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## How the Supreme Court's Reiteration of Sexual Harassment Standards Affirmed in Faragher and Ellerth Would Have Led to Jones' Survival in Jones v. Clinton

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HOW THE SUPREME COURT’S REITERATION OF SEXUAL  
HARASSMENT STANDARDS AFFIRMED IN *FARAGHER* AND  
*ELLERTH* WOULD HAVE LED TO JONES’ SURVIVAL IN  
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I. INTRODUCTION

Paula Jones’ appeal in her sexual harassment case against President Clinton came in the midst of the United States Supreme Court’s rulings in *Faragher v. City of Boca Raton*<sup>1</sup> and *Burlington Industries Inc. v. Ellerth*<sup>2</sup> which reiterated the standard for the determination of an actionable hostile work environment claim. Even though Jones and Clinton settled on November 13, 1998 for \$850,000.00,<sup>3</sup> the Supreme Court’s analysis of hostile environment law would have had bearing on the success of Jones’ appeal. This note demonstrates that a cognizable claim of sexual harassment may be predicated on a severe, yet isolated episode of sexual harassment. In this inquiry, we will look to other Supreme Court and Appellate Court decisions regarding sexual harassment law to support the conclusion that a single incident of

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<sup>1</sup>118 S. Ct. 2275 (1998).

<sup>2</sup>118 S. Ct. 2257 (1998).

<sup>3</sup>Jones v. Clinton, 161 F.3d 528 (8th Cir. 1998); *What’s News*, WALL ST.J., Nov. 16, 1998, at A1.

sexual harassment can constitute an actionable hostile work environment claim. Once this purview has been accomplished, it will become evident that the Eighth Circuit would have ruled in accordance with other courts of appeals in finding a single incident of sexual harassment actionable and would have ruled in favor of Paula Jones on her appeal.

Part II traces the background of sexual harassment law, including what constitutes actionable discrimination and the applicable standards of a hostile work environment claim. Part III outlines the Supreme Court's analysis of actionable employment discrimination based on sexual harassment under Title VII, as well as the Court's establishment of the employer liability standard. Part IV explores the potential outcome of Paula Jones' appeal in the Eighth Circuit if the Court were to find the single incident of sexual harassment upon which her case was premised as actionable. Finally, Part V summarizes the previous sections and concludes that the Supreme Court's reiteration of hostile environment law during the midst of Paula Jones' appeal strengthened her claim of sexual harassment against President Clinton and would have warranted reversal of the dismissal of her case.

## II. BACKGROUND OF SEXUAL HARASSMENT LAW

### A. Title VII

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>4</sup> Title VII's prohibition against discriminating because of sex in the terms and conditions of employment includes sexual harassment of any kind that meets the statutory requirements.<sup>5</sup> An employee claiming sexual harassment is required to prove in a Title VII suit that such conduct was unwelcome, that the conduct was prompted simply because of the employee's gender, and that the conduct was sufficiently pervasive to create an offensive environment in the workplace.<sup>6</sup> Justice Ginsburg, in her concurring opinion in *Harris v. Forklift Systems, Inc.*, stated that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."<sup>7</sup>

### B. Evolution of the Terms "Quid Pro Quo" and "Hostile Work Environment" in Sexual Harassment Law

The development of sexual harassment law evolved into the utilization of primary terms of art.<sup>8</sup> "Quid pro quo" sexual harassment and "hostile work environment" appear nowhere in the text of Title VII. These terms first appeared in

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<sup>4</sup>42 U.S.C. § 2000e-2(a)(1) (1994).

<sup>5</sup>*Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001 (1998).

<sup>6</sup>*See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986); *see also Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1998).

<sup>7</sup>510 U.S. 17, 25 (1993).

<sup>8</sup>*Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257, 2263 (1998).

academic literature and found their way into the decisions of the courts of appeals and then eventually were mentioned in the United States Supreme Court case *Meritor Savings Bank, FSB v. Vinson*.<sup>9</sup> *Meritor's* use of "quid pro quo" sexual harassment and "hostile work environment" served the specific purpose of providing a framework for considering whether the conduct in question constituted discrimination, either explicitly or constructively, in the terms or conditions of employment in violation of Title VII.<sup>10</sup> The *Meritor* Court announced that a violation of Title VII may be predicated on either type of sexual harassment.<sup>11</sup>

Quid pro quo sexual harassment occurs when an employer alters an employee's job conditions or withholds economic benefits because the employee refused to submit to the sexual demands of the employer.<sup>12</sup> Sexual harassment of this kind results in the employer being held strictly liable for its employee's unlawful acts.<sup>13</sup> Hostile work environment harassment, however, is less obvious. A hostile work environment is created when an employer's sexually demeaning behavior has severely or pervasively altered the terms or conditions of employment in violation of Title VII.<sup>14</sup>

The language of Title VII is not limited to economic or tangible employment discrimination.<sup>15</sup> Sexual harassment leading to noneconomic injury indeed violates Title VII under the "hostile work environment" theory.<sup>16</sup> To state a claim under this theory, it must be shown that the workplace is permeated with discriminatory behavior that is sufficiently severe *or* pervasive to create an actionable hostile or abusive working environment.<sup>17</sup>

Courts have interpreted this to mean that a single incident, if sufficiently severe, can give rise to a claim.<sup>18</sup> In *Torres v. Pisano*,<sup>19</sup> the Second Circuit explained that a single episode of harassment, if severe enough, can establish a hostile work

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<sup>9</sup>477 U.S. at 57 (1986).

