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Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?

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Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?

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I. INTRODUCTION

In 1993 several former waitresses at the restaurant "Hooters" sued the chain for sexual harassment. The lawsuits alleged that Hooters established a work environment in which its customers felt free to make sexual comments and advances to its waitresses.¹ Examples of the offensive nature of the work environment included the name of the restaurant ("Hooters," a slang term for women's breasts) and the sexually provocative uniforms the waitresses were required to wear. Responses to the lawsuits varied widely. Some individuals took the view that Hooters should be found liable for the sexual harassment of its waitresses by its customers,² while others argued that the Hooters waitresses should not be allowed to recover for conduct they should have anticipated at the time they chose to work at Hooters.³

The Hooters lawsuits raised the question that is the focus of this Note: should there be an assumption of risk defense to some hostile work environment sexual harassment claims?⁴ Although the

1. *Felepe v. Bloomington Hooters, Inc.*, No. 93-11134, Complaint at 11 (D. Minn. 1993) ("Complaint").

2. For example, Patricia Ireland, the President of the National Organization for Women stated, "I think that the very name and logo [of Hooters] is the kind of approach that invites sexual harassment. It basically says these, quote, girls are available at least to be ogled. . . ." Patty Shillington, *Hooters Concept: Sexist or Just Good, Clean Fun?*, Miami Herald 1J (Aug. 1, 1993).

3. For example, Laura M. Maciejko, a citizen of Cedar Brook, New Jersey, wrote, "It is with outrage that I read July 22 about 'Hooters' restaurants being sued for sexual harassment by their waitresses. Didn't these women research 'Hooters' before applying for the job? . . . Didn't they see the outfits they were required to wear? I can't believe any woman would accept a position in such an establishment and not expect to be leered at and be the subject of come-ons . . . What's next? Playboy centerfolds suing Hugh Hefner because men are making suggestive remarks?" *Letters to the Editor*, Philadelphia Inquirer E04 (Aug. 1, 1993).

4. The statement of the President of NOW, see note 2, and that of the New Jersey citizen, see note 3, represent two sides of the sexual harassment issue. The former position takes the view that all women can be victims of sexual harassment and that women do not sacrifice their right to have a workplace free of sexual harassment by choosing to work at places like Hooters. In order for women to become truly equal in society and in the workplace, Hooters should not be allowed to escape liability for the harassment it encourages its customers to inflict upon its waitresses. In short, Hooters waitresses should not be found to have assumed the risk of sexual harassment. The latter position, on the other hand, takes the view that anti-discrimi-

lawsuits were settled, the issue remains relevant as the potential for hostile work environment sexual harassment claims by employees of Hooters and other sexually charged environments continues to exist.⁵

Part II of this Note provides the legal background for the issue. It provides a brief history of hostile work environment sexual harassment, focusing on cases involving harassment by nonemployees. It also describes the defense of assumption of risk, and distinguishes assumption of risk from the unwelcomeness element in current sexual harassment law. Part III examines the usefulness of an assumption of risk defense in cases involving sexually charged workplaces, describing in detail the allegations of the Hooters lawsuits and applying assumption of risk concepts to the sexual harassment claims in the lawsuits. Part IV attempts to determine when an assumption of risk defense to sexual harassment should be permitted by comparing the Hooters claims to the highly disfavored *Rabidue v. Osceola Refining Company*.⁶ Part V discusses the advantages and disadvantages of the proposed defense, as well as alternatives to the proposed defense, and concludes that assumption of risk concepts are useful in sexual harassment law and should be utilized, even if not by explicitly allowing on assumption of risk defense.

nation laws can go too far in "protecting" women. Women will never be equal in society or in the workplace until they are seen as able to take responsibility for their choices, rather than as perpetual victims. Therefore, women who choose to work at places like Hooters, knowing of the nature of the work environment, should be barred from recovery because they assumed the risk of sexual harassment. For further discussion of the advantages and disadvantages of allowing an assumption of risk defense to sexual harassment, see Part V.

5. There currently is no explicit assumption of risk defense in sexual harassment law. However, the assumption of risk defense has some similarities to the unwelcomeness element of current sexual harassment law. See Part II.C for a comparison of assumption of risk and unwelcomeness.

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

II. LEGAL BACKGROUND

A. *Sexual Harassment*

1. Hostile Work Environment in General

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." It was not until the late 1970s, however, that courts began to recognize sexual harassment as a type of sex discrimination prohibited by Title VII.⁷ The first type of sexual harassment claim courts recognized involved the conditioning of job benefits on sexual favors, now known as "quid pro quo" harassment.⁸ In the early 1980s, courts began to recognize a second type of sexual harassment claim, hostile work environment sexual harassment, which arises when unwelcome conduct based on sex creates a hostile environment. Such harassment can occur even in the absence of tangible job detriments.¹⁰

In *Meritor Savings Bank v. Vinson*, the Supreme Court recognized hostile work environment harassment, holding that a plaintiff may establish a violation of Title VII by showing that discrimination on the basis of sex created an abusive work environment.¹¹ The

7. 42 U.S.C. § 2000e-2 (1988 & Supp. 1991).

8. Barbara Lindemann and David D. Kadue, *Sexual Harassment in Employment Law* 13 (BNA, 1992).

9. See, for example, *Williams v. Saxbe*, 413 F. Supp 654, 657 (D. D.C. 1976), rev'd in part, vacated in part, on separate grounds, 587 F.2d 1240 (D.C. Cir. 1978). (holding that an employer violates Title VII when a supervisor dismisses an employee because she refused to have sex with him); *Tomkins v. Public Service Electric and Gas Co.*, 568 F.2d 1044, 1045 (3d Cir. 1977) (holding that an employer violates Title VII when a supervisor conditions an employee's job status on favorable response to his sexual advances); *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977) (holding that a superior violates Title VII when an employee's job is abolished after she rejects his sexual advances). In their treatise, Barbara Lindemann and David Kadue describe the essence of a quid pro quo claim as "that the individual has been forced to choose between suffering an economic detriment and submitting to sexual demands," a " 'put out or get out' bargain". Lindemann and Kadue, *Sexual Harassment in Employment Law* at 8.

10. See, for example, *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982) (holding that "under certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers tangible detriment"); *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981) (holding that sexually harassing conduct can violate Title VII even without causing a tangible detriment).

11. 477 U.S. 57, 66 (1986). The Court endorsed the EEOC Guidelines that defined sexual harassment, and added the requirement that, in order to be actionable, the harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an

Meritor Court did not clearly specify the elements of a cause of action for hostile work environment sexual harassment. The lower courts, however, have generally held that the necessary elements are: (1) the employee belongs to a protected group;¹² (2) the employee was subjected to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;¹³ (3) the harassment complained of was based upon sex;¹⁴ (4) the harassment complained of was sufficiently severe or pervasive to affect a term, condition, or privilege of employment and create an abusive working environment;¹⁵ and (5) the existence of employer responsibility.¹⁶ Courts have differed, however, in their determinations of the proper standard to determine if harassment was sufficiently severe or pervasive to create an abusive working environment.¹⁷

In *Harris v. Forklift Systems, Inc.*,¹⁸ the Supreme Court clarified the requirements for establishing a hostile work environment sexual harassment claim. The Court held that to be actionable, conduct need not seriously affect the plaintiff's emotional well-being or cause the plaintiff to suffer injury.¹⁹ The Court also held that a dual

abusive working environment. *Id.* at 67. The Court also stated that the gravamen of a sexual harassment claim is that the sex-related conduct was unwelcome, such that the court must inquire as to whether the plaintiff by her conduct indicated that the sexual conduct was unwelcome, not whether her participation in the conduct was voluntary. *Id.* at 68.

12. See, for example, *Henson*, 682 F.2d at 903. All this element requires in any sex discrimination case is a "simple stipulation that the employee is a man or a woman." *Id.*

13. *Id.* The employee must show that the conduct was unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." *Id.* In *Meritor*, the Court held that a complainant's sexually provocative speech and dress is relevant in determining whether he or she found particular sexual advances unwelcome. 477 U.S. at 69.

14. *Henson*, 682 F.2d at 903. The plaintiff must show that but for the fact of her sex, she would not have been subjected to the harassing conduct. *Id.* The court noted that in the typical case in which a male supervisor makes sexual overtures to a female worker, "it is obvious that the supervisor did not treat male employees in a similar fashion." *Id.*

15. *Id.* at 904.

16. *Id.* at 905. The plaintiff must show that the employer knew or should have known of the harassment and failed to take prompt corrective action. *Id.*

17. See, for example, *Dochter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 459 (7th Cir. 1990) (stating that a court should consider the "likely effect of a defendant's conduct upon a reasonable person's ability to perform his or her work" (quoting *Brooms v. Regal Tube Company*, 881 F.2d 412, 419 (7th Cir. 1989)); *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (holding that "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment").

18. 114 S. Ct. 367 (1993).

19. *Id.* at 371. The Court stated that "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Id.* at 370. The Court resolved a conflict among the federal circuits as to whether the conduct needed to pass that threshold to be actionable. *Id.*

objective-subjective standard should be applied in determining whether conduct is severe or pervasive enough to create a hostile work environment.²⁰ The conduct must be such that a reasonable person would find it hostile or abusive, and the victim must subjectively perceive the environment to be abusive.²¹ The Court noted further that whether an environment is hostile or abusive should be determined by looking at the totality of the circumstances, including the frequency and severity of the discriminatory conduct; whether the conduct was physically threatening or humiliating; and whether the conduct unreasonably interfered with the employee's work performance.²²

2. Harassment by Non-Employees

A substantial element of the Hooters lawsuits involved allegations of sexual harassment of Hooters waitresses by customers of Hooters.²³ While there have been many cases involving sexual harassment and many articles covering the topic,²⁴ relatively little has been litigated and written about the harassment of employees by nonemployees.²⁵ The first cases featuring this issue involved employer-imposed sexually provocative dress requirements that resulted in sexual harassment by nonemployees.

a. Dress Code Cases

In *EEOC v. Sage Realty Corp.*,²⁶ the Equal Employment Opportunities Commission ("EEOC") and Margaret Hasselman, a former lobby attendant in an office building, sued the company that managed the office building for sex discrimination because it required

20. *Id.*

21. *Id.*

22. *Id.* at 371.

23. See Complaint at 11-13 (cited in note 1).

24. See, for example, Robert J. Aalberts and Lorne H. Seldman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 *Pepperdine L. Rev.* 447, 447 n.1 (1994) (describing the voluminous amount of scholarly research in the past five years on sexual harassment).

25. See generally Aalberts and Seldman, 21 *Pepperdine L. Rev.* 447 (discussing employer liability for sexual harassment of employees by non-employees); Joseph G. Allegretti, *Sexual Harassment by Nonemployees: The Limits of Employer Liability*, 9 *Employee Rel. L. J.* 98 (1983) (discussing sexual harassment by non-employees); Rhonda Werner, Note, *Exposing Employers in the Hostile Work Environment: Appearance Standards that Lead to Sexual Harassment*, 15 *Hamline J. Pub. L. & Policy* 145 (1994) (discussing employer liability for appearance standards that result in the sexual harassment of employees by non-employees).

26. 507 F. Supp. 599 (S.D. N.Y. 1981).

its female lobby attendants to wear sexually provocative uniforms. The uniform at issue, known as the Bicentennial, resembled an American flag and was to be worn as a poncho.²⁷ Hasselman found the uniform to be short and revealing on both sides; it exposed her thighs and portions of her buttocks.²⁸ When Hasselman wore the uniform in the office building lobby, she was subjected to repeated harassment in the form of sexual propositions, lewd comments, and gestures.²⁹ The court held that Sage's requirement that Hasselman wear the Bicentennial uniform, when it knew that wearing the uniform subjected her to sexual harassment, constituted sex discrimination in violation of Title VII.³⁰

Although *Sage Realty* was decided before the theory of hostile work environment sexual harassment was recognized by the courts, the facts were such that Hasselman was likely subject to hostile work environment sexual harassment.³¹ Because of her sex, Hasselman was required to wear a sexually provocative uniform that subjected her to unwelcome sexual propositions and comments, and this harassment was severe and pervasive enough to alter her working conditions and create an abusive working environment.³² After *Sage Realty*, several other courts stated that requiring female employees to wear sexually provocative attire as a condition of employment could violate Title VII.³³

27. Id. at 604.

28. Id.

29. Id. at 605. Observers made comments such as "I'll run it up the flagpole any time you want. . . ." Id. at 605 n.11.

30. Id. at 609. The court found that the sex discrimination in *Sage Realty* was of the same nature as that found in *Tomkins*, 568 F.2d 1044, and *Barnes*, 561 F.2d 983. Id. *Barnes* and *Tomkins* were two of the first quid pro quo sexual harassment cases. The *Sage Realty* court stated, "Although in *Tomkins* and *Barnes* the victims of sex discrimination were subjected to the direct sexual advances of their supervisors, the reasoning of those courts is entirely apposite here, where [the defendants] knowingly allowed Hasselman, a female employee, to remain, as a condition of her employment, in a position where she would be subjected to sexual harassment on the job." Id.

31. See text accompanying notes 12-16 (listing the elements of a hostile work environment sexual harassment claim). See also Aalberts and Seidman, 21 Pepperdine L. Rev. at 455 (cited in note 24) (stating that *Sage Realty* could possibly have been decided on the hostile environment theory).

32. The court stated that wearing the uniform interfered with Hasselman's ability to perform her duties properly. *Sage Realty*, 507 F. Supp. at 611.

