UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LOIS ROBINSON V. JACKSONVILLE SHIPYARDS, Inc. et. al.
No. 91-3655

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that the following have an interest in the outcome of this case:

Elmer L. Ahlwardt - Defendant

American Civil Liberties Union of Florida, Inc. - Amicus

American Civil Liberties Union - Amicus

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Jacksonville Shipyards, Inc. - Defendant-Appellee and Cross-Appellant

Ellis T. Lovett - Defendant

A. P. McIlwain - Defendant

Honorable Howell W. Melton - U.S. District Judge

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LOIS ROBINSON V. JACKSONVILLE SHIPYARDS, Inc. et. al.

No. 91-3655

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT, cont'd.

National Employment Lawyers Association -- Amicus

NOW Legal Defense and Education Fund

Everette P. Owens - Defendant

Lois Robinson - Plaintiff-Appellant and Cross-Appellee

Eric Schnurer, Attorney

Honorable Harvey E. Schlesinger - U.S. District Judge

Honorable Howard T. Snyder - U.S. Magistrate Judge

Emily Spitzer, Attorney*

John A. Stewart - Defendant and Cross-Appellant

Terex Corporation, parent corporation of Jacksonville Shipyards

Terex Corporation non-wholly owned subsidiaries

Fruehauf Corporation & Co., OHG
Fruehauf de Mexico S.A. de C.V.
Fruehauf International Limited
Fruehauf Trailer Corporation

Henred Fruehauf South Africa Pty. Ltd.
Nippon Fruehauf Company Ltd.
Societe Europeene De Semi-Remorques S.A.

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* Ms. Spitzer represented the plaintiff briefly in 1986 and 1987 and has not represented any party since.

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II. Whether the Defendants are precluded from challenging liability on First Amendment grounds when they failed to raise the issue with the district court.

III. Whether the district court properly denied a broad mental examination of Plaintiff and excluded certain evidence when both were irrelevant and intrusive.

IV. Whether the district court abused its discretion by denying back pay to the prevailing Title VII plaintiff.

V. Whether the district court abused its discretion in fashioning a remedy broad enough to reach all harmful sexual conduct in a workplace with pervasive sexual harassment.

STATEMENT OF THE CASE

(1) Statement of Facts Relevant To This Appeal

A. Harassment Was Pervasive In The Workplace

As described at length in Plaintiff's initial brief and found as fact in the district court's decision, the Jacksonville Shipyards, Inc. ("JSI") were a "man's world."[2] Pictures of naked

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[2] Although Defendants do not challenge any of the district court's findings of fact as clearly erroneous, their Statement of Facts frequently cites to versions of events that differ from findings of the district court. In contrast, Plaintiff relies on the evidence credited by the court at R2-253. For examples of Defendants' citation to uncredited evidence, compare: Cross-Appellants' ("Cr.-App") Brief at 5 (Ms. Robinson not required to enter shipfitter's office), R2-253-6 (customary for welders to enter office); Cr.-App. Brief at 6 (Owens ordered pictures featuring nudity removed), R2-253-50 (Owens ordered pictures depicting intercourse removed, but allowed pictures of nudity to remain).

The district court generally found Ms. Robinson credible, R2-253-11, and chose her account of events over those of Defendants' witnesses when there was a conflict. See id. at 17 (crediting Robinson over Leach), 22 (not crediting testimony of Yeomans and Martin), 46 (crediting Robinson's testimony instead of Kiedrowski's), 50 (accepting Robinson's testimony rather than Ahlwardt's), and 53 (not crediting Yeoman's testimony). Defendants' Statement of Facts also cites portion of the record

and partially naked women were pervasive, see Appellant's ("App.") Brief at 2-22; R2-253-7, vulgar sexual language was a daily matter, App. Brief at 12-21; R2-253-15-16, and management demonstrated its affirmative approval of the sexual pictures and language by its participation in and condonation of the use and display of such language and material. R2-253-9-10, -16, -18. The overwhelming message of such pervasive sexual conduct is that women are unwelcome,[3] and if present, are accepted only as second-class employees and at sufferance.[4] See R2-253-8. This is particularly true where, as here, the work is traditionally "men's work," women were excluded from the workplace until the early 1970s, see McIlwain Dep. at 58-59, women workers are still outnumbered by a factor of more than one hundred, and women workers hold the lowest positions, R2-253-7, see also P. Ex. 9.

