *See* BEINER, *supra* note 116, at 75–76, 95–96.

122. *Id.* at 84.

123. *Id.* at 95.

124. *Id.* at 85.

125. The dealers I interviewed told me that some of their coworkers respond to the environment by flirting with the customers. Interviews with blackjack dealers, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Mar. 2005).

126. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). There is a split among the circuits concerning whether the objective standard is the "reasonable woman" standard or the "reasonable person" standard. *See* EEOC v. Nat'l Educ. Ass'n, Alaska, 422 F.3d 840, 845–48 (9th Cir. 2005); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1173 (9th Cir. 2003); Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 436–37 n.3 (2d Cir. 1999) (refusing to adopt the "reasonable woman" standard, and noting that a sex-based standard would reinforce stereotypes about women); Ellison v. Brady, 924 F.2d 872, 878–79 (9th Cir. 1991) (using the "reasonable woman" standard); *see also* Gray v. Genlyte Group, Inc., 289 F.3d 128, 135 (1st Cir. 2002) (applying the "reasonable woman" standard in a case applying Massachusetts law); Brennan v. Metro. Opera Ass'n, 192 F.3d 310, 321 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part) (noting that the Second Circuit has used both the "reasonable person under the circumstances" and the "reasonable woman" standards, and concluding that the reasonable person standard runs the risk of reinforcing the stereotypical views that Title VII was designed to eliminate).

127. *Harris*, 510 U.S. at 21–22.

alter the terms and conditions of her employment. The fact finder considers the workplace environment in its totality, rather than individual acts of harassment.[128] The Hard Rock interviews suggest that the Hard Rock workplace includes: the occasional touching of Hard Rock employees' genitals and breasts by customers; customers' frequent, sexually explicit, and lewd comments directed at or referring to Hard Rock employees within earshot; lewd and/or sexually explicit comments by coworkers; Hard Rock advertisements and promotions that suggest that women are a commodity to be exploited by the customers; violent and threatening outbursts by customers directed at women dealers couched in sexual terms and the management's failure to correct them; the intersection of racially and sexually offensive comments directed at Asian women dealers; the mistreatment by Hard Rock supervisors of women dealers who refuse to conform to the sexual and/or submissive gender stereotypes; and the general hypersexualized environment at the Hard Rock.

i. Subjective Belief

The women I interviewed subjectively believe that they have worked in a hostile work environment that has altered the terms and conditions of employment. Although most courts accept a plaintiff's testimony of her subjective experience, the casino might attempt to use a plaintiff's behavior outside of work to challenge her claim that she subjectively experienced a severe or pervasive hostile work environment.[129] However, this challenge should fail because a plaintiff's sexual behavior outside of work should not be relevant to whether she subjectively experienced sexually aggressive behavior as altering the terms and conditions of her employment.[130] To require a plaintiff in a sexual harassment case to prove that she has no private sexual indiscretions in her background would reinforce all of the stereotypes of the "virtuous woman" and the "woman as temptress" and would destroy the effectiveness of the sex discrimination law.

128. *See id.* at 23; Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81–82 (1998); Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 193 (4th Cir. 2000); Williams v. Gen. Motors Corp., 187 F.3d 553, 562–63 (6th Cir. 1999).

129. This analysis does not imply that the women I interviewed have such backgrounds, but I raise the question as a theoretical one.

130. *See* Burns v. McGregor Elec. Indus., 989 F.2d 959, 963 (8th Cir. 1993) (holding that lower court erred as a matter of law when it concluded that the plaintiff was not subjectively offended by the harassing behavior at work because she had posed nude in a magazine on a motorcycle); *see also* Swentek v. US Air, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (holding that a plaintiff's use of foul language and sexual innuendo in a consensual setting does not bar her from bringing a sexual harassment claim for behavior occurring at work that is unwelcome); Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983) (plaintiff's consensual sexual activities in private do not constitute a waiver of legal protections against unwelcome sexual harassment).

ii. Reasonable Person (Woman)

Most would agree that the totality of the circumstances as described by my interviewees created a hostile work environment that would alter the terms and conditions of employment of a reasonable person working in a nonsexualized environment. The question arises, however, to what extent courts should consider the workplace context of a casino in determining whether the harassment is sufficiently severe or pervasive to alter the terms and conditions of employment from the standpoint of a reasonable woman.

In blue collar workplaces, a few courts and one commentator have concluded that the atmosphere of the workplace is relevant to the question of whether a reasonable person would consider the behavior sufficiently severe or pervasive to alter the terms and conditions of employment. In *Rabidue v. Osceola Refining Co.*,[131] the Sixth Circuit upheld the lower court's judgment that there was no sexual harassment because it was not sufficiently severe or pervasive from an objective standpoint.[132] The court, quoting the district court judge, concluded that the blue collar environment was relevant to this determination:

> [I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.[133]

However, the Sixth Circuit subsequently decided two hostile work environment cases that appear to undermine *Rabidue*. In *Williams v. General Motors Corp.*,[134] albeit with a strong dissent, the court reversed a lower court's grant of summary judgment to the defendant on the hostile work environment claim where, viewing the evidence in the light most favorable to the plaintiff, she had endured years of sexually suggestive comments, hostile comments regarding her gender, and sabotage of her workplace, among other behaviors.[135] The Sixth Circuit concluded that

131. 805 F.2d 611 (6th Cir. 1986).

132. *Id.* at 622–23.

133. *Id.* at 620–21 (quoting Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984)). In *Rabidue*, the plaintiff, the only woman in a salaried management position, and other women in the workplace were regularly subjected to posters and pinups displayed in common areas of nude or partially clad women. A division supervisor, with the knowledge of the management, regularly spewed obscenities, referring to women as "cunts," "whores," "pussy," and "tits." In addition, the plaintiff received differential treatment from the men in the same position.

134. 187 F.3d 553 (6th Cir. 1999), *reh'g en banc denied*, No. 97-3351, 1999 U.S. App. LEXIS 26482 (6th Cir. Sept. 30, 1999).

135. *Id.* at 559, 563–64.

context does not permit courts to endorse a tradition of hostility toward women in an industry.[136] Then, in *Jackson v. Quanex Corp*,[137] the Sixth Circuit refused to permit the employer to shield itself from liability because the racial epithets used occurred in a blue-collar workplace. Although some courts continue to apply a differential standard to blue-collar settings,[138] many other courts and commentators have criticized *Rabidue*'s conclusion that women working in blue-collar jobs have little recourse in suing for sexual harassment.[139]

In *Oncale v. Sundowner Offshore Services*,[140] decided after *Rabidue*, the Supreme Court advised that courts should consider context in determining whether actionable sexual harassment occurs.[141] Student commentator Amanda Helm Wright[142] relied on *Oncale* to argue that company defendants operating blue-collar workplaces should be able to defend against hostile work environment claims by presenting evidence of the environment in the workplace and the plaintiff's knowledge that the workplace is a rough, vulgar environment.[143]

In *Oncale*, the Court stated:

> We have emphasized . . . that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.*[144]

This passage endorses the consideration of social context in deciding whether behavior is sufficiently severe or pervasive to alter the terms or conditions of employment. In blue-collar workplaces, *Oncale* may encourage the courts and juries to recognize that the mores are rougher

136. *Id.* at 564.