33. In *Marentette v. Michigan Host, Inc.*, 506 F. Supp. 909, 912 (E.D. Mich. 1980), the court stated in dicta that an employer-imposed sexually provocative dress code which subjects employees to sexual harassment "could well violate the true spirit and the literal language of Title VII." In *EEOC v. Newtown Inn Associates*, 647 F. Supp. 957, 958 (E.D. Va. 1986), the EEOC charged Newtown Inn Associates with subjecting its cocktail waitresses to sexual harassment by requiring them to project an air of sexual availability on the job by wearing pro-

The sexually provocative dress cases often involve claims by an employer that it has the right to impose grooming and dress requirements or that the wearing of a provocative uniform is a bona fide occupational qualification ("BFOQ").³⁴ The *Sage Realty* court responded to the former argument by stating that while an employer has the prerogative to impose reasonable grooming and dress requirements on its employees when those requirements present no distinct employment disadvantages and have a negligible effect on employment opportunities, an employer does not have the unfettered discretion to require its employees to wear any uniform the employer chooses, including sexually provocative uniforms.³⁵ The bona fide occupational qualification argument arises out of Section 703(e) of the Civil Rights Act of 1964, which provides that it shall not be an unlawful employment practice for an employer to hire and employ an individual on the basis of his sex in those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.³⁶ The *Sage Realty* court dismissed the defendants' contention that the wearing of a sexually revealing Bicentennial uniform was a BFOQ, stating that the wearing of sexually provocative clothing was clearly not an occupational qualification or the position of office building lobby attendant.³⁷

b. Sexual Harassment by Non-Employees in General

The dress code cases demonstrate that employers can be held liable for sexual harassment by nonemployees.³⁸ In those cases, the

vocative outfits. Finally, in *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal. 1986), the court held that the plaintiff established a prima facie violation of Title VII by demonstrating that her employer terminated her employment as cocktail lounge waitress because she refused to wear sexually provocative attire.

34. See, for example, *Sage Realty*, 507 F. Supp. at 609 (stating that Sage argued that requiring Hasselman to wear the bicentennial uniform was an appropriate exercise of its right to require an employee to work in company-prescribed attire); *Newtown Inn*, 647 F. Supp. at 961 (stating that the employer claimed a bona fide occupational qualification defense).

35. 507 F. Supp. at 608-09 (quoting *EEOC v. Sage Realty Corp.*, 87 F.R.D. 365, 371 (S.D. N.Y. 1980)). See also *id.* at 609 n.15 (discussing circuit court decisions holding that Title VII does not prohibit an employer from making reasonable employment decisions based on factors such as grooming and dress); *Marentette*, 506 F. Supp. at 911 (agreeing with the decision in *Sage Realty* that there is a difference between reasonable employment decisions based on factors such as grooming and dress, and unreasonable ones).

36. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (1988). For a further discussion of BFOQ in the context of the Hooters allegations, see Part IV.C.

37. *Sage Realty*, 507 F. Supp. at 611 (noting that "[i]ndeed, the evidence establishes that wearing the uniform interfered with Hasselman's ability to perform her job").

38. See Aalberts and Seidman, 21 Pepperdine L. Rev. at 453 (cited in note 24) (discussing collected cases).

employers encouraged sexual harassment by requiring their female employees to wear sexually provocative attire.³⁹ Subsequent cases and EEOC Guidelines have established, moreover, that employers can be held liable for the sexual harassment of employees by nonemployees, even in the absence of an employer-imposed sexually provocative dress code.

The Supreme Court stated in *Meritor Savings Bank v. Vinson* that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."⁴⁰ This statement can be interpreted as imposing a duty upon employers to maintain a workplace that is free of sexual harassment; it does not distinguish harassing conduct by employers and co-workers from harassment by nonemployees.⁴¹ Furthermore, the Equal Employment Opportunity Commission's Guidelines on Sex Discrimination⁴² provide that an employer may be liable for the sexual harassment of employees in the workplace by nonemployees when the employer or its supervisory employees knew or should have known of the harassment and failed to take immediate and appropriate corrective action.⁴³ The Guidelines note further that in determining whether an employer is liable for harassment, one should consider any control or other legal responsibility which the employer may have with respect to the conduct of the nonemployees.⁴⁴ Although the EEOC Guidelines are not legally binding on courts, the Supreme Court has afforded them significant weight under certain circumstances.⁴⁵

39. *Id.*

40. 477 U.S. at 65.

41. Aalberts and Seidman, 21 *Pepperdine L. Rev.* at 454 (cited in note 24) (arguing by analogy that an employer's Title VII duty will extend to harassment by non-employees).

42. 29 C.F.R. § 1604 (1994) The Guidelines were promulgated to assist courts in sexual harassment cases. *EEOC Compliance Manual* § 615, ¶ 3114 at 3267 (CCH, 1991).

43. 29 C.F.R. § 1604.11(e) (1994).

44. *Id.* The EEOC Compliance Manual describes the situation of a male customer touching a waitress and telling her that what he wanted was not on the menu, as an example of a situation in which the employer may be responsible if it learned of the conduct and failed to take immediate and appropriate corrective action within its control. *EEOC Compliance Manual* § 615.3(e), ¶ 3102 at 3209 (cited in note 42). The *Manual* suggests that, depending on the circumstances, appropriate corrective action might be as simple as switching table assignments to have a waiter finish serving that table. *Id.* The *Compliance Manual* also states that whether an employer is ultimately responsible for harassment by a nonemployee "will depend on the relationship between the employer and the non-employee as revealed by the specific factual context in which the allegedly unlawful conduct occurred." *Id.* at 3210.

45. The Court stated in *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976), that interpretations and opinions by the EEOC under Title VII constitute a "body of experience and judgment to which courts and litigants may properly resort for guidance." See also Aalberts and Seidman, 21 *Pepperdine L. Rev.* at 457 (cited in note 24) (describing the Supreme Court's

In recent years, several courts have relied on the EEOC Guidelines in holding that employers may be liable for the sexual harassment of employees by nonemployees. In *Powell v. Las Vegas Hilton Corp.*,⁴⁶ a "21" dealer alleged that customers had stared at her for extended periods and told her that she had "great legs" or "great tits," and that her employer had discharged her for complaining about this harassment.⁴⁷ In denying the employer's motion for summary judgment, the court held that an employer may be liable for the sexual harassment of its employees by nonemployees, including customers.⁴⁸ Similarly, in *Magnuson v. Peak Technical Services, Inc.*⁴⁹ and *Hernandez v. Miranda Velez*,⁵⁰ courts held that an employer may be liable for the sexual harassment of an employee by a nonemployee if the employer knew of the harassment and failed to take corrective action to remedy the situation. In addition, several federal courts of appeal have stated in dicta that employers may be liable for the sexual harassment of employees by nonemployees.⁵¹

In conclusion, the current law regarding hostile work environment sexual harassment and harassment by nonemployees demonstrates that an employer such as Hooters, which requires its employees to wear sexually provocative uniforms and which features a "sexually charged" atmosphere in which male customers may feel free to make sexual comments to waitresses, may be liable under Title VII for the sexual harassment of its waitresses by its customers.⁵² The question remains, however, whether Hooters waitresses can and should be said to have "assumed the risk" of some harassing conduct by customers, such that Hooters would not be liable.

approach toward the EEOC Guidelines). The Supreme Court relied on the EEOC Guidelines in deciding *Meritor*. 477 U.S. at 65.

46. 841 F. Supp. 1024 (D. Nev. 1992).

47. *Id.* at 1025-26.

48. *Id.* at 1027-28. The court referred to the statement of the *Meritor* Court that Title VII provides employees the right to work in an environment free of discriminatory intimidation and ridicule. *Id.* at 1028.

49. 808 F. Supp. 500, 513 (E.D. Va. 1992).

50. 1994 WL 394855 at *8 (D. Puerto Rico).

51. See, for example, *Whitaker v. Carney*, 778 F.2d 216, 221 (5th Cir. 1985) (citing 29 C.F.R. § 1604.11(e) for the proposition that "such duty may obtain as to actions of nonemployees in the workplace"); *Garziano v. E.I. DuPont de Nemours & Co.*, 818 F.2d 380, 387 (5th Cir. 1987) (citing 29 C.F.R. § 1604.11(e) in support of its statement that "federal law imposes a specific duty upon employers to protect the workplace and the workers from sexual harassment, including redressing known occurrences of sexual harassment"); *Henson*, 682 F.2d at 910 (noting that "[t]he environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace" (citations omitted)).

52. The Hooters plaintiffs alleged that Hooters knew of the harassment of its waitresses by its customers. Complaint at 18 (cited in note 1).

B. Assumption of Risk

Assumption of risk is an affirmative tort defense, the general principle of which is that a plaintiff who knowingly and voluntarily assumes a risk of harm arising from the negligent or reckless conduct of a defendant is barred from recovery for that harm.⁵³ It is generally recognized as taking two forms: express assumption of risk and implied assumption of risk.⁵⁴ Express assumption of risk arises when the plaintiff evidences her express consent to incur a known risk by written or spoken word.⁵⁵ Implied assumption of risk arises when the plaintiff evidences her consent to incur the risk by her conduct.⁵⁶

The basis of the assumption of risk defense is the plaintiff's consent.⁵⁷ In particular, the defense is based on the plaintiff's express or implied agreement to shift the legal responsibility for possible injury from the negligent defendant onto the plaintiff, thus relieving the defendant of liability.⁵⁸ This agreement can be shown by an exculpatory contract or simply by the plaintiff's actions in voluntarily engaging in some activities, such as contact sports.⁵⁹ The plaintiff's

53. Restatement (Second) of Torts § 496A (1965) ("Restatement (Second)"). The court in *Perkins v. Spivey*, 911 F.2d 22, 31-32 (8th Cir. 1990), explained the defense of assumption of risk in the employment context as follows:

Assumption of risk, in the law of master and servant, is a phrase commonly used to describe a term or condition in the contract of employment, . . . by which the employee agrees that certain dangers of injury, while he is engaged in the service for which he is hired, shall be at the risk of the employee. Assumption of risk generally bars recovery by an employee who knows of the danger in a situation but nevertheless voluntarily exposes himself to that danger. . . . [T]he essence of [assumption of risk] is venturousness; it implies intentional exposure to a known danger. . . .

54. See, for example, Restatement (Second) §§ 496B and 496C (defining express and implied assumption of risk).

55. Paul Rosenlund and Paul Killion, *Once a Wicked Sister: The Continuing Role of Assumption of Risk Under Comparative Fault in California*, 20 U.S.F. L. Rev. 225, 233 (1986).

56. *Id.* The plaintiff implies by her conduct that she consents to the defendant's negligence or recklessness and agrees to take her own chances. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, *Prosser and Keeton on the Law of Torts* § 68 at 481 (West, 5th ed. 1984) ("*Prosser and Keeton on Torts*"). See also Restatement (Second) § 496C, comment b (stating "[t]he plaintiff does not . . . expressly consent to accept the risk of harm arising from the defendant's conduct; but by voluntarily electing to proceed, with knowledge of the risk, in a manner which will expose him to it, he manifests his willingness to accept it, and to take his chances as to harm which may result from it. He is therefore barred from recovery as if he had expressly consented").

57. *Prosser and Keeton on Torts* § 68 at 484. See also Rosenlund and Killion, 20 U.S.F. L. Rev. at 243 (stating that the basis of assumption of risk is the plaintiff's consent); Restatement (Second) § 496C, comment h (stating that the basis of assumption of risk is consent to accept the risk).

58. Rosenlund and Killion, 20 U.S.F. L. Rev. at 243-44.

59. *Id.* at 244-45 (citing, for example, *Kuehner v. Green*, 436 S.2d 78, 81 (Fla. 1983) (participant in karate match deemed to have consented to risk of negligent kick); *Kabella v.*

agreement to waive liability if the defendant is negligent allows the defendant to engage in conduct which the plaintiff desires without fear of liability.⁶⁰ Proponents of assumption of risk contend that the operation of the defense, denying recovery by a plaintiff who has consented to a risk created by the negligence of the defendant, simply enforces the plaintiff's agreement.⁶¹ This enforcement of the plaintiff's agreement is in the interest of plaintiffs as a class, because if plaintiffs are not bound by their promises, future defendants will no longer engage in conduct desired by future plaintiffs due to fear of liability.⁶² These concepts underlying the defense of assumption of risk are "fundamental to a society which places great weight upon the individual's freedom of choice."⁶³

Tort law has established limits to the defense of assumption of risk. For example, courts have refused to give effect to some express agreements by which the plaintiff assumed a risk or to recognize implied assumption of risk, when allowing the plaintiff to assume the risk is contrary to public policy.⁶⁴ Courts are generally concerned with protecting particular classes of people from those who may take unfair advantage of them.⁶⁵ An express agreement for the assumption of risk will not, in general, be enforced, and conduct will not, in general, be found to constitute implied assumption of risk when the defendant

Bouschelle, 100 N.M. 461, 672 P.2d. 290, 294 (1983) (participant in tackle football game deemed to have consented to risk of negligent tackle).

60. Rosenlund and Killion, 20 U.S.F. L. Rev. at 245.

61. *Id.*

62. *Id.* Drag racing is an example of a risky activity that some people may want to experience. A racetrack owner is likely to have participants sign an express agreement assuming the risks of certain injuries that they may sustain while drag racing. Even if the participants do not sign a waiver, they may be viewed as impliedly assuming the risk by choosing to drag race, because drag racing seems to be an activity in which any reasonable person must recognize certain risks. If courts do not enforce the participants' agreement to assume the risk of certain injuries, the racetrack owner will be unable to afford to continue to provide the drag racing experience to interested persons because the risk of financial liability will be too great. Therefore, because of the failure to enforce some participants' assumption of risk, other interested persons will no longer be able to experience the activity. See *Winterstein v. Wilcom*, 16 Md. App. 130, 293 A.2d 821, 828 (1972) (holding that the plaintiff expressly assumed the risk of injuries at the defendant's racetrack). For a discussion of this point in the context of the Hooters lawsuits, see text accompanying notes 159-62.