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 577 (2d Cir. 1998). *See also Meritor*, 477 U.S. at 62 (stating that quid pro quo sexual harassment involves the conditioning of concrete employment benefits on sexual favors).

<sup>13</sup>*Carrero*, 890 F.2d at 579.

<sup>14</sup>*Meritor*, 477 U.S. at 67.

<sup>15</sup>*Id.* at 64.

<sup>16</sup>*Id.* at 65.

<sup>17</sup>*Id.* at 67. *See also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (explaining that conduct that is not severe or pervasive enough to create an objectively hostile work environment, is beyond Title VII's purview; this crucial requirement ensures that courts and juries do not mistake ordinary socializing in the workplace, such as male on male horseplay or intersexual flirtation, for discriminatory conditions of employment).

<sup>18</sup>Beiner, Theresa M., *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 1, 77 (1999).

<sup>19</sup>116 F.3d at 625, 631 n.4 (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997).

environment.<sup>20</sup> The Eleventh Circuit has likewise supported the proposition that severe isolated incidents of harassment are actionable.<sup>21</sup> In *Vance*, the Eleventh Circuit held that the “trial court incorrectly applied mechanically an absolute numerical standard to the number of acts of harassment which must be committed by the defendant before a jury may reasonably find that a hostile environment exists.”<sup>22</sup> *Meritor* supports the theory that discriminatory behavior that is sufficiently severe, although occurring only once, creates an actionable hostile work environment by virtue of its ruling that harassment may be predicated upon the severity *or* pervasiveness of the harassment.<sup>23</sup>

The Supreme Court in *Harris v. Forklift Systems*<sup>24</sup> reaffirmed and expanded upon *Meritor*'s standard for an actionable hostile work environment claim.<sup>25</sup> The Court stated that “[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.”<sup>26</sup> The *Harris* Court adopted both an objective and subjective approach to determine whether the harassment is actionable as a hostile work environment.<sup>27</sup> First, the conduct must be severe or pervasive enough to create an objectively hostile or abusive environment that a reasonable person would find hostile or abusive.<sup>28</sup> Secondly, the victim must subjectively perceive the environment as abusive.<sup>29</sup> In analyzing the subjective aspect of a hostile work environment claim, the Court stated that “Title VII comes into play before the harassing conduct leads to a nervous breakdown.”<sup>30</sup> The harassment need not seriously affect the plaintiff's psychological well-being to be actionable.<sup>31</sup> “So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.”<sup>32</sup>

The Court in *Harris* noted that the objective/subjective test is not by its nature mathematically precise.<sup>33</sup> The Court stated that “the determination of whether an environment is hostile or abusive can only be ascertained by looking to the all of the

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<sup>20</sup>*Id.*; see also *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274, n.4 (7th Cir. 1991).

<sup>21</sup> *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511 (11th Cir. 1989).

<sup>22</sup>*Id.*

<sup>23</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

<sup>24</sup> 510 U.S. 17 (1993).

<sup>25</sup>*Id.* at 21.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup> *Harris*, 510 U.S. at 21.

<sup>30</sup>*Id.* at 22.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* (citations omitted).

<sup>33</sup>*Id.*

circumstances.”<sup>34</sup> The Court further stated that “an analysis of the totality of the circumstances includes the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”<sup>35</sup> The Court explained that “the effect on the employee’s psychological well being is relevant when determining whether the plaintiff actually found the environment abusive.”<sup>36</sup> Psychological harm, however like any other relevant factor, may be taken into account; but no single factor is required.<sup>37</sup>

The *Meritor* Court’s discussion of “quid pro quo” and “hostile work environment” sexual harassment was a milestone in sexual harassment practice. *Meritor*’s use of these terms has had an enduring effect on litigation involving the determination of whether a discriminatory employment action has occurred in violation of Title VII. The most recent decisions of the United States Supreme Court regarding sexual harassment law reaffirm the standard established in *Meritor* and expanded upon in *Harris* relating to hostile environments.<sup>38</sup> The Court in *Faragher* and *Ellerth* states “that the terms ‘quid pro quo’ and ‘hostile work environment’ are helpful in making a rough demarcation in employer liability claims between cases in which threats are carried out and those where they are not or are absent altogether.”<sup>39</sup> The Court further explained that “the terms are relevant only when there is a threshold question of whether the plaintiff can prove discrimination in violation of Title VII; beyond this the terms are of limited utility.”<sup>40</sup>

The Supreme Court’s decision in *Ellerth* and *Faragher* not only reiterated the standard established in *Harris*, which determines unlawful discrimination, but also resolved the conflict in the Courts of Appeals over the appropriate standard for the imposition of vicarious liability for supervisory sexual harassment.<sup>41</sup> In *Ellerth* and *Faragher*, the Court established that the initial step of the inquiry involves the determination of whether discrimination because of sex occurred in violation of Title VII.<sup>42</sup> Once discrimination is proven, the next step of the inquiry determines whether vicarious liability may be imposed upon the employer for the supervisor’s actionable sexual harassment.<sup>43</sup> The Court resolved the conflict in the lower courts by

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<sup>34</sup>*Harris*, 510 U.S. at 23.

<sup>35</sup>*Id.* at 23.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* See also *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1998) (delineating severity versus pervasiveness to determine that sexual harassment need not be so pervasive before actionable); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986) (stating that the determination of sexual harassment is done in light of the totality of the circumstances).

<sup>38</sup>*Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998).

<sup>39</sup>*Ellerth*, 118 S. Ct. at 2264.