137. 191 F.3d 647 (6th Cir. 1999).

138. *See, e.g.*, Smith v. Nw. Fin. Acceptance, Inc., 129 F.3d 1408, 1412–13 (10th Cir. 1997) (holding that context and environment should be evaluated and that, because environment was not unusually rough, supervisor's conduct was sufficiently severe to create hostile environment); Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537–38 (10th Cir. 1995) (concluding that the court should evaluate the plaintiff's claim in the context of a blue collar environment where crude language is commonly used); *see also* Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 440–42 (2002) (explaining the split in the circuits concerning whether to consider the context in the workplace in determining whether a hostile work environment exists).

139. *See, e.g.*, Smith v. Sheahan, 189 F.3d 529, 534–35 (7th Cir. 1999) (holding that an employee should not be required to tolerate a heightened standard of abuse for choosing to work in an intolerant or male-dominated setting); Rebecca Brannan, Note, *When the Pig is in the Barnyard, Not the Parlor: Should Courts Apply a "Coarseness Factor" in Analyzing Blue-Collar Hostile Work Environment Claims?*, 17 GA. ST. U. L. REV. 789 (2001).

140. 523 U.S. 75 (1998).

141. *Id.* at 83.

142. *See generally* Amanda Helm Wright, Note, *From the Factory to the Firm: Clarifying Standards for Blue-Collar and White-Collar Sexual Harassment Claims Under Title VII of the Civil Rights Act of 1964*, 2001 U. ILL. L. REV. 1085.

143. Wright advises that employers require women to sign waivers agreeing to assume the risk of any injury suffered as a result of the rough, vulgar workplace. *See id.* at 1103.

144. *Oncale*, 523 U.S. at 81 (citations omitted) (emphasis added).

than those in white collar offices. As both *Williams* and *Jackson* recognized, however, there is a difference between considering the social context of the workplace and immunizing entire industries from harassment claims because of their traditional hostility to women and minorities in the workplace.[145]

While there is no question that *Oncale* establishes that the context of the workplace is relevant to the issue of whether a hostile work environment exits, it appears that Wright misinterprets *Oncale*. Her proposal and many of the cases in the blue collar arena rest on class-based attitudes about women in blue collar jobs and unfounded assumptions concerning the women who sue, the range of behaviors that they allege, and the motivations of the alleged harassers.[146]

Wright's proposal appears to rely on two flawed assumptions. The first assumption is that the behavior in blue collar workplaces is not severe.[147] The second is that women who work in blue collar workplaces do not attempt to resolve their disputes at work, but instead file complaints in the courts in response to trivial conduct.[148]

Many behaviors, however, strongly suggest a motive to force women out of a previously all-male workplace and are much more severe than those Wright assumes to be present. Moreover, even when the harassment is very severe, social science research suggests that women generally devise a number of coping mechanisms, including ignoring the behavior, avoiding the harasser, threatening to report the harassment, making a joke of the harassment, and going along with it.[149] When these defensive strategies fail, women complain to management, and if management does not cure the problem, these women file charges with the EEOC or state agencies. Women (or gender-noncomforming men) who work in predominately male, blue collar environments suffer serious verbal and physical harassment, much of it criminal behavior, for a long pe-

145. The context in many blue collar jobs would also, in my view, require the fact finder to consider whether the women are outnumbered by the men in the particular jobs they perform or in the workplace in general. *See generally* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

146. I offer the same criticisms of Michael Frank, who endorses using social context to determine the defendant's motivations, whether the behavior is unwelcome, and whether it is sufficiently severe or pervasive. *See* Frank, *supra* note 138, at 498 (arguing that considering context leads to greater certainty in the law).

147. *See generally* Wright, *supra* note 142.

148. *Id.* at 1106.

149. *See* BEINER, *supra* note 116, at 82–84. Specifically in blue collar workplaces, Professor Beiner demonstrates that women's most common response is to ignore the harassment or to respond to it mildly. A smaller, but a substantial percentage of women engage in self-help. Over fourteen percent of women responded verbally, and 6.9% physically attacked the harasser in an attempt to stop the harassment. *See id.* at 84–86; *see also* Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1154–80 (2000) (discussing the reasons why women do not complain of sexual harassment at work).

riod of time before resorting to the courts in an attempt to resolve their differences.[150]

Although a court or jury may properly consider context in determining whether behavior is sufficiently severe or pervasive to alter the terms and conditions of employment, *Oncale* does not instruct courts to permit historically racist or sexist industries to immunize themselves against claims of racial or sexual harassment. To interpret Title VII in this way would undermine the purposes and policies of the statute to open all jobs to qualified men and women and would create no incentive to prevent or remedy harassment in these industries. Furthermore, courts should be extremely cautious in endorsing sexist behavior under the guise of the social context of the blue collar workplace because much of this behavior stems from misogyny and the practice of masculinities to assure the social rank of heterosexual men (over women and gender-nonconforming men) in the organization.[151]

Four conclusions properly follow from *Oncale's* recommendation that courts consider social context when deciding sexual harassment claims. First, considering "social context" would encourage courts to aggregate all harassing behavior in the workplace. Second, occasional or even more frequent off-color language and jokes may be more acceptable in certain workplaces than others, especially if they are not directed at women or gender-nonconforming men and if the language and jokes themselves do not tend to subordinate women.[152] Third, if the particular job the plaintiff holds or the business of the workplace requires language that is sexual or offensive in nature, the courts may conclude that the terms or conditions of employment have not been altered by use of that

150. *See, e.g.*, Torres v. Pisano, 116 F.3d 625, 629 (2d Cir. 1997) (noting that female employee endured verbal abuse for three years and superior referred her to counseling services to cope with the situation); Daniels v. Essex Group, Inc., 937 F.2d 1264, 1272 (7th Cir. 1991) (acknowledging that harassed employees exhibit a variety of coping methods, including avoiding going to work, enduring the harassment, or responding angrily); BEINER, *supra* note 116.

Women's stories support Beiner's data. *See* CLARA BINGHAM & LAURA LEEDY GANSLER, CLASS ACTION: THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW (2002) (describing severe sexual harassment in a taconite mine in Minnesota as the women miners integrated the plant). For example, Lois Jenson endured nine years of severe and pervasive harassment before she filed a charge with the Minnesota Department of Human Rights in 1984. Her harassment went well beyond vulgar and crude language. Rather, she suffered hostile comments, physical assaults, a break-in of her house by a coworker who grabbed her in her bed, a noose hanging at her worksite, and stalking by a supervisor. Coworkers experienced similar treatment including break-ins of their homes by male coworkers, fondling of their breasts and buttocks, being called "bitch," "cunt," and "whore," and a male coworker's ejaculating on a woman coworker's shirts. *Id.* at 46–48; *see also* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993) (holding for plaintiffs in a class action on claims of sexual harassment against a taconite mining facility).

151. *See generally* Pleck, *supra* note 97.

