OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TERESA HARRIS, Petitioner v. FORKLIFT SYSTEMS, INC.

CASE NO: No. 92-1168

PLACE: Washington, D.C.

DATE: Wednesday, October 13, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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TERESA HARRIS, :

Petitioner :

v. : No. 92-1168

FORKLIFT SYSTEMS, INC. :

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Washington, D.C.

Wednesday, October 13, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

IRWIN VENICK, ESQ., Nashville, Tennessee; on behalf of the Petitioner.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioner.

STANLEY M. CHERNAU, ESQ., Nashville, Tennessee; on behalf of the Respondent.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 92-1168, Teresa Harris v. Forklift Systems, Inc. Mr. Venick, we'll hear from you.

ORAL ARGUMENT OF IRWIN VENICK

ON BEHALF OF THE PETITIONER

MR. VENICK: Mr. Chief Justice and may it please the Court:

This case calls upon this Court to determine whether psychological injury is a necessary requirement for a finding of hostile environment liability under title VII of the Civil Rights Act of 1964.

The district court found that Teresa Harris was subjected to a continuing pattern of sex-based derogatory conduct that was not imposed upon men by the president of Forklift. The conduct was found to be unwelcome, offensive to Mrs. Harris, and would have offended a reasonable person in her position. Ms. Harris' claims were dismissed in the trial court and summarily affirmed on appeal based upon the Sixth Circuit rule requiring psychological injury.

In Meritor Savings Bank v. Vinson, this Court stated that a hostile work environment exists if conduct is sufficiently severe or pervasive to alter the

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conditions of employment and create an abusive working environment. This Court rejected the view that title VII was limited to tangible or economic discrimination, and further observed that title VII affords employees the right to work free from sex-based discriminatory insult and ridicule.

The psychological injury test should be rejected because it conditions liability in a title VII case upon the reaction of the victim of discriminatory conduct in the workplace, rather than the effect of that conduct on the terms and conditions of employment. It therefore does not further the equal employment opportunity goals of title VII.

Because the district court's findings satisfy the Meritor standard, Ms. Harris requests reversal of the judgment below.

QUESTION: Do you take the position that there should be no requirement of proof of subjective effect?

MR. VENICK: Your Honor, it's our position that there is a subjective element in the unwelcomeness requirement.

QUESTION: Yes.

MR. VENICK: But beyond that, in this particular case, Your Honor, there were findings that there was both subjective harm, and that Ms. Harris was also subjected to

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conduct that would have offended a reasonable person in her position, so that's not a question that this Court needs to reach in this case.

But with respect to clarifying the Meritor decision, it's our position that the Meritor test should be clarified to the extent that existing societal stereotypes should not be the standard against which hostile environment claims are evaluated.

In my argument, I will first turn to the specific conduct that was found by the district court. I will then discuss why the psychological injury test should not be required for a finding of a hostile work environment, and finally, I will argue that Forklift's test neither concedes the psychological injury requirement, nor comports with the test announced by this Court in Meritor.

The magistrate below found that Charles Hardy was a crude and vulgar man who demeans female employees in his workplace. Through his conduct, Charles Hardy questioned the competence of Teresa Harris because she was a woman.

He made statements to her in the midst of meetings of her fellow employees, "You're a woman. What do you know?" He would also call her on numerous occasions a "dumb-ass woman, again within the midst of her

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fellow employees. He also questioned Ms. Harris' accomplishments as a rental manager, again because she was a woman. He --

QUESTION: Mr. Venick --

MR. VENICK: Yes, Your Honor?

QUESTION: -- with respect to those comments that you just quoted, does the sexual harassment caption really fit those? That has a connotation that perhaps is not quite right, to describe the comments that you just referred to.

MR. VENICK: Your Honor, those comments may be characterized more properly as sex-based comments, but still we believe fall within the sexual harassment --

QUESTION: Hasn't the EEOC picked up on the word gender to try to distinguish that kind of comment from the sexual harassment?

MR. VENICK: They have, Your Honor, and in addition, in their 1990 guidelines, the EEOC sets forth a separate category which it characterizes as sex-based comments, but does not remove them from its general rules regarding the analysis of a sexual harassment case.

Mr. Hardy also directed --

QUESTION: Mr. Venick, suppose I'm a male employee and I am as offended by language and conduct like that as a female employee, or as offended by the posting

of really scatological pictures and whatnot around the workplace, do I have a claim? It makes it as unpleasant a work environment for me as it would for a woman.

MR. VENICK: Under the wording of title VII, Your Honor, I don't believe you would, because you're not being discriminated because of your sex. Now, if there were male pictures put up on the walls, perhaps you might have a claim.

QUESTION: Is she being discriminated against because of her sex? She doesn't like the denigration of sexuality in general.

MR. VENICK: Title VII protects employees against discrimination as to the terms and conditions in their employment because of their sex. In this case, the conduct that Mr. Hardy conducted and which was found by the trial court in our view exposed Teresa Harris to conduct that discriminated against her because of her sex. All these comments, all this conduct, was directed only at women, only at Teresa Harris, not at men, and therefore we believe it falls squarely within title VII.

QUESTION: So it would be different if Charles Hardy had been equally scathing and offensive to men, calling them dumb-ass men?

MR. VENICK: I believe in that case, Your Honor, if he treated everyone equally, Mr. Chief Justice, I don't

believe Teresa Harris may not have had a claim.

QUESTION: He wouldn't discriminate on the basis of sex.

MR. VENICK: That's right, because he's not discriminating on the basis of sex.

Mr. Hardy also --

QUESTION: Some of these are hard to transpose in that way. You're a woman, what do you know, means something different if you say you're a man, what do you know?