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that simply do not support the propositions for which they are cited. See, e.g., R12-77 (Turner testimony allowed in only to show whether complaints made, not for truth of statement that women not bothered), cited at p.5 of Brief; R5-78 (Robinson testified that she was transferred but not that she desired the transfer), cited at p. 7 of Brief; R6-90-95 (Robinson testified that she wrote her chronology of January 1985 events, not an account of all incidents of sexual harassment), cited at p.8 of Brief; R7-180 and R8-66-67 (Albert and Banks did not say pictures do not bother them; Albert said that they offended her and would inhibit her from performing her job and Banks said that, although she was more bothered by not being able to work or to complain, the pictures were "part of the problem." The district court accepted this testimony. R2-253-20-21), cited at p. 10 of Brief.

[3] The court found, based on expert testimony, that where a non-professional ambience of profanity is tolerated in the workplace, men are three to seven times more likely to treat women as sexual objects. R2-253-29. Women are also "profoundly affected" in job performance and job satisfaction; deterred from seeking jobs and promotions; and are disparately affected in job loss.

[4] The court should admit evidence Plaintiff offered, to show that JSI failed to meet its obligations as a federal contractor in employing and promoting women. See R2-175-5-7.

The district court found that the pornographic pictures created a hostile environment under Title VII, 42, U.S.C. § 2000e, et. seq.,because they affected the men's behavior and required women workers to adopt various coping strategies. R2-253-32. Like Lois Robinson, other women workers testified that if at all possible they avoided the pictures and men around the pictures.[5] These observations are supported by Plaintiff's expert witness Dr. Fiske.[6] The court found that frequently men acted in a sexual manner toward women workers at JSI. R2-253-11, -17. See also R5-99 (Robinson); R7-31, -38 (Banks); R8,-32-36, -45-46 (Albert).

The district found that, in response, women workers had to

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[5] See R7-93-98, 124 -125 -179-80 (Banks preferred to stay away from men in the shops where pornography was displayed because those men sexually harass more; male co-workers exposed her to pornography and asked her if it bothered her, which ridiculed and humiliated her; male co-worker brought in a picture of a semi-nude woman, hung it on her wall, and laughed about it in her presence); R8-12-13, -25-29 (Albert: felt discomfort and surprise about sexualized comments from male worker in presence of pornography because "[h]e didn't usually act like that, at least not around me;" felt discomfort at rigger Gene Sharpe's sexualized conduct when he showed her a picture of a masturbating woman; felt distaste when leaderman Leach showed her a picture of Long Dong Silver and decided to employ "smart remark" strategy with him because "if I acted aghast...with Steven Leach I would have been subjected to the same thing day in and day out.") The trial court found that Plaintiff and other women workers blocked out or ignored much of the sexualized conduct, avoided locations where the pornography was located and undoubtedly forgot much routine sexualized conduct that they encountered daily. R2-253-10-11, -18, -20, -32-33.

[6] The court relied on research predicting that when exposed to sexual pictures of women, approximately half the men in the general population would perceive women sexually and act sexually towards them because about half of all males in the general population are "gender schematic." R2-253-27; R8-190-92. The study would predict a higher sexualized response rate at JSI if more men working there are "oriented to their masculinity and sexuality as an important part of their self-concept." R2-253-27.

steel themselves to come to work. R2-253-18. See also R5-156 (Robinson: so difficult to "go in there and face it"); R7-132 (Banks: "everyday I mentally prepared myself"); R8-45-46 (Albert: sexual comments affected her feelings about going to work). Each female who testified to the sexual conduct at work described strategies to discourage and avoid overtures. R5-139 (Robinson); R7-35, -39-40, -114 (Banks); R8-28, -33-34 (Albert).

In addition to daily sexual innuendos partly caused by the pornographic pictures, R2-253-27, male workers also used the pornography to harass individual women. Lois Robinson and other women workers described similar experiences in which male coworkers used sexual pictures and sexual implements to denigrate them. R2-253-11-14; R7-88, -93-97, -111. After Ms. Robinson complained, male co-workers intensified the frequency and obscenity of practices such as using pornographic pictures and reading aloud from graphic sexual materials to humiliate female workers. R2-253-20; R7-88, -93-98.

Defendants offered evidence indicating that sexual assault, the most extreme form of harassment, occurred at the shipyards. R2-253-41-42. Robinson produced other evidence of sexually assaultive conduct by shipyard workers against female employees, R2-253-19-20; R7-35-35; R8-54-56, including evidence of one assault, in which the woman responded with the self-help technique of overpowering the man and attempting to dunk his head in a drum of water. R8-54-56. According to both the witness's own testimony and Defendants' admissions, three of four women who experienced unwelcome sexual experiences also experienced unwelcome sexual touching at work. R2-253-17-22, -41-42. That

Ms. Robinson herself was not sexually assaulted did not exempt her from fear. R5-133, -173-74, R6-38-40.[7]

B. Sexually Discriminatory Regulation Of Speech At JSI

JSI and its agents played an active role in disseminating materials degrading to women while prohibiting materials expressing other messages. With the knowledge and approval of JSI management, JSI officials distributed vendors' calendars featuring nude women to employees. Employees, including supervisors, posted these calendars throughout the shipyards, with the approval of JSI management. R2-253-8-10. JSI also allowed employees to read pornographic magazines in the shipyard and post pictures of women torn out of the magazines. R2-253-9. JSI management refused to issue any policy against the display of calendars and other pictures of naked women, although they were aware that such displays were prevalent in the workplace. R2-253-9-10. In fact, some managers, including Defendants Brown and Stewart, actually gave orders that such pictures should remain posted. R2-253-50-51.

