

A CLASS ACT: FORCES OF INCREASED AWARENESS, EXPANDED REMEDIES, AND PROCEDURAL STRATEGY CONVERGE TO COMBAT HOSTILE WORKPLACE ENVIRONMENTS

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INTRODUCTION

A “triple-play” of judicial rulings, legislative actions and societal changes in the fall of 1991, whether plan, coincidence or legal serendipity, set the stage for new developments and strategies in sexual harassment law. A growing awareness of and sensitivity to sexual harassment in the workplace was fueled by the fiery indignation of millions of women—and men—throughout the country who viewed the Clarence Thomas confirmation hearings, confirmed by the proliferation of claims against prominent politicians and personalities,¹ and invigorated by an awakening in and among women² of long suppressed or long ignored injustices³ in the form of manipulative sexual attention in the workplace.

Against that backdrop, or perhaps because of it, came the opportune passage of the Civil Rights Act of 1991⁴ which allows those harmed by sexual

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1. For example, the Senate Ethics Committee began a preliminary inquiry into sexual harassment allegations against U.S. Senator Robert Packwood of Oregon. The Committee had been under heavy pressure from women’s groups and congressional leaders to investigate allegations from 10 former female staff members who accused Packwood of uninvited, unwanted sexual advances. Larry Margasak, *Packwood Inquiry Starts*, INDIANAPOLIS STAR, Dec. 2, 1992 at A-2. In the year following the initial allegations, coverage of and pressure on Packwood intensified. The number of accusers increased to two dozen, and even members of Packwood’s own party called on him to resign. *Kassebaum Calls on Packwood to Resign*, LOS ANGELES TIMES, Dec. 19, 1993 at A-22, col. 1. Reactions to the Navy Tailhook scandal, where at least 26 women were manhandled by a group of Navy Aviators, included the resignation of the Secretary of the Navy and the reassignment of an admiral who ignored his aide’s complaints. *Suffering in Silence No More, Women Fight Back on Sexual Harrassment*, N.Y. TIMES NATIONAL, July 14, 1992, C-17.

2. Reacting to Anita Hill’s speech at a conference “Women Tell the Truth: Parody, Power and Sexual Harassment” at Hunter College in New York, women said “she absolutely inspired me to think about my own life,” that it is “an issue that people have a lot of feelings about . . . a lot of us have experienced it. And Anita Hill gave us a voice.” *Weekend Edition: Sexual Harassment Conference at Hunter College* (National Public Radio broadcast Apr. 26, 1992) (available in LEXIS, NEXIS library, NPR file).

3. For example, harassment dating back four centuries has been documented, as have incidents of working women being harassed in Massachusetts colonial mills. *Sex, Power and the Workplace* (PBS broadcast Jan. 15, 1993) [hereinafter *Sex, Power and the Workplace*].

4. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) was approved

harassment as a form of sex discrimination to recover compensatory and punitive damages.⁵ Although a hostile, sexually harassing workplace has been recognized as a form of employment discrimination for more than fifteen years,⁶ relief under the Civil Rights Act of 1964 was limited to injunction and restitution for economic injuries such as loss of promotion or pay.⁷ The allowance of compensatory and punitive damages by the Civil Rights Act of 1991 is likely to "up the ante" on both sides: potential claimants now have far greater incentive to bring suit,⁸ and employers have far more to lose, legally and financially.⁹

The timing of such a potentially powerful remedy, coming as it did on the heels of a nationally, even internationally¹⁰ raised consciousness with respect to the prevalence and power of sexual harassment, forms a new wrinkle in this already disheveled area of the law. While there has always existed a moral imperative to seek recompense for harassment wrongs, now there is a clear, practical remedy, one that might prove motivating enough to balance the expense, energy, and risk of humiliation required from a woman brave enough to bring such a suit.

by United States House of Representatives on Nov. 7, 1991 and the United States Senate on Oct. 25, 1991, signed by President George Bush on Nov. 21, 1991 [hereinafter Civil Rights Act of 1991].

5. Civil Rights Act of 1991, § 102 (S 1745), Damages in Cases of Intentional Discrimination, which amends § 1977 (42 U.S.C. 1981) by adding a new § 1977A.

6. *Williams v. Saxbe*, 1976 WL 605 (D.D.C. 1976) was the first case to give authority to the claim that sexual harassment violates Title VII. The Supreme Court ruled in *Meritor Savings Bank FSB v. Vinson* that hostile environments are a violation of Title VII if "sufficiently severe or pervasive." 477 U.S. 57, 67 (1986).

7. According to the Civil Rights Act of 1964, 706(g), 42 USC § 2000e-5(g), prevailing plaintiffs were entitled to only back pay that resulted from termination and equitable relief in terms of reinstatement or front pay. No damages were allowed for emotional distress, humiliation, and psychological damages, and no punitive damages were provided to deter future violations. CHI. DAILY L. BULL., Oct. 31, 1991, p. 3, col. 3.

8. Enhancement of damages will provide "necessary incentive for women to come forward . . . and for employers to take it seriously." Susan Deller Rose in *Thomas Hearings Illustrate Problems Inherent in Resolving Harassment Cases*, 29 GOV'T. EMPL. REL. REP. (BNA), at 1464 (Nov. 11, 1991) [hereinafter *Thomas Hearings*].

9. According to Vincent J. Apruzzese, then-chairman elect of Section on Labor and Employment Law of the American Bar Association, a "garden variety" sexual harassment case "can easily cost \$100,000 to defend." *Alternative Dispute Resolution Program May Be Adopted by EEOC on Trial Basis*, 21 DAILY LAB. REP. A-15 (Jan. 3, 1992) [hereinafter *Alternative Dispute Resolution*].

10. A report of the International Labor Organization found that sexual harassment affects women throughout the industrialized world. The study found that 6-8% of working woman were forced to change jobs due to harassment, and 15-30% had experienced serious sexual harassment problems. From 21% to 74% of women in Austria, Czechoslovakia, Denmark, Germany, France, Spain, and Britain had reported experiencing sexual harassment. *Sex Harassment Occurs Worldwide, Study Finds*, INDIANAPOLIS STAR, Dec. 1, 1992, at B-5.

It was only a matter of time or, perhaps, percolation before the energy generated by this propitious convergence of forces would be released via the procedural tactic of class action certification. The first class certification of a hostile environment claim in a sexual discrimination suit came in December 1991 when Federal District Judge James Rosenbaum certified the class in *Jenson v. Eveleth Taconite Co.*¹¹ This case requested relief from sexual harassment for all women employees at Eveleth, a mining company, citing the hostility of sexually graphic posters, graffiti, insults and comments. Although the sexual harassment allegations were part of a broader claim of sex discrimination, the ruling was significant in that it verified the possibility of the success¹² of such a strategy and forewarned the probability of class action proliferation and power.

This double-barreled impact: greater incentive to bring suit and greater numbers of plaintiffs, geometrically increases the deterrent value of harassment litigation.¹³ As such, it is of widespread importance to employers, to attorneys, to plaintiffs, and to that growing percentage of the workforce¹⁴ who are female and, thus, most susceptible to harassment. Additionally, the public interest stirred by the Thomas-Hill hearings offers an intense, informed setting for legislative and judicial decisions regarding class action certification that could ultimately give more women a stake in such litigation and benefit more women by its outcomes. This Note will examine the legal propriety of class action certification in hostile environment sexual harassment¹⁵ suits and the potential impact of such certification in light of the new remedies afforded by the Civil Rights Act of 1991.

After exploring the reasoning and rulings that have brought the law to this precipice in harassment litigation, this Note discusses the use of class actions in hostile environment cases; why such a procedural device is appropriate and, perhaps, long overdue; and the challenges of meeting the Rule 23¹⁶ certifica-

11. 139 F.R.D. 657 (D. Minn. 1991).

12. The U.S. District Court for Minnesota later ruled that Eveleth was liable under Title VII for creating a hostile work environment for the class of female plaintiffs. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (1993).

13. "The threat of individual suits offers little incentive to employers to avoid discrimination, while the threat of class action suits is very effective in forcing employers to eliminate even the subtlest forms of discrimination." Judith J. Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 COLUM. HUM. RTS. L. REV. 1, 59 (1987).

14. In 1990, women held half of all U.S. jobs. *Sex, Power and the Workplace*, *supra* note 3.

15. The Equal Employment Opportunity Commission (EEOC) definitions of harassment encompass both hostile environment and *quid pro quo* harassment. 29 C.F.R. § 1604.11 (1988) *see* 45 Fed. Reg. 25024 (1980). Since *quid pro quo* suits tend to be more individualized in terms of fact patterns, and often involve direct economic injury, this note focuses primarily on hostile environment claims. For a discussion of *quid pro quo* harassment *see* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 32-40 (1979).

16. Fed. R. Civ. P. 23.

tion requirements. The Note analyzes the probable and potential impact—on employers and on plaintiffs—of this tripartite force of raised consciousness, broadened remedies under Title VII, and new strategies suggested by the *Jenson* case in future hostile environment litigation and, ultimately, its impact on workplace behavior and attitudes. This Note submits the desirability of certifying class actions as appropriate means of litigating harassment claims and suggests how certification of class actions could compel a true difference in attitude and environment that might bring us closer to meeting the goals of Title VII.¹⁷

While writers have discussed the potential impact of the Civil Rights Act of 1991, its allowance of damages, and possible reactions by plaintiffs, employers, and the legal system, the catalytic effect of class action certification may have heretofore been overlooked or underestimated.¹⁸ Especially given the *Jenson* certification ruling and the court's later finding of employer liability, this potential impact should be strongly considered and assessed in light of the possibility of class action certification and the reality of liability to a class for hostile workplace environments. Since this first class certification came so soon after the expanded remedies contemplated and then offered by the 1991 Civil Rights Act, and since the legislation is too new for any of its actual impact to have been fully analyzed, the interplay of these legal forces, both conflicting and complementary, has yet to be fully explored.

I. A TRIAD OF SOCIO-LEGAL FORCES

A. *Raised Consciousness, Increased Claims*

Millions of Americans sat transfixed and transfigured by the Clarence Thomas confirmation hearings, over a period of thirteen days, for 83.8 hours in the fall of 1991.¹⁹ Although sexual harassment was not a novel concept,²⁰ it was this multimedia event that brought it out of the offices and factories and warehouses and into the living rooms of Americans, awakening the consciousness of harassers²¹ and "harassees" alike.

17. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241 (codified in 42 U.S.C. § 2000e to 20003-17 (1982)) [hereinafter Title VII].

18. Helen Norton, of the Women's Legal Defense Fund, reacting to the *Jenson* certification, said she doubted that such treatment would be the norm, or routine way of dealing with such cases. *Federal Judge Grants Class Action Treatment to Sex Harassment Claim Against Mining Company*, 244 DAILY LAB. REP. at A-10 (Dec. 19, 1991). Perhaps this is because the EEOC has focused solely on individual claims, at least since the Reagan administration. *Id.*

19. C-Span broadcast logs, Washington, D.C. (Sept.—Oct. 1991).

20. Over 38,500 sexual harassment cases had been filed with the EEOC since 1980. H.R. Rep. No. 102-40(I) 102d Cong., 1st Sess. 68 (1991) [hereinafter House Report].

21. Irene Natividad, Chairwoman, National Commission of Working Women, suggested that the Thomas hearings acted as a catalyst to push business to move more quickly to avert sexual

The effect has been swift and unmistakable. Since Anita Hill's dramatic testimony, formal charges of sexual harassment have climbed.²² After these hearings, the Equal Employment Opportunity Commission (EEOC) experienced a "tidal wave" of inquiries from women about sexual harassment, and a "marked increase" in complaint filings in the months following the hearings.²³ Some courts are reporting a twenty percent rise in the number of sexual harassment lawsuits.²⁴ This trend could intensify, given that the increased attention being paid to the problem by both media and employers will likely make women's claims "more respectable" and eliminate some of the stigma associated with them.²⁵

This rapid rate of expansion is likely to accelerate in the coming years. Most harassment that women experience has been neither reported nor litigated,²⁶ so the sheer volume of *potential* sexual harassment litigants is overwhelming.²⁷ Even if the present level of actual harassment remains

harassment *Morning Edition: Employers Deal with Sexual Harassment* (National Public Radio broadcast, May 7, 1992) (available in LEXIS, NEXIS library, NPR file).

22. In the year following the Hill-Thomas hearings, the EEOC reported a dramatic increase in formal charges of sexual harassment. *Id.* See also Marilyn Adams, *Sex Harassment Charges Up Sharply*, BOSTON GLOBE, July 13, 1992 at 3 (EEOC sees increase in the number of sexual harassment claims received in 1992 as compared to the same period in 1991); Jane Gross, *Suffering in Silence No More, Women Fight Back on Sexual Harassment*, NEW YORK TIMES, July 14, 1992 at C-17 (The E.E.O.C. reported that sexual harassment claims filed in the first half of fiscal year 1992 were up more than 50% from the same reporting period the year before).