MR. VENICK: That's correct, Your Honor.

(Laughter.)

MR. VENICK: But again, Your Honor, if Mr. Hardy perhaps directed all these comments towards men, then the males at the workplace may have had a claim, and not Teresa Harris.

But Mr. -- in getting back to your question --

QUESTION: Mr. Venick, you've never had anybody tell you, you're a man, what do you know? You've never --

(Laughter.)

QUESTION: You must live in a different family environment from mine.

MR. VENICK: Well --

(Laughter.)

MR. VENICK: -- Your Honor, not only in my

family but in the courtrooms as well.

(Laughter.)

MR. VENICK: Going back to your comment, Justice Ginsburg, there were comments and conduct directed by Mr. Hardy that had a sexual connotation. He would ask only female employees to remove coins from his front pants pocket. He would only ask female employees to pick up coins on the floor and then make comments about their physical attributes.

QUESTION: Just before we leave this point, suppose there are sex-based comments in the workplace generally among men. They talk about sex all the time. It's not directed to the women. They talk about male sex, they talk about heterosexual sex -- all kinds of sex. The woman is highly offended by this. It's not directed at her. What result?

MR. VENICK: Your Honor, I don't believe in that case that specific factual situation would fall within the sex-based criterion under Meritor. We don't have discrimination on the basis of sex, we have comments or conduct and discussions that involve sex.

QUESTION: Well, you certainly could have a hostile working environment that makes it very difficult for the female employee to continue to work there, couldn't you, under those circumstances?

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MR. VENICK: If the conduct, Your Honor, is directed towards the female employee --

QUESTION: No, that wasn't the assumption, but it nonetheless creates a hostile working environment.

MR. VENICK: If the conduct is found under Meritor to be sufficiently severe or pervasive to alter the conditions of that employee's work environment, yes, that would be a hostile work environment.

QUESTION: What is the reasonable person standard that we employ? Is it a reasonable woman, or a reasonable victim, or what is it? There's some difference in the views of different courts about what the reasonable person standard is, isn't there?

MR. VENICK: Well, Justice O'Connor, there is a great deal of confusion in the lower courts about that standard. In our brief -- again, we don't really -- perhaps don't need to get to that point in this case, but in our brief we've characterized it as a reasonable person in the position of the plaintiff, recognizing that hostile environment claims can be brought by both men or women.

It is our view, though, that if the Court decides to address that question and wants to fashion a test, that what the Court needs to bear in mind is, what is the goal that we're trying to achieve, and I think that goal can be perceived in two ways.

First, it is essential that existing societal stereotypes be eliminated from consideration of workplace conduct, and secondly, we have to look towards the goals and objectives of title VII, which is to eliminate discrimination in the workplace, and I think if the Court is the address that point, I would suggest that it look at it from those two principles.

QUESTION: Well, I don't see why it should necessarily be the reasonable woman, reasonable victim, as you put it, rather than the reasonable employer.

MR. VENICK: Mr. Chief Justice, the reasonable employer is the person who is perpetrating the conduct. In our view --

QUESTION: Well, that's what we're trying to find out, and one way we will find out differently, depending on what test is applied, is whether you say, is it a reasonable employer or a reasonable victim?

MR. VENICK: Mr. Chief Justice, title VII is intended by its very language to protect employees from discriminatory conduct in the workplace. It would therefore be our view that --

QUESTION: It doesn't define from whose focus discrimination is to be considered.

MR. VENICK: That's correct, Mr. Chief Justice, but the focus of the statute is to protect employees, and

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it would therefore seem in our view that the perspective should be from the perspective of the plaintiff or the victim.

QUESTION: Well, you have any number of personal injury statutes -- that are designed to protect employees, but the standard of negligence is not the standard of a reasonable employee but the standard of a reasonable person.

MR. VENICK: That's correct, Mr. Chief Justice, and a number of the amici that have filed briefs have pointed out one of the problems with the reasonableness standard, and that is that it's not found expressly in the language of title VII. However, I would direct the Court's attention to its language in Meritor that -- to the effect that a mere insult would not give rise to title VII liability, and in our view some of the lower courts have imported and implied a reasonableness standard to take into consideration that limiting factor that this Court announced in Meritor.

QUESTION: Of course, I have trouble with this whole debate. It's hard for me to imagine something that a reasonable employer could do that a reasonable employee could object to. It just seems to me circular. It seems to me that if the reasonable employee could object to it, a reasonable employer couldn't do it. That's the end of

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the case.

I have great difficulty with this problem, and I agree with the suggestion of the Chief Justice that we look upon the actor whom we are attempting to control, and require that that actor be reasonable in his or her conduct in the workplace.

MR. VENICK: Your Honor, that would create a problem in the context of this case, because Mr. Hardy believed that he was acting reasonably. He believed that his conduct was --

QUESTION: Well, but he might have been very wrong.

(Laughter.)

MR. VENICK: We would hope he might be found to have been very wrong, but --

QUESTION: And it's not his subjective belief, is it? If an employer thinks he's being reasonable and he's coarse and vulgar and creates a hostile working environment, he's liable under the law.

MR. VENICK: That's correct, if his conduct is found to be sufficiently severe or pervasive to alter the working environment, and it's our view that that perspective needs to be from the perspective of the employee, because it's the employee who's subjected to the conduct. The employer is the one who is causing the

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conduct, and it's the employee who is the one who is going to be complaining about it.

It's our view that any test --

QUESTION: You're positing a reasonable employer who has been educated and made aware, not -- for example, a reasonable employer in the old days might have thought it was perfectly fine to say all kinds of unpleasant things to women. Even great professors had such things as Ladies Day, and in their day they were considered entirely reasonable, so we're positing a reasonable employer who knows the law, knows the command, thou shalt not discriminate.