152. *See* Kirsten Dellinger & Christine L. Williams, *The Locker Room and the Dorm Room: Workplace Norms and the Boundaries of Sexual Harassment in Magazine Editing*, 49 SOC. PROBS. 242 (2002) (finding that in a desegregated editorial office, where women and men share power, the women and men broke the tension of editing a sex magazine by joking, but joking that went into personal issues was not acceptable).

language.[153] Finally, the study of context should include careful consideration of the power relationships and structures at work. Vicki Schultz has demonstrated that sex segregation of workers and jobs creates the necessary conditions for sexual and gender harassment to flourish "because numerical dominance encourages male job incumbents to associate their work with masculinity and to police their jobs by treating women and gender-nonconforming men as 'different' and out of place."[154] In turn, the harassment serves as a "tool of segregation," discouraging women from attempting to work in jobs that are historically male-dominated.[155]

Although Professor Schultz's argument applies to harassment by coworkers, it is not irrelevant in the context of the woman blackjack dealer. Until recently, men dominated the job of blackjack dealer,[156] and the job itself—competing over cards—is a traditionally male activity. A male patron who loses to a woman blackjack dealer may respond by sexually harassing her in order to affirm his own masculinity, which may be more damaged due to his loss to a woman in a competitive game than if he had lost to a man. Although the job of blackjack dealer is no longer segregated, the identity of the job remains masculine. By placing women in these jobs while emphasizing the role of women as sexual objects, the casino enhances the customer's discomfort and thereby encourages harassing behavior.

In a sexualized environment, therefore, the court should not permit an employer to benefit from a "social context" defense if the offensive language is accompanied by conduct, if it is pervasive in the workplace, if it tends to subjugate women and is not a term or condition of employment, or if the power structure of the job, combined with the sexualization of the workplace, encouraged the harassment.[157]

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153. Some would use the "social context" or the "workplace culture" to consider the motivations of the employees, whether the behavior is welcome, and the severity of the behavior. *See* Frank, *supra* note 138, at 488–90. This is an expansion of *Oncale*. In *Oncale*, the Court offered the use of the "social context" to determine whether the behavior was sufficiently severe or pervasive so as to alter the terms and conditions of employment. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998).

154. Schultz, *supra* note 145, at 2132.

155. *Id.*

156. *Id.* A male dealer complained that when he applied for his job, he was told that the Hard Rock wanted to hire female dealers because the clientele liked attractive women. For a number of years, the management "kicked all of the men (dealers) out of the high limit pit." Recently, he noted, the Hard Rock has moved more men into the high limit pit because the women complained about the clientele acting up. Removing women from the high limit pit will harm them economically because the tips are greater there. Interview with blackjack dealer, Hard Rock Hotel and Casino, in Las Vegas, Nev. (Feb. 22–23, 2005). The Hard Rock may not be the only casino in Las Vegas that is attempting to hire more women into visible jobs. *See* Brooks v. Hilton Casinos, Inc., 714 F. Supp. 1115 (D. Nev. 1989) (holding that defendant Hilton Casinos, Inc. had violated Title VII by firing thirty-seven former male dealers and floor men and replacing them with twenty-four women and fourteen men, a disproportionate number of women compared to the hiring pool).

157. For a discussion of how this proposal should adapt to work that requires more sexual content beyond that of a blackjack dealer, see McGinley, *supra* note 120, at 96–107.

Proper factors to consider as context in a casino may include a loud and sometimes boisterous clientele who may have had too much to drink and some expressions of frustration from customers, including the use of off-color language and flirtatious behavior. Nonetheless, the pervasive, hostile, gender-based behavior described by the Hard Rock dealers far exceeds these factors, and should be sufficient to support the conclusion that a casino worker's terms or conditions of employment have been altered.

c. Because of Sex

In *Oncale*, the Court held that Title VII creates a cause of action for sexual harassment where the harassers and the victim are of the same sex if the environment discriminates "because of sex."[158] Before and after *Oncale*, debate has arisen over what behavior constitutes behavior "because of sex." This debate occurs most frequently with same-sex harassment and attempts to draw the line between harassment that is because of one's sex or gender, which is clearly forbidden by Title VII, and harassment that occurs because of a victim's sexual orientation, which the courts hold is not prohibited by Title VII.[159]

Generally, courts conclude that harassment occurs because of the victim's sex where the harasser is a heterosexual man, the victim is a woman, and the means of harassing the victim include sexual comments or touching.[160] It appears, therefore, that the promotions and advertising of the Hard Rock, combined with the sexually explicit comments and behavior exhibited by the customers, would undoubtedly fulfill the requirement that the behavior occurs "because of sex."[161] Defendants, however, have begun to argue that behavior that has sexually explicit content and is directed at both men and women does not *necessarily* occur "because of sex."[162]

Professor Beiner explains that the cases arise in two ways. The first occurs when an "equal opportunity harasser" directs harassing behavior equally at both men and women.[163] In this situation, some courts conclude that because the conduct is directed indiscriminately at men and women, the harassment does not occur because of sex.[164] The second occurs in a predominately male workplace where generally crude behavior

158. 523 U.S. at 80.

159. For a more thorough discussion of this issue, see McGinley, *supra* note 1, at 400–17.

160. *Oncale*, 523 U.S. at 80.

161. *See, e.g.*, Bradshaw v. Golden Rd. Motor Inn, 885 F. Supp. 1370, 1380–81 (D. Nev. 1995) (stating that a female plaintiff who is subjected to gender-based insults, such as "fucking bitch" or "cunt," "would normally not lose on her hostile environment claim at the summary judgment stage," but requiring evidence that the plaintiff has heard the comments).

162. *See, e.g.*, Petrosino v. Bell Atl., 385 F.3d 210 (2d Cir. 2004); Ocheltree v. Scollon Prod., Inc., 335 F.3d 325 (4th Cir. 2003) (en banc).

163. BEINER, *supra* note 116, at 106–07.

164. *See* Holman v. Indiana, 211 F.3d 399, 401 (7th Cir. 2000).

prevails.[165] Under these circumstances, defendants argue that because men and women are subjected to the sexually explicit behavior and comments, the behavior must not occur because of sex.[166] Both of these types of harassment exist at the Hard Rock. First, the harassment by individual customers is often aimed both at men and women employees. Second, although the workplace at the Hard Rock is not necessarily predominately male, the Hard Rock caters to a heterosexual male clientele and encourages their patronage through its advertisements, promotions, and the dress requirements of the female employees. However, although much of the crude promotions, behavior, and comments occur throughout the Hard Rock and are not directed at the women specifically, there is much behavior that is directed only at the women, and the women employees suffer the behavior more than the men because it reinforces the view of women as sexual playthings.

A number of courts have properly rejected the equal employment opportunity harasser defense and have emphasized that the courts should consider objective differences in treatment of men and women as well as the subjectively different reactions women may have to similar treatment. In *Steiner v. Showboat Operating Co.*,[167] the court rejected the defendant's argument that because the plaintiff's supervisor yelled at both men and women his behavior was not directed at Steiner because of her sex.[168] The court noted that the supervisor's abusive treatment of men and women differed—his yelling at women was of a sexual or gender-specific nature, whereas the abuse of the men did not include gender-specific terminology.[169]

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165. *See* BEINER, *supra* note 116, at 106–07.