23. According to John D. Schmelzer, attorney-advisor in EEOC office of program operations. *Alternative Dispute Resolution*, *supra* note 9, at A-15.

24. *Id.*

25. *Thomas Hearings*, *supra* note 8, at 1464.

26. Most women tolerate sexual harassment as a matter, not of choice, but of economic survival, "suffering in silence" despite the chronic debilitating effect of harassment. *Sex, Power and the Workplace*, *supra* note 3.

27. For example, 88% of the 9000 women responding to a REDBOOK survey had experienced sexual harassment. Claire Safron, *What Men Do to Women on the Job*, REDBOOK, Nov. 1976, at 149. The chairman of the House Subcommittee investigating sexual harassment in the federal government said, "[t]he problem is not only epidemic, it is pandemic, an everyday, everywhere occurrence." *Sexual Harassment in the Federal Government: Hearings Before the Subcommittee on Sexual Harassment in the Federal Government*, 96th Cong., 1st Sess. 1 (1979) (statement of Rep. Hanley). More than 42% of female federal government employees reported being harassed. *Sexual Harassment in the Federal Government: An Update* at 11, Merit Systems Protection Board (1988). Fifty-three percent of working women say they have encountered harassment. BARBARA GUTEK, *SEX AND THE WORKPLACE* 47-48 (1985). Studies have found that sexual harassment occurs throughout the nation, in large cities and small towns, and in a wide range of occupational settings. Jill Laurie Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go*, 10 CAP. U. L. REV. 445, 453 (1981). Unfortunately, age, education, geography or job status does not insulate one from a hostile environment. Even among professionals, harassment is pervasive. Frances Conley, a female neurosurgeon at Stanford University, reported that she had been subject to 20 years of pervasive harassment. See *Sex, Power and the Workplace*, *supra* note 3. Fifty-one percent of woman lawyers reported in a recent survey that they had experienced harassment on the job. Thom

constant or even decreases, more victims choosing to come forward to report a greater percentage of incidents will have the effect of increasing litigation.

This galvanization of unprecedented public awareness was just the first step. Given the enormous disincentives to bringing suits against employers,²⁸ awareness—even outrage—is, by itself, not enough.

*B. Meaningful Remedies:
The Civil Rights Act of 1991 is Passed Into Law*

The provisions for compensatory and punitive damages for Title VII violations²⁹ included in the Civil Rights Act of 1991 offer fuller and fairer relief to plaintiffs.³⁰ That the damages are limited to “cases of intentional discrimination,” i.e. disparate treatment, will not insulate defendants in sexual harassment claims since such environmental harassment is by definition intentional.³¹ The offensive environment created by sexual harassment does not present an elusive factual question of intentional discrimination, since “it should be clear that sexual harassment is discrimination based upon sex.”³²

To receive punitive damages, the complainant must prove discriminatory practices were implemented with malice or reckless indifference to individuals rights. Although the burden is on the plaintiff to prove this conduct, “the nature of sexual harassment . . . appears uniquely susceptible to such proof.”³³

These new remedies should be particularly attractive to hostile environment plaintiffs. In many cases of hostile environment harassment, there has been great suffering and loss³⁴ but no economic harm. Before 1991, no other

Weidlich & Charlise K. Lawrence, *Sex and the Firms: A Progress Report*, THE NATIONAL LAW JOURNAL, Dec. 20, 1993 at 1. A survey involving nearly 30,000 faculty at 270 U.S. colleges and universities revealed that one out of 7 female faculty members had experienced sexual harassment at their current institution. *Harassment: It's Academic*, USA Today, April 8-10, 1994, at 1A.

28. See *infra* notes 116-19, 205-16 and accompanying text.

29. Damages available under Title VII include compensatory damages for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.” *Computing Damages*, 131 DAILY LAB. REP. EI (July 8, 1992). Also punitive damages are available in cases where the plaintiff “demonstrates that the [employer] engaged in discriminatory practice[s] with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” *Id.*

30. William Kandel, *Mixed Motives, Sexual Harassment and the Civil Rights Act of 1991*, 17 EMPLOYEE REL. L.J. 636, 641 (1992).

31. In *Bundy v. Jackson* the court found that in cases of sexual harassment, the advance or insult almost always represents “an intentional assault on an individual’s innermost privacy.” 641 F.2d 934, 945 (D.C. Cir. 1981).

32. *Jones v. Flagship Int’l.*, 793 F.2d 714, 720 n.5 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (no specific prima facie case needed).

33. See Kandel, *supra* note 30, at 641.

34. Victims of intentional discrimination often endure humiliation, pain, suffering, psychological harm, and related medical problems which result in medical expenses and other

meaningful remedy was available because previously Title VII had provided no damages remedy to redress such violations.³⁵ While other kinds of discrimination wrongs often result in discharge, denial of promotion, or refusal to hire for which back pay or other equitable relief has been possible, if accompanied by constructive or actual discharge,³⁶ victims of hostile environments often choose to stay and suffer the stress and illness they experience.³⁷ Even though courts have held that economic damage is not required for a showing of sexual discrimination,³⁸ the limited pecuniary remedies made a legal verdict for a prevailing plaintiff a somewhat hollow personal victory. Now, the availability of compensatory and punitive damages may serve a dual purpose: as a powerful threat to those employers who may not have taken sexual harassment seriously, and as an incentive for women to more vigorously pursue their claims.

Once it is shown that an employer has violated Title VII, courts have been clear that relief due must be provided on an individualized basis to those who have suffered discrimination.³⁹ Where the form of illegal practice makes it difficult to reach individual determinations, as might be true in sexual harassment suits, classwide relief may be appropriate.⁴⁰ The entire amount of damages can be prorated to each victim of discrimination based on some formula. Usually this is done in the context of back pay, but now that compensatory and punitive damages are allowed, these could be distributed in a similar fashion, on the assumption that the hostile environment had minimum or equal affects on all exposed.

C. *Jenson v. Eveleth Taconite, Co. Gives Class Certification to Hostile Environment Claims*

The third and final force in this triad occurred with the 1991 class certification of a suit brought by three women alleging gender discrimination, including a hostile work environment. In *Jenson v. Eveleth Taconite Co.*,⁴¹ the plaintiffs sued on behalf of a class of women who had applied for employment or had been employed by the company, and Judge James Rosenbaum certified the class, finding that the plaintiffs could include

economic loss. House Report, *supra* note 20, at 66.

35. 42 U.S.C. § 2000e-5(g). See also *Bohen v. City of East Chicago*, 799 F.2d 1180, 1184 (7th Cir. 1986).

36. *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989).

37. Testimony of Jackie Morris, who suffered nervousness, sleeplessness and breathing difficulties from harassment: "I recovered nothing for the pain, suffering and frustration that I endured for years." See House Report, *supra* note 20, at 66.

38. *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986).

39. SUSAN M. OMILIAN AND JEAN P. KAMP, *SEX BASED EMPL. DISCRIMIN.* § 14.03 at 13 (1990).

40. *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984).

41. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991).

harassment claims in allegations of sex bias in their employment.⁴² Ultimately, the plaintiffs prevailed—in its ruling on the class action lawsuit alleging sexual harassment, the Minnesota District Court found Eveleth Taconite Co. liable for creating a hostile work environment for women.⁴³

The plaintiffs in *Jenson* did not raise individual claims of harassment but argued that the systemic offenses were pervasive enough to create an “oppressive work environment.”⁴⁴ Even though the defendants argued that sexual harassment claims cannot be made on a classwide basis, the judge applied the reasonable woman standard⁴⁵ in finding the requisite commonality, and refuted defendant’s contention that commonality is automatically defeated by individual reaction to harassment. In *Jenson*, the court found “while the factual patterns experienced by individual women are inevitably distinct, they give rise to a common question of law—whether or not Eveleth Mines discriminated against women.”⁴⁶ The *Jenson* court shifted emphasis to the *result* of the hostile behavior, away from the *reaction* to it. Specifically, the court chose to define the common questions of law as whether discrimination in the form of a hostile environment occurred (the behavior of the defendant) and not whether or how an employee reacted to that discrimination (reaction of the plaintiff). This reasoning offers a logic and a precedent that could allow other such actions to meet the oft-disputed commonality requirement.

Also significant is the court’s decision to include all of the claims, since it could have chosen to certify the class absent the harassment claims.⁴⁷ Such an approach, to isolate and then deny certification of the harassment claim, has been used previously to prevent sexual harassment class actions.⁴⁸ Since the *Jenson* plaintiffs were subjected to whatever conditions existed in the mines, they could fairly include claims for harassment of other employees.⁴⁹ The court inferred that all woman workers were subject to a hostile work environment and that this fact connected persons otherwise differently situated.⁵⁰

In *Jenson*, the court pointed out that the women “advance[d] the view that incidents of sexual harassment constitute but one facet of their discrimination

42. *Id.*

43. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993).

44. Evidence included sexually explicit graffiti, posters everywhere (including locked company bulletin boards, restrooms, and elevators) and offensive language, both specific and generic. *Id.* at 663, n.20.

45. See *infra* notes 67, 98, 144 and accompanying text.

46. *Jenson*, 139 F.R.D. at 665.

47. Class may be certified as to one or more claims without certifying the entire complaint. FED. R. CIV. P. 23(c)(4).

48. *UAW v. LTV Aerospace and Defense Co.*, 136 F.R.D. 113, 130 (N.D. Tex. 1991).

49. *Jenson*, 139 F.R.D. at 663.

50. *Id.*

claims.” They did not seek damages based on individual incidents of harassment but requested class-wide injunction, declaratory and financial relief.⁵¹

II. A POWERFUL CONVERGENCE OF FORCES

Taken alone, it is probable that each of these forces would have had some impact, however inestimable, on the volume and intensity of sexual harassment litigation: greater numbers of plaintiffs likely to come forward—more aware, more encouraged, or more motivated by the promise of adequate remedies. Taken together, the impact may be geometric rather than additive in effect. Given increased awareness and the incentive of meaningful remedies, that hostile environment claims can now be litigated on a class-wide basis suggests they are a force to be reckoned with.⁵²

A. *Of Pin-ups and Profanity: Offensive Workplace Environments*

Before analyzing the combined effect of awareness, available damages, and the opportunity for class action treatment in hostile environment suits, it is useful to briefly examine the state of sexual harassment law as it relates to those claims. The concept itself did not even come into popular use until the mid 1970s.⁵³ Since the Supreme Court’s ruling in *Meritor Savings Bank v. Vinson*,⁵⁴ sexual harassment has been recognized as a form of sex discrimination under Title VII.⁵⁵ Moreover, a hostile environment, even absent tangible

51. *Id.* at 662. In its ruling, the district court explained that hostile environment class actions differ from usual pattern and practice cases: in the latter, a determination of discriminatory pattern or practice entitles individual members to a presumption of discrimination against him or her, and the burden shifts to the employer to rebut that presumption. In contrast, individual harassment claimants are entitled only to the presumption that the conduct was unwelcome, that the environment was hostile—each must then show she was as affected as a reasonable woman would be before the burden shifts. Thus, individual proof is required for recovery. *Employment Discrimination*, 61 U.S.L.W. 2696, May 25, 1993 (discussing *Jensen* decision). In order to qualify for individual remedy, each class member must prove by a preponderance of the evidence that she was as affected as a “reasonable woman” would have been by the harassment. *Id.*

52. See Johnson, *supra* note 13.

53. Catharine McKinnon is credited with popularizing the term in her book, *SEXUAL HARASSMENT OF WORKING WOMEN*. See MACKINNON, *supra* note 15, at 27-28 n.13 (referring to the term’s use in *In re Carmita Wood*, App. No. 207, 958, New York State Department of Labor, Unemployment Insurance Division Appeal Board (Oct. 6, 1975) and in CARROLL BRODSKY, *THE HARASSED WORKER* 27-28 (1976)).

54. 477 U.S. 57 (1986).

55. “Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.” *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902-04 (11th Cir. 1982)).

economic detriment, forms the basis for such a claim.⁵⁶ To maintain an action for sexual harassment under Title VII, a plaintiff must demonstrate that the harassment "alter[s] the conditions of [the victim's] employment and create[s] an abusive working environment."⁵⁷ No proof of tangible psychological injury is required, only conduct that creates an "objectively hostile or abusive environment."⁵⁸ Hostile environments are created by harassment that is "sufficiently severe or pervasive to alter terms, conditions, or privileges of employment."⁵⁹ This requires an objective evaluation to be determined from "looking at all the circumstances."⁶⁰ Hostile environment sexual harassment claims require that (1) the employee belongs to a protected class or group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of affected a "term, condition or privilege" of employment; and (5) respondeat superior exists.⁶¹

According to Equal Employment Opportunity Commission (EEOC) guidelines,⁶² sexual harassment is conduct which has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment" in the form of "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."⁶³ While the level of pervasiveness and abusiveness necessary to constitute such unreasonable interference has been measured from a variety of perspectives, including that of the individual plaintiff,⁶⁴ through the eyes of a reasonable person,⁶⁵ and in combination.⁶⁶

56. *Id.*

57. *Id.* See also *Scott v. Sears, Roebuck & Co.* 798 F.2d 210, 213 (7th Cir. 1986).

58. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993). In *Harris*, where a manager had been subjected to abusive remarks and sexual innuendo by the company president, the Supreme Court ruled on sexual harassment for the first time since 1986 and confirmed the *Meritor* standard for actionability of a hostile environment claim (including the requirements of an objectively hostile environment and the victim's subjective perception of abuse). The *Harris* court also clarified that conduct need not seriously or tangibly effect an employee's psychological well-being or lead the employee to suffer injury in order to be actionable as harassment. *Id.* at 370.

59. These circumstances include frequency, severity, level of physical threat or humiliation, and unreasonableness, of interference with work performance. *Harris*, 114 S. Ct. 367, 371 (1993).

60. *Id.*

61. See *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014-15 (8th Cir. 1988).

62. 29 C.F.R. § 1604.11(a)(3)(1987) (EEOC Guidelines).

63. *Id.* While the EEOC Guidelines specifically identify sexual conduct, they do not exclude other types of behavior. Alleged offensive conduct does not have to be purely sexual; if the conduct would not have occurred *but for* the sex of the victim, it can constitute prohibited sexual harassment regardless of whether it was taken with sexual overtones. See *Hicks v. Gates Rubber Co.*, 928 F.2d 966 (10th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988).

64. *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 214 (that plaintiff considered defendant

In applying the objective component, recent appellate court decisions have suggested that it is appropriate for courts to apply the standard of a "reasonable woman."⁶⁷

For the purposes of class action certification, however, any of these disputes about the proper standards to apply, about the differences in reaction of the class members, or about presenting the prima facie case for hostile environment harassment are, albeit academically interesting, only marginally relevant. Importantly, the propriety of class action treatment is determined without inquiry into the merits of the individual or class claims—the only

to be a friend relevant to finding no hostile environment).

65. EEOC Compliance Manual (CCH) § 3113, 3274 (March 19, 1990) (suggests evaluating harassing conduct from objective standpoint of a reasonable person).

66. A number of courts including *Harris* have suggested that both an objective and subjective test should be used. The standard requires an objectively hostile environment—one that a reasonable person would find hostile—as well as the victim's subjective perception that the environment is abusive. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370-71 (1993). See also *Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991); *White v. Federal Express Corp.*, 939 F.2d 157 (4th Cir. 1991); *Ellison v. Brady*, 724 F.2d 872 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

67. The Ninth Circuit declared that a court should focus on "the perspective of the victim" in evaluating the severity of sexual harassment. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). Thus, *Ellison* offered a new interpretation of the law, using the point of view of the reasonable woman to define sexual harassment. Reasoning that "a sex-blind reasonable person standard tends to be male-biased" and systematically ignores the experiences of women, the court concluded that a "gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men." *Id.* at 878-79. See also *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1515 (D. Me. 1991) (applying "reasonable black person standard" in racial harassment case; "standard for assessing the unwelcomeness and pervasiveness of conduct and speech must be founded on a fair concern for the different social experience of men and women in the case of sexual harassment"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (adopting "reasonable woman" standard and holding that unwelcome harassment is established by behavior disproportionately more offensive or demeaning to one sex); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993).

Although *Harris* presented the Supreme Court with an opportunity to clarify the legal standard for hostile environment sexual harassment claims, the court's opinion did not specifically address whether the objective standard should be the reasonable person or the reasonable victim/woman. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993). However, the district court had found that the conduct would affect "the reasonable woman" or that "[a] reasonable woman would have been offended" by the conduct. App. to Pet. for Cert. (A-33). In the first federal harassment case to be decided *after Harris*, the 7th Circuit court found that the plaintiff's claim failed not because the fondling and forced kissing had not occurred, but because the objective test of whether a reasonable person would have found the environment hostile or abusive had not been satisfied. *Saxton v. American Tel. & Tel. Co.*, 1993 U.S. App. LEXIS 31599 (7th Cir. Dec. 3, 1993). However, the *Saxton* court declined to decide the appropriateness of using a reasonable woman standard, finding instead that the results of its analysis would be the same whether or not a gendered standard was used. *Id.*

thing required is adherence to Federal Rules of Civil Procedure Rules 23(a) and 23(b).⁶⁸ At the certification stage, it is premature to consider or judge whether sexual harassment did in fact occur. All the named plaintiff must do is make an affirmative showing of discrimination.⁶⁹ At the class certification stage, if the defendant argues that this showing is without merit, the court can postpone resolution to the time when the case's merits are considered.⁷⁰ "In determining the propriety of a class action, the question is not whether the . . . plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."⁷¹ The *Jenson* court appropriately refused to address the merits of the evidence since such an analysis was unnecessary for questions of class certification.⁷²

B. *The Use of Class Actions in Title VII Actions*

Given this raised consciousness, these expanded remedies, the possible application of a reasonable woman standard and the federal district court certification ruling in *Jenson*, will hostile environment class actions proliferate? The idea of using class actions in Title VII cases is hardly an innovative strategy. Such procedure has always been allowed, even encouraged, in Title VII actions,⁷³ and class certification has been sought and granted for a variety of sex and race discrimination suits,⁷⁴ guided by the reasoned premise that discrimination is by definition class discrimination.⁷⁵ Although class actions were an early mainstay of civil rights litigation, the number of class actions has dipped significantly since 1977, due in some part to the Supreme Court's

68. *Eisen v. Carlisle & Jacquelin, Inc.*, 417 U.S. 156 (1974).

69. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 660 (D. Minn. 1991). Plaintiffs must only allege "an atmosphere of sexual hostility that evidences discrimination." *Id.* (citing *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 625 (N.D. Ill. 1989)).

70. *Id.* at 661.

71. *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971).

72. *Jenson*, 139 F.R.D. at 661.

73. Congress confirmed this approach to Title VII by indicating an intent *not* to affect class action practice under the Act when amended in 1972. LEGAL SERVICES MANUAL FOR TITLE VII LITIGATION National Employment Law Project at 31 (Rev. Oct. 1975). "Title VII actions are by their very nature class complaints, and any restrictions on such actions would greatly undermine the effectiveness of Title VII." Conference Committee of Congress, S. REP. NO. 415, 92nd Cong., 1st Sess. 27 (1971). By so stating, Congress endorsed the use of class actions to eliminate discrimination. No contrary or changed intent was indicated in the 1991 Amendment.

74. Although it has been legally recognized that sexual harassment *is* sex discrimination, the former appears to still be approached as a somewhat more trivial subclass due to the absence of tangible, easily quantifiable harms. Still, for the purposes of this Note and consistent with the finding in *Meritor*, the definition of harassment as discrimination is adhered to, allowing analogy to other kinds of race and sex discrimination cases.

75. See *Bowe v. Colgate-Palmolive, Co.*, 416 F.2d 711, 719 (7th Cir. 1969). *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968).

“tightening up” of the requirements for such certification,⁷⁶ which dismantled the long held presumption that all such civil rights cases are suitable for class relief.⁷⁷ Although only fifty-one employment discrimination class actions were filed in FY 1989,⁷⁸ that decrease has leveled off in the past few years.⁷⁹ With the advent of sexual harassment certifications, there may well be a rousing revival.

Class actions have long been a popular and effective way of battling employment discrimination. Individuals may bring suit under Title VII of the Civil Rights Act either for themselves or on behalf of a class of persons similarly situated.⁸⁰ Given the nature of Title VII violations, where the prohibited discrimination is based on class characteristics, sexual discrimination is at its core a class violation.⁸¹ Prior to 1977, the courts construed the Rule 23 requirements liberally, aware and acknowledging that “suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs [and that] common questions of law or fact are typically present.”⁸² More recently, the court has required that only after a “rigorous analysis” that the prerequisites of Rule 23(a) have been satisfied can a Title VII class be certified.⁸³ This shift began in *East Texas Motor Freight v. Rodriguez*,⁸⁴ where the Supreme Court reversed appellate court certification of a class of all Blacks and Mexican Americans who had been denied equal employment opportunities and held that careful attention must be made to Rule 23 requirements and that a complaint alleging discrimination would no longer ensure class action certification.⁸⁵ That finding required courts to pay close attention to all Rule 23 prerequisites in discrimination actions and suggested that an allegation of discrimination alone would not support an action which challenged a broad range of employer practices. In *General Telephone Company v. Falcon*, the court stressed the need to “evaluate carefully the legitimacy of the named plaintiff’s plea that he is a proper class representa-

76. See *infra* notes 83-91 and accompanying text.

77. See, e.g., *Bowe v. Colgate-Palmolive, Co.*, 416 F.2d 711; *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496.

78. John J. Donohue III and Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991). Even a smaller portion of those will be certified. This is down 96% from a peak of 1106 in FY 1975. *Id.* at 21.

79. 13 CLASS ACTION REP. 171 (1990).

80. Ronald M. Green, *Class Actions*, 325 P.L.I. LIT. 227 (1987).

81. “A suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion or national origin.” *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969) (employee sued under Title VII charging intentional discrimination by system of job classification).

82. *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977).

83. *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982).

84. *East Texas Motor Freight*, 431 U.S. 395 (1977).

85. *Id.*

tive.”⁸⁶ To prevail, a plaintiff must bridge a “wide gap between [his] claim” and “the existence of a class of persons who have suffered the same injury . . . such that the . . . [individual] and the [class] will share common questions of law or fact and that the individual’s claim will be typical of the class claims.”⁸⁷ By requiring that a representative meet the Rule 23 requirements for each type of discrimination claim, the *Falcon* court slammed shut the door previously presumed wide open to broad-based class actions.

However, these rulings did not *preclude* the bringing of class actions in discrimination cases, but merely eliminated the presumption that the Rule 23 prerequisites are satisfied for “across-the-board” class actions.⁸⁸ Urging that only those cases which clearly exhibited the Rule 23 commonality and typicality be certified, the *Falcon* court required a greater nexus between an individual claim and the allegation that the company had a policy of discrimination. However, many of the cases denying class certification on the grounds of insufficient nexus between the individual and class claims included instances of specific hiring, or promotion discrimination, where the individual circumstances were unique.⁸⁹ These should be distinguished from discrimination that effects a term or condition of employment in the form of a hostile environment which would less likely be worker-specific. Given the scrutiny urged by the Supreme Court and the burden on the class plaintiff to provide facts that support her assertion that Rule 23 criteria are fulfilled,⁹⁰ there is little chance that baseless class actions will succeed. The question of whether the moving party has met this burden is, however, left “to the sound discretion of the district court.”⁹¹

Allegations of harassment have generally been brought as part of broad based class actions⁹² and have not asserted only sexual harassment claims.⁹³ Nevertheless, harassment-only cases would not be procedurally impossible where there was a continuing, severely hostile workplace environment as long as the class action prerequisites are met.

86. *Falcon*, 457 U.S. at 160.

87. *Id.* at 157.

88. *Id.* at 153-54.

89. The facts in *Falcon* can be distinguished from most hostile environment cases, since the plaintiff wished to represent persons injured by employment practices different than those that injured him. A hostile environment is a sole employment practice with a single discriminatory affect on those who must accept it as a condition of their jobs.

90. See, e.g., *Roby v. St. Louis S.W. Ry.*, 775 F.2d 959 (8th Cir. 1985).

91. *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 594 (2d Cir. 1986).

92. See generally ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE* 162 (1990). But, harassment allegations have been included in sex discrimination suits. See, e.g., *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993). See also *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619 (N.D. Ill. 1989); *Frazier v. Southeastern Penn. Transp. Auth., Inc.*, 123 F.R.D. 195 (E.D. Pa. 1988).

93. *Sheehan v. Purolator, Inc.*, 839 F.2d 99 (2d Cir. 1988); *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398 (D. Minn. 1987).

Even though sexual harassment class actions are clearly procedurally appropriate, one could posit three reasons that the first class certified for a claim of hostile environment harassment as sex discrimination did not appear until as late as 1991.⁹⁴ First, the liberal approach to prerequisites and presumptive propriety of class action for civil rights suits was chilled by *Falcon* and *Rodriguez*, long before the current wave of sexual harassment awareness and litigation. Second, and perhaps more importantly, the incentive for bringing any kind of discrimination suit has historically been weak, given the paucity of adequate remedies and the acknowledged, deterring hurdle of the significant investment of time, money, and self required to bring such a suit. The dearth of sexual harassment class suits has not been because class actions are in some way legally inappropriate or outmoded.⁹⁵ Rather, the failure to use class actions is because there has been little incentive⁹⁶—in fact there are huge *disincentives*—to bringing *any* sex discrimination suits, class or individual, due to the prior lack of available remedies and the fear of retaliation.⁹⁷ Finally, only recently has the reasonable woman standard been considered or used to evaluate the hostility of the workplace.⁹⁸ This appropriate⁹⁹ standard

94. Joyce Jenson's case was first filed in 1988. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991).

95. Some have opined that "class actions had their day in the sun and kind of petered out." Paul Carrington, official reporter of the Federal Rules of Civil Procedure, in Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7, col. 3.