63. Rosenlund and Killion, 26 U.S.F. L. Rev. at 245.

64. See Restatement (Second) § 496B, comment j (stating that an express agreement by the plaintiff to assume the risk will not be enforced if the defendant's superior bargaining position impaired the plaintiff's free choice) and § 496C, comment j (stating that the same public policy considerations invalidating some express assumptions of risk may also invalidate implied assumptions of risk).

65. *Id.* § 496C, comment j.

has such greater bargaining power than the plaintiff that their agreement does not represent the plaintiff's free choice.⁶⁶

The knowing and voluntary elements of implied assumption of risk are additional means courts use to limit the defense.⁶⁷ A plaintiff will not be found to have impliedly assumed the risk of harm arising from the defendant's conduct unless she knew of the existence of the risk and appreciated its nature, character, and extent.⁶⁸ The standard is subjective, and considers what a particular plaintiff in fact knew and understood.⁶⁹ There are some risks, however, that are so clear and obvious that no one will be believed if they say they did not understand them.⁷⁰

For the defense of assumption of risk to apply, the plaintiff must accept the risk voluntarily.⁷¹ The Restatement (Second) of Torts provides that the plaintiff's acceptance of a risk is not voluntary if the defendant's negligence has left the plaintiff no reasonable alternative.⁷² The comments to the Restatement provide further, however,

66. Id. § 496B, comment j and § 496C, comment j. One relationship in which courts generally find such a disparity of bargaining power that they will not allow a plaintiff to assume the risk of harm is when the defendant and plaintiff are employer and employee, as economic necessity may force employees to agree to assume risks. Id. § 496C, comment j.

67. See Ann K. Bradley, Note, *Knight v. Jewett: Reasonable Implied Assumption of Risk as a Complete Defense in Sports Injury Cases*, 28 San Diego L. Rev. 477, 496 (1991) (stating that a court can fulfill its public policy aims by narrowly defining the terms knowing and voluntary). See also *Prosser and Keeton on Torts* § 68 at 486-87 (cited in note 56) (stating that the defense of assumption of risk is quite narrowly restricted by the requirement that the risk assumption be knowing and voluntary). Restatement (Second) § 496C defines implied assumption of risk as follows: a plaintiff who fully understands a risk of harm to himself caused by the defendant's conduct or by the condition of the defendant's property, and who nevertheless voluntarily chooses to enter or remain within the area of that risk, under circumstances showing his willingness to accept the risk, is not entitled to recover for harm within that risk.

68. Restatement (Second) § 496D.

69. Id., comment c; *Prosser and Keeton on Torts* § 68 at 487 (cited in note 56). If the plaintiff does not understand the risk involved in a situation because of his lack of information, experience, or judgment, he will not be found to have assumed the risk. Restatement (Second) § 496D, comment c.

70. Restatement (Second) § 496D, comment d. Examples of risks that anyone of adult age must be found to appreciate include: slipping on ice, lifting heavy objects, flammable substances, falling through unguarded openings, driving a car with faulty brakes, and unguarded dangerous machinery. See *Prosser and Keeton on Torts* § 68 at 488. In the usual case, the plaintiff's "knowledge and appreciation of the danger will be a question for the jury; but where it is clear that any person in his position must have understood the danger, the issue may be decided by the court." Id. at 489.

71. Restatement (Second) § 496E.

72. Id. One such case involved a plaintiff who, knowing that the floor was defective, entered the outhouse provided by her landlord and fell into the pit below. *Rush v. Commercial Realty Co.*, 7 N.J. Misc. 337, 145 A. 476, 476 (1929). The court held that the plaintiff "had no choice, when impelled by the calls of nature, but to use the facilities placed at her disposal by the landlord," and thus did not voluntarily assume the risk of injury. Id.

that the plaintiff's acceptance of the risk is to be considered voluntary when the plaintiff is acting under the compulsion of circumstances that leave him no reasonable alternatives, as long as those circumstances were not caused by the defendant's tortious conduct.⁷³

There has long been controversy surrounding the defense of assumption of risk, particularly in the employment context. Use of the defense reached its height during the Industrial Revolution, when it was used to insulate employers from the cost of on-the-job injuries to employees, in order to "encourage industrial undertakings by making the burden upon them as light as possible."⁷⁴ In applying the doctrine, courts reasoned that, because workers were not forced to remain at any given job, they assumed the risk of working at a dangerous one.⁷⁵ Assumption of risk, contributory negligence,⁷⁶ and the fellow servant rule⁷⁷ were known as "the three wicked sisters of the common law," because of the great obstacles they posed to recovery for industrial accidents.⁷⁸ Because of the growing belief that workers need protection, today the defense of assumption of risk has been almost entirely eliminated in the employment setting through labor legislation.⁷⁹

73. Restatement (Second) § 496E, comment b.

74. See *Prosser and Keeton on Torts* § 80 at 571-72 (cited in note 56). See also Rosenlund and Killion, 20 U.S.F. L. Rev. at 226 (cited in note 55) (referring to the use of the defense to "insulate nineteenth century capitalists from the 'human overhead' of their developing industries").

75. Jane P. North, Comment, *Employees' Assumption of Risk: Real or Illusory Choice?*, 52 Tenn. L. Rev. 35, 40 (1984). The problem with this reasoning was that most employees had no real choice of a safe place to work. The working conditions in many industries were extremely inhumane, and this use of the assumption of risk defense meant that employers had no incentive to improve working conditions. *Prosser and Keeton on Torts* § 80 at 573.

76. The contributory negligence rule prevented employees from recovering for injuries caused by their own failure to exercise reasonable care for their safety. *Prosser and Keeton on Torts* § 80 at 569.

77. The fellow servant rule prevented employees from recovering from their employer for injuries caused solely by the negligence of a fellow servant. *Id.* § 80 at 571.

78. *Id.* § 80 at 573. Under the common law system, which relied on the three defenses, the vast majority of industrial accidents were uncompensated, and "the burden fell upon the worker, who was least able to support it." *Id.* § 80 at 572.

79. North, 52 Tenn. L. Rev. at 42 (cited in note 75). By 1949, every state had enacted a workers' compensation statute. *Id.* Such statutes rest upon a theory of social insurance rather than tort liability. *Prosser and Keeton on Torts* § 80 at 568. The worker gives up her right to sue her employer for work-related injuries at common law in exchange for the fixed and certain compensation awards set by the statute. North, 52 Tenn. L. Rev. at 42. Workers' compensation is a form of strict liability for the employer, who has no common law defenses. *Prosser and Keeton on Torts* § 80 at 573. The assumption of risk defense was eroded further by other state legislative action, such as hazardous occupations employer's liability acts and acts abrogating the defense in certain employment contexts. North, 52 Tenn. L. Rev. at 43-44.

The viability of the defense of assumption of risk in general, not just in the employment context, has been uncertain since the replacement of contributory negligence by comparative fault in almost every state. See generally John L. Diamond, *Assumption of Risk After*

The same broad theory underlies both the decline of the defense of assumption of risk and the rise of Title VII. Assumption of risk has fallen into disfavor and Title VII has flourished because of the beliefs that workers need the protection of the state and that the market operating alone does not sufficiently protect the interests of workers.⁸⁰ Assumption of risk was clearly abused as a defense during the Industrial Revolution, and its decline in the employment context has generally benefited workers.⁸¹ Similarly, Title VII has benefited workers by recognizing that state intervention is necessary to eliminate discrimination in employment.⁸² This Note argues, however, that the law can go too far in protecting workers, with the result that workers are limited in their ability to choose the type of environment in which they work.⁸³ The expansion of sexual harassment law in particular poses an additional danger for women: that they will be viewed as perpetual victims who always need the protection of the state, rather than as free thinkers who can accept responsibility for their choices.⁸⁴ This Note contends that a limited assumption of risk defense in sexual harassment law would avoid these dangers, allowing individuals to choose to work in sexually charged environments and recognizing that employees can and should face the consequences of their choices.

Comparative Negligence: Integrating Contract Theory into Tort Doctrine, 52 Ohio St. L. J. 717 (1991); Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. Rev. 213 (1987); Rosenlund and Killion, 20 U.S.F. L. Rev. 225 (cited in note 55). While contributory negligence, like assumption of risk, is a complete defense; under comparative fault, a plaintiff's negligence results in only a partial deduction from recovery, depending upon the relative culpability of the defendant and the plaintiff. Diamond, 52 Ohio St. L. J. at 719-20. Courts and commentators have reached several different conclusions on the issue of whether assumption of risk should be subjected to the apportionment principles of comparative negligence. See *id.* at 720-25 (exploring ways to reconcile assumption of risk and comparative negligence).

80. See *Prosser and Keeton on Torts* § 80 at 572-73 (discussing the motivations behind the statutory changes in the law which nearly eliminated the assumption of risk defense in the employment setting); *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 800 (1972) (stating that the purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens").

81. See notes 74-79 and accompanying text.

82. See, for example, *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (noting that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers" (cited approvingly in *Meritor*, 477 U.S. at 66)).

83. See notes 159-62 and accompanying text.

84. See Part V.A.

C. *Distinguishing Assumption of Risk From the Unwelcomeness Element of Current Sexual Harassment Law*

The assumption of risk defense is similar to the unwelcomeness element of hostile work environment sexual harassment. Both focus on the plaintiff's conduct, rather than the defendant's, to potentially relieve the defendant from liability. While several commentators have criticized this aspect of the unwelcomeness element,⁸⁵ another has approved it, noting that the element recognizes that women can and, in some circumstances, should protect themselves from sexual harassment, rather than assuming the role of victim.⁸⁶ Both the assumption of risk defense and the unwelcomeness element provide that a plaintiff who has indicated her willingness for the defendant to engage in certain conduct should not be allowed to complain about the defendant's conduct later, whether the plaintiff voluntarily chooses to encounter a known risk and consents not to hold the defendant liable for any injury from that risk, or engages in conduct that indicates that sexual comments or advances are invited and not offensive.⁸⁷

One difference between assumption of risk and unwelcomeness involves the burden of proof. Assumption of risk is an affirmative defense the defendant must plead and prove.⁸⁸ Proof of unwelcomeness, however, is part of the plaintiff's prima facie case.⁸⁹ More importantly, assumption of risk and unwelcomeness differ substantively. The basis of the assumption of risk defense is consent. Harassing conduct must, by definition, be unwelcome to constitute sexual harassment.⁹⁰ If the conduct is unwelcome and is thus harassment, how can the plaintiff be said to have consented to it, in order to have assumed the risk of the harassment? The necessary distinction is that for assumption of risk purposes, a court must find that the plaintiff consented merely to the *risk* of the conduct, not to the conduct itself. In other words, she accepted the risk of the conduct because she found that the probable benefits of a certain activity

85. See, for example, Christina A. Bull, *The Implications of Admitting Evidence of a Sexual Harassment Plaintiff's Speech and Dress in the Aftermath of Meritor Savings Bank v. Vinson*, 41 UCLA L. Rev. 117, 147 (1993) (stating that "admitting evidence of a woman's dress and speech necessarily focuses the trial inquiry on the conduct of the plaintiff rather than of the defendant . . . [and] encourages blaming the victim for the offense committed against her").

86. Marie T. Reilly, *A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss*, 47 Vand. L. Rev. 427, 473 (1994).

87. See notes 13 and 53 and accompanying text.

88. *Prosser and Keeton on Torts* § 68 at 494 (cited in note 56).

89. See *Henson*, 682 F.2d at 903 (stating that the employee must show that the harassing conduct was unwelcome).

90. See *id.*

outweighed the likely risks, and she voluntarily entered into the risky activity. This consent to assume the risk of the harassing conduct is distinguishable from consenting to or welcoming the conduct itself. The latter is what is required for harassing conduct to be welcome, and thus not to constitute actionable sexual harassment. In short, in the sexual harassment context, finding that the plaintiff assumed the risk of sexual harassment means that she consented to bear the risk of certain harassing conduct, even that which she found offensive and unwelcome at the time it occurred.

We can draw an analogy to a situation where an individual is commonly said to have assumed the risk of injury, football.⁹¹ When a person plays football, courts generally say that the mere fact that they entered into the game indicates that they impliedly consented to assume the risk of some injury.⁹² Their conduct suggests that they consented to the risk of injury because they believed that the fun of the game outweighed its potential risk. Their conduct does not suggest, however, that they welcomed or invited the injury itself or that they indicated that an injury would be desirable.

The distinction between welcomeness and assumption of risk was muddled by the Supreme Court's statement in *Meritor* that a plaintiff's sexually provocative speech or dress is relevant in determining whether she found particular sexual advances welcome.⁹³ A plaintiff's sexually provocative speech or dress, if shown to be directed at a particular co-worker or customer (probably a rare situation), may be useful in demonstrating that she invited his advances or indicated that she would find his advances desirable. Such evidence thus may show that she welcomed his advances and that the advances did not constitute sexual harassment. On the other hand, evidence that a plaintiff used sexual language or dressed provocatively, but where there is no showing that the plaintiff directed this behavior at one or more individuals (probably a more common situation), does not seem to be very probative that she welcomed the advances of any particular person.⁹⁴ Rather, evidence of such behavior by the plaintiff seems

91. See, for example, *Kabella v. Bouschelle*, 100 N.M. 461, 672 P.2d 290, 294 (1983) (participant in tackle football game deemed to have consented to the risk of a negligent tackle).

92. *Id.* at 292 (stating that "[v]oluntary participation in a football game constitutes an implied consent to normal risks attendant to bodily contact permitted by the rules of the sport").

93. 477 U.S. at 69.