In contrast to JSI's support for pornographic images featuring women,[8] JSI enforced limitations on all other printed

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[7] Although at work Robinson routinely used a welding torch, which might have discouraged some unwelcome sexual approaches, she resisted disclosing where she lived because she feared that shipyard employees might bother her at home. See R1-59-2-3, R1-175-2-3. This fear was realistic given the experience of another female worker who suffered a sexual assault by a male co-worker at her home and unwelcome gross and demeaning sexual overtures by telephone to her home by a supervisor. R2-253-19-20; R7-72-82, -126-30.

[8] JSI never distributed or allowed others to distribute calendars featuring pictures of nude men. R2-253-8. Supervisors testified that they had never seen pictures of nude men, would be surprised to see any, and would throw any such pictures into the

materials. For safety purposes, the Defendants forbade workers from bringing printed matter onto the jobsite.[9] R2-253-9. While They also discouraged posting of political or commercial materials generally, they specifically did not forbid or require permission for posting pictures of naked or semi-naked women. R2-253-9. Vice President of Operations Larry Brown had an unwritten policy against posting materials regarding gun control that he enforced by refusing permission to post such materials and taking down materials posted without permission. Brown Dep. at 22-23 & 42-43. He had this policy, in part, to avoid workplace conflict. Id. at 22-23 & 43. Likewise, Defendant JSI maintained rules against obscenity and abusive language, Jt. Ex. 12 at 18, primarily, again, to avoid conflict. See Lovett Dep. at 19-21. Defendants, however, failed to apply these rules to the pornographic pictures or sexual comments even when Ms. Robinson directed Mr. Owens and Mr. Ahlwardt to these written policies during her meetings with them in January 1985. R2-253-49, -51-52.

Defendants' discriminatory treatment of sexual harassment complaints, R2-253-41, is further illustrated by an example of Defendants' handling of a complaint by a male worker, Fraser, that a female employee, Gail Banks, "cussed him" in response to his sexual harassment of her. R2-253-19. Although Banks

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trash. One foreman explained that, if a vendor distributed a calendar with men, he would think the "son of a bitch" was "queer." R2-253-9; Turner Dep. at 52-53.

[9] Although managers observed or learned of men reading pornographic magazines on the job, they did not penalize such conduct. R9-157, R11-216. In contrast, Plaintiff was reprimanded for reading a newspaper in the shipyard. R5-189.

immediately reported the harassment incident to her leaderman and Fraser's leaderman, Eugene Sharpe ("Sharpe"), Sharpe's response humiliated Banks. Management called Banks to a meeting the next day at which Fraser demanded an apology for her use of profanity. A foreman interrupted an "emotionally distraught Banks and told her to shut up, stop crying, return to work, or face being fired." Fraser was not reprimanded for his sexual harassment. R2-253-41.

C. Expert Testimony On The Effects of Pornography On Women In The Workplace

The district court found the testimony of Plaintiff's experts, Dr. Susan Fiske and K.C. Wagner, persuasive and useful because their studies and observations were specifically focused on the effects of sexual behavior and materials on women working in an environment similar to JSI. R2-253-69. The district court relied upon Dr. Fiske's "sound, credible theoretical framework" in holding that the pornographic pictures, combined with other characteristics of the environment, were harmful to women. First, Dr. Fiske testified that the extreme rarity of women workers at JSI made them the object of undue attention and extreme responses, mostly negative, because of their sex. R2-253-24-26. Second, some men were much more likely to act sexually toward women because of the presence of sexual pictures of women and sexual or profane language; testimony of witnesses confirmed "a correlation between the presence of pictures and sexual comments and the level of sexual preoccupation of some of the male workers whose conduct had sexual overtones observable to female workers." R2-253-27. Third, the male hierarchy in JSI

trivialized women's complaints about sexual harassment, subjected the complaining woman to ridicule, and failed to discipline the harasser "commensurate with the misconduct." R2-253-28. Finally, Dr. Fiske noted that the "nonprofessional ambience," repels and offends women, forces women to "constantly monitor their behavior to determine whether they are eliciting sexual attention," and requires them to conform to stereotypes along sexual lines. R2-253-29. The district court recognized supporting evidence for each of these observations and found that male managers and co-workers selectively interpreted women's behavior according to sexual stereotypes of women, which affected women's job satisfaction and commitment. R2-253-30.