MR. VENICK: That's correct, Justice Ginsburg, but even in the situation where all employers are presumed to know the law, as Charles Hardy was presumed to know the law, they ofttimes, or sometimes don't act in accordance with the law, and that's why, from our perspective, it's the employee who has the interest in bringing forth actions under title VII to enforce the law, and that's why from our view that is the employee's perspective, if the Court's going to reach that point, that should be utilized in analyzing these facts.

It's our view that any test that requires psychological injury as a necessary element of proof to establish a sexually hostile work environment does not

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further the objectives of title VII to eliminate discriminatory conduct because of an employee's sex.

The psychological injury test requires such an employer -- or employee to endure discriminatory conduct without a remedy, and that results for two reasons: first, because employment conditions can be altered by severe or pervasive workplace conduct before any kind of psychological injury manifests itself, and secondly because the psychological injury threshold itself may insulate unlawful activity if employees leave their employment rather than suffer continued workplace harassment because of their sex.

QUESTION: Mr. Venick, you were going to tell us why the respondent, although purporting to concede the psychological injury point, in fact does not concede it. I hope you'll do that before your --

MR. VENICK: I'll do that right now, Your Honor.

Forklift suggests a test in its brief, that the test that satisfies Meritor, the only test that satisfies Meritor, is that the plaintiff must show interference with his or her work performance, and that test can only be satisfied in one of two ways: either psychological injury, or an inability to do the job.

It's our position that obviously psychological injury as a means of satisfying the interference to impair

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work performance means psychological injury. It is hard for us to concede how, or conceive of how a worker may be unable to do their job without manifesting some degree of psychological injury. It seems to be a circular argument saying one and the same thing, and therefore, in our view, they basically back-door the psychological injury requirement and put it in new garb.

QUESTION: How do you define interfere with work performance?

MR. VENICK: Your Honor, we don't believe that that test is necessary for a finding of hostile work environment. It's our belief that this Court under Meritor set forth a proper standard, and that is that the conduct should be evaluated to determine whether it is sufficiently severe or pervasive to alter the conditions of the workplace, and that can involve a whole range of effects, and to try to categorize them --

QUESTION: How about just saying it makes the job more difficult for the person?

MR. VENICK: Again, we would need to, in that case, Your Honor, try to quantify what that difficulty is, and we harken back to the language in Meritor that title -- hostile environment cases don't involve tangible or economic injury.

QUESTION: How about if you take a similarly

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situated man and a woman, and the woman is constantly told, you're a woman, you think like a woman, and her coworker is not told those things? Doesn't that make their job more difficult? Do you need anything further than that? Is it really more complex?

MR. VENICK: We don't believe it is necessarily more complex if the conduct is sufficiently severe or pervasive. It is difficult, and I don't think title VII was intended to require a plaintiff to quantify any reduction in their job performance.

QUESTION: You're talking about terms and conditions of employment, and the terms and conditions aren't equal if one is being called names and the other isn't.

MR. VENICK: That's correct, Your Honor, but we don't believe you have to go any further and put a label on it, making it more difficult for her to do that job. Her terms and conditions have been affected in violation of title VII because she has been subjected --

QUESTION: You would seem to be developing a more complex test, and I was wondering why? You said severe, and pervasive, and --

MR. VENICK: That's the language in Meritor, Your Honor, which we heartily embrace.

QUESTION: I asked you what you thought it

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meant.

MR. VENICK: In evaluating whether conduct is severe or pervasive, one would look through the factors that have been adopted by most of the courts of appeals in the EEOC --

QUESTION: But you said sufficiently severe to alter the conditions of employment. That is utterly meaningless to me. I don't care if we did say it.

(Laughter.)

QUESTION: Sufficiently -- or circular. I mean, it's circular. Sufficiently severe to alter the conditions. How do I know whether it's severe enough to alter the conditions?

MR. VENICK: The factors, Your Honor, that would be applied to make a determination, is how often does the conduct occur, whose perpetrating the conduct, who else was exposed to the conduct, who else joined into the conduct?

QUESTION: All right, those are all factors, but how many of them do you need to alter the conditions?

MR. VENICK: That is a determination --

QUESTION: How can you tell? What magic event said, oh, it's risen to the level of severity to alter the conditions?

Now, the test that says, it affects your work

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performance, ah, there's something I can identify. But you just give me this standard, it's sufficiently severe to alter the conditions of employment. I have no idea what that means.

MR. VENICK: The interference with work performance test would require a plaintiff to quantifiably prove some reduction in job performance which goes beyond --

QUESTION: Which is identifiable.

MR. VENICK: Which -- but it also goes beyond --

QUESTION: Are you saying you have to show that the quality of work is different, that --

MR. VENICK: That's what that -- excuse me, Your Honor.

QUESTION: That the output is different, and --

MR. VENICK: That's what that --

QUESTION: -- that's the test to do it?

MR. VENICK: We're not positing that test, Your Honor. That's the test that --

QUESTION: You're not positing it because you don't -- you would have us adopt a test without any subjective element at all.

MR. VENICK: We believe that the Court can do that, Your Honor.

QUESTION: I thought you said --

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QUESTION: But that's why you don't posit it.

QUESTION: I thought you said that it had to at least be unwelcome, that there was a subjective component.

MR. VENICK: That is --

QUESTION: Didn't you say that?

MR. VENICK: Yes, I did, Justice O'Connor.

QUESTION: But the -- as I understand your view, the employee would not have to prove that job performance was in fact affected deleteriously.