94. A major criticism of the unwelcomeness defense in sexual harassment law is the contention that women generally do not dress to attract men, and therefore it is erroneous to use their dress as evidence that they welcomed sexual conduct. Ann C. Juliano, Note, *Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 Cornell L. Rev.

more appropriate to demonstrate that she assumed the risk of harassing conduct: she voluntarily acted or dressed provocatively, knowing that doing so would create a risk of sexual advances from her co-workers and customers. In short, evidence of the plaintiff's provocative speech or dress, which the *Meritor* court held was admissible to show welcomeness, seems generally more relevant to show assumption of risk.⁹⁵ Commentators, recognizing that such evidence tends not to be very probative as to whether the plaintiff truly welcomed the harassing conduct and tends to be very prejudicial to the plaintiff, have argued that the *Meritor* court erred in stating that such evidence is generally relevant as to welcomeness and have criticized the very existence of the welcomeness element.⁹⁶

Welcomeness and assumption of risk are two distinct defenses to a claim of sexual harassment,⁹⁷ and each plays a useful role if limited to its proper scope.⁹⁸ The plaintiff will meet the unwelcomeness element of a sexual harassment claim if she can show that she did not solicit or incite the harassing conduct and that she regarded the con-

1558, 1585 (1992). Even if a woman does dress to look attractive to a particular man, that does not mean that she welcomes sexual attention from all men. *Id.* at 1585-86. "Unless her actions or dress clearly indicate a desire for sexual conduct with the alleged harasser, there is no basis for believing that a woman's desire to engage in sexual conduct *with a specific person* is indicated by her dress or general speech." *Id.* (emphasis added).

The justification for a welcomeness element provided by the EEOC in its *Meritor* amicus brief supports the contention that evidence of a plaintiff's dress or speech that is not directed at any particular person is not probative as to welcomeness. The EEOC stated that a welcomeness element was needed to "ensure that sexual harassment charges do not become a tool by which one party to a consensual sexual relationship may punish the other." *Id.* at 1575 (quoting Brief for EEOC, *Meritor* (No. 84-1979)). This statement suggests that evidence showing that the plaintiff was trying to attract a particular person should be relevant as to welcomeness. Contrary to the *Meritor* court, the statement does not suggest that general evidence of a plaintiff's speech and dress is relevant to show that the plaintiff welcomed the advances of any person, thus barring her sexual harassment claim.

95. While it is arguable that evidence of a plaintiff's provocative speech or dress could be used to demonstrate that she assumed the risk of sexual harassment and thus should be barred from recovery, this Note contends that any assumption of risk defense in sexual harassment law should be narrow, in order to achieve the goals of Title VII. See Part IV. This Note proposes an assumption of risk defense that is limited only to the specific situation of a plaintiff who works for an employer that sells sex appeal as a substantial part of its business and who offers sex appeal as a substantial part of her particular job. This proposed assumption of risk defense would therefore be unavailable to employers who do not have sex appeal as a substantial part of their business, but who want to argue that the plaintiff's sexually provocative speech or dress is relevant to show that she assumed the risk of sexual harassment.

96. See generally Bull, 41 UCLA L. Rev. 117 (cited in note 85); Juliano, 77 Cornell L. Rev. 1558 (cited in note 94).

97. Assumption of risk is, of course, not a defense that currently exists in sexual harassment law.

98. See Part V.A (discussing the advantages of the assumption of risk defense).

duct as undesirable or offensive.⁹⁹ The assumption of risk defense only becomes relevant after the plaintiff has demonstrated unwelcome sexual harassment. This Note, focusing on the allegations of the Hooters lawsuits, argues that, even if a plaintiff succeeds in showing that she did not welcome the harassing conduct at the time it occurred, she should still be unable to win her sexual harassment claim if the defendant can show that the plaintiff assumed the risk of sexual harassment and that her job is one in which allowing employees to assume the risk of sexual harassment is not contrary to public policy.

III. ANALYSIS OF AN ASSUMPTION OF RISK DEFENSE TO THE SEXUAL HARASSMENT CLAIMS IN THE HOOTERS LAWSUITS

A. *The Allegations of the Hooters Lawsuits*

The Hooters lawsuits alleged several different types of sexually harassing conduct that contributed to a hostile work environment. One allegation involved conduct by the Hooters management and male employees. The lawsuits alleged that the management and male employees subjected female employees to derogatory language and unwelcome sexual commentaries about their bodies, including managers making statements about the size of waitresses' breasts, referring to a waitress as having "DSL"—dick-sucking hips, and nicknaming a waitress "Clitoris."¹⁰⁰ The lawsuits alleged further that Hooters management imposed unwelcome sexual contacts on waitresses, including attempting to have sex with them, grabbing them on the buttocks and groin area, and subjecting them to involuntary "massages."¹⁰¹ Other allegations included that managers conferred special rewards on waitresses who provided them with sexual favors, and that managers intimidated waitresses about their bodies.¹⁰²

Another type of sexual harassment alleged by the lawsuits was harassing conduct by Hooters customers. The lawsuits alleged that Hooters established a working environment in which its customers

99. As discussed above, evidence of the plaintiff's sexually provocative speech and dress, contrary to the statements of the *Meritor* court, is typically not relevant to the welcomeness issue. See notes 93-96 and accompanying text.

100. Complaint at 4 (cited in note 1).

101. *Id.* at 5.

102. *Id.* at 5, 7.

were encouraged to make sexual comments and advances to its waitresses.¹⁰³ Some specific examples proffered were: the name of the restaurant (a slang term for women's breasts); waitresses referred to as "Hooters girls"; management's directions for waitresses to smile at the hoots and leers of male customers; Hooters' displays of sexist menus, pictures, calendars, and signs on the work premises in view of customers; and Hooters' requirement that female employees wear sexually provocative uniforms.¹⁰⁴ The lawsuits also alleged that Hooters' tolerance and encouragement of sexual communications and requirement of a sexually provocative employee uniform caused waitresses to be subjected to unwelcome sexual communications by customers, including "I want to order your hooters," asking waitresses to "show me your hooters," making comments about women's breasts and buttocks, and staring at and making passes at waitresses.¹⁰⁵ Yet another type of sexual harassment alleged by the lawsuits involved the nature of the workplace in general: a place where women's bodies were used for the sexual entertainment of men.¹⁰⁶

The lawsuits alleged further that the plaintiffs were offended by the harassment and gave notice to Defendant Hooters of the unwelcome sexual conduct and communications, but that Hooters failed to take prompt or adequate remedial action.¹⁰⁷

B. Analysis of the Hooters Allegations Under Hostile Work Environment Sexual Harassment Law

The facts alleged in the Hooters lawsuits seem likely to constitute a hostile and offensive working environment. All of the necessary elements of a hostile work environment sexual harassment claim, as laid out in *Henson v. City of Dundee*,¹⁰⁸ appear to be met.

103. *Id.* at 6.

104. *Id.* at 11.

105. *Id.* at 12.

106. *Id.* at 8-9. The lawsuits provided examples of the exploitation of women's bodies in the workplace, such as: defendants' choice of Hooters as the name for their restaurant; a framed poster of a Playboy magazine cover with "Hooters" written across a woman's naked breasts was hung on the wall greeting all employees; a sign at the restaurant entrance stated "Men: no shirts, no shoes: no service. Women: no shirt: free food"; waitresses were required to wear sexually provocative uniforms; waitresses were required to hula hoop at the request of customers; and managers pulled female employees' T-shirts tight and tied them in the back so the women's breasts would bulge out the top. *Id.*

107. *Id.* at 18.

108. 682 F.2d 897, 903-05 (11th Cir. 1982). See notes 12-16 and accompanying text.

The plaintiffs clearly belong to a protected group.¹⁰⁹ It also seems clear that the harassment complained of was based upon sex.¹¹⁰

The requirement that the plaintiffs must have been subject to unwelcome sexual harassment is not as obviously met. The allegations demonstrate that the plaintiffs were subject to sexual harassment;¹¹¹ the more difficult issue is whether the harassing conduct was unwelcome. The lawsuits alleged that the conduct was unwelcome, but the EEOC Guidelines and several courts indicate that one should examine the totality of the circumstances in determining whether conduct was unwelcome¹¹² in the sense that the employee did not solicit or incite the conduct and the employee regarded the conduct as offensive.¹¹³ As discussed previously, the holding of the *Meritor* court that evidence of the plaintiff's sexually provocative speech or dress is "obviously relevant" to welcomeness has encouraged courts to broaden their view of welcomeness, admitting evidence that is not probative of whether the plaintiff welcomed the harassing conduct but rather suggests that she assumed the risk of any harassment she suffered.¹¹⁴ Under this broad view of welcomeness, it could be argued that the plaintiffs' decision to work at Hooters, a place named after a slang term for women's breasts, where the waitresses must wear sexually provocative attire, suggests that the harassing conduct was not un-

109. In all cases of sexual discrimination, the membership in a protected group element simply requires a stipulation that the employee is a man or a woman. *Henson*, 682 F.2d at 903.

110. *Id.* As the *Henson* court explained, in a case in which a male supervisor makes sexual overtures to a female worker, it is usually obvious that the supervisor did not treat male employees similarly. The allegations of the Hooters lawsuits, that the male management, employees, and customers made unwelcome sexual comments about the waitresses' bodies, such as "I want to order your hooters," and imposed sexual contacts upon waitresses, seem equally based upon the sex of the waitresses. See Complaint at 4, 12 (cited in note 1). It is highly unlikely that male employees were subjected to such behavior.

111. The *Henson* court described sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature." *Id.* (quoting the EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1981)). Management, male employees, and customers were all alleged to have made sexual comments to the waitresses, management was alleged to have physically touched the waitresses in a sexual way, and customers were alleged to have made sexual advances to the waitresses. See generally Complaint.

112. See EEOC Compliance Manual, § 615 at 3270 (CCH, 1990); *Downer v. Federal Aviation Administration*, 775 F.2d 288, 295 (Fed. Cir. 1985) (stating that "the offensiveness of conduct cannot be judged simply by proving that an incident involving sexual remarks occurred without considering the context").

113. *Henson*, 682 F.2d at 903.

114. See Juliano, 77 Cornell L. Rev. at 1585-92 (cited in note 94) (arguing that evidence of a woman's speech and dress is rarely probative that she welcomed sexual behavior, and stating that evidence of the plaintiff's past conduct "may invite juries to punish women for past expressions of sexuality or to incorrectly infer that sexual expression with one person invites sexual expression with all").

welcome, that the plaintiffs solicited such conduct or indicated that they did not find such conduct offensive.¹¹⁵ The plaintiffs' choice of where to work, however, does not seem very probative of whether they welcomed harassing conduct from any particular employee or customer of Hooters, and seems more relevant to a determination of whether they assumed the risk of sexual harassment.¹¹⁶ In addition, the broad view of welcomeness seems inappropriate in light of the reasons why an unwelcomeness standard was advocated.¹¹⁷ Finally, a highly relevant factor in the unwelcomeness determination is whether the plaintiff complained about the harassing conduct.¹¹⁸ Commentators have argued that a woman's conduct should never outweigh her words: If a plaintiff affirmatively told her harassers that she found their conduct offensive, this statement should be dispositive as to unwelcomeness.¹¹⁹ The Hooters lawsuits allege that the plaintiffs continually complained about harassing conduct.¹²⁰ The alleged complaints arguably outweigh any welcomeness that may have been suggested by their decision to work at Hooters, and demonstrate that the conduct was indeed unwelcome.

The next required element, that the harassment be sufficiently severe or pervasive to affect the terms and conditions of employment and create an abusive working environment, also appears to be satisfied by the allegations in the Hooters lawsuits. The *Harris* Court

115. The allegations of the Hooters lawsuits are distinguishable from the facts of *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959 (8th Cir. 1993). In *Burns*, the district court ruled against the plaintiff, despite the "grisly and shocking facts supporting a finding of unwelcome sexual harassment," because the plaintiff had previously appeared in provocative photos in a lewd magazine. *Id.* at 961. The district court reasoned that a person who would appear nude in a magazine would not be offended by the conduct at issue in the case. The Eighth Circuit reversed, holding that "[t]he plaintiff's choice to pose for a nude magazine outside work hours is not material to the issue of whether plaintiff found her employer's work-related conduct offensive. This is not a case where Burns posed in provocative and suggestive ways at work." *Id.* at 963. The sexually provocative behavior of the plaintiff in *Burns* was not work-related, and thus the court held it was not relevant as to whether the plaintiff found her employer's conduct offensive. *Id.* The Hooters plaintiffs, however, chose to work at a place where sexually provocative attire was required of the waitstaff. This was therefore work-related, and thus arguably could be relevant as to whether the plaintiffs solicited the harassing conduct and/or found it offensive. See *Mitchell v. Hutchings*, 116 F.R.D. 481, 484 (D. Utah 1987) (holding that "evidence relating to the work environment . . . is obviously relevant if such conduct was known to [the] defendant").

116. Part III.C discusses the application of assumption of risk concepts to the Hooters allegations.

117. See note 94.

118. See EEOC Compliance Manual, § 615 at 3270 (cited in note 112) (stating that "[w]here there is some indication of welcomeness . . . the charging party's claim will be strengthened if she made a contemporaneous complaint or protest").

119. See, for example, Bull, 41 UCLA L. Rev. at 151 (cited in note 85).

120. Complaint at 13 (cited in note 1).

stated that whether an environment is hostile can be determined only by looking at the totality of the circumstances, including the frequency and severity of the discriminatory conduct, whether the conduct was physically threatening or humiliating, and whether the conduct unreasonably interfered with an employee's work performance.¹²¹ At Hooters, alleged harassment by management, coworkers, and customers certainly appeared to be frequent. Some of the conduct appeared to be quite severe and physically threatening, especially the allegations that managers grabbed intimate areas of the body of one of the plaintiffs, and that a manager attempted to have sex with another.¹²² The allegations that the plaintiffs were forced to resign due to the unrelenting harassment and that they suffered severe mental anguish and emotional distress as a result of the harassment,¹²³ suggest that the harassment unreasonably interfered with the plaintiffs' work performance.