96. "There is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order . . . to her employer to treat her with the dignity she deserves. One can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities which she has suffered in private. . . ." *Mitchell v. OsAir, Inc.* 629 F. Supp. 636, 643 (N.D. Ohio 1986) (holding employer strictly liable for sexual harassment in a hostile environment case).

97. New York City's first female firefighter, who had sued the city to force it to hire women, was not only harassed for bringing suit but also received numerous death threats. See *Sex, Power and the Workplace*, *supra* note 3.

98. See generally Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?*, 26 IND. L. REV. 227 (1993) (suggesting women would win harassment suits more often if federal courts were required to apply the reasonable woman test). Significantly, the Jenson court employed the "reasonable woman" standard in finding liability, concluding that the reasonable woman would find that the working conditions at Eveleth's mines affected the terms and conditions of her employment. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 885 (1993). See *supra* note 67 and accompanying text.

99. Differences in perception are attributable to the fact of gender. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 885 (1993). "As with many gender-related issues however, men, when they are in the majority and when they control the avenues of power, and thus are generally immune to unwelcome conduct, may fail to observe what a reasonable woman perceives on a continual basis." *Id.* See *infra* note 138. Because men are rarely victims of sexual assault, they tend to view sexual conduct in a vacuum "without full appreciation of the social setting or the underlying threat of violence that a woman may perceive." *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

is consistent with finding commonality and typicality¹⁰⁰ in these claims, and continued and expanded judicial application of this standard will support greater numbers of class action certifications.

III. RULE 23 REQUIREMENTS CAN BE MET IN HOSTILE ENVIRONMENT SEXUAL HARASSMENT CASES

While some were surprised at the *Jenson* certification, believing it ran counter to the prevailing wisdom that sexual harassment is too discrete and too individualized a violation to be afforded class action treatment,¹⁰¹ an analysis of the Rule 23 requirements¹⁰² actually shows hostile environment claims to be well suited to such treatment. This is especially true given the recent decisions of a number of circuits suggesting the use of a reasonable woman standard to evaluate sexual harassment claims.¹⁰³ The Rule 23 requirements for maintaining a class action are broadly viewed in race and sex discrimination cases¹⁰⁴ and ask only that the plaintiff satisfy numerosity,¹⁰⁵ commonality,¹⁰⁶ typicality¹⁰⁷ and adequacy of representation.¹⁰⁸ Hostile environment cases could withstand such rigorous analysis. By examining each of these requirements¹⁰⁹ in light of the facts and the law of sexual harassment

100. See *supra* notes 135-84 and accompanying text.

101. See Charles Mishkind, *Sexual Harassment Hostile Work Environment Class Actions: Is There Cause for Concern?* 18 EMPL. REL. L.J. 141 (1992).

102. Rule 23 states, in pertinent part:

(a) One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a)

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of [inconsistent or varying adjudications or which would be, as a practical matter, dispositive of other members' interests]; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

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

103. See *supra* notes 67, 98 and accompanying text.

104. See, e.g., *Green v. USX Corp.*, 843 F.2d 1511, 1534 (3d Cir. 1988).

105. FED. R. CIV. P. 23(a)(1).

106. FED. R. CIV. P. 23(a)(2).

107. FED. R. CIV. P. 23(a)(3).

108. FED. R. CIV. P. 23(a)(4).

109. For a class to be certified, the named plaintiff must prove the requirements of

cases, most hostile environment claims can be shown to meet these requirements and therefore are appropriate for class action certification.

A. Numerosity

The first prerequisite of Rule 23 is that the class upon whose behalf the representative is suing is "so numerous that joinder of all members is impracticable."¹¹⁰ While the term "numerous" would seem to demand great numbers of potential class members to show extreme difficulty or inconvenience of joinder, the quantity of members is not in itself the benchmark for measurement. "No magic number exists in order [to] satisfy the numerosity requirement."¹¹¹ While the numerosity requirement can be met on sheer magnitude, it also takes into account all other factors affecting the impracticability of joinder. Courts have suggested a flexible standard for numerosity in employment discrimination suits which are "particularity fit for class action treatment."¹¹² Other factors affecting practicability of joinder include the location of class members, the type of action, the injunctive nature of the claim, the size of the claims involved, the person bringing the action, the convenience of conducting individual lawsuits, and other factors pertinent to propriety of joinder such as the potential of retaliation by employers which would prevent employees from joining the class without such a class procedure.¹¹³ While class actions are most often associated with mass tort actions that involve and affect hundreds or thousands of class members, Rule 23 requires only that joinder be impracticable, not impossible.¹¹⁴ Class actions have been brought with less than thirty class members.¹¹⁵

All of the aforementioned factors are relevant to discourage joinder in sexual harassment suits. Despite current higher levels of awareness, the unwillingness of women to bring individual suits, or to join in a claim, for fear

numerosity, commonality, typicality and adequacy of representation have been met. *Wetzel v. Liberty Mut. Ins., Co.*, 508 F.2d 239, 246 (3d Cir. 1975).

110. FED. R. CIV. P. 23(a)(1).

111. *Frazier v. Southeastern Penn. Trans. Auth., Inc.*, 123 F.R.D. 195, 196 (E.D. Pa. 1988) (court granted certification to three classes of plaintiffs suing the transportation authority claiming racial and sex discrimination) (citing *Snider v. Upjohn Co.*, 115 F.R.D. 536, 539 (E.D. Pa. 1987)).

112. *Slanina v. William Penn Parking Corp.*, 106 F.R.D. 419, 423 (W.D. Pa. 1984).

113. R. Green, *supra* note 80, at 230. See also Alba Conte, *Class Action: Remedy for the Hostile Environment*, TRIAL, July 1992, at 19.

114. Practicality is the key in evaluating the number of prospective class members: "practicability" is not equivalent to "impossibility." *Samuels v. University of Pittsburgh*, 56 F.R.D. 435, 439 (W.D. Pa. 1972).

115. See, e.g., *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n.*, 375 F.2d 648 (4th Cir. 1967) (18 identifiable members); *Sabala v. Western Gillette, Inc.*, 362 F. Supp. 1142 (S.D. Texas 1973) (26 class members enough); *Slanina v. William Penn Parking Corp.*, 106 F.R.D. 419 (25 members); *Hoston v. United States Gypsum, Co.*, 67 F.R.D. (E.D. La. 1975) (23-33 members).

of humiliation, interrogation, retaliation or termination remains an obstacle in these cases.¹¹⁶ Current employees may be hesitant to join a suit, because employees have a strong interest in maintaining good relationships at work.¹¹⁷ The courts often consider fear of retaliation against individual plaintiffs when considering numerosity in a race or sex discrimination suit.¹¹⁸ In some cases, plaintiffs may not even argue the impracticability, inconvenience, dispersion, or size of the class but may rely on claimed fear of retaliation toward current employees as a factor that renders joinder impracticable if not impossible.¹¹⁹

By including future "reasonable people" whom the hostile environment would similarly affect, the class can be made more numerous.¹²⁰ An injunction against future discrimination could be considered "prospective relief," and the size of the prospective class could be extrapolated outwards to include these currently unidentifiable class members.¹²¹ These "unnamed, unknown" future employees¹²² are appropriate class members¹²³ in that they would benefit from the injunctive relief that the named plaintiff seeks: the removal of open hostility or veiled misogyny from the environment. Joinder of these unknown individuals would certainly be impractical.¹²⁴

In any case, one of the purposes of class actions is efficiency, and courts may find that the economies of class litigation outweigh any concerns about the number of plaintiffs.¹²⁵ Especially in cases where injunctive or declara-

116. Freda Klein, sexual harassment training consultant, suggested that even today those who have nothing but private conversations to report still are reluctant to come forward, learning from the Thomas hearings that "when it's her word against his, he wins." *Morning Edition* (National Public Radio broadcast, May 7, 1992) (available in LEXIS, NEXIS library, NPR file). A majority of women lawyers who had experienced harassment on the job did not report such incidents, despite the existence of formal, written harassment policies. Thom Weidlich & Charlise K. Lawrence, *Sex and the Firms: A Progress Report*, THE NATIONAL LAW JOURNAL, Dec. 20, 1993 at 1.

117. One court even took judicial notice "that employees are apprehensive concerning loss of jobs and the welfare of their families. They are frequently unwilling to pioneer an undertaking of this kind. . . ." *Horn v. Associated Wholesale Grocers*, 555 F.2d 270, 275 (10th Cir. 1977).

118. See *Frazier v. Southeastern Penn. Trans. Auth., Inc.*, 123 F.R.D. 195, 197 (E.D. Pa. 1988); *Slanina v. William Penn Parking Corp.*, 106 F.R.D. at 423 (W. D. Pa. 1984).

119. Even when the number of class members is small, courts realize that "[c]omplicating an employee's ability to pursue his own claim is the fear that his job will be jeopardized by bringing his employer to court." *Allen v. Isaac*, 99 F.R.D. 45, 53 (N.D. Ill. 1983).

120. CHARLES R. RICHEY, *MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS* A-57 (1988).

121. Conte, *supra* note 113, at 19.

122. See, e.g., *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974).

123. The assumption is that as a result of the current practice, if not enjoined, those future employees would be discriminated against with regard to the terms and conditions of their employment because of their sex. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 659 (D. Minn. 1991) (Plaintiff's motion to certify the class, at 2).

124. *Jack*, 498 F.2d at 124.

125. *Jenson*, 139 F.R.D. at 664 (quoting *American Pipe and Constr. v. Utah*, 414 U.S. 538,

tory relief is sought, individual disinterest or less than unanimous support¹²⁶ is not enough to defeat the numerosity requirement where all members would benefit from the relief.

The courts have been careful to distinguish questions on the merits of the case from those impacting fulfillment of the prerequisite numerosity.¹²⁷ In a case where the defendant contended that the description of the class was incorrect and thus not numerous, the courts warned that such a defense was merit-oriented and not a proper inquiry for determination of class certification.¹²⁸ If the plaintiff's allegations are correct, numerosity is met; if proven wrong on the merits, then the class can be decertified.¹²⁹

In determining whether joinder of individual suits is practicable, courts also consider the potential size of recovery and the chance that individual cases would be brought. In the past, the relatively scant recovery afforded to individual plaintiffs discouraged them from bringing such suits. Also, individual sexual harassment cases are difficult to prove, making it harder to obtain counsel, because there is greater chance of loss and slimmer opportunity for settlement.¹³⁰

Given the new remedies available, the argument could be made that the incentive of individual, monetary damages might renew a woman's interest in bringing and controlling her own suit in order to take maximum advantage of the monetary relief available. However, when *net* recovery is calculated, not only in terms of damages received, but taking into consideration the financial, emotional and physical¹³¹ costs incurred, the desire to bring individual suits appears less enticing.¹³² Furthermore, the damages cap¹³³ in the Civil Rights Act of 1991 offers a reality check to any imagined visions of punitive windfalls. And, if a woman chooses to opt out of the class, it is unlikely that significantly different damages would be awarded her in a later individual suit if she was in fact very similarly situated in the environment.

553 (1974)).

126. *Id.*

127. Not all commentators agree with this approach. *See generally* Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688 (1980).

128. *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619 (N.D.Ill. 1989).

129. *Id.*

130. *Johnson*, *supra* note 13, at 59.

131. Research shows that harassment is linked to self-blame, depression and anxiety. JANA HOWARD CAREY, *SEXUAL HARASSMENT IN THE WORKPLACE*, 426 PLI Lit. 49 (1992). Also, harassment can cause physical symptoms such as nausea, cramps, headaches, and loss of sleep. *Id.*

132. As seen in the *Meritor* case, a plaintiff who alleges harassment in effect makes her personal life fair game, getting little protection from the court, and opening herself up to inspection of medical records, sexual history, etc. *Thomas Hearings*, *supra* note 8, at 1464.

133. To protect employers, damage caps are set based on size of the company, from a limit of \$50,000 for employers with fewer than 100 employees to \$300,000 for large firms with more than 500 employees. Civil Rights Act of 1991, Pub. L. No. 102-166 (105 Stat. 1071) § 102.