MR. VENICK: That is correct, Justice Souter. There would not have to be proof that there was a quantifiable reduction in job performance by the plaintiff.

Thank you very --

QUESTION: Thank you, Mr. Venick. Mr. Minear.

ORAL ARGUMENT OF JEFFREY P. MINEAR

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE PETITIONER

MR. MINEAR: Mr. Chief Justice, and may it please the Court:

This Court held in Meritor Savings Bank v. Vinson that sexual harassment can result in title VII discrimination if the conduct is gender-based, unwelcome, and sufficiently severe or pervasive to alter the conditions of the victim's employment.

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There's no question in this case the conduct at issue was gender-based and unwelcome. Instead, the question is whether it was sufficiently severe or pervasive to satisfy the Vinson test. We think that a plaintiff can satisfy that requirement by showing that the gender-based conduct made it more difficult for the person to do the job.

QUESTION: Do you have both an objective and a subjective component to "make more difficult"?

MR. MINEAR: For that standard, Your Honor, we have only an objective component. The question is whether it would make it more difficult for a reasonable person vis-a-vis the people who are not discriminated in the workplace to do the work, to perform the job.

QUESTION: Why isn't that predicating liability with an injury? You're saying -- I mean, isn't that the equivalent of saying anyone who drives a car without due care is going to be liable whether or not he bumps into somebody or not?

MR. MINEAR: No. The injury here, Your Honor, is with respect to being denied the right to a discrimination-free employment place, and our test goes to whether or not there is discrimination in the workplace. The person can be injured even though the person does not have compensable damages. In fact, until recently, title

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VII did not provide a damage remedy.

QUESTION: I take it the unwelcome component of the test, which is not involved here, is to satisfy some subjective --

MR. MINEAR: That is correct.

QUESTION: -- requirement, and makes this not just like negligence in the act.

MR. MINEAR: Yes, that is correct, and -- but the issue in this case is the question of severity or pervasiveness, trying to understand what that concept means in the workplace.

QUESTION: And the remedy could be simply, stop it, without any -- talking about somebody who says the job is more difficult for me to perform than the next guy -- not asking for any money, and just says, the remedy is an injunctive order to stop it.

MR. MINEAR: That is exactly correct. Now, this is not the only way to prove that conduct might be severe or pervasive, but we think that is a very useful benchmark in a case like this, because it helps to focus the inquiry on the practical effect of the conduct in the workplace.

QUESTION: What other way is there to prove it? I was very hopeful. I thought you had given us a touchstone -- makes the work more difficult, it is severe enough to affect the conditions of employment -- but you

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say that's not the only --

MR. MINEAR: Well, what we are --

QUESTION: What else is there besides that?

MR. MINEAR: Oh, this is a matter of proof for the plaintiff, but suppose in fact --

QUESTION: I know that. What does the plaintiff have to prove?

MR. MINEAR: Suppose the plaintiff had clinical psychosis as a result of a rape in the workplace. I think she could use that evidence without necessarily needing to show it made the job more difficult to do. It almost certainly would, but again, this is a matter of choice of proof.

The standard is set forth in Meritor, and we have no quarrel with that standard at all, that is, whether it's sufficiently severe or pervasive. The question is, how does the plaintiff go about proving it, and we're saying that one way you can prove it --

QUESTION: No, the question is, sufficiently to what, that's what the question is, sufficiently to what? You give us one thing, sufficiently to make the job more difficult to perform -- fine -- and you say, but there are other things, and you don't want to tell us all of them.

MR. MINEAR: Well --

QUESTION: One is, sufficiently to produce

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psychological injury, okay. You acknowledge that that is one way, okay.

MR. MINEAR: Yes. Another way to --

QUESTION: What else?

MR. MINEAR: Another example would be, for instance, let's take the concrete example of a woman who drives a taxicab for a taxi company, and she wants to work in the shop. She wants to work with her hands and be a mechanic. In that case, she might be deterred from making the job transfer in that situation because there's harassment in the mechanic's shop. Now, that wouldn't interfere with her current job, but it would, in fact prohibit, or prevent her from moving to a different job.

QUESTION: Mr. Minear, what about the woman who doesn't see herself as a victim, but finds this terribly annoying. It's a condition that she has to confront every day, and she puts up with it. She outperforms everyone else. Does she not have a claim? I'm not following your --

MR. MINEAR: She does have a claim under those circumstances. Again, annoyance, pervasive annoyance --

QUESTION: So even though she proves no psychological harm, and that she has been able to do the job as well, indeed, better than her coworkers --

MR. MINEAR: That is correct. She would still

have a claim, because our test is an objective one. We look to what a reasonable person in her situation, whether or not that person is disadvantaged, vis-a-vis people who are not subject to that treatment.

Now, if the conduct is gender-based, and is unwelcome, then we move on to that question of whether it makes it more difficult for a reasonable person in her situation to do the job.

QUESTION: Even if it's only mildly offensive, so it's not severe enough -- it's just mildly offensive, but it's offensive.

MR. MINEAR: Well, that's captured by our notion of a reasonable person in the position of the plaintiff.

Now, we accept that in the workplace there's a certain amount of unpleasantness in any workplace, and that people become accustomed to that one way or another. We're expected as a matter -- society expects us to accept a certain amount of unpleasantness, but the question is, if it is gender-based, and it makes it more difficult to do the job, is that enjoinable, and title VII says, yes, it is.

QUESTION: So your difficulty in doing the job is simply a -- is an objective tests, and the failure of an employee to work as well under this discriminatory atmosphere as without it is simply relevant evidence, it's

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not an element of anything.