Finally, the allegations in the Hooters lawsuits also appear to satisfy the requirement that the employer be responsible for the harassing conduct. With respect to harassing conduct by supervisors and co-workers, an employer is liable for a sexually hostile environment if the employer knew or should have known of the sexual harassment and failed to prevent the harassment or to take immediate and appropriate corrective action.¹²⁴ The Hooters lawsuits alleged that the defendant knew or should have known of the harassing conduct by the plaintiffs' supervisors and co-workers;¹²⁵ and the harassment alleged was so pervasive and severe that it seems that Hooters certainly should have known of it.¹²⁶ The lawsuits also allege that Hooters had actual knowledge of the harassment because of the plaintiffs' contin-

121. *Harris*, 114 S. Ct. at 371.

122. Complaint at 5 (cited in note 1).

123. *Id.* at 18.

124. Lindemann and Kadue, *Sexual Harassment in Employment Law* at 191-92 (cited in note 8). For an in-depth analysis of employer liability for sexual harassment by supervisors, see generally Glen A. Staszewski, Note, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Harassment*, 48 Vand. L. Rev. 1057 (1995).

125. Complaint at 9-10 (cited in note 1).

126. Lindemann and Kadue, *Sexual Harassment in Employment Law* at 159 (cited in note 8) (stating that "[k]nowledge of sexual harassment may be imputed to the employer as a matter of law if it is openly practiced in the workplace or well-known among employees"); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 906 (1st Cir. 1988) (stating that "there was sufficient evidence in the record from which it could be inferred that the [sexually hostile] atmosphere described by the plaintiff was so blatant as to put the defendants on constructive notice that sex discrimination permeated the [General Surgery Residency Training] Program").

ual complaints and that Hooters made no effort to stop the harassment.¹²⁷

The EEOC Guidelines and case law provide that an employer may be liable for the sexual harassment of employees by nonemployees if it knows or should have known of the harassment and failed to take corrective action.¹²⁸ As with the harassment by their supervisors and co-workers, the plaintiffs complained about harassment by customers, and Hooters allegedly failed to take any action to stop the harassment.¹²⁹ In addition, the allegations suggest that Hooters should be responsible for the customers' conduct because Hooters established an environment in which customers were encouraged to make sexual comments and advances to waitresses. Furthermore, *Sage Realty* and the other dress code cases demonstrate that Hooters could be found liable for the sexual harassment of waitresses by customers based solely on the fact that Hooters required its waitresses to wear sexually provocative uniforms.¹³⁰

C. Analysis of the Hooters Allegations Under Assumption of Risk

As discussed above, the allegations of the Hooters lawsuits appear to support a claim of hostile work environment sexual harassment. To examine the usefulness of an assumption of risk defense in cases involving sexually charged workplaces, this Note next considers whether the Hooters plaintiffs can be said to have assumed the risk of any of the harassing conduct alleged, such that they should have been barred from recovery for any harm caused by that conduct. The general principle of the tort defense of assumption of risk is that a plaintiff who voluntarily assumes a known risk of harm arising from the defendant's conduct is barred from recovery for that harm.¹³¹ The doctrine of assumption of risk, if imported into sexual harassment law, would provide that a plaintiff who voluntarily assumes a known risk of sexual harassment arising from her employer's conduct is barred from recovery for that sexual harassment. As there is no evidence that the Hooters plaintiffs expressly assumed the risk of sexual harassment by signing an exculpatory contract agreeing not to hold Hooters responsible for sexual harassment occurring on the job, the

127. Complaint at 18 (cited in note 1).

128. See text accompanying notes 43-51.

129. Complaint at 18 (cited in note 1).

130. See text accompanying notes 26-33.

131. Restatement (Second) § 496A.

plaintiffs must have evidenced their consent to incur the risk, if at all, by their conduct.¹³²

To determine whether the Hooters plaintiffs can be said to have assumed the risk of sexual harassment, one must first examine whether any conduct by the plaintiffs impliedly evidenced their consent to assume that risk. The implied agreement of a plaintiff to relieve a defendant from liability for any harm resulting from certain risks can be shown simply by the plaintiff's actions in voluntarily engaging in some activities.¹³³ In their treatise on torts, Prosser and Keeton state that implied assumption of risk can arise when a plaintiff voluntarily enters into a relationship with the defendant, knowing that the defendant will not protect him against certain future risks that may arise from that relationship.¹³⁴ It can be argued that the plaintiffs' conduct, in agreeing to work for a restaurant named after a slang-term for women's breasts where waitresses must wear sexually provocative attire, evidenced their consent to relieve Hooters from liability for any sexual harassment which they reasonably expected at the time they took their jobs.¹³⁵

It seems undebatable that the Hooters plaintiffs, when they decided to work at Hooters, knew that sex appeal was a substantial part of the product Hooters offered to its customers.¹³⁶ This knowledge of the importance of sex appeal to the plaintiffs' place of employment is in direct contrast to the situation in *Sage Realty*, where the plaintiff had no idea that she would be required to wear a sexually provocative uniform at the time she began her job, and the nature of her job, a lobby attendant in an office building, gave her no reason to believe that sex appeal was a part of her employer's business.¹³⁷ Because the Hooters plaintiffs in all likelihood knew that sex appeal

132. See notes 54-56 and accompanying text.

133. Rosenlund and Killion, 26 U.S.F. L. Rev. at 244 (cited in note 55). An example is that participants in contact sports are usually held to assume both the risk of contact reasonably expected in the sport and the risk of an occasional unreasonable blow. *Id.*

134. *Prosser and Keeton on Torts* § 68 at 481 (cited in note 56).

135. The plaintiffs' decisions to work at Hooters are much more probative on the issue of whether they assumed the risk of sexual harassment than they are on the issue of whether the plaintiffs welcomed certain harassing conduct. See text accompanying notes 114-16. In addition, while a plaintiff's complaints about sexual advances should outweigh any behavior suggesting that she welcomed the advances, such complaints will not allow her to recover for the harassment if she previously assumed the risk of harassment.

136. Apparently, Hooters employees are currently required to sign the company's sexual harassment policy, which includes an acknowledgment that "female sex appeal is an essential ingredient of the Hooters concept." Associated Press, *Former Hooters Employees Fired for Not Signing Form*, Miami Herald 5B (Aug. 14, 1993).

137. See text accompanying notes 26-30.

was part of the product Hooters was selling, it also seems likely that they knew there was a risk that customers would make passes at them and make sexual comments to them. Although the plaintiffs may argue that they were not in fact aware of this risk, the risk may be so obvious that no jury would believe them.¹³⁸

While the risk of harassing conduct by customers was arguably known to the plaintiffs at the time they decided to work at Hooters, the same cannot be said about the risk of harassing conduct by supervisors and co-workers. The fact that sex appeal is an essential ingredient of the product Hooters offers to its customers does not make it obvious that a risk of working at Hooters is unwelcome sexual comments and contacts by supervisors and fellow employees. Unlike the risk of sexual comments from customers, it is unlikely that the Hooters plaintiffs knew when they decided to work at Hooters that their employment would place them at risk of being subjected to sexual comments about their bodies and to groping by supervisors and fellow employees. It is highly unlikely that the plaintiffs assumed the risk of harassing conduct by Hooters management and co-employees when they accepted employment at Hooters.

Another factor to be considered is whether the Hooters plaintiffs voluntarily accepted the risk of sexual harassment. It is possible that the individual Hooters plaintiffs did not voluntarily accept the risk of sexual harassment, because their decision to work at Hooters may have been prompted by economic need. Defendant Hooters could make a strong case that the plaintiffs' choice of Hooters as a place of employment was voluntary, however, by producing evidence of other restaurants and bars in the same market where the plaintiffs could have found work, or by showing Hooters possessed particular characteristics that led the plaintiffs to affirmatively choose to work there. For example, a former Hooters waitress from Florida, who brought a sexual harassment lawsuit against Hooters claiming that her manager punished her with undesirable shifts when she refused his sexual advances, remarked about Hooters: "I knew I wanted to work at Hooters. It's great money, a fun place to work. . . . I loved the [Hooters] concept. If I can use my looks to make good money, why shouldn't I?"¹³⁹

138. See, for example, note 3.

139. Patty Shillington, *Hooters Concept: Sexist or Just Good, Clean Fun?*, Miami Herald 1J (Aug. 1, 1993) (quoting Christine Brooks). Another Hooters waitress claimed that Hooters was the perfect summer job because the money was great and because working at Hooters had given her more confidence. *Id.* (quoting Heather Citta).

It appears that the Hooters plaintiffs voluntarily decided to work at Hooters despite the known risk of sexual harassment by customers. As such, they may have impliedly assumed the risk of sexual harassment. Courts refuse to recognize the doctrine of assumption of risk, however, when allowing the plaintiff to assume the risk is contrary to public policy, such as when the defendant has substantially greater bargaining power than the plaintiff.¹⁴⁰ The employment relationship at issue in the Hooters lawsuits may be such a situation. Prospective employees at Hooters certainly lack the bargaining power to convince Hooters to change its name or to persuade Hooters to permit them to wear less provocative attire. After all, Hooters maintains that sex appeal is an essential aspect of the Hooters concept.¹⁴¹ Nevertheless, as discussed above, if there are other restaurants and bars where the plaintiffs could have worked as waitresses, or if the plaintiffs made the affirmative choice to work at Hooters because of its promotion of sex appeal, courts may find that allowing the plaintiffs to assume the risk of sexually harassing comments by customers does not offend public policy.

In conclusion, application of the assumption of risk defense to the allegations of hostile work environment sexual harassment in the Hooters lawsuits suggest that the plaintiffs may have knowingly and voluntarily assumed the risk of verbal harassment by customers, but that they did not assume the risk of verbal or physical harassment by their supervisors or fellow employees.

IV. IN WHAT SITUATIONS SHOULD AN ASSUMPTION OF RISK DEFENSE TO SEXUAL HARASSMENT BE AVAILABLE?

The prospect of allowing an assumption of risk defense to some hostile work environment sexual harassment claims is somewhat alarming because allowing the defense in an excessively broad category of cases could thwart completely the ability of sexual harassment law to make workplaces more open to women. One example of the dangers of the assumption of risk defense is the infamous and highly disfavored *Rabidue v. Osceola Refining Co.*¹⁴²

140. See notes 64-66 and accompanying text. For a further discussion of the public policy implications of allowing an assumption of risk defense in sexual harassment law, see Part V.B.

141. See note 136.

142. 805 F.2d 611 (6th Cir. 1986).

A. Rabidue—*An Argument Against an Assumption of Risk Defense in Sexual Harassment Law*

In *Rabidue v. Osceola Refining Co.*, the plaintiff, Vivienne Rabidue, brought a sexual harassment suit against her former employer.¹⁴³ The alleged sexual harassment was primarily caused by the conduct of the plaintiff's co-worker, Douglas Henry.¹⁴⁴ The *Rabidue* majority acknowledged that Henry was a vulgar individual who frequently made obscene comments about women generally and about the plaintiff in particular.¹⁴⁵ In addition, there were pictures of nude or scantily clad women displayed in common work areas.¹⁴⁶ The court required the same elements for a hostile environment sexual harassment claim as described in *Henson*,¹⁴⁷ but added the requirement that the sexual harassment be severe enough to seriously affect the plaintiff's psychological well-being.¹⁴⁸

The court stated that the totality of the circumstances should be examined to determine whether a reasonable person would be offended by the work environment at issue and whether the particular plaintiff was actually offended by the environment.¹⁴⁹ Relevant factors in the totality of the circumstances included "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment."¹⁵⁰ The court noted that the presence of actionable sexual harassment would differ depending on the prevailing work environment,¹⁵¹ and quoted with approval from the opinion of the district court:

Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girly magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for

143. *Id.* at 614.

144. *Id.*

145. *Id.* In his dissent, Judge Keith noted that Henry routinely referred to women as "whores," "cunt," "pussy," and "tits," and specifically remarked of the plaintiff, "All that bitch needs is a good lay." *Id.* at 624 (Keith, J., dissenting).

146. *Id.* at 615.

147. See text accompanying notes 12-16.

148. *Rabidue*, 805 F.2d at 619. This requirement was held to be improper in *Harris v. Forklift*, 114 S. Ct. at 370-71. See notes 18-19 and accompanying text.