In the cases where numerosity is a close call, courts can and should err on the side of finding numerosity fulfilled, and then decertify the class if information presented later defeats the proposition.¹³⁴

B. Commonality

The second requirement, that "there [be] questions of law or fact common to the class,"¹³⁵ is especially appropriate to hostile environment claims, evinced in a "common thread of discrimination" in the form of hostility woven throughout the workplace.¹³⁶ At its core, harassment is a group-based, community experience.¹³⁷ Usually what one woman finds unwelcome will be what most women find unwelcome.¹³⁸ Since individual experiences derive from a social context, the same thing does not happen or feel the same to every woman, yet the factors that explain and comprise sexual harassment characterize all women's situations.¹³⁹

The key to decisions about whether the prerequisite of commonality in sex discrimination cases has been met is how the common questions are defined. In evaluating commonality the court looks at relevant criteria such as whether the unlawful practice charged affected only a few employees or had a genuine classwide impact; how uniform or diverse are the relevant employment practices of the employer; how uniform or diverse is the membership of the class in terms of the likelihood that the members' treatment will involve common questions; the degree of the employer's centralization and uniformity

134. FED. R. CIV. P. 23(c)(2).

135. FED. R. CIV. P. 23(a)(2) (commonality required).

136. *Jordan v. County of L.A.*, 669 F.2d 1311, 1322 (9th Cir. 1982), *vacated*, 459 U.S. 810 (1982). *See also* *Avagliano v. Sumitomo Shoji American, Inc.*, 103 F.R.D. 562, 582 (S.D.N.Y. 1984) (quoting *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982)).

137. "One woman can bring a legal complaint but the group-based nature of the claim that one's treatment is based on sex requires that the complaint refer to a group-based experience in one way or another." Thomas I. Emerson, *Foreward* to CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* at xii-xiii (1979). "It is this level of community that makes sexual harassment a woman's experience, not merely an experience of a series of individuals who happen to be of the female sex." *Id.*

138. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984) (many actions women find offensive are perceived as harmless by men). There are often distinct differences in how men and women perceive harassing behavior. For example, seven in ten female lawyers say the problem exists in their firms, while only four in ten male lawyers agree. Thom Weidlich & Charlise K. Lawrence, *Sex and the Firms: A Progress Report*, THE NATIONAL LAW JOURNAL, Dec. 20, 1993 at 1. A study of 20,000 federal employees suggests that men tend to feel the problem of workplace sexual harassment was greatly exaggerated, while women did not, and that men were more likely to believe women brought harassment on themselves. Office of Merit Sys. Review and Studies, U.S. Merit Sys. Protection Bd., *Sexual Harassment in the Fed. Workplace, Is It A Problem?* (1981) (cited in Lester, *supra* note 98).

139. Thomas I. Emerson, *Foreward* to CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* at xii (1979).

of policies and practices; and the length of time covered by allegations and how possible that similar condition prevailed throughout that period.¹⁴⁰ The certification in *Jenson* resulted from a finding that the common question of law was whether Eveleth Mines discriminated against women, not the fact patterns experienced by individual women or the varied and incidental acts.¹⁴¹

Those who view sexual harassment as an intensely individual violation where reactions to the harassing behaviors are distinctive and not amenable to classwide adjudication believe class certification should fail in these cases.¹⁴² Some courts have generally concluded that although there is "evidence indicating that incidents of sexual harassment occur" that "this form of discrimination simply is not amenable to class treatment."¹⁴³ However, the growing use of a standard to evaluate whether a reasonable woman¹⁴⁴ would have considered the conduct severe or pervasive enough to alter conditions of employment militates against the myth that sexual harassment is a highly individualized offense highly dependent on the subjective reactions and realities of each woman involved.¹⁴⁵

The commonality in a hostile environment claim is as intrinsic as it is interpretable. The women being represented endure "a workplace pervaded by sexual slur, insult and innuendo,"¹⁴⁶ and even if they are not directly harassed¹⁴⁷ they are affected by the same manipulations.¹⁴⁸ The issues

140. See *Harris v. Pan American World Airways, Inc.*, 74 F.R.D. 24 (N.D. Cal. 1977).

141. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 663 (D. Minn. 1991).

142. See *Mishkind*, *supra* note 101, at 143. How stringently restrictions are applied to class certifications depends in large part on whether discrimination is presumed to be "a discrete and isolated occurrence" or "a discriminatory policy [that] affect[s] different class members" in "varying ways." *Jordan v. County of L.A.*, 669 F.2d 1311, 1322 (9th Cir. 1982), *vacated*, 459 U.S. 810 (1982).

143. In *International Union v. LTV Aerospace and Defense Co.*, the court, in denying certification of a class composed of female employees who alleged individual acts of hostile environment sexual harassment, reasoned that the complaints were "too individualized." 136 F.R.D. 113, 130 (N.D. Tex. 1991). The court summarily dismissed the claim as "not amenable to class treatment," warning that defenses to these claims would "likely be very fact specific, and including these claims in the larger class action would cause the case to devolve into a series of individual trials." *Id.*

144. See *supra* notes 67, 98 and accompanying text.

145. The presumption that the employer discriminated against *individual* class members does not arise from the determination that a reasonable woman would have been affected. The individual will have to show subjective response to the harassment before she is entitled to damages. Because subjective response is an essential part of proving the claim, she must still prove that she was affected, at least as affected as the reasonable woman. The other elements are established by the court's determination in the liability phase of the proceedings. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 876 (1993). This burden has been significantly lightened by the Supreme Court holding in *Harris* that no psychological harm need be shown. *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993).

146. *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983).

147. Even if harassment is directed at employees other than the individual plaintiff, that evidence might be relevant to show hostile environment. Thus, even "non-victims" can still make

determinative of whether an environment is so hostile as to be discriminatory are likely to be common among a class of co-workers. The effect of the use of the reasonable woman standard on meeting the prerequisite of commonality was shown in the *Jenson* case, where the court disagreed with the contention that reactions to profanity are highly individualized. The fact that individual female plaintiffs may have had different reactions to alleged profanity, pornography or other potentially offensive material in the workplace did not preclude certification of class—the common question was “not how individual class members reacted but whether reasonable women would find the work environment hostile.”¹⁴⁹

While earlier cases have suggested that claims of retaliation and sexual harassment often require highly individualized proof and are thus unsuitable for class action,¹⁵⁰ this view is inconsistent with more recent rulings and application of the reasonable woman standard. Even if individual suits remain the most appropriate strategy for pursuing *quid pro quo* sexual harassment claims,¹⁵¹ a hostile environment, by definition, suggests that the discriminatory conduct endured by one plaintiff is similar to that affecting the class, and the relief requested must be compatible and appropriate for the class.¹⁵² Even in cases where a “single discriminatory policy may affect different employees differently, whether the policy itself is discriminatory is a question of fact common to all members of the class.”¹⁵³

The shift of focus¹⁵⁴—from the plaintiff’s reaction to the defendant’s

a claim for discrimination based on the harassment that surrounds them. *See, e.g., Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988).

148. An examination of the totality of the circumstances looks at a pattern of conduct that affects a victim directly and “reverberates throughout the work environment.” The “subliminal nature of such conduct . . . affects everyone in the workplace.” CONTE, *supra* note 92, at 97. The posting of sexually-oriented materials in common areas may serve as evidence of a hostile environment. *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988). The pervasive use of derogatory and insulting terms to women generally and to women personally may also serve as evidence of hostile environment. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990).

149. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 665 (D.Minn. 1991). *See also Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990). The determination of whether the employer exposed women to a sexually hostile environment is the focus of the liability phase of the class claim because “at issue therein is the common question of law which makes a class action an appropriate vehicle for prosecuting claims of sexual harassment.” *Jenson*, 824 F. Supp. 847, 875.

150. *See, e.g., Sheehan v. Purolator, Inc.*, 103 F.R.D. 641 (E.D.N.Y. 1984).

151. *See supra* note 15.

152. R. Green, *supra* note 80, at 232.

153. *Id.* at 231.

154. “[T]he focus of the question of sexual harassment should be on the defendant’s conduct, not the plaintiff’s perception or reaction to the defendant’s conduct.” *Scott v. Sears, Roebuck & Co.*, 605 F. Supp. 1047, 1056, *aff’d in part and rev’d in part on other grounds*, 581 F.2d 941 (D.C. Cir. 1978) (quoting *Jennings v. D.H.L. Airlines*, 101 F.R.D. 549, 551 (N.D. Ill.

conduct—in essence makes moot the question of individualized response to harassment. Concern about the “uniqueness” of harassment claims is without much merit given this appropriate new focus on behavior, not reactions. Further, adopting the reasonable woman standard to measure the severity of these claims minimizes the need for individualized analysis of reaction to prove hostility; rather, that standard evaluates the action as to whether a reasonable woman would have been bothered by it, and minimizes the subjective, and admittedly varying, reactions of any individual plaintiff.¹⁵⁵

Except for class actions maintained where common questions must predominate over individualized ones,¹⁵⁶ “commonality is not a demanding requirement,” mandating only “one issue of law or fact common to the claims of the class members.”¹⁵⁷ Common questions of fact are likely to predominate where a pattern of discrimination is alleged; if necessary, the class could be subdivided into subclasses later to assure factual commonality within the class.¹⁵⁸

In an analysis of commonality, the facts do not have to be identical, and disparities can be superseded by operation of pervasive discriminatory employment policy.¹⁵⁹ “Factual differences between individuals are to be expected and will not preclude a class action.”¹⁶⁰ Perhaps no policy is more pervasive than a hostile environment which touches and scorns all who dare enter it.

Also worthy of consideration is the fact that courts have found it unnecessary for the intimidation and insult to be sexual in nature.¹⁶¹ All that is necessary is that if the plaintiff “had been a man she would not have been treated in the same manner.”¹⁶² This would further minimize the need to examine the sexual proclivities or sensibilities of any particular woman.

1984); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (shifting focus from individual response to harassment itself).

155. If the employer is liable for creating a hostile environment because a reasonable person would have found the conditions abusive, damages are then determined on an individual basis. Although individual class members must prove they were subjectively affected at least as much as a reasonable person would be in order to recover, the greater hurdle (establishment of a hostile environment) is determined in the liability phase. Proof of subjective reaction may have been an obstacle when psychological harm or injury was required. But *Harris* lowered that hurdle by holding that harassment is actionable without economic, tangible, or serious or concrete effect on psychological well being. *Harris*, 114 S. Ct. 367, 371 (1993).

156. FED. R. CIV. P. 23(b)(3).

157. *See, e.g., Armstrong v. Chicago Park Dist.*, 117 F.R.D. 623, 628 (N.D. Ill. 1987).

158. *Johnson v. Georgia Highway Exp., Inc.*, 417 F.2d 1122 (5th Cir. 1969).

159. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

160. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 661 (D. Minn. 1991) (quoting *Coley v. Clinton*, 635 F.2d 1364 (8th Cir. 1980)).

161. *Hall v. Gus Const. Co.*, 842 F.2d 1010 (8th Cir. 1988) (intimidation and hostility can result from other than sexual conduct).

162. *Tompkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977) (quoting *Skelton v. Blazano*, 424 F. Supp. 1231, 1235 (D.D.C. 1976)).

The *Ellison* court indicated that it was the harasser's conduct that must be pervasive or severe, not the alteration in the conditions of employment.¹⁶³ "[E]mployees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation."¹⁶⁴ This too would undermine the theory that differences in plaintiff reaction or sensitivity should preclude the propriety of class certification because of lack of commonality. If what matters is that the conduct is pervasive, or that the environment is hostile or abusive, or that the conduct would be offensive to a reasonable woman, then the determination can be made by examining the facts of the environment, and by assuming that the pervasiveness, abusiveness, and hostility would impact all reasonable women exposed to that environment.

Even the EEOC policy statement suggests that an "objective standpoint" of a "reasonable person" should be taken and applied, but suggests that "petty slights" suffered by "hypersensitive" plaintiffs are not actionable.¹⁶⁵ A closely woven net is best used to collect the class members in these cases. To restrictively apply the prerequisites of commonality and typicality in the zealous attempt to screen out the few women who may have not been offended (at least not consciously) is to deny many thousands of woman who have been harmed a practical means of obtaining justice.

C. Typicality

The third requirement, typicality, also is intrinsically linked to the types of claims made. The typicality requirement asks whether "the claims or defenses of the representative parties [are] typical of the claims or defenses of the class"¹⁶⁶ or whether the representative "possess[ed] the same interest and suffer[ed] the same injury"¹⁶⁷ as the class members. Although it is often confused with commonality, this requirement focuses not on the broad picture of whether there is an identifiable class but whether this representative is an appropriate representative for the class because her claim is typical.¹⁶⁸ Commonality concerns whether there is a commonality of relationship among all the class claims, while typicality focuses on the similarity of the representa-

163. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (quoting *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991)).

164. *Ellison*, 924 F.2d at 878.

165. EEOC: Policy Guidance on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6681 (March 19, 1990) (Guidelines urge consideration of whether conduct was verbal or physical or both; whether conduct was frequently repeated; whether conduct was hostile and patently offensive; whether alleged harasser was co-worker or supervisor; whether others joined in perpetuating the harassment; whether the harassment was directed at more than one individual).