<sup>40</sup>*Id.*

<sup>41</sup>*Faragher*, 118 S. Ct. at 2283, 2293; *Ellerth*, 118 S. Ct. at 2265, 2270.

<sup>42</sup>*Ellerth*, 118 S. Ct. at 2263.

<sup>43</sup>*Faragher*, 118 S. Ct. at 2290.

establishing the proper employer liability standard to be utilized when addressing the second aspect of the analysis.

III. *ELLERTH* AND *FARAGHER*: THE SUPREME COURT REITERATES *HARRIS* AND REAFFIRMS HOSTILE WORK ENVIRONMENT LAW

The facts in both *Ellerth* and *Faragher* indicate that the plaintiffs were sexually harassed by their supervisors yet suffered no adverse, tangible job detriments.<sup>44</sup> In *Ellerth*, the harassed employee quit her job after fifteen months as a salesperson in one of the employer's, Burlington Industries', many divisions, allegedly because she had been subjected to constant sexual harassment by one of her supervisors.<sup>45</sup> In the hierarchy of Burlington's management, the harassing supervisor was a mid-level manager who had the authority to make hiring and promotion decisions.<sup>46</sup> Ellerth's supervisor made repeated unwelcome, boorish and offensive remarks and gestures towards Ellerth, yet she suffered no tangible retaliation and was, in fact, promoted once.<sup>47</sup> Ellerth never informed anyone in authority about the supervisor's conduct, despite knowing Burlington had a policy against sexual harassment.<sup>48</sup>

In *Faragher*, the claimant worked while attending college, and during the summers, worked as an ocean lifeguard for the City of Boca Raton.<sup>49</sup> She alleges that her supervisors created a sexually hostile atmosphere at the beach by repeatedly subjecting Faragher and other female lifeguards to uninvited and offensive touching, by making lewd remarks, and by speaking of women in offensive terms.<sup>50</sup> One of the harassing supervisors involved was the Chief of the Marine Safety Division and had the authority to hire new lifeguards, to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline.<sup>51</sup> The other supervisor involved was a Marine Safety lieutenant who was responsible for making the lifeguards' daily assignments, and for supervising their work and fitness training.<sup>52</sup> Although the City adopted a sexual harassment policy, it failed to disseminate its policy among the Marine Safety Section, including the supervisors involved here.<sup>53</sup>

During the five-year period that Faragher was employed as a lifeguard, her supervisors made crude demeaning references to women generally, and made vulgar comments regarding the bodies of female lifeguards and beachgoers.<sup>54</sup> One of

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<sup>44</sup>*Id.* at 2281; *Ellerth*, 118 S. Ct. at 2262.

<sup>45</sup>*Ellerth*, 118 S. Ct. at 2262.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Faragher*, 118 S. Ct. at 2280.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Faragher*, 118 S. Ct. at 2281.

Faragher's supervisors made disparaging comments about her shape and told her, but for a physical characteristic he found unattractive, he would readily have had sexual relations with her.<sup>55</sup> Despite the harassing behavior of Faragher's supervisors, she never complained to higher management, although she spoke of their behavior to another non-harassing supervisor who did not report her complaints to any higher authority.<sup>56</sup> Faragher resigned after five years of employment, during which time she never suffered any tangible job action for her refusals to welcome the sexual harassment of her supervisors.<sup>57</sup>

A. *Proof of Discrimination Because of Sex Necessary for Violation of Title VII*

The Supreme Court in *Faragher* and *Ellerth* began its analysis of establishing an actionable claim for sexual harassment by reiterating the necessity of proving that the sexual harassment was discrimination because of one's sex. The Court initially stated that the terms quid pro quo and hostile work environment are of limited utility in determining whether discriminatory sexual harassment occurred.<sup>58</sup> To the extent that the terms illustrate the distinction between cases involving a carried-out threat and offensive conduct in general, they are relevant when there is a threshold question of whether a plaintiff can prove discrimination in violation of Title VII.<sup>59</sup> The purpose of the terms quid pro quo and hostile work environment, the Court explained, is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment.<sup>60</sup> When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms or conditions of employment that is actionable under Title VII.<sup>61</sup> The Court further explained that for any sexual harassment preceding the employment decision to be actionable, the conduct must be severe or pervasive.<sup>62</sup>

In analyzing severe or pervasive harassment that creates a hostile work environment, the Court relied on *Harris's* ruling that a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.<sup>63</sup> The Court emphasized the use of looking at the totality of the circumstances to determine whether an environment is sufficiently hostile or abusive as done in *Harris*.<sup>64</sup> The Court further explained that simple teasing, offhand

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<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Id.*

<sup>58</sup>*Ellerth*, 118 S. Ct. at 2264.

<sup>59</sup>*Id.* at 2265.

<sup>60</sup>*Id.* at 2264.

<sup>61</sup>*Id.* at 2265.

<sup>62</sup>*Id.*

<sup>63</sup>*Faragher*, 118 S. Ct. at 2283.