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

150. *Id.*

151. *Id.*

the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.¹⁵²

The *Rabidue* decision presents an example of the dangers inherent in allowing an assumption of risk defense in sexual harassment cases. The *Rabidue* court's focus on the lexicon of obscenity that had pervaded the workplace and the plaintiff's reasonable expectation upon entering that environment suggests that women generally assume the risk of working in a sexually hostile environment.¹⁵³ If a workplace has always been primarily male, and obscene language and pornography have always been present at the workplace, any woman who voluntarily chooses to work there assumes the risk of any harassing conduct that may occur. This view of Title VII completely thwarts the ability of the statute to make workplaces more open to women: Any workplace that is currently obscene appears to have the right to stay that way,¹⁵⁴ or at least no woman who chooses to work there with knowledge of the prevailing work environment has the right to complain about it. This view does not allow Title VII to act proactively, but requires that the status quo of the hostile work environment be maintained. The dissent in *Rabidue* strongly disagreed with the ma-

152. *Id.* at 620-21 (quoting *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

153. See, for example, *id.* at 626 (Keith, J., dissenting) (stating that "[t]he majority suggests through these factors that a woman assumes the risk of working in an abusive, anti-female environment"); Jane L. Dolkhart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 *Emory L. J.* 151, 190 (1994) (referring to the "*Rabidue* court's suggestion that the plaintiff's assumption of risk is relevant in assessing the employment environment"); Tomi Lester, *The Reasonable Woman Standard in Sexual Harassment Law—Will it Really Make a Difference?*, 26 *Ind. L. Rev.* 227, 241 (1993) (stating that "the court intimated that *Rabidue* assumed the risk of being harassed when she took a job with the company"); E. Clayton Hipp, *Now You See It, Now You Don't: The "Hostile Work Environment" After Meritor*, 26 *Am. Bus. L. J.* 339, 356 (1988) (referring to the assumption of risk theory impliedly created by the *Rabidue* decision); Michael D. Vhay, Note, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 *U. Chi. L. Rev.* 328, 347 (1988) (asserting that the *Rabidue* version of a reasonableness test would "essentially expose plaintiffs to the defense of assumption of risk").

154. The court's quoting with approval of the district court's statement that Title VII was not meant to change work environments where sexual jokes and conversations and girlie magazines may abound shows the court's very narrow view of Title VII. In his dissenting opinion, Judge Keith contended that "by applying the prevailing workplace factor, this court locks the vast majority of working women into workplaces which tolerate anti-female behavior." *Rabidue*, 805 F.2d at 627.

majority's view of Title VII.¹⁵⁵ The response to the *Rabidue* majority's use of assumption of risk concepts has been completely negative.¹⁵⁶

B. Distinguishing Hooters from Rabidue: What is the Proper Scope of an Assumption of Risk Defense in Sexual Harassment Law?

Can the Hooters lawsuits be distinguished from the *Rabidue* case, such that allowing an assumption of risk defense in cases like Hooters would not open the door for more decisions like *Rabidue*? There are two very important differences between Hooters and *Rabidue*. First, the workplaces differed greatly in the nature of the product or service being produced or performed and in the nature of the particular plaintiff's job. In *Rabidue*, the business of the employer was refining oil, and the plaintiff's particular job was as an administrative assistant. There was nothing about the work being performed at Osceola Refining Co. that encouraged harassing conduct, or that

155. "In my view, Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environments of classes protected under the Act." *Id.* at 626 (Keith, J., dissenting). Judge Keith stated further:

To condone the majority's notion of the "prevailing workplace" I would also have to agree that if an employer maintains an anti-semitic workforce and tolerates a workplace in which "kike" jokes, displays of nazi literature and anti-Jewish conversation "may abound," a Jewish employee assumes the risk of working there, and a court must consider such a work environment as "prevailing." I cannot.

Id. at 626.

156. See, for example, the EEOC Compliance Manual, § 615 at 3275-76 (cited in note 112):

In general, a woman does not forfeit her right to work in an atmosphere free from sexual harassment by choosing to work in an environment that has traditionally included vulgar, anti-female language. The Commission . . . agrees with the dissent in *Rabidue* that a woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment.

Numerous law review articles agree with the EEOC about *Rabidue*, such as Paul B. Johnson, *The Reasonable Woman Standard in Sexual Harassment Law: Progress or Illusion*, 28 Wake Forest L. Rev. 619, 631 n.54 (1993) (stating "[i]n my opinion, *Rabidue* was wrongly decided . . . [because] the court took the erroneous view that a female employee who voluntarily enters into a pre-existing work environment where harassment is common 'assumes the risk' of those conditions"); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. Pa. L. Rev. 899, 966 (1993) (stating that the *Rabidue* court misapplied the assumption of risk doctrine by not considering whether the plaintiff had actually assumed the risk but rather "seemed to hold that, as a matter of law, women assume the risk of harassment if they choose to work in nontraditional settings which are commonly the scene of offensive conduct"); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L. J. 1177, 1199 (1990) (stating that the court's assumption of risk analysis "ignored the possibility that [*Rabidue's*] situation was the product of structural inequities in society that she was powerless to overcome"); Lester, 26 Ind. L. Rev. at 241 (cited in note 153) (arguing that the *Rabidue* court's assumption of risk analysis was based on conjecture, because the court never attempted to determine whether *Rabidue* knew about the offensive work environment before she took the job); Hipp, 26 Am. Bus. L. J. at 356 (cited in note 153) (asserting that the assumption of risk theory impliedly created by the *Rabidue* court is clearly unacceptable).

suggested that harassing conduct must be permitted to occur or else the business would be threatened. In *Hooters*, however, the nature of the employer's business can be characterized as serving food and drink in an atmosphere promoting sex appeal, and the plaintiffs' particular jobs were as waitresses who personified that sex appeal.¹⁵⁷ Unlike the work performed at *Osceola*, the work performed at *Hooters* does encourage sexual comments and overtures.

The focus on the nature of the work performed in deciding whether a plaintiff should be allowed to assume the risk of sexual harassment was supported by Judge Keith in his dissent in *Rabidue*. He stated that "job relatedness" was the only additional factor which should bear on whether the plaintiff reasonably found her work environment offensive.¹⁵⁸ It is arguable that receiving sexual comments and overtures from customers is required of a waitress in an establishment where sex appeal is a part of the product provided.

The same is not true, however, of receiving such comments from supervisors or co-workers. The other major difference between *Hooters* and *Rabidue* lies in the question of from whom employees may assume the risk of sexual harassment. After applying the assumption of risk doctrine to *Hooters*, this Note asserts that the plaintiffs only assumed the risk of harassing conduct by customers, not of such conduct by supervisors or co-workers. In *Rabidue*, the majority suggested that the plaintiff had assumed the risk of harassing conduct by her co-workers. This difference is connected to the nature of the businesses at issue. If sex appeal is a substantial part of the product or service an employer provides to its customers, then it seems logical that, in order for the employer to continue to promote sex appeal as a part of its business, employees should be able to assume the risk of sexual harassment by customers. In contrast, there is no rational business justification for an employer to be able to have its employees assume the risk of sexual harassment by their fellow employees or supervisors. Therefore, the *Hooters* lawsuits suggest

157. The fact that sex appeal is a substantial part of the service *Hooters* provides its customers is indicated by the name of the restaurant and the attire of the waitresses. See note 136.

158. The relevant question is "whether the behavior complained of is required to perform the work." *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting). Judge Keith provided the example of employees of soft pornography publishers, who, depending on their job descriptions, should reasonably expect exposure to nudity and sexually explicit language as inherent aspects of working in that field. *Id.* He also noted, "However, when that exposure goes beyond what is required professionally, even sex industry employees are protected under the Act from non-job related sexual demands, language, or other offensive behavior by supervisors or co-workers." *Id.*

that employees should only be able to assume the risk of sexual harassment if sex appeal is a substantial part of their employer's business and of the employee's particular job.

The comparisons between Hooters and *Rabidue* establish the proper scope of the assumption of risk defense in hostile work environment sexual harassment law. Women may voluntarily and knowingly assume the risk of harassment by customers where sex appeal is a substantial part of their employer's business and of their job in particular.¹⁵⁹ Allowing women to assume the risk of sexual harassment in this narrow context protects the interests of women who desire to market their sexuality.¹⁶⁰ Some women, including at least some of those who work at Hooters, choose to work in environments that promote their sex appeal and provide a greater risk of sexual harassment, in order to receive a premium wage for their acceptance of that risk.¹⁶¹ If no assumption of risk defense to sexual harassment claims is available to employers like Hooters, employees will be able to sue these employers based on conduct by customers that the employees impliedly consented to assume the risk of when they accepted their jobs. This risk of liability for sexual harassment by customers may be so substantial that employers like Hooters will be unable to afford to continue to promote sex appeal as a part of their business. As a result, women who want to market their sex appeal and their accep-

159. Thus, topless dancers, for example, may also be allowed to assume the risk of sexual harassment by customers.

160. Marie Reilly describes the assumption of risk defense in the employment context as follows:

The notion of assumption of the risk as a bar to recovery enables a person who prefers risk to market that preference. Some workers, willing to tolerate greater risk, may agree to work for a wage that would not be acceptable to a risk-adverse or a risk-neutral person. By barring recovery to the worker who accepted a premium for the risky job, the court enforces a socially optimal allocation of loss between an employer and an employee under which a risk-preferring employee agrees to accept risk in exchange for a risk differential. If the employer knew *ex ante* it could not enforce the agreement with the risk-preferring employee, it would invest in safety and pay the worker less. Without the doctrine of assumption of the risk, or any other way of enforcing the *ex ante* allocation of risk, the employer would be worse off, but the employee would not be better off.

Reilly, 47 Vand. L. Rev. at 467 (cited in note 86).

161. Reilly asserts that "[w]omen can and do market their preference for risky sexual conduct," providing the examples of women who work as "Laker Girls," those who model for magazine swimsuit issues, and those who work as cocktail servers in skimpy attire. *Id.* at 469. She concludes that "[w]holesale elimination of the assumption-of-the-risk defense for employers charged with hostile environment sexual harassment deprives women of the opportunity to market their risk preferences, but it does not make them better off." *Id.* Furthermore, the statement of Christine Brooks, a former Hooters waitress from Florida, see note 139, supports the assertion that some women choose to market their preference for risky sexual conduct: "I loved the [Hooters] concept. If I can use my looks to make good money, why shouldn't I?"

tance of the risk of sexual harassment in exchange for a premium wage will no longer have the freedom to do so.¹⁶²

To allow women to assume the risk of sexual harassment in situations outside the narrow Hooters context, such as harassment by supervisors or coworkers, or harassment by customers where sex appeal is not a substantial part of the employer's business and of the women's particular jobs, would violate the general public policy against sex discrimination represented by Title VII. As demonstrated by *Rabidue*, allowing the assumption of risk defense to sexual harassment claims in a broad spectrum of cases would seriously impede the ability of Title VII to eliminate discrimination against women in the workplace. The narrow scope of the Hooters assumption of risk defense provides a balance between competing interests: the interest of women who desire to market their sexuality and the public interest in eliminating sex discrimination in employment. The defense as defined would not apply in cases like *Rabidue*, and thus would not perpetuate historically anti-female environments by finding that any woman who chose to work in such an environment assumed the risk of any harassment she received from her co-workers.

C. *Wilson v. Southwest Airlines: How Does the Proposed Hooters Assumption of Risk Rule Compare to BFOQ Cases?*

The bona fide occupational qualification ("BFOQ") exception to Title VII provides that an employer can hire and employ an individual on the basis of his or her sex in those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.¹⁶³ The BFOQ defense is analogous to the proposed Hooters assumption of risk rule.¹⁶⁴ *Wilson v. Southwest Airlines Co.*,¹⁶⁵ however, defines the BFOQ defense more narrowly than the proposed assumption of risk defense, and suggests that the proposed assumption of risk defense may be contrary to the goals of Title VII.

162. Reilly, 47 Vand. L. Rev. at 469.

163. Civil Rights Act of 1964, § 703(e), codified at 42 U.S.C. § 2000e-2(e) (1988 & Supp. 1991).

164. The proposed assumption of risk defense provides that employees can assume the risk of sexual harassment if sex appeal is a substantial part of the employer's business and of the employee's particular job.

165. 517 F. Supp. 292 (N.D. Tex. 1981).

In *Wilson*, a class of male applicants for the jobs of flight attendant and ticket agent with Southwest Airlines challenged Southwest's refusal to hire males for those positions as a violation of Title VII. Southwest admitted that it intentionally discriminated against males, but argued that this discrimination was permissible under the BFOQ exception to Title VII.¹⁶⁶ Specifically, Southwest claimed that female sex appeal was a bona fide occupational qualification for the jobs of flight attendant and ticket agent.¹⁶⁷ Southwest had developed a marketing scheme that projected an image of feminine spirit, fun, and sex appeal.¹⁶⁸ The airline claimed that its decision to hire only females, dressed in high boots and hot pants, in the high customer contact positions of ticket agent and flight attendant, was an integral part of its sexy, feminine image.¹⁶⁹

The district court held that the BFOQ exception did not justify Southwest's refusal to hire male flight attendants or ticket agents, notwithstanding the airline's feminine image.¹⁷⁰ The court followed a two-step BFOQ test: (1) does the particular job at issue require that the worker be of a certain sex; and if so (2) is that requirement reasonably necessary to the essence of the business.¹⁷¹ Southwest conceded that males were able to perform effectively all of the basic, mechanical duties required of flight attendants and ticket agents.¹⁷² The airline contended, however, that only females could fulfill certain nonmechanical aspects of the jobs, such as attracting those male customers who preferred female flight attendants and preserving the authenticity of Southwest's feminine personality.¹⁷³ The court rejected this argument, finding that these sex-linked job functions were only tangential to the essence of the jobs of flight attendant and ticket agent in particular and of the airline business in general.¹⁷⁴ The court held that because Southwest was not a business where vicarious sex-

166. *Id.* at 293.

167. *Id.*

168. Southwest's public image was based on this "love" personality. *Id.* at 294. Its ads promised to provide "tender loving care" to its passengers, who were predominantly men traveling for business. *Id.* Southwest's first ads featured the slogan, "At Last There Is Somebody Else Up There Who Loves You." *Id.* Its television commercials featured attractive flight attendants in tight outfits catering to male passengers, as a female voice promised in-flight love. *Id.* at 294 n.4.

169. *Id.* at 295. Southwest claimed that its female flight attendants had come to personify the airline's public image. *Id.*

170. *Id.* at 304.

171. *Id.* at 299 (citing *Weeks v. Southern Bell Tel. and Tel. Co.*, 408 F.2d 288 (5th Cir. 1969) and *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971)).

172. *Id.* at 300.