MR. MINEAR: That could be relevant evidence, yes, and in fact we think the correct standard was stated by the court below in the racial harassment context.

In Davis v. Monsanto, the Court said, and I quote, "In establishing the requisite adverse effect on work performance, the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. The employee need only show that the harassment made it more difficult to do the job."

Now, we think that the same standard should apply in the racial and the sexual context.

QUESTION: You don't really mean more difficult to do the job, you mean more unpleasant to work there, is what you mean by more difficult to do the job.

MR. MINEAR: Well, that can make the job more difficult to do.

QUESTION: So why don't you just say that, more unpleasant to work there? It doesn't sound as -- it doesn't sound as good, but that's really what you mean. It makes it more unpleasant to work there.

MR. MINEAR: I think that it's helpful to look in response to this to the facts of this actual case, and the United States and the EEOC believes that the sex-based abuse that occurred in this case provides an example

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of enjoinable harassment. Hardy's sexually demeaning conduct clearly created a work environment that made it more difficult to do the work, to succeed, and to receive credit for the success.

Now, if we look to specifics in this context, Hardy's suggestion in front of others that petitioner have sex with a customer to obtain business for the company would undermine or demoralize a reasonable woman by degrading her in front of her coworkers, and also by denying her credit for results achieved through superior effort or skill.

Now, this is not simply a hurt feelings situation. In the case of a manager who is undermined before other managers and before her subordinates, it makes it tangibly more difficult for her to do the job. In fact, Teresa Harris made the statement in --

QUESTION: I'm puzzled by the more difficult to do the job.

Supposing an office had a policy -- they found out that people worked more efficiently if they didn't look at the window, so they gave all the windowless offices to the women and the offices with nice views to the men, so it's more pleasant to work there, and they did this as a matter of policy.

Women get the inside offices, men get the

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outside offices. Each do their work exactly as efficiently as the other, without difficulty. Is there a violation or not?

MR. MINEAR: Well, keep in mind, Your Honor -- yes, there is a violation, and it is --

QUESTION: Without it being more difficult --

MR. MINEAR: -- and again, this goes back to my point of saying that this is not the exclusive test, that there are other ways. The ultimate touchstone here is whether it affects working conditions.

QUESTION: You don't mean more difficult to do the job, you mean more unpleasant --

(Laughter.)

QUESTION: More unpleasant to work there --

MR. MINEAR: I mean, Your Honor --

QUESTION: -- is all you mean. Why don't you say that, and that covers everything you're talking about?

MR. MINEAR: Again, let's go back to -- again, the ultimate touchstone here is whether it alters working conditions. Meritor indicated that is the question, and that covers Justice Stevens' situation.

QUESTION: Whether one sex has to put up with something that the other sex doesn't have to put up with.

MR. MINEAR: That's right, but it can also make it more difficult to do the job, and in terms of Teresa

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Harris' --

(Laughter.)

MR. MINEAR: I think this is a serious point, and I think -- and I want to make this point. In the case of Teresa Harris, she was undermined in performing her work in the eyes of her subordinates. She made the point that her authority was undermined as a result of these comments. She received less respect in the workplace from her subordinates than her -- male managers did.

Now, this is the way a glass ceiling is enforced, and this is a very tangible way in which the ability to do the job can be affected. It is not simply hurt feelings here.

QUESTION: I wonder if alter the environment is the happiest way of putting it. It was put that way in Meritor, certainly, but it wouldn't be a defense for the employer for him to show that he'd been doing this for 20 years. There's no alteration of the environment. He'd always done that.

MR. MINEAR: That might be correct, but the question here is, I think we're looking in a more global sense of whether there is different treatment for women and men in the workplace.

QUESTION: Which really doesn't depend on altered treatment at all, does it?

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MR. MINEAR: Not necessarily, again, it doesn't, and that's why I think it's helpful, again as a benchmark here, to ask whether women and men are being treated differently in terms of whether or not it makes it more difficult to do the job. This --

QUESTION: What about some sort of de minimis? There is different treatment, but it's just barely different.

MR. MINEAR: That is why we think that a reasonable person standard is appropriate in this context, and there was some discussion before about whether we looked to the reasonable woman, the reasonable victim, the reasonable man. I think the important point is there does need to be some objective measure of conduct in the workplace.

QUESTION: Well, Mr. Minear, if the employer just makes it more difficult for everybody to do the job, male or female --

MR. MINEAR: Then there is no gender --

QUESTION: -- is there a complaint? Is there a --

MR. MINEAR: Then there --

QUESTION: -- cause of action?

MR. MINEAR: In that situation there is no gender-based discrimination, and so the first factor in

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Meritor is not satisfied.

Thank you, Your Honor.

QUESTION: Thank you, Mr. Minear. Mr. Chernau.

ORAL ARGUMENT OF STANLEY M. CHERNAU

ON BEHALF OF THE RESPONDENT

MR. CHERNAU: Mr. Chief Justice, and may it please the Court:

This case presents a situation that is somewhat peculiar. We concede that the Rabidue case in the Sixth Circuit that requires severe psychological injury is a test that is too stringent. However, having said that, we also assert that that Rabidue case was decided on another independent ground.

Now, we agree that the Rabidue case is wrong in the requirement of severe psychological injury, but the magistrate clearly applied the test of whether or not the conduct of the defendant interfered with the work performance of the petitioner. Now, stopping at that point, that's what the EEOC says in their brief should be the standard.

QUESTION: But he -- didn't he do that, and isn't the difficulty with your argument both on this and other quotes that you make, that the magistrate did this in the course of a paragraph in which -- and I'm referring, by the way to pages A-35 -- A-33 and 34 of the

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appendix.