<sup>64</sup>*Id.*



comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.<sup>65</sup> Once discrimination is proven, however, the factors surrounding the imposition of employer liability, not the categories of quid pro quo and hostile work environment, control on the issue of vicarious liability.<sup>66</sup>

In applying the principles for determining whether actionable discrimination occurred in violation of Title VII to *Ellerth* and *Faragher*, the Court found actionable sexual harassment in both cases.<sup>67</sup> The Court affirmed the district court ruling in *Faragher* that the degree of hostility in the work environment rose to the actionable level to be deemed sufficiently severe and pervasive.<sup>68</sup> Faragher's supervisors sexually harassed her during her entire five-year period of employment.<sup>69</sup> The Court found Faragher's workplace to be permeated with pervasive sexual discriminatory behavior in violation of Title VII.<sup>70</sup> The Supreme Court in *Ellerth* accepted the district court ruling that the alleged sexual conduct was severe or pervasive.<sup>71</sup> Ellerth pointed to incidents during her employment which contributed to the creation of a hostile work environment.<sup>72</sup> Ellerth's supervisor made unsolicited remarks about her breasts, rubbed her knee, inquired as to what she was wearing and encouraged her to wear shorter skirts.<sup>73</sup> The Court found in *Ellerth* that the discrimination was sufficiently pervasive in violation of Title VII.<sup>74</sup>

A sense of permanence in the area of hostile environmental law has emerged from the *Ellerth* and *Faragher* Supreme Court decisions. A sound contemporary example of the application of hostile environment law, originating in *Harris* and then reaffirmed in *Faragher* and *Ellerth*, would have been in Paula Jones' appeal of her sexual harassment claim against President Clinton. If the Eighth Circuit had the opportunity to rule on Jones' claim of sexual harassment based on a hostile work environment theory, the Court most likely would have found for *Jones* and reversed the grant of summary judgment to President Clinton.

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<sup>65</sup>*Id.*

<sup>66</sup>*Ellerth*, 118 S. Ct. at 2265.

<sup>67</sup>*Id.* at 2271; *Faragher*, 118 S. Ct. at 2293.

<sup>68</sup>*Faragher*, 118 S. Ct. at 2293.

<sup>69</sup>*Id.* at 2281.

<sup>70</sup>*Id.* at 2293.

<sup>71</sup>*Ellerth*, 118 S. Ct. at 2265.

<sup>72</sup>*Id.* at 2262.

<sup>73</sup>*Id.*

<sup>74</sup>*Id.* at 2265.

IV. *JONES V. CLINTON*: EIGHTH CIRCUIT WOULD HAVE REVERSED DISMISSAL OF ACTION

A. *Grant of Summary Judgment in the District Court Proceedings*

Paula Jones' claim of sexual harassment against President Clinton was based on an incident said to have taken place on the afternoon of May 8, 1991, in a suite at the Excelsior Hotel in Little Rock, Arkansas.<sup>75</sup> President Clinton was Governor of the State of Arkansas at the time, and the plaintiff was a State employee with the Arkansas Industrial Development Commission ("AIDC"), having begun her State employment on March 11, 1991.<sup>76</sup> On the day in question, then-Governor Clinton was at the Excelsior Hotel delivering a speech at an official conference being sponsored by the AIDC.<sup>77</sup> Jones stated that she and another AIDC employee, Pamela Blackard, were working at a registration desk for the AIDC when a man approached the desk and informed her and Blackard that he was Trooper Danny Ferguson, the Governor's bodyguard with the Arkansas State Police.<sup>78</sup> They proceeded to make small talk in a friendly manner and then Ferguson returned to the Governor.<sup>79</sup> Upon leaving the registration desk, Ferguson apparently had a conversation with the Governor about the possibility of meeting with Jones, during which Ferguson stated that the Governor remarked that she had "that come-hither look," i.e. "a sort of [sexually] suggestive appearance from the look or dress."<sup>80</sup> The facts further indicated that the Governor asked Ferguson to get him a room because he had phone calls to make and also to tell Jones that if she wanted to meet him that she could come up to his hotel room.<sup>81</sup> Ferguson later reappeared at the registration desk, delivered Jones a piece of paper to her with a four-digit number written on it, and said that the Governor would like to meet with her in that suite.<sup>82</sup>

Upon arriving at the suite and announcing herself, the Governor shook her hand, invited her in, and closed the door.<sup>83</sup> A few minutes of small talk ensued, which included the Governor asking her about her job and him mentioning that Dave Harrington, Jones' ultimate superior within the AIDC and a Clinton appointee, was his good friend.<sup>84</sup> The Governor then reached over to her, took her hand, and pulled her toward him, so that their bodies were close to each other.<sup>85</sup> Jones stated that she removed her hand from his and retreated several feet, but that Clinton approached

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<sup>75</sup>*Jones v. Clinton*, 990 F. Supp. 657, 662-63 (E.D. Ark. 1998).

<sup>76</sup>*Id.* at 663.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.*

<sup>79</sup>*Jones*, 990 F. Supp. at 663.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Jones*, 990 F. Supp. at 663.

<sup>85</sup>*Id.* at 664.

her again and, while saying, “I love the way your hair flows down you back” and “I love your curves,” put his hand on her leg, and started sliding it toward her pelvic area, bent down to attempt to kiss her on her neck, all without her consent.<sup>86</sup> Jones stated that she exclaimed, “what are you doing?,” told the Governor that she was “not that kind of girl,” and “escaped” from the Governor’s reach “by walking away from him.”<sup>87</sup> She stated that she was extremely upset and confused and, not knowing what to do, attempted to distract the Governor by chatting about his wife.<sup>88</sup> Jones stated that she sat down at the end of the sofa nearest the door, but that the Governor approached the sofa where she had taken a seat and, as he sat down, “lowered his trousers and underwear, exposed his penis (which was erect) and told [her] to ‘kiss it.’”<sup>89</sup> She stated that she was “horrified” by this and that she “jumped up from the couch” and told the Governor that she had to go, saying something to the effect that she had to get back to the registration desk.<sup>90</sup> Jones further stated that the Governor, “while fondling his penis,” said, “well, I don’t want to make you do anything you don’t want to do,” and then pulled up his pants and said, “if you get into trouble for leaving work, have Dave call me immediately and I’ll take care of it.”<sup>91</sup> She also stated that as she left the room (the door of which was not locked), the Governor “detained” her momentarily, “looked sternly” at her, and said, “You are smart. Let’s keep this between ourselves.”<sup>92</sup>