166. Vicki Schultz notes that women are harassed most frequently when they occupy jobs that are segregated. In jobs historically occupied by men, women suffer harassment because men associate their jobs with masculinity and police the jobs by harassing women and gender nonconforming men. The harassment occurs as a result of women's job segregation and continues to reinforce it. *See* Schultz, *supra* note 145, at 2132. This conclusion is consistent with masculinities theory. Men harass women to reaffirm themselves as powerful and masculine in the view of other men. *See, e.g.*, David L. Collinson & Jeff Hearn, *Men and Masculinities in Work, Organizations, and Management*, *in* HANDBOOK OF STUDIES ON MEN & MASCULINITIES, *supra* note 95, at 289; Thomas Dunk & David Bartol, *The Logic and Limitations of Male Working-Class Culture in a Resource Hinterland*, *in* SPACES OF MASCULINITIES 31, 38–39 (Bettina van Hoven & Kathrin Hörschelmann eds., 2005).

167. 25 F.3d 1459 (9th Cir. 1994).

168. Her supervisor called her offensive gender-based names such as "dumb fucking broad," "cunt," and "fucking cunt." *Id.* at 1461. He also reprimanded Steiner for "comping" a breakfast for two men who had played blackjack at her table, approached her in a threatening manner and yelled at her, "Why don't you go in the restaurant and suck their dicks while you are at it if you want to comp them so bad?" *Id.*

169. *Id.* at 1462. The court stated:

> The numerous depositions of Showboat employees reveal that Trenkle was indeed abusive to men, but that his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct. While Trenkle may have referred to men as "assholes," he referred to women as "dumb fucking broads" and "fucking cunts," and when angry at Steiner, suggested that she have sex with customers. And while his abuse of men in no way related to their gender, his abuse of female employees, especially Steiner, centered on the fact that they were females. It is one thing to call a woman "worthless," and another to call her a "worthless broad."

Furthermore, the court observed that the supervisor could not cure his abuse toward the women by using "sexual epithets equal in intensity and in an equally degrading manner against male employees"[170] because the standard for determining whether a hostile work environment exists is whether a reasonable woman would find the environment hostile.[171] The court continued:

> And, finally, although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that *both* men and women working at Showboat have viable claims against Trenkle for sexual harassment.[172]

In *EEOC v. National Education Ass'n, Alaska*,[173] the EEOC brought suit on behalf of three women who worked for the NEA, alleging that they were subjected to a hostile work environment. According to evidence in the record, the interim director created a general atmosphere of intimidation in the workplace, and women were afraid of him.[174] The trial court granted the defendant's motion for summary judgment, concluding that there was insufficient evidence that the treatment was "because of sex."[175] The Ninth Circuit overturned the lower court's grant of summary judgment, concluding that the lower court erred when it held that defendant's acts must be either of a sexual nature or motivated by discriminatory animus against women.[176] The Ninth Circuit stated that in a workplace where there was a majority of women, the evidence raised the inference that the interim director was "more comfortable when bullying women than when bullying men."[177]

In determining whether a hostile work environment is "because of sex," the Ninth Circuit looked to the differences between the objective treatment of men and women and the subjective effects of that treatment. The court noted that there was sufficient evidence in the record to conclude that the women were treated more harshly than men and that there was a marked difference in subjective effects on the women.[178] This case goes beyond *Steiner* because it concluded that evidence of differences in subjective effects of the behavior on men and women is relevant to the question of whether women and men were treated differently, "even where the conduct is not facially sex- or gender-specific."[179]

Id. at 1463–64 (citation omitted).

170. *Id.* at 1464.

171. *Id.*

172. *See id.* (noting also that racially derogatory language such as "UFO's—ugly fucking orientals," differs "fundamentally" from less specific terms like "jerk" and "asshole").

173. 422 F.3d 840 (9th Cir. 2005).

174. *Id.* at 843.

175. *Id.* at 844.

176. *Id.*

177. *Id.* at 845.

178. *Id.* at 845–46.

179. *Id.*

Besides the Ninth Circuit, other courts look at the perspective of the alleged victim and the social context in which the behavior occurs to determine whether the environment could affect women (or men) more harshly.[180] In *Petrosino v. Bell Atlantic*,[181] the Second Circuit overturned the lower court's grant of summary judgment to the defendant on a hostile work environment claim.[182] The court reasoned that even though both men and women were exposed to a hostile environment and even though the conduct ridiculed some men, it "also frequently touted the sexual exploits of others."[183] Moreover, the court stated that "the depiction of women in the offensive jokes and graphics was uniformly sexually demeaning and communicated the message that women were available for sexual exploitation by men."[184] The court concluded, "[s]uch workplace disparagement of women, repeated day after day over the course of several years without supervisory intervention stands as a serious impediment to any woman's efforts to deal professionally with her male colleagues."[185]

Even though my interviews of Hard Rock dealers intimate that both men and women are subject to abuse by high roller patrons, abuse of the women occurs on different, gender-based terms. In addition to the more generic yelling focused at the men, the dealers told me that patrons subject women dealers to comments about their bodies, their sex lives, and

180. Petrosino v. Bell Atl., 385 F.3d 210 (2d Cir. 2004); Ocheltree v. Scollon Prods., Inc., 335 F.3d 325 (4th Cir. 2003) (en banc); Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525 (M.D. Fla. 1988).

181. 385 F.3d 210 (2d Cir. 2004).

182. *Id.* at 226. The plaintiff submitted evidence that the workplace was permeated by offensive profanity and crude humor, including comments by male workers who insulted one another by bragging about imaginary sexual exploits of their coworkers' wives. *Id.* at 214 n.3. The plaintiff was also subject to sexually harassing behavior directed at her. Petrosino was physically attacked from behind in a parking lot by a coworker who groped and kissed her; other coworkers made frequent disparaging remarks about her "'ass,' her 'tits,' her menstrual cycle, her weight, and her eating habits, and at least one terminal-box drawing depicted her performing a sex act on a supervisor." *Id.* at 215. Her supervisor made hostile gender-based comments about her, referring to Petrosino as "a damn woman," and "telling her to calm her 'big tits down.'" *Id.* Another manager stated that women were "too simple, too sensitive, and too damn thin-skinned." *Id.* Petrosino was told to "'keep her mouth shut'" when she tried to complain about the environment. *Id.* at 216.

183. *Id.* at 222.

184. *Id.*

185. *Id.* *Petrosino* adopted the views expressed in the dissenting opinion in *Brennan v. Metro. Opera Ass'n, Inc.*, 192 F.3d 310 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part). *See Petrosino*, 385 F.3d at 223. In *Brennan*, Judge Newman opined that "commonality of exposure cannot be permitted to defeat all claims of gender discrimination," *Brennan*, 192 F.3d at 320, and explained that the determination of whether discrimination occurs through exposure to sexual or racially provocative displays "turns in large part on the perspective of a reasonable person or that of a reasonable member of the protected class." *Id.* Like Judge Newman in *Brennan*, the majority in *Petrosino* rejected the defendant's "argument that the common exposure of male and female workers to sexually offensive material necessarily precludes a woman from relying on such evidence to establish a hostile work environment based on sex." *Petrosino*, 385 F.3d at 223; *see also* Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 332 (4th Cir. 2003) (en banc) (holding that lower court erred in overturning a jury verdict for the plaintiff in a vulgar environment, which was equally crude to the men, because the jury could have inferred that the sexist and sex-laden talk was aimed at the plaintiff because of her sex, in order to make her uncomfortable and self-conscious as the only woman in the workplace).

their sexual interests; to propositions for sex; and to unwelcome touching. Men dealers do not experience this type of gender-based treatment.