173. *Id.*

174. *Id.* at 302.

ual entertainment was the primary service provided, the ability of the airline to perform its primary business function, the transportation of passengers, would not be at risk if it hired males.¹⁷⁵ Thus Southwest failed to satisfy the requirements of the BFOQ exception to Title VII's prohibition of sex discrimination.¹⁷⁶

The court refused to define the essence of Southwest's business as including sex appeal.¹⁷⁷ According to the court, in order to recognize a BFOQ for "mixed essence" jobs, those requiring multiple abilities, some sex-linked and some sex-neutral, the sex-linked requirements of the job must dominate.¹⁷⁸ Otherwise the employer will not satisfy the requirement that sex be so essential to successful job performance that someone of the opposite sex could not perform the job.¹⁷⁹ The court noted that in jobs where vicarious sexual recreation is the primary service provided, such as a Playboy Bunny or a topless dancer, being of a certain sex would be a BFOQ.¹⁸⁰ Because Southwest's primary service was not vicarious sexual entertainment, being female was not a BFOQ for any of its jobs.¹⁸¹

Wilson provides that the BFOQ defense is a very narrow exception to Title VII's prohibition of sex discrimination in employment. A possible interpretation of the *Wilson* decision is that the narrow scope of the BFOQ defense in sex discrimination law should be a guide for the scope of any assumption of risk defense in sexual harassment law, such that there can only be an assumption of risk defense to sexual harassment when sex appeal is the essence of the employer's business. This interpretation would mean that employers like Hooters, which have sex appeal as a substantial part of their business, may not be able to use the assumption of risk defense because the primary product Hooters provides is arguably food and

175. *Id.*

176. *Id.* at 304.

177. *Id.* at 302.

178. *Id.* at 301.

179. *Id.*

180. *Id.* The court emphasized that mere customer preference for employees of one sex did not satisfy the BFOQ requirements, unless the customer preference was based on the company's inability to perform the primary service it offered, such as where sex appeal itself was the primary service provided. *Id.* at 301. See also *Diaz*, 442 F.2d at 389. If customer preference was allowed to determine the validity of sex discrimination in employment in other than those limited circumstances, "the purpose of Title VII to overcome stereotyped thinking about the job abilities of the sexes would be undermined." *Wilson*, 517 F. Supp. at 301 n.21.

181. *Id.* at 302.

drink, not vicarious sexual entertainment.¹⁸² Under this view, the only employers who could use the assumption of risk defense to claims of sexual harassment of their employees by their customers are those whose primary product or service is sexual entertainment, such as those employing strippers.

This interpretation of *Wilson* is supported by the statement, made by the Supreme Court, that Title VII does not permit employment decisions to be made based on stereotyped impressions about the characteristics of males or females.¹⁸³ The anti-sexual stereotypes statement can be viewed as implying that places like Hooters, where stereotypes about women are flaunted as part of the restaurant's image,¹⁸⁴ are disfavored under Title VII. One may contend that, because places like Hooters are arguably disfavored under Title VII, molding an assumption of risk defense that protects places like Hooters from some sexual harassment claims violates the policies and goals of Title VII.

It is uncertain, however, that allowing an assumption of risk defense in the Hooters context, where sex appeal is a substantial part of the plaintiff's particular job and of the employer's business, would violate the goals of Title VII. The prohibition of discrimination on the basis of sex was a last-minute amendment to the bill which became the Civil Rights Act of 1964, and there is little legislative history explaining the goals behind the prohibition of sex discrimination in employment.¹⁸⁵ Furthermore, the anti-sexual stereotypes approach does not provide a strong argument for the position that the Hooters assumption of risk defense is contrary to the goals of Title VII. Title VII has failed to ban the existence of places of employment that flaunt sexual stereotypes far more than does Hooters. To the contrary, courts have stated that the BFOQ defense *insulates* employers hiring only females for such sex-oriented jobs as social escort, topless dancer, and Playboy Bunny, from violating Title VII in their hiring policies.¹⁸⁶

182. The *Wilson* court states, in fact, that sex does not become a BFOQ merely because an employer decides to exploit female sexuality as a marketing tool, which is arguably the marketing strategy behind Hooters. 517 F. Supp. at 303.

183. *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978) (citing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (stating that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group").

184. See note 106.

185. *Meritor*, 477 U.S. at 63-64.

186. See *Wilson*, 517 F. Supp. at 301 (citing *St. Cross v. Playboy Club*, Appeal No. 773, Case No. CFS 22618-70 (New York Human Rights Appeal Board, 1971)) and *Weber v. Playboy Club*, Appeal No. 774, Case No. CFS 22619-70 (New York Human Rights Appeal Board, 1971)).

As mentioned in the above discussion of *Wilson*, sex appeal has been found to be a bona fide occupational qualification for such jobs, where vicarious sexual entertainment is the primary service provided.¹⁸⁷ It may be argued, however, that referring to the BFOQ cases only supports the argument that the scope of the BFOQ exception should be a guide for the scope of the assumption of risk defense to sexual harassment claims, such that an assumption of risk defense should only be available where sex appeal is the essence of the business.

There are stronger arguments, however, against this proposition. Sexual harassment was not recognized as a type of sex discrimination prohibited by Title VII at the time the statute was enacted,¹⁸⁸ so it is unclear if and how the statutory BFOQ defense relates to sexual harassment.¹⁸⁹ More importantly, it seems incongruous that an assumption of risk defense should be available only to employers whose primary business is the promotion of sex appeal, rather than also to employers like Hooters, which feature sex appeal as a substantial part of their business. As discussed above, the likely result of prohibiting an assumption of risk defense to claims of sexual harassment of employees by customers is that employers who promote sex appeal as a part of their product or service would be forced by fear of liability to stop promoting sex appeal.¹⁹⁰ As a result, women who want to market their sex appeal and accept the risk of sexual harassment in exchange for a premium wage would no longer be able to do so.¹⁹¹ Similarly, the likely result of limiting an assumption of risk defense to sexual harassment to employers whose primary business is the promotion of sex appeal is that only women willing to market their sex appeal to such an extent, i.e., dance in a strip club, would be able to receive economic benefit from marketing their sex appeal. Women would be denied a moderate market for their sex

187. *Wilson*, 517 F. Supp. at 301.

188. The first case recognizing sexual harassment as a form of sex discrimination was *Williams v. Saxben*, 413 F. Supp. 654 (D. D.C. 1976).

189. See, for example, Aalberts and Seidman, 21 *Pepperdine L. Rev.* At 460 (cited in note 24) (contending that the BFOQ defense "will have little impact on sexual harassment cases by non-employees in general"); Cara D. Helper, Comment, *Enforcing the Equal Employment Opportunity Commission Guidelines on Discrimination Because of National Origin: The Overextension of English-Only Rules in Garcia v. Spun Steak Co.*, 79 *Minn. L. Rev.* 391, 402 n.61 (1994) (stating that the Supreme Court "has not associated abusive environment discrimination with either disparate treatment or disparate impact theory. Furthermore, the employer's defense to such claims involves the employer's response to the harassment, rather than a business necessity or BFOQ standard").

190. See notes 160-62 and accompanying text.

191. *Id.*

appeal in a place like Hooters, where the "essence" of the job is serving food and drink, but a substantial part of the job is sex appeal.¹⁹² This result, that women who wish to receive any economic benefit from their sex appeal must work for an employer whose primary business is vicarious sexual entertainment, seems incongruous with the goal of Title VII to make more employment options available to those of either sex.¹⁹³ Therefore, the argument that the proposed Hooters assumption of risk defense is contrary to the goals of Title VII is ultimately unconvincing.

V. CONCLUSIONS ABOUT THE USE OF AN ASSUMPTION OF RISK DEFENSE IN SEXUAL HARASSMENT LAW

A. *Advantages of the Defense*

There are two major advantages that would result from the recognition of a limited assumption of risk defense in sexual harassment law. The first is that the defense would allow employers who market their employees' sex appeal to continue to exist, allowing

192. It is certainly plausible that some women, like Christine Brooks, who want to "use [their] looks to make good money," by working at Hooters, would not want to work for an employer, like a strip club, whose primary business is sexual entertainment. See notes 139 and 161.

193. There is one strong argument in favor of limiting the assumption of risk defense to only employers whose primary business is vicarious sexual recreation, even though that limitation may result in places like Hooters facing too great a risk of sexual harassment liability to continue to exist. Businesses such as Hooters, which promote sex appeal as a substantial part of their business, may be more harmful by subtly reinforcing stereotyped notions of women than strip clubs where sex appeal is clearly the essence of the business. It is obvious that women are objectified in strip clubs; the objectification of women is the sole reason why such establishments exist. Businesses like Hooters, or Southwest Airlines under its former marketing scheme, may be more detrimental to Title VII's goal of equality of the sexes in employment because they are more subtle in their objectification of women, by combining their promotion of sex appeal with the provision of a sex-neutral service. Because Hooters' objectification of women is more subtle than that occurring in businesses with vicarious sexual recreation as their essence, and because places like Hooters are viewed as more socially acceptable than the latter businesses (families with young children go to Hooters), Hooters may do more to reinforce traditional stereotypes about the role of women in society. As noted by Kim Gandy, executive vice president of the National Organization for Women, Hooters extends "the aura of night clubs and strip joints to the neighborhood cafe." Eugene Carlson, *Restaurant Chain Tries to Cater to Two Types of Taste*, Wall St. J. B2 (March 20, 1992). The danger of the subtle objectification of women promoted by establishments like Hooters pulls against the availability of an assumption of risk defense to employers which offer sex appeal as a substantial part, but not as the essence, of their business. This danger must be balanced against the interest of women in being free to make economic choices in order to determine whether the proposed Hooters assumption of risk defense is consistent with the goals of Title VII.

women the freedom to market their sexuality and acceptance of the risk of sexual harassment in exchange for a premium wage.¹⁹⁴ Allowing women the freedom to choose to receive economic benefit from their sex appeal seems consistent with the goal of Title VII to make more employment options available to both sexes.¹⁹⁵

The second advantage that would result is the recognition of the capacity of women to make voluntary choices about where they work and to take responsibility for those choices. Title VII, and sexual harassment law in particular, play an essential role in our society by providing women equal access to employment opportunities. Reading Title VII and shaping sexual harassment law so as not to hold women accountable for choosing to work in environments promoting their sex appeal, however, can be harmful to women by failing to acknowledge their ability to choose to work in sexually charged environments and to face the consequences of their decisions. Such a view of sexual harassment law places women in the role of perpetual victim, rather than establishing them as responsible actors with free will.

In order for the sexes to be equal, it is essential for women to be viewed as responsible actors. The capacity for responsibility is highly beneficial to individuals, because it means that they have the ability to exercise rational self-control and, thus, that the law should respect their autonomy and privacy.¹⁹⁶ Criminal law scholars view the power of the responsible individual to exercise rational choice as an essential attribute of the normal human being.¹⁹⁷ Historically, women have been viewed as unable to make rational choices about their behavior and to accept responsibility for those choices.¹⁹⁸ The result has been "protective" legislation that "put women, not on a pedestal, but

194. See notes 160-62 and accompanying text.

195. See *Griggs v. Duke Power Company*, 401 U.S. 424, 429 (1971) (stating that the objective of Congress in the enactment of Title VII was to achieve equal employment opportunity).

196. Anne M. Coughlin, *Excusing Women*, 82 Cal. L. Rev. 1, 12 (1994).

197. *Id.* at 12. The most human capacity is the power to choose. Because behavior is itself a matter of choice, "it is both moral and respectful to the actor to hold the actor responsible." *Id.* at 18 (quoting Stephen Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. Cal. L. Rev. 1247, 1252-54, 1268 (1976)).

198. Coughlin, 82 Cal. L. Rev. at 28-29 (asserting that "since at least as early as the eighth century, the criminal law has been receptive to the idea that normal women, unlike men, are susceptible to having their choices guided by the wills of men and that this inclination for submissiveness must be taken into account in judging women's responsibility"). Professor Coughlin contends that the relatively recently developed battered woman syndrome defense is dangerous because it "rests on and reaffirms this invidious understanding of women's incapacity for rational self-control." *Id.* at 6.

in a cage,"¹⁹⁹ often by limiting the types of jobs they could have.²⁰⁰ For example, in 1872, the Supreme Court held that the decision of the Supreme Court of Illinois to refuse to grant to a woman a license to practice law in the state did not violate the U.S. Constitution,²⁰¹ with one justice declaring that "[m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."²⁰²

The proposed assumption of risk defense recognizes that women can voluntarily choose to work in establishments that promote their sex appeal and holds women responsible for that choice by not allowing them to recover for harassing conduct they knew was likely to occur when they accepted the job. The defense thus supports a view of women as responsible actors who have the power to exercise rational choice, that "most human capacity."²⁰³ This view of women is directly opposite to the position of the radical feminists, who suggest that women do not have the ability to exercise rational choice when their sexuality is involved.²⁰⁴ One may argue that the proposed as-

199. Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 Va. L. Rev. 1099, 1149 (1993) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion)).

200. See, for example, *Muller v. State of Oregon*, 208 U.S. 412, 423 (1908) (upholding an Oregon law limiting the hours that women could work in factories or laundries).

201. *Bradwell v. The State*, 83 U.S. (16 Wall) 130, 138-39 (1872).

202. *Id.* at 141 (Bradley, J., concurring).

203. See note 197.

204. See Reilly, 47 Vand. L. Rev. at 475 (cited in note 86) (discussing the radical feminist view that the very act of sexual conduct is "so inherently coercive, so fraught with domination and submission, that consent to it by a woman is impossible"); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 177 (Harvard U., 1989) (claiming that "women are socialized to passive receptivity" in the context of sexual intercourse); Andrea Dworkin, *Intercourse* 125-26 (Free, 1987) (claiming that sexual intercourse is by nature coercive and perpetuates the subordination of women).