The Governor’s advances towards Jones were unwelcomed and she stated that when the Governor referred to Dave Harrington, she understood that he had control over Mr. Harrington and over her job, and that he was willing to use that power.<sup>93</sup> She also stated that she was very fearful that her refusal to submit to the Governor’s advances could damage her career and even jeopardize her employment.<sup>94</sup>

Jones continued to work at AIDC following the alleged incident in the hotel suite.<sup>95</sup> One of her duties was to deliver documents to and from the Office of the Governor, as well as other offices around the Arkansas State Capitol.<sup>96</sup> On one occasion, Jones claimed that Clinton “accosted” her in the Rotunda of the Arkansas State Capitol when he “draped his arm over her, pulled her close to him and held her tightly to his body,” and said to his bodyguard, “Don’t we make a beautiful couple: Beauty and the Beast?”<sup>97</sup> Jones additionally stated that on an unspecified date, she

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<sup>86</sup>*Id.*

<sup>87</sup>*Id.*

<sup>88</sup>*Id.*

<sup>89</sup>*Jones*, 990 F. Supp. at 664.

<sup>90</sup>*Id.*

<sup>91</sup>*Id.*

<sup>92</sup>*Id.*

<sup>93</sup>*Id.*

<sup>94</sup>*Jones*, 990 F. Supp. at 664.

<sup>95</sup>*Id.* at 665.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.*

was waiting in the Governor's outer office on a delivery run when the Governor entered the office, patted her on the shoulder, and in a "friendly fashion" said, "how are you doing, Paula?"<sup>98</sup>

Jones stated that she continued to work at AIDC even though she was in constant fear that the Governor would retaliate against her because she refused to have sex with him.<sup>99</sup> She claimed that this fear prevented her from enjoying her job.<sup>100</sup> She further stated that she was treated very rudely by certain supervisors in AIDC, including her direct supervisor, Clydine Pennington, and that the rude treatment had not happened prior to her encounter with the Governor.<sup>101</sup> Jones finally terminated her employment with AIDC voluntarily on February 20, 1993, to move to California with her husband, who had been transferred.<sup>102</sup>

Jones brought her claim under 42 U.S.C. § 1983 against former Governor Clinton, alleging that he, acting under color of state law, deprived her of her constitutional right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution by sexually harassing her.<sup>103</sup> A § 1983 sexual harassment claim should be analyzed under the standards developed in similar Title VII litigation.<sup>104</sup> Paula Jones sued Clinton individually as the Governor acting under color of state law, hence the use of § 1983 as the basis of her claim. Even though *Ellerth* and *Faragher* discuss the imposition of employer liability for supervisory sexual harassment, vicarious liability is not relevant under Jones' claim since she is suing Clinton individually. However, the fact that *Ellerth* and *Faragher* reaffirmed the hostile environment standard announced in *Harris* is relevant to finding proof that Clinton unlawfully discriminated against Jones because of her sex. Therefore, Jones' claim should be analyzed under the Title VII sexual harassment law relating to actionable hostile work environments already discussed throughout this note.

In its opinion the Eastern District Court of Arkansas per Judge Susan Webber Wright, separated the quid pro quo claims of sexual harassment from hostile work environment claims and held that Jones had failed to establish either, thus granting summary judgment to President Clinton on her sexual harassment claims.<sup>105</sup> The district court ruled that a showing of job detriment or adverse employment action was an essential element to a § 1983 claim based on quid pro quo sexual harassment

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<sup>98</sup>*Id.*

<sup>99</sup>*Jones*, 990 F. Supp. at 665.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.*

<sup>102</sup>*Id.* at 666.

<sup>103</sup>*Id.*

<sup>104</sup>*Trautvetter v. Quick*, 916 F.2d 1140, 1140 (7th Cir. 1990) (noting that a claim of sexual harassment under § 1983 must generally satisfy the contours of a sexual harassment claim under Title VII); Leon Friedman, *Relationship Between Title VII, Section 1981, 1983, 1985, ADEA, The Equal Pay Act, and State Causes of Action for Employment Discrimination*, SC59 A.L.I.-A.B.A. 277 (1998) (explaining the congressional intention to allow an overlap between Title VII and Section 1983 causes of action for all public employees).

<sup>105</sup>*Jones*, 990 F. Supp. at 674, 676.

law.<sup>106</sup> Jones did not demonstrate any tangible job detriment for her refusal to submit to the Governor's advances; therefore, the district court held that she could not establish a cognizable claim.<sup>107</sup> The district court further held that Clinton's conduct was not so severe or pervasive that it could have been said to alter the conditions of Jones' employment and create an abusive work environment.<sup>108</sup> The court further noted that this case was "not one of those exceptional cases in which a single incident of sexual harassment, such as sexual assault, was deemed sufficient to state a claim of hostile work environment."<sup>109</sup> The court opined that "while the alleged incident in the hotel, if true, was certainly boorish and offensive, the Court has already found that the Governor's alleged conduct does not constitute sexual assault."<sup>110</sup> The district court effectively required a showing of sexual assault before holding a single incident of sexual harassment as an actionable hostile work environment.<sup>111</sup>

Paula Jones appealed the district court's dismissal of her case to the Court of Appeals for the Eighth Circuit, focusing on whether a single episode of severe sexual harassment constitutes discrimination under Title VII. During the period between the district court ruling and oral argument set for October 20, 1998 in the Eighth Circuit, the Supreme Court ruled on *Ellerth* and *Faragher* which altered the standard of analysis for sexual harassment claims and their effect on employer liability. The parties settled, however, on November 17, 1998, after oral argument but before any ruling by the Eighth Circuit.<sup>112</sup> The Eighth Circuit has yet to have another opportunity to rule on a similar case claiming discriminatory sexual harassment based on a single incident under the severity test of actionable hostile work environment.