He did this in a paragraph in which he is discussing the requirement of offending the reasonable woman, and so that it's perfectly true that at one point he refers simply to interfering with work performance, but he does it, as it were, in the same breath, albeit in a different sentence from the one in which he is referring to seriously affecting psychological well-being, and he seems to be in effect conflating the two, and I find it difficult to separate them.

MR. CHERNAU: If we take the fact that all offensive conduct and all things that may be characterized as harassment are not -- do not enable you to seek redress under title VII, which is what the Meritor case says, there are acts that can be characterized as harassment but don't rise to the level of allowing you to obtain successfully redress for what you complain of.

Now, as I read A-34 and 35, beginning on A-33, he says -- he discusses offensiveness. He says, "I believe some of Hardy's inappropriate sexual comments are" --

QUESTION: Excuse me, are you referring to the joint appendix, to some page in it, or to the petition, or what?

MR. CHERNAU: Yes, A-33 of the appendix, excuse

me.

QUESTION: Well, this is the cert appendix.

QUESTION: Of the petition?

MR. CHERNAU: Or the petition for writ.

QUESTION: Of certiorari.

QUESTION: The cert petition.

MR. CHERNAU: It's the cert petition, A-33.

QUESTION: Thank you.

MR. CHERNAU: Excuse me. May I proceed?

QUESTION: Yes, thank you.

MR. CHERNAU: At A-33 he says, "I believe that some of Hardy's inappropriate sexual comments, especially this last one, offended plaintiff and would offend a reasonable woman." So he finds that indeed -- he found the conduct offensive, and that it would offend a reasonable woman. Then he says, "However, I do not believe that they were so severe as to be expected to seriously affect plaintiff's psychological well-being."

QUESTION: Right, but doesn't the positioning of these sentences indicate that he thinks he's applying one element of the test, not two different tests or two different elements?

MR. CHERNAU: Well, I -- that is not the way I read it, because when he starts the next paragraph, which is a new thought --

QUESTION: If there's any doubt about that, we should send it back, shouldn't we, if we don't accept the psychological injury test?

MR. CHERNAU: If there is any doubt in this Honorable Court's mind as to whether the magistrate focused clearly on all of the tests that have been enunciated as opposed to focusing on the psychological injury test --

QUESTION: Mr. Chernau, the magistrate set out -- and this is A-29 and A-30 of the appendix to the petition for certiorari -- set out marching orders from the Sixth Circuit and one of those, number 4, says, "offensive work environment that affected seriously the psychological well-being of the plaintiff." That's a requirement set down by the Sixth Circuit.

Is a magistrate free to ignore that and say, well -- he says, I'm purporting to follow this rule. That is the law of the Sixth Circuit. Is a magistrate free to say, well, I don't like that so I'm going to ignore it?

MR. CHERNAU: No, I don't believe that he's free to ignore it, and indeed, I don't believe he did ignore it. What I believe the magistrate did was try to apply all of the tests, the Rabidue case from Sixth Circuit, the EEOC guidelines, together with the language of -- that came out of Meritor, which included --

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QUESTION: But you agree that the Sixth Circuit has said this is not merely a sufficient condition for liability, it's a necessary condition, part of plaintiff's proof -- plaintiff must prove serious psychological well-being.

MR. CHERNAU: Yes.

QUESTION: So if that's the law of the Sixth Circuit, mustn't we assume that that's what the magistrate applied?

MR. CHERNAU: Yes, but I don't think that it's -- you necessarily have to assume that he stopped at that point. I think that he covered what the Sixth Circuit says, and then went -- proceeded beyond that to apply --

QUESTION: Where do you find a clear statement that there's an alternative ruling in this case?

MR. CHERNAU: I don't believe that he used the word, alternative, but in reading at A-34 and A-35, particularly I think at A-35, where he says, "Although Hardy may at times have genuinely offended plaintiff, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to plaintiff," and I believe that he was trying to apply the exact language out of Meritor, so I think that he applied Rabidue, and then went beyond Rabidue.

Now, if -- if we agree that psychological injury should not have to be proven, I again state to you that I believe that in this case the magistrate applied every test that he could have applied, including what the EEOC says to apply, which is interfere with a reasonable person's work performance or victim's performance, the Meritor, which I just recited that he said, and that the psychological injury doesn't tie in and that his thought process was not infected -- the petitioner says that his thought process was infected by the Rabidue case, and I say that it wasn't. Now there's one --

QUESTION: Well, he at least said that it had to affect work performance, isn't that right?

MR. CHERNAU: Yes.

QUESTION: And your opponent contends that that isn't even necessary.

MR. CHERNAU: That's correct.

QUESTION: Just making a more unpleasant work environment is enough.

MR. CHERNAU: Yes, and interesting enough, Your Honor, is that the --

QUESTION: Do you disagree with that?

MR. CHERNAU: I agree that that's what the petitioner asserts.

QUESTION: Right.

MR. CHERNAU: And I say to you that the EEOC -- we agree with the EEOC, who says that the standard should be related to work performance, that the EEOC and my side of the case agree.

Now, the Meritor case also points --

QUESTION: Mr. Chernau, this magistrate said this is a close case. If he regards it as a close case, then if the standard is not as hard to meet as the Sixth Circuit stated -- seriously affects psychological well-being -- and the magistrate regards it as a close case, isn't it likely that if the standard were less strict for the plaintiff, that the case would go the other way?

You read one sentence out of -- what is this one in your appendix, over 40 pages --

MR. CHERNAU: Yes, Your Honor.

QUESTION: If one concentrates on, I believe this is a close case, and then the judge is told, well, the standard is easier for the plaintiff to meet than you think, then wouldn't the close case tip the other way?