The model anti-pornography ordinance drafted by radical feminists Dworkin and MacKinnon reflects their belief that women are inherently incapable of voluntarily choosing to enter into activities involving their sexuality, in particular, posing for sexually explicit pictures. Strossen, 79 Va. L. Rev. at 1137 (cited in note 199). The ordinance provides that proof of any of the following shall not negate a finding that a woman was coerced into posing for pornography:

that the [allegedly coerced] person actually consented to a use of the performance that is changed into pornography; or . . . that the person knew that the purpose of the acts or the events in question was to make pornography; or . . . that the person showed no resistance or appeared to cooperate actively in the . . . events that produced the pornography; or . . . that the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or . . . that no physical force, threats, or weapons were used in the making of the pornography; or . . . that the person was paid or otherwise compensated.

sumption of risk defense is detrimental to the goal of women becoming full and equal members of society, because it allows businesses such as Hooters, which objectify their female employees, to continue to exist. The position of the radical feminists is more harmful to that goal, however, because it perpetuates the perception of women as unable to make rational decisions about their sexuality and encourages the state to protect women from themselves.²⁰⁵ The radical feminist view of female sexuality "ultimately demeans and infantilizes all women,"²⁰⁶ unlike the proposed assumption of risk defense, which supports the ability of women to rationally choose whether they want to market their sexuality and to take responsibility for that choice.

B. Disadvantages of the Defense

There are several disadvantages to adoption of an assumption of risk defense in sexual harassment law. One problem is that assumption of risk is a tort defense and Title VII is not a fault-based tort scheme.²⁰⁷ Tort law and discrimination law differ greatly in purpose: the purpose of tort law is risk allocation and the compensation of individuals, while the purpose of discrimination law is achieving the goal of equal employment opportunity.²⁰⁸ Tort law views people as individuals either injuring someone or being injured and tries to discern who is at fault, while discrimination law views people as members of groups and may find someone liable even if they had no discriminatory intent if their action negatively affected a certain group.²⁰⁹ The aim of Title VII is the effect of an employment practice,

Id. at 1137-38 n.155 (quoting Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 Harv. Women's L. J. 1, 26 (1985)). The city of Indianapolis enacted an ordinance based on the Dworkin-MacKinnon ordinance; the ordinance was declared unconstitutional because it violated the First Amendment in *American Booksellers Association v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *aff'd mem.* 475 U.S. 1001 (1986).

205. See note 204. Many feminists are realizing that emphasizing the victimhood of women "can backfire against gender equality." Strossen, 79 Va. L. Rev. at 1152.

206. Strossen, 79 Va. L. Rev. at 1140.

207. *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991).

208. Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 Emory L. J. 151, 191 (1994).

209. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (stating that certain employment practices can violate Title VII even if the employer has no discriminatory intent).

In her highly influential book *Sexual Harassment of Working Women*, Catharine MacKinnon asserts:

Torts best redress injuries to one's person, [such as] to individual sexuality as an aspect of self, rather than to public and shared social existence, [such as] sex in employment. . . . To the extent that tort theory fails to capture the broadly social sexuality/employment nexus that comprises the injury of sexual harassment, by treating the incidents as if

rather than the motivation of co-workers or employers.²¹⁰ The tort defense of assumption of risk may be out of place in Title VII sexual harassment law because the defense focuses on whether an individual plaintiff should be denied recovery due to the plaintiff's consent to assume the risk of injury, rather than viewing the plaintiff as a woman, a member of one of the groups Title VII was designed to protect. The defense, in effect, allows employees to opt out of some of the protections of Title VII, which may be contrary to the goal of Title VII: equal employment opportunity and the removal of workplace barriers to equality.²¹¹ The individual choice of the employee to waive some of her rights under Title VII may be inappropriate because the law is meant to serve the interests of women as a group.

Another related problem with the proposed assumption of risk defense is that tort law does not allow individuals to assume the risk of injury when doing so is contrary to public policy.²¹² A plaintiff is generally able to assume the risk of injury caused by the defendant's violation of a statute.²¹³ The proposed assumption of risk defense would operate to bar a plaintiff's recovery for injury caused by the defendant's violation of a statute, because the employer would have violated Title VII by failing to take action to stop the sexual harassment of its employees. The Restatement (Second) of Torts provides that a plaintiff is unable to assume the risk of a defendant's violation of a statute when allowing the plaintiff to do so "would defeat a policy of the statute to place the entire responsibility for such harm as has occurred upon the defendant."²¹⁴ Such a statute is generally one which was intended to protect a particular class of persons, to which the plaintiff belongs, from their inability to protect themselves.²¹⁵ It is

they are outrages particular to an individual woman rather than integral to her social status as a woman worker, the personal approach on the legal level fails to analyze the relevant dimensions of the problem.

Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 88 (Yale U., 1979).

210. *Rogers v. EEOC*, 454 F.2d 234, 239 (5th Cir. 1971).

211. Michael Vhay contends that "Title VII does not allow its 'risks' to be assumed. Rather, the statute requires the eradication of discrimination." Vhay, 55 U. Chi. L. Rev. at 347 (cited in note 153) (criticizing the majority opinion in *Rabidue*).

212. Restatement (Second) §§ 496B and 496C.

213. *Prosser and Keeton on Torts* § 68 at 492 (cited in note 56).

214. Restatement (Second) § 496F.

215. *Id.* § 496F, comment d states:

Thus a child labor act will ordinarily be found to be intended to protect the child against his own inexperience or lack of judgment, and to place the whole responsibility upon the employer. Since this purpose would be defeated if the child were held to assume the risk, that defense is not available to the defendant. Likewise a factory act, requiring precautions to insure safe working conditions, may be found to be intended to protect workmen against the economic pressure which might force them into unsafe employment; and if so, again the defense would not be permitted.

therefore necessary to consider whether the policy of Title VII is to place the entire responsibility for sexual harassment upon the employer, such that allowing employees to assume the risk would defeat the fundamental purpose of the statute. It is uncertain that Title VII was intended to protect women from their inability to protect themselves.²¹⁶ Nonetheless, Title VII, and sexual harassment law in particular, represent a public policy to eradicate sexual harassment from the workplace. Allowing employees to assume the risk of sexual harassment, even in the narrow circumstances contemplated by the proposed assumption of risk defense, may cut against this policy.

The general decline of the assumption of risk defense in the employment context is another disadvantage of the proposed assumption of risk defense. The defense became disfavored in the employment context because of the realization that it was unfair to say that employees with no real workplace power or choice voluntarily assumed the risk of working in an unsafe environment.²¹⁷ Because of the sordid history of assumption of risk in the employment context, it is difficult to advocate an introduction of the defense into the employment discrimination context. This disadvantage of the defense, however, is the least problematic. While most employees during the Industrial Revolution had few real economic choices, female employees today can choose places to work where sex appeal is not a substantial part of their employer's business or of their particular job. Therefore it is not unfair to say that women who choose to work at places like Hooters voluntarily assumed the risk of sexual harassment by customers.

C. Alternatives to the Defense

Are there any ways to accomplish the same advantages that the assumption of risk defense would provide under the current Title VII framework? One possibility is the unwelcomeness element. As formulated in this Note, assumption of risk is an additional defense available to the employer after the employee has established that she did not welcome the harassing conduct. The Supreme Court's state-

216. Such an interpretation of the statute puts women in the role of helpless victim, which may be detrimental to the goal of gender equality. See Reilly, 47 Vand. L. Rev. at 474 (cited in note 86) (discussing the dangers of viewing women as lacking the capacity to protect themselves from "sexual loss"). In contrast, one of the advantages of the proposed assumption of risk defense is that it represents a view of women as responsible actors with free will.

217. See notes 74-78.

ment that a plaintiff's sexually provocative speech or dress is relevant in determining whether she welcomed harassing conduct, however, introduced assumption of risk concepts into the welcomeness inquiry.²¹⁸ Therefore, it is clearly possible to incorporate assumption of risk concepts into sexual harassment law by broadening the unwelcomeness element.²¹⁹ Using the unwelcomeness element to incorporate assumption of risk concepts into sexual harassment law would accomplish the first advantage of the proposed assumption of risk defense, allowing women to receive economic benefit from the marketing of their sex appeal. This option is problematic, however, because the use of the term "welcomeness" suggests that women objectively *want* certain harassing conduct to occur when, in fact, they merely made a rational decision that the benefits of working in a certain environment outweighed the risk of harassing conduct.²²⁰ Incorporating assumption of risk concepts into the unwelcomeness element suggests that women signal their desire for sexual advances by their choice of workplace, rather than acknowledging that their choice of workplace was the result of a rational utility-maximizing decision on their part.

An additional problem with the use of the unwelcomeness element to introduce assumption of risk concepts into sexual harassment law involves the scope of the risk assumed. The proposed assumption of risk defense is very narrow, only allowing employees to assume the risk of sexual harassment when sex appeal is a substantial part of their employer's business and of their particular job. An explicit assumption of risk defense is also useful because it requires a defendant to prove that the plaintiff knew about the risk and indicated her consent to voluntarily assume it by her conduct. Incorporating assumption of risk concepts into the unwelcomeness element would lack these limiting devices. The *Meritor* Court's statement regarding the relevance of a plaintiff's sexually provocative speech or dress to the issue of unwelcomeness²²¹ suggested that women assume the risk of sexual harassment merely when they speak or dress provocatively, without requiring defendants to prove

218. See notes 93-95.

219. For example, under a broad view of welcomeness, it could be argued that the Hooters' plaintiffs' decisions to work at Hooters, a place named after a slang term for women's breasts, where the waitresses must wear sexually provocative attire, suggests that the harassing conduct was not unwelcome, that the plaintiffs solicited such conduct or indicated that they did not find such conduct offensive.

220. See note 13.

221. Such evidence, which the Supreme Court held was admissible on the issue of unwelcomeness, is more relevant to show assumption of risk. See notes 93-96 and accompanying text.

that the women knew that such behavior was likely to cause sexual harassment or that their conduct demonstrated their desire to voluntarily assume the risk of sexual harassment. The *Rabidue* decision demonstrates the dangers of a broad assumption of risk defense in sexual harassment law.²²² Any behavior by a woman that a court thinks she should have known would cause men to harass her could be used to show that she assumed the risk of the harassment, thus harming the ability of Title VII to make workplaces more open to women. The proposed assumption of risk defense is therefore preferable to incorporating assumption of risk concepts into the unwelcomeness element.

Another way to incorporate assumption of risk concepts into sexual harassment law without creating an explicit assumption of risk defense is to account for the plaintiff's reasonable expectations of her work environment when determining whether the harassing conduct at issue is severe enough to cross the threshold into actionable sexual harassment. This approach was proposed in an article by Robert Aalberts and Lorne Seidman,²²³ that suggested classifying occupations as high, medium, and low risk, with differing levels of harassing conduct necessary in each to be severe and pervasive enough to constitute sexual harassment.²²⁴ A topless dancer would reasonably expect stares and comments but not physical contact from her audience, and a cocktail waitress in a conventional lounge would reasonably expect some stares and an occasional compliment, while a female employee in a conventional bookstore would reasonably expect no sexual attention from customers at all.²²⁵

This sliding-scale occupational risk approach would accomplish the first advantage of the proposed assumption of risk defense, allowing employers who market their employees' sex appeal to continue to exist, providing women the freedom to market their sexuality. Unlike the unwelcomeness alternative, this approach would not suggest that women "want" harassing conduct to occur, but would recognize that women have reasonable expectations about the customer behavior

222. See Parts IV.A and B.

223. Aalberts and Seidman, 21 *Pepperdine L. Rev.* at 470 (cited in note 24). "[T]he standard applied when non-employees are involved must be keyed to the reasonable expectations of the employee in her particular employment environment." *Id.* "[A] woman who works in revealing attire in an establishment that touts itself for its sex appeal would have to consider the specific environment in determining what detrimentally alters the terms and conditions of her work environment." *Id.* at 469.

224. *Id.* at 470-72.

225. *Id.*

they will be exposed to at a particular job, and that they rationally decide whether the benefits of the job are likely to outweigh any negative customer behavior. Therefore, this alternative also achieves the second advantage of the proposed assumption of risk defense: It recognizes the ability of women to rationally choose where they work and to accept the consequences of that choice.

This approach, however, shares the unwelcomeness alternative's problem with the scope of the risk assumed. The proposed assumption of risk defense only allows the plaintiff to assume the risk of sexual harassment and thus only considers her reasonable expectation of her work environment when sex appeal is a substantial part of her employer's business and of her particular job. The sliding-scale occupational risk approach considers the plaintiff's reasonable expectation of her work environment no matter what her occupation is. The phrase "reasonable expectation of her work environment" is reminiscent of *Rabidue*,²²⁶ except that the sliding-scale approach only applies to customer harassment. Under this approach, an employee at a conventional restaurant may be unable to recover for harassing conduct by customers if that particular restaurant has always featured rude comments by customers to waitresses, because that fact would be relevant to the reasonable expectation of the employee's work environment and to the level of conduct necessary to cross the threshold into sexual harassment. Therefore this approach may share the *Rabidue* problem of allowing currently obscene workplaces to stay that way.²²⁷

D. Conclusion: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?

Because of its important advantages, the proposed assumption of risk defense should be introduced into hostile work environment sexual harassment law. Employers should have the opportunity to prove that, by accepting a certain job, an employee demonstrated her consent to assume the risk of sexual harassment by cus-

226. *Rabidue*, 885 F.2d at 620.

227. See text accompanying notes 153-56.

tomers, as long as sex appeal is a substantial part of the employer's business and of the employee's particular job.

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