*B. Likelihood of Success of Jones' Claim for Actionable Hostile Work Environment if the Eighth Circuit had the Opportunity to Rule on her Claim*

After the district court ruling in Jones' case granting summary judgment to President Clinton and prior to oral argument of the appeal, the Eighth Circuit held that conduct not nearly as severe as that alleged of Clinton was a triable question for the jury, thus precluding summary judgment on a hostile work environment claim.<sup>113</sup>

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<sup>106</sup>*Id.* at 674.

<sup>107</sup>*Id.* (examples of lack of tangible job detriment included the discouragement from seeking more attractive jobs and reclassification and the fact that Jones job was changed to one with fewer responsibilities when there was no diminution in salary).

<sup>108</sup>*Id.* at 675.

<sup>109</sup>*Id.*

<sup>110</sup>*Jones*, 990 F. Supp. at 675; *see e.g.*, *Crisonino v. New York Housing Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997) (supervisor called plaintiff a "dumb bitch" and "shoved her so hard that she fell backward and hit the floor, sustaining injuries from which she has yet to fully recover.") The *Crisonino* case was used by the District Court in *Jones* to illustrate an example of sexual assault sufficient enough to constitute a claim of hostile work environment for a single incident of sexual harassment. *Id.*

<sup>111</sup>*Jones*, 990 F. Supp. at 675.

<sup>112</sup>*Jones v. Clinton*, 161 F.3d 528 (8th Cir. 1998).

<sup>113</sup>*Rorie v. United Parcel Service*, 151 F.3d 757, 762 (8th Cir. 1998).

In *Rorie*, the Eighth Circuit conceded that the facts in that case were on the borderline of those sufficient to support a claim of sexual harassment.<sup>114</sup> However, the Court stated that it could not “say that a supervisor who pats a female on the back, brushes up against her, and tells her that she smells good does not constitute sexual harassment as a matter of law.”<sup>115</sup> The Eighth Circuit ruled that the supervisor’s behavior, coupled with his other lewd comments, presented a jury question as to the pervasiveness of the hostile environment.<sup>116</sup>

If the Eighth Circuit had the opportunity to rule on Jones’ appeal concerning whether an actionable hostile environment existed in light of *Rorie*, Clinton’s conduct would have risen to the level of actionable discrimination. The facts as alleged by Jones and taken as true for purposes of evaluating the summary judgment motion, indicate that Clinton exposed himself to Jones; that on another occasion, he draped his arm over Jones and pulled her close to him and held her body tightly to his; and that on another occasion, he allegedly patted her shoulder.<sup>117</sup> The facts in *Rorie*, which warranted a trial, are not nearly as severe or pervasive as the facts relating to the sexual harassment in *Jones*. The President’s offensive conduct towards Jones in exposing himself in the Excelsior Hotel suite, coupled with the other alleged incidents of sexual harassment, would have lead the Eighth Circuit, in adhering to precedent, to reverse the dismissal in the district court and allow Jones’ claim of actionable hostile environment to go to the jury. Clinton’s conduct, like that in *Rorie*, was sufficiently pervasive in that it permeated Jones’ workplace with discriminatory intimidation, ridicule, and insult creating a hostile work environment.

Given that the Eighth Circuit in *Rorie* found facts that border on those sufficient to support a claim of pervasive sexual harassment as triable questions for the jury, a logical extension of *Rorie* would be to find severe, yet isolated, incidents of sexual harassment as triable questions as well. The chances of success in Jones’ claim on appeal for actionable hostile work environment would have been high based on the likelihood of the Eighth Circuit holding a single isolated incident of sexual harassment as discriminatory. Jones argued in her appellate brief to the Eighth Circuit that “the events at the Excelsior Hotel by themselves are sufficient to support a claim for sexual harassment.”<sup>118</sup> The United States Supreme Court noted in *Ellerth* that they “express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.”<sup>119</sup> In *Faragher*, however, the Supreme Court stated “that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms or conditions of employment.”<sup>120</sup> The Supreme Court has consistently held that the determination of a hostile work environment is determined

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<sup>114</sup>*Id.* at 762.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>*Jones*, 990 F. Supp. at 664, 665.

<sup>118</sup>Brief for Appellant at 24, (No. 98-2161) (visited Apr. 29, 1999) <<http://www.law.csuohio.edu/lawlibrary/usgovernment/judgepage.htm>>.

<sup>119</sup>*Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998).

<sup>120</sup>*Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998).

by looking at all of the circumstances, which may include the frequency of the discriminatory conduct, its severity, and whether it is physically threatening or humiliating.<sup>121</sup> These Supreme Court rulings may be interpreted to support the proposition that a severe and extremely serious single incident of sexual harassment is actionable as a hostile environment.