MR. CHERNAU: I believe that when he stated this was a close case, that what he was talking about was the totality of the case, all of the circumstances, the credibility of the witnesses -- as we all know, events don't take place in a vacuum, and I think that one of the really helpful things that comes out of Meritor, in

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addition to the test that it states, is the totality of circumstance statement, where Meritor says that you have to look to the totality of the circumstances, that the trier of fact must determine the existence of sexual harassment in light of the record as a whole, and the totality of circumstances such as the nature of the sexual advances and the context in which the alleged incidents occurred.

Now, the reason I state that is that the totality of the circumstances in this case --

QUESTION: Why is it -- the magistrate made a finding, "Plaintiff was the object of a continuing pattern of sex-based derogatory conduct from Hardy, including..." and then he goes on and on for a few pages, so he's found a pattern, a continuing pattern of derogatory conduct.

MR. CHERNAU: He has found a continuing pattern of derogatory conduct, and he is trying to determine from all of the facts and circumstances surrounding this case, and he went to events that are extrinsic to the simple words that were said, and what the petitioner says, how they affected her.

He went to a number of incidents that caused him to wonder if, indeed -- if, indeed, she was basing this case on what she was asserting or whether, for example, the business relationship that soured with her husband had

more --

QUESTION: He didn't make any finding on that. Mr. Chernau, I'm curious, if this had finding, instead of plaintiff was the object of a continuing pattern of sex-based derogatory conduct, if it had been race-based or religion-based or national origin, and we had a similar inventory of continuous behavior, would your analysis be any different than -- is the sex analysis any different from one if we had race or national origin-based derogatory continuing conduct?

MR. CHERNAU: I think that when you try to -- in order to answer -- that is a very difficult question to ask -- to answer, because one racial epithet, it's been ruled as not enough. I don't think I can give you --

QUESTION: Well, there was not one epithet here, there was a whole series of them.

MR. CHERNAU: Yes, that is true, but what I was going to say is that I can't give you a mathematical formula, but I can again --

QUESTION: I haven't asked you for a formula. I asked you is -- in your judgment, under this statute, is sex different than race or national origin or religion in terms of the level of unpleasantness, annoyance, differential treatment based on race -- is it any different for race, or is the test the same, in your

judgment, whether we're talking about race, or national origin, or religion?

MR. CHERNAU: My answer to that question is that I believe that is the same.

QUESTION: So that the Monsanto test that the -- I think it was the Sixth Circuit, wasn't it?

MR. CHERNAU: I believe the Monsanto was the Sixth Circuit.

QUESTION: Yes. The one that they applied to race, that would apply to sex as well?

MR. CHERNAU: I believe that that's accurate, and I agree that they shouldn't be distinguished, but again I state that if you go to the Meritor case, the Meritor case refers to the gauntlet of sexual harassment, sexual demeaning remarks, so it's not only whatever happens -- the Meritor case recognizes this.

It's not only what happens in work performance as that victim sits at her desk, but what she has to go through to get to her desk, and that's a question of degree. That's why the totality of the circumstances and all of the attending facts become so important.

QUESTION: Mr. Chernau, why do you say that the test affecting work performance, which you're proposing, is the same test the EEOC proposes? What do you base that on?

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MR. CHERNAU: Well, because --

QUESTION: I mean, I thought -- I was listening to Mr. Minear, and I think what Mr. Minear's saying is it doesn't have to affect work performance. It's enough if it renders the job more unpleasant, whether it affects performance or not.

MR. CHERNAU: The EEOC --

QUESTION: You say it has to affect performance.

MR. CHERNAU: The EEOC states a sexually -- this is in their brief at page 25. "A sexually demeaning work environment can interfere with a reasonable woman manager's work performance."

QUESTION: It can, and that would certainly be enough, but I'm not -- I don't understand them to say that's a prerequisite.

MR. CHERNAU: Well, they state in describing -- well, the focus -- I believe that the EEOC's position is this: that the focus of title VII is on the employment opportunity and whether or not the party complains employment opportunity -- that is to succeed and to do the job --

QUESTION: I don't think --

MR. CHERNAU: -- is adversely affected.

QUESTION: I don't think they agree with that. I think they say even if you can have just as much

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opportunity for promotion, even though you do the job just as well, if you have to work in a more unpleasant environment -- substantially more unpleasant. Not negligibly, but substantially more unpleasant environment -- you have a claim.

MR. CHERNAU: Well, the fact --

QUESTION: You disagree with that, right? You say it has to affect work performance.

MR. CHERNAU: Yes. Yes, and the reason that I disagree is that I don't think that offensive conduct automatically alters conditions of employment. I think that you can have offensive conduct that just doesn't rise to the level that this law seeks to protect, and that is your employment opportunity and whether a condition -- whether there's a condition imposed, or there's an alteration that rises to the level where you can seek redress successfully.

QUESTION: Suppose a union negotiates a contract and the contract says, we will have Muzak piped in to the -- that's one of the conditions of employment. It's in there, in the contract. It doesn't necessarily have to affect work performance, but it is a condition of employment.

MR. CHERNAU: And I believe that's offensive, but I don't believe --

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(Laughter.)

MR. CHERNAU: -- but I don't believe it rises to the level --

QUESTION: I think you missed my point, Mr. --

(Laughter.)

MR. CHERNAU: I don't believe it rises to the level where the law is intended to protect you and give you redress.

QUESTION: Mr. Chernau, I just wanted to make sure that Davis v. Monsanto is indeed -- you told me that yes, that standard would be the same, and one of the things the Sixth Circuit said in that 1988 decision was, "In establishing the requisite adverse effect on work performance, the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassments." Are you agreeing that that would be so in the sex case as well?