Moreover, my interviews of women dealers at the Hard Rock suggest that like the women in *Petrosino*, women at the Hard Rock suffer more harshly from the hypersexualized environment than their male counterparts. There should be little debate that the hypersexualized environment that seeks to attract heterosexual men based on sexual innuendo and titillation may place a heavier burden on the women employees than on the men. Therefore, under *Petrosino*, the environment itself is hostile because of sex.[186] In response to that environment, the individual customers direct sexually harassing behavior at the women that differs from the generally harassing behavior that is at times directed at the men. Assuming the veracity of the information supplied by the interviewees, this behavior is sufficient to conclude that the behavior occurs "because of the women's sex" under *Steiner*, *EEOC v. National Education Ass'n, Alaska*, *Petrosino* and *Ocheltree*.[187]

Studies show that men who subject women to violent behavior are often supported and their behavior reinforced by male peers who legitimate the abuse of women.[188] "[M]ale physical and sexual violence against women is very much a function of men's deep-rooted concern with 'presenting an image of themselves as men within their social networks.'"[189] At the Hard Rock, women dealers describe a scenario in which customers subject women dealers to misogynist behavior in response to an atmosphere consciously created by the management that encourages competition among men.

3. *Employer Liability*

An employer may be liable for sexual harassment of an employee by the supervisors,[190] coworkers, or the customers of the employer.[191] If

186. *But see* Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 25 BERKELEY J. EMP. & LAB. L. 87, 103 (2004) (arguing that cases like *Petrosino* are wrongly decided because they do not require a motivation or intent to discriminate but rather focus on the effect of the environment).

187. For a brief discussion of *Ocheltree*, see *supra* note 185.

188. Walter S. DeKeseredy & Martin D. Schwartz, *Masculinities and Interpersonal Violence*, *in* HANDBOOK OF STUDIES ON MEN & MASCULINITIES, *supra* note 95, at 353, 357.

189. *Id.* at 357–58 (quoting R.L. Sinclair, Male Peer Support and Male-to-Female Dating Abuse Committed by Socially Displaced Male Youth: An Exploratory Study 20 (2002) (unpublished dissertation, Carleton Univ.)).

190. The standard for employer liability depends on the status of the harasser or harassers. If the harasser is a supervisor with immediate or successive authority over the employee, the employer will be vicariously liable for the supervisor's actions. Whether the employer may raise a defense to vicarious liability depends on whether the harasser takes a tangible employment action against the employee. If the harasser is a supervisor and takes a tangible employment action against the employee, the employer will be strictly and vicariously liable to the employee. Under these conditions, the employer may not assert a defense. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (holding that no affirmative defense is available when a supervisor's harassment culminates in a tangible employment action); Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998) (same); *see also* Pa.

the harasser is a coworker or customer, the courts employ a negligence standard, which holds the employer liable if the plaintiff proves that the employer knew or had reason to know of the harassment and did not take corrective measures.[192] When ascertaining liability for customer or other third-party harassment, courts are also required to consider the ability and opportunity the employer has to control the customer or third party.[193]

In *Powell v. Las Vegas Hilton Corp.*,[194] the federal district court, following the EEOC guidelines promulgated in 1980,[195] concluded that an employer may be liable for the sexual harassment of an employee by a

State Police v. Suders, 542 U.S. 129, 137 (2004) (affirming *Faragher* and *Ellerth* and holding that if the employee is constructively discharged, the employer may assert the affirmative defense unless the constructive discharge occurred as part of a supervisor's "official act"). If the same supervisor creates a hostile work environment but does not take a tangible employment action, the employer is vicariously liable to the harassed employee unless it proves the affirmative defense that: (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid the harm otherwise." *Ellerth*, 524 U.S. at 765.

191. *See infra* notes 192–99 and accompanying text.

192. *See Ellerth*, 524 U.S. at 759 (noting that negligence sets a minimum standard for employer liability under Title VII); *Faragher*, 524 U.S. at 789 (indicating that employer's knowledge of harassment combined with inaction might constitute "demonstrable negligence"); *see also* Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1067, 1072–75 (10th Cir. 1998) (applying the negligence standard to customer harassment, the court upheld a jury verdict for plaintiff waitress who was subject to a customer pulling her hair, grabbing her breast, and putting his mouth on her breast, because her supervisor had ordered her to wait on men despite notice that the same men on other occasions had told her "I would like to get into your pants" and pulled her hair); Crist v. Focus Homes, Inc., 122 F.3d 1107, 1108–09 (8th Cir. 1997) (reversing district court's grant of summary judgment where an employer operating a group home did not respond upon repeated notification that a developmentally disabled boy acted out sexual aggressions against staff).

193. In *Whitaker v. Carney*, the court noted that while an employer is liable for the harassing actions of a former employee that occur in the work environment, there is no liability for third party harassment that occurs outside of the workplace. 778 F.2d 216, 221 (5th Cir. 1985). Other courts disagree with the inside/outside distinction and would rely on the more appropriate test of determining whether the employer has the ability to control the actions of the harasser. *See, e.g.*, *Crist*, 122 F.3d at 1111–12 (rejecting lower court's conclusion that the defendant could not control the aggressive sexual actions of a sixteen-year-old mentally disabled individual living in its group home); Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 512–13 (E.D. Va. 1992) (holding that an employer could be liable for harassment of their female sales manager by an outside sales manager of an independent company, which occurred at an independent dealership, if it knew of the harassment and failed to take corrective action).

194. 841 F. Supp. 1024 (D. Nev. 1992).

195. The EEOC Guidelines state:

> An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate appropriate corrective action. In reviewing these cases the Commissioner will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

29 C.F.R. § 1604.11(e) (1985). While the guidelines are not controlling on the courts, the Supreme Court has stated that EEOC rulings and interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." General Elec. Corp. v. Gilbert, 429 U.S. 125, 141–42 (1976). In *Meritor Savings Bank v. Vinson*, the Supreme Court accepted the EEOC guidelines referring to hostile work environment claims of sexual harassment. 477 U.S. 57, 65 (1986).

casino patron.[196] This liability flows from the right afforded by Title VII to work in an environment that is "'free from discriminatory intimidation, ridicule, and insult.'"[197] A few years later, in *Folkerson v. Circus Circus Enterprises, Inc.*,[198] the Ninth Circuit agreed with *Powell* and set the standard for employer liability for customer harassment:

> [A]n employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.[199]

Given the hypersexualized atmosphere at the Hard Rock and the complaints to management concerning the behavior of the customers, a good argument exists that the Hard Rock knows or should know of the frequent customer harassment of its employees. This conclusion is reasonable in spite of the denial of the Vice President of Human Resources. Although the Vice President of Human Resources may not have received complaints personally, the Hard Rock's atmosphere, the history of Hard Rock violations, the emphasis of its "no harassment" policy on harassment by employees rather than customers, and the interviews of the dealers detailing severe harassment could lead a reasonable person to believe that harassment has occurred and that either the Hard Rock is aware of the harassment or that if unaware, the Hard Rock is not looking very hard to find harassment where it exists.