166. FED. R. CIV. P. 23(a)(3).

167. *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Committee*, 418 U.S. 208, 216 (1975)).

168. R. Green, *supra* note 80, at 231.

tive's claim to that of the rest of the class.¹⁶⁹ Since, to be typical, a plaintiff's claim must have something in common with other class members' claims, the requirements of typicality and commonality "tend to merge."¹⁷⁰ The typicality requirement is intended to protect plaintiffs and defendants from being represented by a person whose stake in the action is dissimilar to theirs, to insure that they will not be involved in unwarranted or unnecessary adjudication, and to promote the judicial economy that is the central concept of class actions.¹⁷¹ To the extent that the same evidence used to prove each individual claim would be relevant to prove the class claim, typicality is established.¹⁷²

"Typicality requirements may be satisfied even if there are factual dissimilarities or variation."¹⁷³ It fails only in instances with very unique fact patterns, employment circumstance or defenses.¹⁷⁴ This uniqueness is unlikely in a hostile environment case, since such environment by definition surrounds and touches all. Even in cases where the named plaintiff was the only one directly approached, co-workers still may be offended, that is, harassed, by such activities. Indeed, courts have found harassment in claims by persons who were indirect victims of the harassment since even visual or verbal assaults not directed at a particular female employee "sexualizes the work environment to the detriment of all female employees."¹⁷⁵ Like second-hand smoke, such hostility directed toward other women can choke even those who do not participate or who would attempt to ignore or escape it.

Differing experiences of retaliation also do not render a claim atypical for purpose of class certification.¹⁷⁶ Barring certification for that reason would illogically encourage defendants to insulate themselves from class actions by retaliating against anyone who brought a charge.¹⁷⁷

The other typicality problems that exist in discrimination cases involve multiple facilities or geography, where corporate practices may differ.¹⁷⁸ However, these are less likely in a hostile environment sexual harassment case where the discrimination is usually concentrated in a single environment.

169. *Id.*

170. *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *see* *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 597 (2d Cir. 1986).

171. 6 Federal Procedure L.Ed. Class Actions § 12:81.

172. *See* *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 665 (D. Minn. 1991).

173. 15 CLASS ACTION REPORT 122 (1992).

174. *See, e.g., Sheehan v. Purolator, Inc.*, 103 F.R.D. 641 (S.D. N.Y. 1984), *aff'd*, 839 F.2d 99 (2d Cir. 1988).

175. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1504 (M.D. Fla. 1991).

176. *See* *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 624 (N.D. Ill. 1989).

177. *Id.*

178. R. Green, *supra* note 80, at 232.

Especially where plaintiffs do not claim damages for all class members based on individual incidents of sexual hostility but allege an atmosphere that evidences discrimination, as was the case in both *Meiresonne* and *Jenson*, there is no need to provide conclusive proof that an identical hostile atmosphere exists for every class member.¹⁷⁹ Where plaintiffs had chronicled a dozen individual incidents of sexual hostility, plus expressions of the general harassing attitudes, the court found typicality.¹⁸⁰ Similarities in employment conditions, discriminatory practices and type of relief sought also show that plaintiffs' claims are aligned with those of the other class members.¹⁸¹

Another factor in determining typicality is if the claims would be the same whether brought by an individual or a class, and if evidence used to prove each individual claim would be relevant to prove the class claims.¹⁸² It would certainly be inefficient to go through a series of trials where woman after woman provided evidence to show that the environment was characterized by offensive words, pictures and actions. All those in the environment subjected to it and affected by it would proffer similar proof.

Typicality only requires an employee who can "press with substantially equal vigor or ability."¹⁸³ Just as commonality does not require named plaintiffs to clone all other class members in terms of sensitivity or reaction, typicality does not require the class representative be identical to those she represents, in terms of rank, job description, or other employment characteristic.¹⁸⁴

D. Adequacy of Representation

The final prerequisite to class action is the adequacy of representation, that the named plaintiff(s) "will fairly and adequately protect the interests of the class."¹⁸⁵ Considered here are whether the counsel is competent,¹⁸⁶ whether

179. *Meiresonne*, 124 F.R.D. at 625.

180. *Id.* (Memorandum in support of Plaintiff's Motion to Certify the Class and to Consolidate Consideration of Class Issues with Trial, at 15).

181. Conte, *supra* note 113, at 20.

182. See *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 665 n.19 (D. Minn. 1991).

183. Johnson, *supra* note 13, at 61.

184. If such identity of function were required, all classes of professional employees would likely be precluded from class certification. See *Meyer v. MacMillan Pub. Co.*, 95 F.R.D. 411 (S.D.N.Y. 1982). In *Jenson*, named plaintiffs were allowed only to represent hourly and not salaried workers, because there were different hiring and promotion schemes. "In traditional employment discrimination cases, variations based on salary and seniority do not render claims atypical for class certification purposes." Conte, *supra* note 113, at 20.

185. FED. R. CIV. P. 23(a)(4).

186. Unless there is evidence to the contrary, this is usually assumed. Defendants have unsuccessfully attempted to suggest that the stress caused by the harassment rendered the plaintiff an inadequate representative for the class. Conte, *supra* note 113, at 20 n.22.

any collusion is possible and whether named plaintiff's interest are antagonistic to the class she represents.¹⁸⁷

This requirement should be easily met, absent any interest truly antagonistic to the class. Even disagreements regarding the preferred remedy do not provide sufficient antagonism to defeat a claim of adequate representation. Differing levels of interest among prospective class members alone will not defeat the adequacy requirement.¹⁸⁸ Adequacy of representation has not proven to be a difficult requirement to meet. Claims of antagonistic interest between the named plaintiff and other female co-workers she seeks to represent because they were, in effect, competing for the same jobs and promotions have been deemed "absurd" by the courts, reasoning that to discredit adequacy by such a logic would doom almost every workplace action.¹⁸⁹ Moreover, any intraclass conflict alleged to defeat the adequacy of representation could be remedied easily by the provisions for notice and opting out; any class member could choose not to participate in the class action.¹⁹⁰

A showing of adequacy may require at least an active interest and familiarity with the case, someone willing to act for the class and not just to promote or preserve self-interest.¹⁹¹ Since a named plaintiff in a sexual harassment case must first have expended the effort to exhaust administrative remedies,¹⁹² at least some level of interest and familiarity can be assumed. Given the intensely personal nature of the claim, finding a plaintiff with an active interest would likely not be difficult. Familiarity with the facts of a hostile environment claim could be imputed to a woman who had worked in that environment for a period of time. While finances may be a concern, attorney's fees are usually available in Title VII,¹⁹³ and attorneys could

187. JACK H. FRIEDENTHAL, MARY KAY KANE AND ARTHUR R. MILLER, CIVIL PROCEDURE § 16.2 (1985).

188. *Hedge v. Lyng*, 689 F. Supp. 884 (D. Minn. 1987) (plaintiff seeking to represent class does not have to show all members would agree with her in order to qualify as adequate representative).

189. *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 625 (N.D. Ill. 1989).

190. *See, e.g., U.A.W. v. LTV Aerospace and Defense Co.*, 136 F.R.D. 113, 125 (N.D. Tex. 1991).

191. *See, e.g., Kuenz v. Goodyear Tire & Rubber Co.*, 104 F.R.D. 474 (E.D. Mo. 1985); *Wofford v. Safeway Stores*, 78 F.R.D. 460, 487 (N.D. Cal. 1978).

192. An individual satisfied the requirements by filing a timely charge with EEOC and acting pursuant to an EEOC right-to-sue letter. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

193. Title VII authorizes an award of attorney's fees to the "prevailing party." 42 U.S.C. § 2000e-5(k). This has been interpreted to mean such fees are required "unless special circumstances would render an award unjust." *Christianburg Garmant Co. v. EEOC*, 434 U.S. 412 (1978). Because the plaintiffs in *Jenson* prevailed on their claims of sexual harassment, they were awarded reasonable attorney's fees. *Jenson*, 824 F. Supp. 847, 889.

advance those to the plaintiff.¹⁹⁴ Generally this aspect of adequacy is not scrutinized. Given the depth and energy of feeling that have surfaced, finding committed plaintiffs¹⁹⁵ and attorneys willing to finance the suits should not be difficult.

E. Maintainability of the Suit: Fulfillment of 23(b)(2) and 23(b)(3)

In addition to meeting the four prerequisites, the claimant seeking class certification must overcome an additional hurdle by positioning itself under one of the three subsections of Rule 23(b): (1) either the prosecution of separate actions risks inconsistent adjudications or would, as a practical matter, be dispositive of the interests of non-participants;¹⁹⁶ (2) where the opposing party has acted or refused to act on grounds generally applicable to the class, and where injunctive or declaratory relief is appropriate;¹⁹⁷ and (3) common questions of law or fact predominate over individual questions.¹⁹⁸ While most discrimination cases have been certified as 23(b)(2) cases which contemplated declaratory and injunctive relief, this may be because that was the sole relief available. The fact that the Civil Rights Act of 1991 now offers compensatory and punitive damages should invite class actions certified under 23(b)(3), which usually applies to actions where damages are sought. While this section requires an additional finding that "questions of law or fact common to the members of a class predominate over any questions affecting only individual members" and that the procedure is "superior to other available methods for the fair and efficient adjudication of the controversy,"¹⁹⁹ such a situation could be found in hostile environment sexual harassment cases if matters similar to those used to assess joinder impracticability are considered. For example, the interest an individual class member might have in controlling his or her separate action,²⁰⁰ the extent and nature of litigation already commenced, the desirability of concentrating the litigation in a particular forum, and the difficulties likely to be encountered in managing the action. The additional burden of notice required by a 23(b)(3) action would be minimal,

194. MODEL RULES OF PROFESSIONAL CONDUCT 1.8(e)(1)-(2) (Aug. 1983).

195. Class representatives need to have "a sense of identity with and an emotional tie to the class . . . [or] be motivated by a personal drive to eradicate general injustice against his class." Johnson, *supra* note 13, at 45. Given the emotion and awareness stirred by the Thomas hearings and their aftermath, such identity and drive should be more prevalent.

196. FED. R. CIV. P. 23(b)(1).

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

198. FED. R. CIV. P. 23(b)(3).

199. *Id.*

200. While in *quid pro quo* cases there may be an individual interest due to the different intensity of the harassment, a member exposed to the same hostile environment would likely have less interest in individual control and hope for a better outcome with class proof since courts assess frequency of harassment to determine pervasiveness.

because records would likely be available as to the whereabouts of employees or ex-employees. And, because the size of the class remains relatively small in most hostile environment cases, notice would not be an insurmountable challenge. In cases where notice is required, it has generally been for those members that could be identified, with defendants required to provide necessary address lists.²⁰¹

While most Title VII cases are certified under 23(b)(2) because of the predominant need for injunctive remedies, the rules allow certification under both subsections for different parts of the case, i.e., the equitable portion and the damages portion.²⁰² Indeed, a proposed amendment to the Federal Rules of Civil Procedure suggested combining the subsections and treating them as factors in deciding whether a class action is a superior method of adjudication.²⁰³

IV. HOSTILE ENVIRONMENT CLASS ACTIONS ARE DESIRABLE AND EFFECTIVE

Given the foregoing, class certification in these cases is appropriate and, in any case, is left to the discretion of the court.²⁰⁴ What remains to be determined is whether such a procedural strategy is desirable from the standpoint of meeting the goals of Title VII. This Note suggests that it is, and that such an approach would provide an adequate deterrent, would compensate victims, would encourage more plaintiffs to come forward to represent their peers, would have a greater financial impact on companies, and therefore would motivate institution of stronger, proactive, anti-harassment policies and procedures, and more efficient complaint mechanisms. Most significantly, the use of class actions could provide a collective voice for women, one loud enough to outshout the cacophonous clatter of offensive work environments.

A. Class Actions Would Encourage and Allow More Women to Bring Hostile Environment Claims

One of the most important outcomes of applying a class action strategy to hostile environment claims is the strong possibility that it would secure relief for a greater number of victims.

Fear of retaliation is a strong disincentive to women considering the filing of a claim against their employer alleging harassment in the workplace.²⁰⁵ The

201. LEGAL SERVICES MANUAL FOR TITLE VII LITIGATION at 31 (Rev. Oct. 1975) National Employment Law Project. See also *Arey v. Providence Hosp.*, 55 F.R.D. 62 (D.C. 1972); *Ostapowicz v. Johnson Bronze Co.*, 54 F.R.D. 465 (W.D. Pa. 1972).

202. 15 CLASS ACTION REPORTER 27.

203. *Id.* at 21 (Amendments proposed by the Advisory Committee on Civil Rules of the Judicial Conference).

204. *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 594 (2d Cir. 1986).