About half of the Federal courts of appeals, excluding the Eighth Circuit, have held a single isolated incident of sexual harassment as actionable under the hostile work environment theory.<sup>122</sup> Some of the appellate courts have utilized a frequency versus severity test to hold the proposition that a single episode of sexual harassment can support a Title VII claim.<sup>123</sup> The Ninth Circuit has explained this test by noting “that the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.”<sup>124</sup> In *Carrero*, the Second Circuit delineated between severity versus pervasiveness to determine that discriminatory sexual harassment need not be so pervasive before becoming actionable as a hostile work environment.<sup>125</sup> Jones’ claim of sexual harassment based on the single incident in the Excelsior Hotel analyzed under the frequency versus severity test at least merits a reversal by the Eighth Circuit, if it were to rule a single episode as actionable hostile environment.<sup>126</sup>

Other courts of appeals have flatly held a single incident of sexual harassment as actionable. The Second Circuit held that even a single incident of sexual harassment can in some circumstances suffice to state a claim of hostile work environment.<sup>127</sup> The Second Circuit actually ruled a single incident sufficient to withstand summary judgment, but the plaintiff’s alleged severe sexual harassment was rape.<sup>128</sup> “While rape clearly is a severe form of harassment, something less than that should be actionable. Obviously, conduct that falls short of this could alter the ‘terms, conditions, or privileges’ of plaintiff’s employment.”<sup>129</sup> The Tenth Circuit has ruled

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<sup>121</sup>*Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

<sup>122</sup>See e.g., *Brown v. Hot, Sexy, and Safer Products, Inc.*, 68 F.3d 525 (1st Cir. 1995); *Torres v. Pisano*, 116 F.3d 625, 631 (2d Cir. 1997); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 (7th Cir. 1991); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167 (10th Cir. 1996); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511 (11th Cir. 1989).

<sup>123</sup>*Ellison*, 924 F.2d at 878.

<sup>124</sup>*Id.*; see also *Equal Employment Opportunity Commission v. Sam & Sons Produce Co., Inc.*, 872 F. Supp. 29 (W.D.N.Y. 1994).

<sup>125</sup>*Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1998).

<sup>126</sup>Robert L. Jackson, *Lewinsky could Reappear in Jones Appeal; Courts: Federal Panel Considering whether to Revive Sexual Harassment Case Indicates that Clinton’s Trysts with Intern might “Become an Issue”*, L.A. TIMES, Oct. 21, 1998, at A18 (indicating by the questions posed by appellate judges of the Eighth Circuit to Clinton’s attorneys during oral argument that the Court might find that a severe isolated incident of sexual harassment to be discriminatory).

<sup>127</sup>*Torres*, 116 F.3d at 631.

<sup>128</sup>*Tomaka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995).

<sup>129</sup>*Beiner*, *supra* note 18, at 112, n. 266.

“that an employee may prevail . . . if there was only a single incident of harassment which, standing alone, was sufficiently ‘severe’.”<sup>130</sup> The First Circuit is in accordance with these other circuits when it explained that “we do not hold that a one-time episode is per se incapable of sustaining a hostile environment claim. The frequency of the alleged harassment is . . . only one of [the] many [factors] to be considered.”<sup>131</sup>

The Seventh Circuit, in determining the objective severity of harassment, has focused this inquiry on “the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing.”<sup>132</sup> The Seventh Circuit went on to explain further that “on the [sexual harassment] side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures.”<sup>133</sup> Rulings in other circuits would support the Eighth Circuit in also holding a single incident of sexual harassment as sufficiently severe to be actionable under hostile environment basis of sexual harassment. If the Eighth Circuit were to adopt this holding, then Jones’ chance of success on appeal regarding her claim of the existence of actionable sexual harassment would have been high.

Some district court decisions support the finding of sexual harassment predicated on severe isolated incidents. In *Roberts v. Signature Group, Inc.*,<sup>134</sup> the court listed isolated activities that have commonly been held to constitute hostile work environments.<sup>135</sup> The list included “touching the plaintiff, explicitly or implicitly inviting the plaintiff to have sex with him or go out on a date with him, making any verbal threats, exposing himself to the plaintiff, or engaging in his alleged misconduct in a non-public place.”<sup>136</sup> Another district court has held that it was a question of fact as to whether a supervisor created a single-incident hostile work environment by forcibly kissing the plaintiff and touching her breasts during a closed door meeting in the his office.<sup>137</sup> The court focused on the setting of the alleged sexual harassment and explained that sexual acts that take place behind closed doors in non-social settings are objectively more abusive.<sup>138</sup>

Some courts of appeals, however, still require more than one incident of sexual harassment to support a claim of hostile work environment. The Eighth Circuit is one of these appellate courts. It seems that the Eighth Circuit has rejected the totality of the circumstances test to determine actionable discrimination as set forth by the

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<sup>130</sup>*Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 170 (10th Cir. 1996).

<sup>131</sup>*Brown v. Hot, Sexy, and Safer Products, Inc.*, 68 F.3d 525, 541 (1st Cir. 1995).

<sup>132</sup>*Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 431 (7th Cir. 1995).

<sup>133</sup>*Id.* at 430.

<sup>134</sup>No. 95-2501-JWL, 1996 WL 707106, (D. Kan. Nov. 14, 1996).

<sup>135</sup>*Id.* at \*4.

<sup>136</sup>*Id.*

<sup>137</sup>*Fall v. Indiana Univ. Board of Trustees*, 12 F. Supp. 2d 870, 880 (N.D. Ind. 1998).

<sup>138</sup>*Id.* at 86-87.