Moreover, it appears that the Hard Rock may have ratified and/or acquiesced in the harassment by failing to adopt corrective or remedial actions, creating a hypersexualized environment through advertising and promotions, failing to train its employees about the stated prohibition of customer harassment, and failing to enforce its own policies.

Protecting black jack dealers from harassment would be relatively easy. Dealers perform their jobs in public under the close supervision of their floor men and pit bosses. Additionally, security personnel and sur-

196. *Powell*, 841 F. Supp. at 1027–28.

197. *Id.* at 1028 (quoting *Meritor Savings Bank*, 477 U.S. at 65).

198. 107 F.3d 754, 755 (9th Cir. 1997). Before *Powell* and *Folkerson*, a few cases outside of the Ninth Circuit had held employers responsible for customer harassment in situations where the employer had required the employee to wear a sexually provocative outfit. *See, e.g.*, EEOC v. Newtown Inn Assoc., 647 F. Supp. 957, 958 (E.D. Va. 1986) (assuming that employer will be responsible for sexual harassment by the customers where employees, cocktail waitresses, are required to wear skimpy uniforms); EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981) (holding that the plaintiff established a cause of action under Title VII where the employer required the plaintiff, a lobby hostess in a building operated by the defendant, to wear an ill-fitting, skimpy "Bicentennial" outfit that subjected her to repeated harassment including lewd comments and sexual propositions).

199. *Folkerson*, 107 F.3d at 756. Although the language of *Folkerson* indicates it is expressing a holding, the court held that the employer was not liable as a matter of law because the plaintiff failed to prove that Circus Circus had acquiesced in or ratified the patron's sexual harassment. *Id.* at 756; *see also* Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 852 (1st Cir. 1998) (upholding a jury verdict under Puerto Rican law against the employer for customer harassment of its female employee where the employer ratified the behavior by stressing to the employee the importance of the customer and by instructing the employee to respond to the harasser "as a woman").

veillance cameras are ubiquitous in casinos and could be used to enforce strict antiharassment codes against out-of-control clientele. A casino employer that fails to use its security to protect its women employees from customer harassment exposes itself to the possibility of extensive liability for severe harm.

B. Possible Affirmative Defenses

1. Bona Fide Occupational Qualification (BFOQ)

Customer preferences do not create a defense to a cause of action brought under Title VII.[200] Permitting an employer to discriminate on the basis of customer preferences would significantly undermine the protections provided by the Civil Rights Act because it would create a marketing advantage for the employer who discriminates. If an employer could defend its discriminatory practices based on customer preferences, its competitors may be compelled to follow suit, eliminating a whole category of jobs for members of protected groups.

The BFOQ defense,[201] however, under certain limited conditions, permits employers to consider customer preferences in making employment decisions when those consumer preferences are closely linked to the ability of the employee to do her job and the essence of the business.[202] This defense permits an employer to base its employment decisions on a person's sex if sex is a "bona fide occupational qualification" for the job.[203] Because the BFOQ defense permits an employer to avoid Title VII's nondiscrimination principles by intentionally discriminating against persons because of their membership in a protected class, the Supreme Court has interpreted it to apply only in extremely narrow circumstances.[204]

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200. Bradley v. Pizzaco of Neb., 7 F.3d 795, 799 (8th Cir. 1993); Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 609 (9th Cir. 1982); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388–89 (5th Cir. 1971); EEOC v. Hi40 Corp., 953 F. Supp. 301, 305–06 (W.D. Mo. 1996).

201. The statute provides that it is not an unlawful employment practice for "an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (2000).

202. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2573 (1994). For example, courts have permitted the defense if the privacy interests of customers or patients are at stake. *See e.g.*, Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 134 (3d Cir. 1996) (holding that for privacy and therapeutic reasons, the management of a psychiatric hospital for abused children could assure a balance of men and women counselors on the night shift); Jennings v. N.Y. State Office of Mental Health, 786 F. Supp. 376, 387 (S.D.N.Y. 1992) (holding that patients' privacy interest justified defendant's BFOQ defense).

203. 42 U.S.C. § 2000e-2(e)(1).

204. *See, e.g.*, UAW v. Johnson Controls, Inc., 499 U.S. 187, 200–06 (1991) (rejecting use of BFOQ defense of defendant's fetal protection policy); Dothard v. Rawlinson, 433 U.S. 321, 333–37 (1977) (upholding a regulation excluding women prison guards from high security prison as a BFOQ, but emphasizing that the defense should be applied narrowly).

Lower courts have also repeatedly emphasized the importance of applying the defense sparingly.[205] In *Diaz v. Pan American World Airways, Inc.*,[206] for example, the defendant asserted a BFOQ defense for hiring exclusively women flight attendants, arguing that customers preferred women to men in that position.[207] The Fifth Circuit rejected the defense because the primary function of an airline is safe transportation; excluding men as flight attendants did not further this function.[208] Likewise, in *Wilson v. Southwest Airlines*,[209] Southwest Airlines offered a BFOQ defense for limiting flight attendant and ticket agent positions to women, in connection with an advertising campaign and a new sexy, young image.[210] The court rejected Southwest's BFOQ defense because men can perform the jobs of flight attendant and ticket agent, the sex appeal portion of the job was tangential to the essential duties of a flight attendant, and the company could not prove that it would go out of business if it hired men into those positions.[211] The court stated that the BFOQ defense is not applicable if sex is used to promote a business that is unrelated to sex: "[S]ex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool, or to better insure profitability."[212]

In *UAW v. Johnson Controls*,[213] the Supreme Court held that a fetal protection policy that screened women of child bearing age from jobs that exposed women and their potential fetuses to high levels of lead did not constitute a BFOQ.[214] *Johnson Controls* established two requirements for application of the BFOQ defense: first, the sex or sex-based characteristic must be objectively and verifiably necessary to the employee's performance of job tasks and responsibilities; and second, the sex or sex-based job qualification must relate to the "essence" or the "central mission" of the employer's business.[215]

Based on *Johnson Controls*, a business whose "essence" is selling sex could argue that hiring a woman into a specific job that requires female sex or sex-based characteristics is a BFOQ. Some scholars conclude that a legitimate business that operates a "gentleman's club" may employ the BFOQ defense when challenged for hiring exclusively women as exotic dancers if the essence of its business is to provide enter-

205. *See, e.g.*, Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983) (holding that establishing the defense presents an employer with a "heavy burden").
206. 442 F.2d 385 (5th Cir. 1971).
207. *Id.* at 386.
208. *Id.* at 388.
209. 517 F. Supp. 292 (N.D. Tex. 1981).
210. *Id.* at 293.
211. *Id.* at 302.
212. *Id.* at 303.
213. UAW v. Johnson Controls, Inc., 499 U.S. 187 (1999).
214. *Id.* at 188–89.
215. *Id.* at 203.