205. Comments of Marcia Greenberger, of the National Women's Law Center, in *Federal*

lingering and largely accurate perception that pursuing individual claims will invite reprisal or retaliation can be a powerful deterrent to women, forcing many to keep their mouths shut and their sexual harassment claims unfiled.²⁰⁶

Certification of a class action would serve to protect participation in the action.²⁰⁷ While in a perfect world, legal and otherwise, those harmed would be able to come forward freely with their claims,²⁰⁸ that is not always the case. Many women are afraid to complain, not wanting to be seen as troublemakers, and are intimidated by possible repercussions.²⁰⁹ Women often are forced to endure an abusive environment or risk losing job, salary or livelihood,²¹⁰ all on the basis of a lawsuit whose outcome she cannot guarantee.²¹¹ It is well-recognized, and perhaps was even re-emphasized by the Thomas hearings, that it takes great courage and stamina to proceed with claims.²¹²

Since one of the barriers to bringing sexual harassment charges is the unappealing prospect of being a one-woman "David" against a corporate "Goliath," only the heartiest of women²¹³ may be willing to undertake such a seemingly futile battle and risk an unfavorable outcome.²¹⁴ The Thomas-Hill hearings may have sent a mixed message to women,²¹⁵ and even had a

Judge Grants Class Action Treatment to Sex Harassment Claim Against Mining Company, 244 DAILY LABOR REPORT A-10 (1991).

206. Most or all of the plaintiffs in *Slanina* would have been hesitant to participate if joinder had been required. *Slanina v. William Penn Parking Corp.*, 106 F.R.D. 419, 424 (M.D. Pa. 1984).

207. *Id.* See also Conte, *supra* note 113, at 18, suggesting the use of class actions shields against the retaliatory conduct that is common in sexual harassment cases.

208. See § 704 which prohibits employers from retaliating against complaining employees. Title VII of the 1964 Civil Rights Act, § 704, 42 U.S.C. § 2000e-3(a) (1982).

209. Claire Safran, *supra* note 27, at 219.

210. Workers filing claims often encounter retaliatory discharge, demotions, ostracisms by co-workers, and even "black-listing" by employers in a particular field or industry. House Report, *supra* note 20, at 71.

211. "Even if [women] recognize themselves as victims of sexual harassment, many perceive bringing it out into the open will only backfire on her." James Gruber, University of Michigan sociologist and workplace harassment authority in Leslie Dreyfous, *Women in Workplace Coming Forward after Thomas Allegations*, MPLS. STAR TRIBUNE, Oct. 10, 1991, at 8A.

212. Victor Schacter suggested the paradox of the response to the hearings: although there was greater awareness generated by Hill's testimony, since Thomas was ultimately successful, some women may have drawn the conclusion that it is just not worth the trouble. *Thomas Hearings*, *supra* note 8, at 1464.

213. Protest requires a "quality of inner resolve that is reckless and serene, a sense of 'this I won't take' that is both desperate and principled." MACKINNON, *supra* note 15, at 53. Especially in a tough economic climate where women are in many cases the breadwinner for their families, such resolve is rare.

214. One of Packwood's accuser's said "I'm really afraid we'll go through with all this, then if nothing happens, or virtually nothing happens, we have actually harmed other women by becoming an illustration of how hard it is to challenge this." Margasak, *supra* note 1, at A-2.

215. *Thomas Hearings*, *supra* note 8, at 1464.

“chilling” effect on the desire to bring suits. It is that image of a sole female pitted against the pomposity of a panel of unaffected men that provided for some women the most poignant—and most powerful—image of the Thomas hearings.²¹⁶ That scenario of one woman “going it alone,” stands in sharp contrast to the image of a suit brought on behalf of a group of aggrieved colleagues. With a class behind her claim, one woman’s whispered word against the world is amplified by the resonant voices of her co-workers.

Class actions will serve to remove some of the obstacles to filing charges or at least minimize or spread them across the class. Class actions also can help spread the cost of litigation.²¹⁷ If the *Meritor* decision was expected to fuel an increased number of claims,²¹⁸ then certainly the now greater awareness and the opportunity to commune as a class²¹⁹ will have a similar motivating effect on women. Moreover, as greater numbers of woman have their sexual harassment claims adjudicated, even more legitimacy will be associated with such claims.

The class action also offers maximum protection for plaintiffs and makes it easier for them to bring suit. While an employment discrimination action can generally only be certified as a class action to the extent of the named plaintiff’s EEOC charge,²²⁰ courts have encouraged liberal interpretation, taking into consideration that such charges are filed by laywomen and allowing the class complaint to include all claims which could reasonably be expected to grow out of the charge of discrimination.²²¹ This provides the opportunity for class certification of a claim which, when the EEOC charge was originally filed by the named plaintiff, might not have included other discriminatory factors.²²² Such flexibility would allow women not originally contemplating the use of class action to broaden the complaint to include other discriminatory acts.

A prospective class member would have little incentive to opt out if the case were brought as a 23(b)(3) class action. Even if the employer is found not to have engaged in a general pattern or practice of discrimination, a class

216. “Hill’s allegations and accusations that the [Senate] Judiciary Committee failed properly to investigate them, have brought to a boil anger about sexual harassment—and the silence that reinforces it.” Leslie Dreyfous, *supra* note 211, at 8A.

217. *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1578-80 (1976).

218. Cook, *The New Bias Battleground: Sex Harassment*, NAT’L L.J., July 7, 1986, at 11, col 3 (suggesting that the *Meritor* ruling should make women feel more comfortable about bringing suit).

219. Women may be more likely to file claims because “they feel less alone,” and employers are getting more aggressive with policies and letting people know complaint routes, per Judith Vladeck. *Thomas Hearings*, *supra* note 8, at 1464.

220. See *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986).

221. See *Griffin v. Carlin*, 755 F.2d 1516, 1522 (11th Cir. 1985).

222. Lois Jenson’s original EEOC charges described only incidents of sexual harassment, but the court allowed an expansion of those claims in the class suit. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 666 n.30 (D. Minn. 1991).

member can still maintain a civil action alleging an individual claim of discrimination.²²³ Thus, an employee would have little to lose by remaining a member of the class. If a *general* practice of discrimination were not found, still available to her would be the opportunity to litigate charges of discrimination against her as an *individual*. Thus, the rationale that restrictive application of Rule 23 requirements are mandated by the *res judicata* effect of adverse determination is largely a theoretical argument.

Since the scope of Federal Court inquiry is limited to the scope of the EEOC investigation or some reasonable derivation from the EEOC charge,²²⁴ complainants considering class action treatment will likely be advised to challenge a wide range of employment practices. This may intensify the pressure on employers to avoid "simple" harassment, realizing that full-blown discrimination suits can grow from those charges.

B. Class Actions Would Allow More Hostile Environment Plaintiffs to Prevail

The use of class actions, though a procedural strategy, could mean more successful sexual harassment suits. In many cases, sexual harassment claims have failed when an accuser's credibility has been questioned due to lack of corroborating evidence. Sexual harassment claimants have had difficulty convincing co-workers to testify.²²⁵

A pattern of harassment generally contributes to a stronger hostile environment claim than an isolated incident.²²⁶ Even where individual plaintiffs could not prove harassment, it has been acknowledged that sexually harassing incidents reported by other female employees could be "relevant in a class action suit."²²⁷ That the number of incidents required for severity is inversely related to the offensiveness of the event would suggest that a large group of women harassed on a classwide and regular basis would provide the required indicia of severity.²²⁸ Harassment of more than one woman is found as strong evidence that such harassment occurred.²²⁹ The greater the quantity of harassing incidents, the less egregious each of them has to be.

223. See *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984).

224. See *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970).

225. MACKINNON, *supra* note 15, at 20.

226. EEOC: Policy Guidelines on Sexual Harassment, 8 Fair Employment Practices Manual (BNA) 405: 6681, 6690 (Mar. 19, 1990).

227. *Jones v. Flagship Int'l*, 793 F.2d 714, 720 (5th Cir. 1986) (suggesting relevance to class actions of testimony about incidents involving other employees).

228. See generally *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, *supra* note 138, at 1454-59.

229. MACKINNON, *supra* note 15, at 26. See also *Pease v. Alford Photo Indus., Inc.*, 667 F. Supp. 1188 (W.D. Tenn. 1987) (supporting testimony of co-workers was an important factor in finding of hostile environment). And, the more severe or pervasive the hostility is, the more likely it is that a number of employees can qualify as class members.

Where a woman might have lacked evidence of the pervasiveness of the actions, her representation of a class of similarly situated, similarly harassed colleagues would offer convincing evidence of the frequency and quantity of occurrences. This collective accusation would contrast to the bringing of individual suits, where those asked to testify had little to gain personally, and much to lose, especially if they were still employed in and subjected to the harassing environment.

Fear of retaliation, thinking no one will believe them or that they will not be taken seriously, and a desire not to see the harasser punished are all reasons women do not report harassment.²³⁰ Class action certification would offer a buffer of protection from retaliation and would provide the charges with a level of seriousness and respectability that a sole claimant could not collect or conjure.

To the extent courts correctly believe the reasonable person standard trivializes concerns of women, the reasonable woman standard should result in a finding of liability in a broader array of situations than the previous standards.²³¹ This could contribute to the success of class actions in cases where courts employ the reasonable woman test.

Many women have quit their jobs rather than endure an abusive environment; this leads to continued victimization of others and contributes to the lack of visibility of the problem.²³² Class actions could provide some better visibility. While a decision rendered about one woman's reality can be important, as it was in the case of Anita Hill's testimony, one that suggests that numerous females in a corporation have been involved will certainly have greater ramifications.

*C. The Use of Class Actions for Hostile Environment
Discrimination Claims Will Create a Greater Financial Impact
on Employers and Motivate Stronger Anti-Harassment Policies*

With or without class actions, an increase in suits based on various forms of discrimination, including gender, are expected during the next decade.²³³ Just as the lack of monetary damages removed incentive for plaintiffs to bring sexual harassment suits, the minimal financial consequences may have also

230. Anita Hill speaking at a forum of human resources executives on October 12, 1992. 30 GOV'T EMPL. REL. REP. (BNA) 1404 (1992).

231. *Special Study, Sexual Harassment in the Workplace*, Research Institute of America at 11 (July 1991).

232. Elaine Frost, *Sexual Harassment in the Workplace*, 71 WOMAN LAWYERS JOURNAL 19 (1985).

233. *Six Major Areas of Litigation Predicted for the 1990s*, 3 Inside Litigation 32 (P-H) (Mar. 1992).

discouraged employers from taking stronger remedial action to "clean up their acts"—and their hostile environments.²³⁴

If money talks about the need to take strong action to prevent sexual harassment in the workplace, it will speak even more loudly and more articulately through the class.²³⁵ Making employers liable for losses will deter future acts, not only for that specific employer but will also serve as a general example to others in the industry.²³⁶ The increased financial liability expected due to the compensatory and punitive damages provisions of the Civil Rights Act of 1991 will create a powerful deterrent force.²³⁷ Factoring in the multiplier effect of class actions on employer liability will serve to intensify the deterrent effect of monetary damages.²³⁸ Even given new remedies, if damages are limited only to a single victim, the impact on a business of a verdict for the plaintiff is, in the big picture, insignificant. When that verdict²³⁹ is multiplied by 20 or 100 or 1000, the impact, the incentive and the urgency are likewise multiplied; the bottom line, sorely effected; the point, clearly made. Regardless of outcome, the litigation itself is expensive.²⁴⁰

*D. Class Actions are an Efficient Way of Dealing
with Expected, Increased Litigation*

The rapid growth in employment discrimination litigation in the years since Title VII went into effect has raised concern that such cases impose a significant burden on federal judges.²⁴¹ Racial and sexual harassment claims

234. "If [the employer] faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).

235. "If discrimination costs money, people will stop doing it." Dr. Heidi Hartman, testifying before House Committee. House Report, *supra* note 20, at 70.

236. "The damages a plaintiff recovers contribute significantly to the deterrent of civil rights violations in the future." *Riverside v. Rivera*, 477 U.S. 561, 575 (1986).

237. Data suggest that perception of increased liability causes employers to take action to interrupt and prevent employment discrimination. House Report, *supra* note 20, at 70. While damages will unlikely make a plaintiff whole (unfortunately, even most successful plaintiffs end up leaving the defendant's employ) they can serve as a deterrent to future harassment of others. House Report, *supra* note 20, at 70 (1990 Hearing, Vol. 2 at 180-181).

238. Wende Farrow, of the Minneapolis based Employer Association, a human resource consulting firm, suggests that with the new damages provision of the Civil Rights Act of 1991, the class action has great implications for employers. "If employers need to have a strong legal message to get them to take the action, you're not going to probably get one that's stronger." *Morning Edition* (National Public Radio broadcast Aug. 13, 1992) (available in LEXIS, NEXIS library NPR file).