United States Supreme Court.<sup>139</sup> The Eighth Circuit held in a racial harassment case that it disagreed with the plaintiff's argument that a court must look to the totality of the circumstances to determine whether the working environment is free of a racially hostile atmosphere.<sup>140</sup> The court found the single incident of harassment in *Clayton* as insufficient to state a Title VII claim.<sup>141</sup>

It is important to note that *Clayton* was decided in 1989, a pre-*Harris* decision, which was ruled on in 1993.<sup>142</sup> With Jones' appeal, the Eighth Circuit would have had an opportunity to align itself with *Harris* and more carefully apply the totality of the circumstances analysis, focusing on severity as an legitimate factor. The Eighth Circuit needs to comply with the law as articulated by the Supreme Court by adhering to the totality of the circumstances test.

If the Eighth Circuit aligns itself with the other courts of appeals in holding a single incident as actionable sexual harassment, then Jones would have had the opportunity to prevail on her claim that the incident with Clinton in the Excelsior Hotel was sufficiently severe to create a hostile environment. If the Eighth Circuit were to require more than one incident of sexual harassment when ruling on Jones' appeal, Jones would still have a chance of success by virtue of the precedent set in *Rorie*. The overall likelihood of Jones' success in her appeal for actionable hostile work environment would have been high, considering the Eighth Circuit's precedent and trend in other circuits in finding actionable sexual harassment for severe isolated incidents of harassment.

The likelihood of the Eighth Circuit reversing the dismissal of Jones' claim is heightened once the facts, as alleged by Jones and taken as true for purposes of evaluating summary judgement, are applied to relevant hostile work environment standards enunciated in *Harris*. Jones claimed that Clinton's discriminatory behavior in exposing himself to her in the hotel suite was sufficiently severe.<sup>143</sup> When looking to the totality of the circumstances surrounding the incident in the hotel suite, Clinton's conduct may be deemed objectively hostile.<sup>144</sup> Clinton not only exposed himself to Jones, he also asked her to "kiss it."<sup>145</sup> During the same incident while alone in the hotel suite, Clinton "put his hand on her leg, and started sliding it toward her pelvic area, [and] bent down to attempt to kiss her on her neck."<sup>146</sup> His conduct, while maybe not physically threatening, was humiliating.

As to the issue of whether Clinton's conduct was severe, the context of the alleged sexual harassment is key in determining whether the incident qualifies as severe enough to be actionable.<sup>147</sup> One court concluded that an isolated incident of

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<sup>139</sup>Gloria Allred & John S. West, *Employment Law Sexual Harassment*, NAT'L L.J., Oct. 26, 1998, at B12.

<sup>140</sup>*Clayton v. White Hall School District*, 875 F.2d 676 (8th Cir. 1989).

<sup>141</sup>*Id.*

<sup>142</sup>*Id.*

<sup>143</sup>*Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993).

<sup>144</sup>*Id.* at 23.

<sup>145</sup>*Jones v. Clinton*, 990 F. Supp 657, 664 (E.D. Ark. 1998).

<sup>146</sup>*Id.*

<sup>147</sup>*Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1003 (1998).

touching and grabbing the plaintiff's posterior was not the type of severe conduct that a reasonable person would consider a hostile working environment.<sup>148</sup> In Jones' context, however, a reasonable person might find Clinton's conduct severe. Clinton not only offensively touched Jones, he also exposed himself to her and suggested that she perform oral sex. Although a reasonable person might find offensive touching not severe, once coupled with the uninvited exposing of himself, that same reasonable person probably would consider the latter conduct to be severe and find a hostile environment.

Once the determination is made that Clinton's conduct is objectively hostile, Jones must have subjectively perceived the environment as abusive in order to claim an actionable hostile work environment. Jones perceived the environment as hostile as evidenced by her testimony that she was extremely upset and horrified by Clinton's conduct.<sup>149</sup> Even though there are no facts indicating that Jones sought counseling after the hotel incident, the harassment need not affect the plaintiff's psychological well-being to be actionable.<sup>150</sup> The Eighth Circuit has ruled that it was sufficient for a plaintiff to testify credibly that she felt afraid, intimidated, and anxious and that those feelings had a detrimental impact on her psychological well-being to satisfy the subjective aspect.<sup>151</sup> Given that Jones can fulfill both the objective and subjective requirements of an actionable hostile work environment claim, the Eighth Circuit would probably rule in favor of Jones and let her case go to the jury. As long as Jones can show that Clinton's discriminatory behavior was sufficiently severe to create an actionable hostile work environment, the fact that the harassment occurred only once does not diminish her claim of sexual harassment.

#### V. CONCLUSION

*Ellerth* and *Faragher*, the United States Supreme Court's most recent decisions in the area of sexual harassment law, reiterate the principles set forth in *Harris* regarding the parameters of hostile work environment claims.<sup>152</sup> The established principles of hostile environment law permit claims of sexual harassment predicated on isolated, yet severe incidents.<sup>153</sup> The application of hostile environment law as developed by the courts to Paula Jones' appeal of her sexual harassment case against President Clinton would have resulted in reversal of the dismissal of her case in the Eighth Circuit. Clinton's conduct was sufficiently severe to be deemed actionable sexual harassment, even though the harassment culminated on a single occasion.

MOIRA MCANDREW

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<sup>148</sup>Scarborough v. Brown Group, Inc., 972 F. Supp. 1112, 1119 (E.D. Tenn. 1997).

<sup>149</sup>*Jones*, 990 F. Supp. at 664.

<sup>150</sup>*Harris v. Forklift Systems*, 510 U.S. 17, 23 (1993).

<sup>151</sup>*Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1998).

<sup>152</sup>*Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. at 2257, 2264 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998) .

<sup>153</sup>See case cited *supra* note 122.