tainment to heterosexual men.[216] The BFOQ defense may also potentially protect employers in gentlemen's clubs who specify the age and physical characteristics of the women employees they hire.[217]

Although the BFOQ defense may permit owners to define their own businesses in accordance with customer expectations, there are exacting limitations on the rights of employers created by the BFOQ.[218] For example, although the BFOQ defense arguably permits a gentleman's club to hire only women strippers, it does not license the gentlemen's club to refuse to hire men in all positions in the club, including those that are not related to delivery of sexual entertainment to the heterosexual male clientele. Furthermore, the BFOQ defense does not apply in cases where sex is related to the concept of the business, but not the only product or service the business sells.[219]

Under *Johnson Controls, Diaz, Southwest Airlines, and Price Waterhouse v. Hopkins*,[220] it would appear that a gaming or food service business may not avail itself of the BFOQ defense if it employs women (or women with certain characteristics) exclusively in certain jobs in order to enhance its marketing strategy or create a niche for its service.[221] Dean Katherine Bartlett makes this argument forcefully with reference to the lawsuits against Hooters,[222] a restaurant chain that hires only female wait staff who wear sexually provocative clothing:

> Hooters should be required to show that the sex distinctions at issue are so essential to its business that without them it could no longer provide the primary product or service it intends, lawfully, to provide. Following *Diaz* and *Wilson*, it should not be enough that consumers at Hooters enjoy—and even demonstrate through customer surveys that they enjoy—having the option of buying food in an environment in which sexual excitement is also provided. What

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216. *See* Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 157–58 (2004). This position is not unassailable. If sexual harassment results from segregation in the workforce as Vicki Schultz argues, *see* Schultz, *supra* note 145, at 2087, a good argument can be made that employers should not be privileged to hire only women to perform in sex clubs. If the balance of women and men performing in the clubs is equal, the attitudes toward the women and harassment may be substantially alleviated.

217. *See* Bartlett, *supra* note 202, at 2576–77.

218. Courts typically permit more leeway in use of the BFOQ defense in jobs where the customers have privacy interests. *See* Yuracko, *supra* note 216, at 157 n.25.

219. *See id.* at 158 (describing the sex-plus cases where the BFOQ defense has failed).

220. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that it is sex discrimination to fail to promote to partnership a woman who did not conform to the stereotypes of how a woman should act or dress).

221. *See* Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257 (2007).

222. Hooters is a restaurant chain that advertises the sex appeal of its waitresses who dress in tight midriff shirts and shorts. Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163, 191 n.134 (1997). The shirts, which are worn very tight, exhibit two large eyes of an owl over the breasts. "Hooter" is also a slang term for breast. *See* Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Work Environment Claim Brought by a Nude Dancer?*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 295 (1998).

> *Wilson* establishes is that the sexual subordination of women cannot be used simply to gain competitive advantage. A business must show that its primary purpose is to provide sexual stimulation rather than food, drink, or some other service for which sex is not an essential component. This it has a perfect right to do, although to defend its right to discriminate on the basis of sex, a business will not be able to hide behind the legitimacy of ordinary business purposes the public deems more "respectable"—flying passengers, serving food, and so on. Once it attempts to defend its business in nonsexual terms, the BFOQ exception is no longer available to protect sex-specific requirements. The rule of thumb at the end of the day is simple: sex bars may subordinate women, but airlines and restaurants may not.[223]

In *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*,[224] I examined the question of whether a casino that hires exclusively women cocktail servers and dresses them in sexy attire must defend a Title VII case by proving that being a sexy woman is a BFOQ for the job. In *Jespersen v. Harrah's Operating Co.*,[225] Harrah's Casino fired a woman bartender because she refused to wear makeup. Sitting *en banc*, the Ninth Circuit upheld the dress and appearance code because it did not impose an unequal burden on women and men bartenders. The court stated, however, that a plaintiff may attack a dress and grooming code under *Price Waterhouse v. Hopkins*[226] if the code intentionally stereotypes women because of their sex and the stereotyping objectively interferes with the woman's ability to perform the job.[227]

Noting that the uniforms worn by women cocktail servers intentionally stereotype them because of their sex, and the skimpy uniforms often cause problems for the waitresses, I concluded that after *Jespersen*, a casino could not impose sexy dress codes exclusively on women cocktail servers unless it proves that being a sexy woman is a BFOQ for the job.[228] Moreover, after examining the potential arguments that the casino would interpose in favor of a BFOQ defense, I concluded that being a woman is not a BFOQ for the job, and that both men and women should be hired for cocktail server positions.[229] Because men can perform the tasks and responsibilities of the job, it would be very difficult for the casino to prevail on the argument that being a sexy woman is objectively and verifiably necessary to the performance of the job as cocktail server. I noted

223. Bartlett, *supra* note 202, at 2578–79. Law Professor David Cruz argues that the BFOQ defense should not apply at all to the terms and conditions of employment. According to the statutory text, he argues, the defense applies only to the hiring and firing of employees. *See* David B. Cruz, *Making Up Women: Casinos, Cosmetics and Title VII*, 5 NEV. L.J. 240, 244 (2004).

224. *See* McGinley, *supra* note 221.

225. 444 F.3d 1109 (9th Cir. 2006) (en banc).

226. 490 U.S. 228 (1989) (plurality opinion).

227. *Jespersen*, 444 F.3d at 1111–12.

228. *See* McGinley, *supra* note 221, at 279.

229. *Id.* at 271.

that the best policy reason for not expanding the use of the BFOQ defense to cocktail server positions is that job segregation leads to job stratification, lower salaries, and sexual harassment of women.[230]

Finally, I argued that *Jespersen* should permit casinos that legitimately sell entertainment to hire cocktail servers and other similar employers whose jobs include an aspect of performance to require that both men and women wear sexually provocative uniforms to work.[231]

The case of sex industry jobs occupied exclusively by women or men may present a different issue. Even though appearance requirements and dress codes are terms and conditions of employment, the BFOQ defense may potentially protect a sex industry employer who imposes appearance and dress codes that are necessary to the job performance and relate to the essence of the business.[232]

Even though the BFOQ defense may apply to appearance and dress codes in the sex industry, policy considerations should defeat the use of the BFOQ defense to sexual harassment claims in sexualized environments. Permitting an employer to apply the BFOQ defense to claims of sexual harassment would create an incentive for employers operating highly sexualized businesses to abandon the dictates of Title VII by conditioning employment of women on the ability of applicants to withstand substantial sexual harassment. This defense would create a strong disincentive to casino employers to control aggressive sexual harassment practiced against women dealers. Because men dealers do not suffer such aggressive sexually harassing treatment, the imposition of a BFOQ defense would create an even greater divide between the terms and conditions of employment of women and men doing the same job at casinos in highly sexualized environments. Moreover, permitting such a defense would also encourage employers who hire women dealers to treat preferentially those women who tolerate sexual harassing behavior at work. In a casino such as the Hard Rock, the employer could legally transfer women dealers who do not tolerate sexual harassment well to work in areas of the casino that do not cater to the "high rollers," while women who suffer (tolerate) sexual harassment would work on the high roller tables, earning significantly more in tips.[233]

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230. *Id.* at 274; *see* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2066, 2140 (2003) (demonstrating that harassment occurs frequently in sex segregated jobs).