239. Punitive damages are available up to \$300,000 from large employers. 42 U.S.C §1981 9(a) and (b) (Supp II 1992). And, since each individual is entitled to the maximum amount of damages under Title VII, class actions can result in six or seven figure damages awards.

240. See *Alternative Dispute Resolution*, *supra* note 9, at A-15.

241. John J. Donohue III and Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, May 1991 (citing Federal Courts Study

represent a growing percentage of civil rights litigation under Title VII.²⁴² This burden could be alleviated by greater use of class action lawsuits for sexual harassment. Proof of many of the elements of the claims made by women in a single workplace environment would be identical whether taken individually or as a class, and much of the same evidence would be used.²⁴³ To disallow class actions and by so doing insist that a series of repetitive claims be brought by a variety of different plaintiffs against a single employer would be highly unproductive, from the point of view of the courts and the employer.²⁴⁴ While this "parade" of individual hostile environment suits may not yet have occurred, due to the small percentage of claims made,²⁴⁵ the new awareness and increased damages may significantly and quickly lengthen that queue.

Another administrative efficiency would result from the fact that only the named plaintiff need exhaust the EEOC administrative process prior to filing a Title VII class action suit.²⁴⁶ Thus, a matter of workplace hostility could be investigated and litigated without the separate filing of dozens or hundreds of separate, but essentially equal, EEOC complaints.²⁴⁷ Although individuals may be excluded from the class for not filing charges with the EEOC because the statute of limitations had run by the time the class charge was filed,²⁴⁸ such exclusions are procedural, not philosophical, and not abundant enough to disturb the premise that class actions are legally proper. Also, the EEOC is authorized to bring an action against an employer on behalf of a class in its own name, without meeting Rule 23 requirements so long as the allegations grew out of the EEOC investigation.²⁴⁹

*E. The Use of Class Actions to Litigate Hostile Environment
Claims Supports the Remedial Nature of Title VII*

The goal of Title VII is eliminating discrimination in the workplace.²⁵⁰ Congress intended this would be accomplished by "the removal of artificial,

Committee, Tentative Recommendations for Public Comment 49-50 (1989) (noting increase in cases)).

242. CHI. DAILY L. BULL., Oct. 31, 1991, p. 3, col. 3.

243. See, e.g., *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 665 (D. Minn. 1991).

244. *Johnson*, *supra* note 13, at 61.

245. See *supra* notes 26-27 and accompanying text.

246. CONTE, *supra* note 92, at 163.

247. Requiring every employee to file an EEOC charge would "frustrate our system of justice and order." *Oatis v Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). "It would be wasteful if not vain, for numerous employees, all with the same grievance, to . . . process identical complaints with the EEOC." *Id.* at 498.

248. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 246 (3rd Cir. 1975).

249. 42 U.S.C. § 2000e-5(f)(1). See also *Donohue and Siegelman*, *supra* note 241, at 988.

250. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

arbitrary and unnecessary barriers to employment."²⁵¹ The Civil Rights Act of 1991 was enacted to "strengthen and improve Federal civil rights law"²⁵² because Congress had found that additional remedies were needed to deter unlawful harassment and intentional discrimination in the workplace."²⁵³ Thus, the remedial purpose of Title VII legislation²⁵⁴ suggests the need for an approach to these cases that will have significant, and prompt, impact on reducing sexual harassment overall.²⁵⁵ The enforcement of Title VII actions necessarily depends on the ability of individuals to present their grievances without the threat of retaliatory conduct by their employers,²⁵⁶ and class actions would dissuade employers from retaliation against any single employee. Also contrary to the intent of Title VII is restrictive application of the commonality and typicality requirements.²⁵⁷ The class action has been an important enforcer of Title VII's promise to eliminate discrimination from the workplace. "Without [a class action's] efficiency and economy . . . the injury of thousands would have remained undiscovered and unredressed."²⁵⁸

The use of class actions to protect women from being discriminated against in the workplace may have broader, positive social impact. "By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private as well. Thus Title VII may advance the goal of eliminating prejudices and biases in our society."²⁵⁹ Such a lofty goal, certainly not attainable on the legal force of Title VII alone, is less likely to be met by one plaintiff at a time. A class action, which addresses and redresses the wrongs of groups of women, would more effectively "inform" people of the unacceptability of sexist views.

251. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1470 (3d Cir. 1990) (citing *Griggs*, 401 U.S. 424).

252. P. L. 102-166 [S. 1745] *reprinted in* 1991 U.S. Code Cong. and Adm. News, 105 Stat. 1071.

253. *Id.* This redundancy in wording should not be interpreted to infer that unlawful harassment is *not* intentional discrimination. Rather, it expresses a desire to explicitly recognize the dangers of harassment being covered by the Act and to place them on equal footing with the more prominent methods of discrimination.

254. The "remedial and humanitarian underpinnings" of Title VII should be considered in not allowing procedural technicalities to bar claims under this act. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 560 (5th Cir. 1970).

255. "Class actions are a necessary tool to vindicate Title VII rights." *See Johnson, supra* note 13, at 3.

256. *See, e.g., Jones v. Flagship Int'l*, 793 F.2d 714, 726 (5th Cir. 1986).

257. Excessive demands of identical interest will serve to defeat certification and, thus, the policy and remedial purposes of Title VII. *Johnson, supra* note 13, at 39. "[I]f our nation is to move with speed toward genuine equality of opportunity, employers . . . cannot be allowed to escape the requirements of Title VII by a litigation strategy of divide and conquer." *Id.* at 40 (citing *Cook v. Boorstin*, 763 F.2d 1462, 1472 (D.C. Cir. 1985)).

258. *Johnson, supra* note 13, at 62.

259. *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988).

As with any type of classwide relief, there will likely be some marching out of monsters, the demons of unreasonable damage awards,²⁶⁰ frivolous litigation,²⁶¹ or the horror of unharmed women receiving damages because the behavior in question did not affect or impact them as it did the rest of the class.²⁶² Adherence to a reasonable woman standard in the liability phase of a class claim does not determine whether each individual woman was harmed, but whether a reasonable woman would find the environment abusive. This standard protects employers from liability for exposing *ultrasensitive* employees to a hostile environment, but it also requires that they be responsible for hostility toward *insensitive* employees. An isolated incident of a woman who is found to have been exposed to a hostile environment although she is not consciously offended by the hostility that surrounds her should not prevent the many hundred or thousands of others from making use of their legal rights to take classwide action to stop such hostility. The harm done may not be cognizable to the individual woman but rather is made manifest in the long term inferiority, lack of respect and power, and damage to self-concept that such harassment engenders.

Most victims lack the means, the legal know-how, the access and the energy to be frivolous in their pursuits.²⁶³ And no floodgate of litigation has been swept open by the availability of similar damages for racial discrimination.²⁶⁴ The fears of fostering unnecessary litigation, disproportionate jury awards, or discouraging claim settlement and conciliation are not founded in fact or previous Title VII experience.²⁶⁵

260. There is no merit to statement that adding a damages remedy will cause jury awards disproportionate to the offense committed or injury sustained. House Report, *supra* note 20, at 72. For example, an analysis of damage award under Section 1981 shows that between 1980 and 1990, compensatory and punitive damages were awarded in only 69 of 594 section 1981 cases. In two thirds of these, the award was \$50,000 or less, and the award only exceeded \$200,00 in four cases. *Id.* (citing Shea & Gardner, *Analysis of Damage Awards under Section 1981* (Jan. 23 1991)).

261. Suing an employer is an undertaking with personal and professional ramifications. House Report, *supra* note 20, at 71. Also, since most plaintiff's attorneys in these cases get paid only if they win, they are unlikely to pursue claims without merit.

262. This fear is unfounded. A victim must "subjectively perceive the environment to be abusive" for Title VII damages to be awarded. *Harris*, 114 S. Ct. 367, 370 (1993). A finding of liability in a class action only establishes the hostility of the environment; no remedy is available to a class member unless she is subjectively, negatively affected. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 876 (D. Minn. 1993).

263. Nancy Ezold, testifying at the 1990 Hearings (Vol. 2, at 191) suggested that there are enormous obligations and costs to the plaintiff, in terms of time and trial. She cited the huge financial burden on a plaintiff that a corporation does not equally bear. House Report, *supra* note 20, at 71.

264. House Report, *supra* note 20, at 71 (compensatory and punitive damages have long been available under Section 1981 for racial discrimination with no evidence that an inordinate number of frivolous lawsuits have been filed).

265. See House Report, *supra* note 20, at 71-73. And, in any event the burden of proving that she was harmed remains on the individual during the recovery phase. Prior to that showing,

V. CONCLUSION

The stage is set: increased awareness due, in large part, to the Thomas confirmation hearings (but brewing for years before in the "undiscovered and unredressed"²⁶⁶ injury of millions of women in the workplace); expanded remedies in the form of compensatory and punitive damages provided by the Civil Rights Act of 1991; and the class certification²⁶⁷ and eventual success²⁶⁸ of a hostile environment claim in *Jenson v. Eveleth Taconite Co.* Even with strict adherence to the Rule 23 requirements, many hostile environment claims, whether brought alone or as part of an across the board charge of discrimination, have the potential for class certification. The threat of retaliation and resultant fear of joinder will assure the meeting of numerosity in many cases; the application of the reasonable woman standard will often provide the requisite commonality and typicality; and the growing numbers, new interest and renewed strength of working women is likely to encourage more plaintiffs to come forward as adequate representatives.

Whether the curtain rises on a proliferation of class action suits will depend in part on the employer's level of proactive earnestness in dealing with sexual harassment and the judicial response to future requests for class action certification in hostile environment cases. Some may argue that class claims for hostile environments will make employers liable even to women who are not offended or affected by the environment; however, one must consider that, just as super-sensitive plaintiffs cannot easily seek recovery under the reasonable woman theory, women who are unreasonably *unaffected*, or perhaps acculturated or afraid to be affected, by patently offensive and sexually degrading environments will also not defeat the legitimate claims of the majority of reasonable women. There is no cost of injunctive relief for these unaffected women, and the cost of damages is far less than that expended to hire and train the thousands of reasonable women whose work environments are poisoned and whose job status is impacted, however subtly or long term, by harassing and abusive environments.²⁶⁹

Morality and justice aside, adequate practical forces and business wisdom speak against allowing sexual harassment. Employers need to consider the cost savings to be realized by eliminating harassing behavior. Strenuous

she is only eligible for appropriate prospective relief consistent with a finding of liability. *Jenson*, 824 F. Supp. at 875.

266. See *supra* note 258 and accompanying text.

267. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657 (D. Minn. 1991).

268. *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993).

269. The fiscal impact of harassment is great. It has been estimated that the total costs for replacing an employee often exceeds the salary; the Employee Management Association estimates that it costs almost \$8000 to recruit and hire an exempt employee. Lost productivity due to low morale and turnover are even more expensive. JANA HOWARD CAREY, SEXUAL HARASSMENT IN THE WORKPLACE, 426 PLI Lit. 30 (1992)

efforts to protect vulgar speech, pornography, and sexual epitaphs are counterproductive and have not been proven to positively impact on the productivity of men or women. Harassment is time consuming, and certainly not focused on the important work at hand. Non-work related chatter and the time taken to post pornography are certainly unnecessary expenses that employers could eliminate, while at the same time preventing costly and embarrassing harassment suits.

Prior to the *Jenson* case, such sexual harassment suits had been brought only by individuals.²⁷⁰ Those individual suits have been traditionally difficult to prove, sometimes because of the unwillingness of female colleagues and co-workers to corroborate the accusations. It may be that the comfort—and power—of class certification will convince women that they are not alone and will reapportion the energy acknowledgedly needed to endure and survive harassment litigation. In a class action, where all those affected stand to benefit equally, women formerly concerned about ending up on the winning side may be motivated to reassess their loyalties and recalculate their odds for a positive outcome. Allowing suits to now be brought on behalf of *all* women exposed to the same hostile environment raises new questions that will only be answered by the judicial response to future requests for class certification.

Careful, legally appropriate use of class actions should provide employers with a powerful incentive to eradicate hostile behavior from their workplaces. The class action procedure provides women with the muscle to gently shift the balance of power, by forcing relocation of the fulcrum to accommodate the weight of multiple female plaintiffs. While class actions are neither a panacea, nor appropriate in every sexual harassment situation, they do offer the promise of strengthening Title VII's remedial scheme and, if not providing women with an ultimately "powerful new tool,"²⁷¹ at least providing an articulate and much needed voice to many of those who now suffer in silence.

270. "To the court's knowledge no class of plaintiffs has ever maintained through trial a claim of sexual harassment." *Jenson*, 824 F. Supp. 847, at 875.

271. According to *Jenson's* lawyer, the certification "represents a major breakthrough that will give all women faced with sexual harassment in the workplace a powerful new tool in future cases." *Judge Rules Lawsuit on Sex Harassment can be Class Action*, N.Y. TIMES, Dec. 19, 1991, at B17.