MR. CHERNAU: Yes, and in regard to the tangible, the magistrate found that she -- indeed, the petitioner suffered no injury, he said, of any kind whatsoever, whether it be tangible or intangible, that really she didn't -- she wasn't adversely affected.

QUESTION: I'm not sure that you understood my question. I asked if you are conceding that it is not any kind of part of the plaintiff's case to show that her work

output was adversely affected, because that's the standard that the Sixth Circuit applies in racial harassment cases.

MR. CHERNAU: Well, I may have misspoken on that, because I do feel that one of the ways to offer evidence to establish that indeed the discrimination that you're suffering rises to the level is to show that you have to go through a gauntlet to get to your desk, or when you get to your desk you're adversely affected.

QUESTION: We all agree on what would be sufficient. The question is, what's necessary.

MR. CHERNAU: I think that it is -- I don't believe that it is necessary to specifically assert and prove interference with your work performance in order to be successful.

QUESTION: You don't. Oh, well, that's new. That's new to me, then. You're changing your position that was in your brief.

MR. CHERNAU: I do not believe that it is absolutely necessary that in all circumstances you would have to prove that --

QUESTION: Oh.

MR. CHERNAU: Because I think --

QUESTION: Well, we don't have any disagreement here then. I think both sides are saying the same thing.

MR. CHERNAU: No, I believe that that is an

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essential element, but under certain circumstances, for instance --

QUESTION: But you disagreed with this standard where the Sixth Circuit made it quite plain that it isn't under any circumstances, it's not -- plaintiff need not prove, and that's why I asked you, because I wanted to be sure that you were associating yourself with the identical standard -- it is the same statute, title VII. What applies to race would apply to gender, right -- and that this standard says that that's no part of plaintiff's case to prove that productivity was adversely affected.

MR. CHERNAU: The reason that I can't state that it is an absolute essential element is because that was never mentioned in the Meritor case, which is the only case that we have from this Court to give us guidance.

The work performance was not mentioned in the Meritor case. It was the altered conditions and the hostile environment conjunctively, and therefore, if I say that it is an absolute essential that you prove that in order to win, I'm saying something that has not been stated by this Court.

QUESTION: But then why should you win in this case?

MR. CHERNAU: Well, the issue that's been presented by this case and why I'm here is whether or not

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psychological damage, severe psychological damage has to be proven by the petitioner, and I -- and I say to you I don't believe that the magistrate rested this case on that finding, and I concede --

QUESTION: The magistrate rested that case, and did no actual interference with work performance, and he did say that, but you say that's not necessary, either.

MR. CHERNAU: I say --

QUESTION: Why do you win, is what I'm trying to ask?

MR. CHERNAU: I think because the magistrate applied the language and test of the Meritor case, which is the only case we have.

QUESTION: He applied more than that.

MR. CHERNAU: I'm sorry.

QUESTION: He applied more than that. He applied two elements that are not in it, 1) the severe psychological injury, and secondly, interference with work performance, neither of which is in Meritor.

MR. CHERNAU: Well, if he applied every test, including the Meritor test, which I say that he did, then how could he be clearly erroneous on the standards that he applied?

QUESTION: Where did he apply the Meritor test?

MR. CHERNAU: At A-35 of the petition for writ

of certiorari, he says, "Although Hardy may at times have genuinely offended plaintiff, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to plaintiff," and I believe that under Meritor, that is the conjunctive part where Meritor says, "For sexual harassment to be actionable it must be sufficiently severe or persuasive to alter the conditions of the victim's employment and create an abusive working environment," and I believe that that language on page A-35 was the magistrate's attempt to comply with the only case we have giving us guidance, which is Meritor.

QUESTION: One other question, if I may. The magistrate said, not abusive to plaintiff, so that would have been subjective. Do you think that's equivalent to saying not abusive to a reasonable person?

MR. CHERNAU: The magistrate I believe said, to a reasonable woman manager in this position. I believe that the reasonable person test is the proper test if --

QUESTION: Well, but the paragraph to which you refer is devoted to her subjective reaction.

MR. CHERNAU: Which --

QUESTION: A-34, running over to A-35. It begins, "Neither do I believe the plaintiff was subjectively so offended," and then ends with "not too abusive to the plaintiff," so the finding is that if the

Meritor test is subjective, you're right, he did make that finding, but if the Meritor test is objective, this paragraph does not address the question.

MR. CHERNAU: The confines of that paragraph, I would agree with you, it does not.

I do think, if I could quickly make this point, that the proper test is the reasonable person test, because what we're looking at under this law is the effect of the complained-of conduct on the party that's aggrieved.

I don't think that we're looking into the character of what was done as much as we're trying to assess what the consequences or the effect of that conduct was, and I believe that what I just stated comports with the EEOC guidelines and what the EEOC believes in this case, so again, this is a difficult situation.

A hostile environment is such an amorphous subject that it's very difficult, and as I said, you can't reduce it to a mathematical formula. Each case I believe has to be decided on the facts of that case, that these cases are fact-intensive, they are not easy to decide, and the trier of the fact indeed has to look to the totality of all of the circumstances, just as was pointed out in the Meritor case, which I think is a very, very, very valid and necessary observation for this Court to have had

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to make, and which, indeed, it did.

I have no --

CHIEF JUSTICE REHNQUIST: Very well. Thank you, Mr. Chernau. The case is submitted.

(Whereupon, at 11:54 a.m., the case in the above-entitled matter was submitted.)

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NO. 92 - 1168

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BY Ann Marie Federico

(REPORTER)