231. *See* McGinley, *supra* note 221, at 275.

232. I make no attempt to answer this question in this article, but there is a good argument that if employers wish to exploit sexuality in jobs that sell sex, the employers should exploit men and women equally. *See* Vicki Schultz, *Sex and Work*, 18 YALE J.L. & FEMINISM 223, 229 (2006) (arguing that if employers in the sex industry exploit sex, they should be required to hire both men and women).

233. This appears to be the current policy of the Hard Rock. The Vice President of Human Resources told me that there are always women dealers who are willing to put up with the harassment because the harassers are the best tippers. Thus, in the cases of bad but not very bad customer behavior, instead of banning the harassers from the casino or requiring that they change their behavior, the Hard Rock will move the dealer or the harasser so that he has a different dealer who is willing to deal to him. *See* Interview with Valerie Smith, *supra* note 17.

Finally, the application of a BFOQ defense to sexual harassment, hostile work environment cases in sexualized work environments might conceivably permit employers to require women employees to waive their rights to sue the employer for sexual harassment. Such a result would make women dealers and cocktail servers targets for aggressive sexual harassment.

2. *Assumption of Risk/Waiver*

Although the courts have never accepted assumption of the risk as a defense to sexual harassment claims brought under Title VII, at least two student commentators have argued that women working in a sexualized environment assume the risk of sexual harassment.[234] In *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, Kelly Ann Cahill argues that employers should have an assumption of risk defense in a customer harassment suit if the plaintiff knowingly and voluntarily sells her sex appeal as part of her job.[235] Cahill argues that women will acquire equal status to men if they avoid the status of "victim" and shoulder responsibility for their choices.[236] She claims that "Hooters girls" who freely choose to gain economic benefit from their sexuality[237] have assumed the risk of customer harassment and, therefore, should not have a cause of action against their employer for the customers' behavior. Amanda Helm Wright makes a similar argument. She proposes that women working in rough, blue collar workplaces should sign waivers of liability to protect the employer from lawsuits based on coworker harassment.[238]

If the assumption of risk defense applies to waitresses at Hooters, it might also be asserted against women dealers and cocktail servers who work at the Hard Rock. In essence, the casino would argue that given the open and obvious danger of sexual harassment created by the Hard Rock dress codes, environment, advertisements, and promotions, by agreeing to work there, women have assumed the risk of any customer harassment that takes place.[239]

As used in this context, however, the assumption of risk defense is based on the masculinist notion that women are commodities to be

234. Kelly Ann Cahill, *Hooters: Should There Be An Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107 (1995); Wright, *supra* Part III.A.2.b.(2) and notes (discussing Wright, *supra* note 142).

235. Cahill, *supra* note 234, at 1139 n.164.

236. Cahill relies on work by Ann Coughlin. *See generally, e.g.*, Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994).

237. Cahill, *supra* note 234, at 1132.

238. *See supra* notes 142–50 and accompanying text. For more discussion of the public reaction to law suits brought against Hooters for sex discrimination, see McGinley, *supra* note 120, at 101 n.217.

239. While Cahill might conclude that dealers at the Hard Rock do not work in jobs in which sex appeal plays a substantial role and therefore the defense does not apply, others would likely extend the argument to all women working at the Hard Rock.

grabbed, prodded, harassed, and purchased. Even though harassment may occur too frequently in sexualized workplaces, women who work in these establishments are not responsible for the patrons' boorish behavior. Additionally, the defense ignores the economic realities of women who are relatively uneducated and the systemic challenges they face. My research demonstrates that women dealers at the Hard Rock, for example, choose between making a living income by working in sexualized environments and making much less in a nonsexualized environment. Requiring women to accept sexual harassment as a corollary of this "choice" reinforces the harm of sex discrimination that creates the inequities in the first instance. It permits the exploitation of women for others' benefit.[240] Finally, the defense ignores the structural conditions that create harassment. The employer's responsibility derives not only from awareness, but also from an active participation in the creation of the image of the business. This act makes the employer who ignores customer harassment an accomplice to the harassment.

In the highly sexualized work environment, employers should provide more protection to their women employees because employers make a profit from commodifying women's sexuality.[241] They promote their businesses through sexual advertising and encourage heterosexual men to partake in a male fantasy. As a result, these employers are, or should be, aware of the possibility that sexual harassment by customers will occur. Rather than place the responsibility on individual women employees to control male customers' sexually aggressive behavior, the law should hold responsible the employer who creates and profits from the environment and then turns its back on its employees.

The law should treat the employer's creation of the sexualized environment as constructive knowledge that harassment by customers is likely to occur. This knowledge creates a duty to take extra efforts to prevent sexual harassment. If despite these efforts harassing behavior occurs, the behavior should trigger the employer's responsibility to correct the problem immediately. If the employer does not make substantial preventive efforts to discourage sexual harassment, or if once harassment occurs the employer does not effectively stop the harassment, the employer should be held liable.

This interpretation of Title VII furthers its dual purposes of preventing discrimination and compensating for harms suffered from discrimination, without placing undue burden on the employer. By creating the sexy image of the business, the employer participates in encouraging the harassment and is on notice that harassment may occur. The em-

240. Alan Wertheimer concludes that exploitation does not require a defect in consent. *See* ALAN WERTHEIMER, EXPLOITATION 247–53 (1996) (defining exploitation as a transaction whose substance is unfair to one party).

241. Liz Benston, *Gaming Executives Top List of Highest Paid in Las Vegas*, LAS VEGAS SUN, June 3, 2005 (noting that gaming executives make extraordinary sums from stock options).

ployer, rather than the individual employee, is in the better position to prevent harm by communicating its nonharassment policy to customers, by instructing its security guards and floor managers to act vigilantly to prevent harassment, and by acting when harassment occurs. Moreover, if the law applies evenly to all highly sexualized environments, business owners in the industry will not suffer a business loss. Finally, holding the employer liable will compensate victims for their harms and will permit women to hold good jobs in casinos on an equal par with their male counterparts.

IV. CONCLUSION: PROTECTING VULNERABLE WOMEN WORKERS

The Hard Rock case study demonstrates that the casino creates a highly sexualized environment that encourages customer harassment of women card dealers. In determining whether customer behavior alters the terms and conditions of employment of the women dealers, courts should consider the context of the highly sexualized environment. Behavior that may be unacceptable in a white collar workplace would not necessarily constitute a hostile work environment at the Hard Rock. But when the behavior becomes seriously abusive, the law should hold the casino or other sexualized workplace responsible for its role in creating a sexualized environment and failing to prevent or correct the harassment. Title VII guarantees women equal job opportunities and equal treatment on the job. It does not exempt highly sexualized workplaces from its requirements. Such an exemption would seriously limit the opportunities available to women workers and would pose a serious threat to the goals of Title VII.