Ms. Wagner testified that the "[t]ypical coping methods" of women confronted with sexual harassment include avoiding the harassment, denying it, making jokes about it, threatening to make complaints, and -- the riskiest and least-used strategy -- actually making complaints. R2-253-32. The district court credited this testimony and noted that it explained the absence of formal complaints of women workers at JSI. R2-253-32, -39. Wagner also testified that Plaintiff's proposed policy was appropriate based on research and experience in other workplaces like JSI and contained the components of an effective sexual harassment policy. R2-253-32-34.

The district court concluded that the testimony, although not the ultimate opinion, of Defendant's expert Donald Mosher

tended to support the position of the Plaintiff. R2-253-36.[10] Even Dr. Mosher's study found that women described the Playboy playmate picture as "offensive," were they viewed at work.[11] The trial court concluded that women likely would be significantly affected if they encountered such pictures at work in a setting like JSI R2-253-36.[12] In reaching this conclusion, the district court considered certain circumstances of Dr. Mosher's study including: Dr. Mosher advised the subjects before the study that they might view negative materials and that they could terminate participation if they wished, R9-92; he confirmed that control was important in the acceptability of exposure to sexual material, R9-99-100; his female subjects viewed the materials in a room of all women, R9-75; and he did not ask his subjects to rate how they might respond to such materials in a workplace of

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[10] The trial court did not credit the testimony of Defendant's other expert, Dr. Joseph Scott, that the pornographic pictures would not affect the average female, see Cr.-App. Brief at 10. The district court found that Dr. Scott's methodology was flawed. His study was done on only twelve college subjects, six men and six women. The subjects had volunteered to view thousands of pictures in Hustler magazine, hardly a representative universe of persons, and did so at their own leisure. R2-253-138-39. Last but not least, Dr. Scott had a strong pecuniary interest in defending pornography given his contract work for Playboy, Penthouse and Hustler magazine. R2-253-37-38; R9-104-05, -123.

[11] The JSI workplace prominently displayed such pictures, as well as more demeaning pictures of women which were also present in significant numbers. See, e.g., Jt. Ex. 1 & 2 (two different 1985 Whilden Valve and Gauge Calendars). R2-253-11-15; App. Brief at 5-10.

[12] Defendants offered testimony of three women to claim that women did not object to the sexual pictures of women, R11-176-214. Of two women who testified that they never saw pictures of nude or semi-nude women at JSI, R11-193, -205, the trial court found their testimony not credible given the extensive testimony about the number of such pictures. R2-253-22 (finding Martin and others not credible).

all men, R9-83.

D. Defendants' Ineffective Handling Of Complaints

The trial court found that, given the pervasive nature of the sexual conduct at JSI, Defendants should have taken effective steps to remedy the harassment and failed to do so. JSI denied equal employment opportunity to its women workers by requiring the few female workers to complain each time the daily sexual conduct occurred. Moreover, as the Defendants evidently had a lesser standard for enforcement of rules when women complained, complaint-making was a futile pursuit for women workers. R2-253-41. As one female worker, Leslie Albert, aptly said:

> Day in and day out. Those are the little things that are hard to bring up incident by incident because they happened every day all day. And it's hard to just separate the one from the other. It's not like you're complaining; it's like you're whining; it was there. And it was all crafts, all day, both yards.
>
> Now, are you going to, you know, fall out every time something like that happens? You can't do that. It's -- I mean the boss is going to think you're crying wolf, first of all, all of the time. So if you complained and you went to make a serious complaint, it had better be a serious incident.

R8-36.

When Ms. Robinson and other women complained of harassment their concerns were often belittled or ridiculed, turning the process of complaining into a "second episode of harassment." R2-253-46-47, -49, -56-57, -83. In response to complaints, little or no investigation was conducted. R2-253-41-42, -49, -82-83. For example, JSI never made any effort to determine who was responsible for the "Men Only" sign. R2-253-49. JSI never kept records of sexual harassment complaints, so it had no way of knowing the extent of the problem or whether there were repeat

offenders. R2-253-42.

The court also found that Defendants' response to complaints was inadequate and that JSI often did nothing to remedy the situation. R2-253-56, -82-83. For example, both Stewart and Brown issued orders that pictures of nude women should not be taken down and Stewart was angered when the superintendent of Mayport removed calendar pictures from a shop. R2-253-50-51, 56. When women complained about individuals, the offender received, at most, a talk with a supervisor. R2-253-42-43. When JSI did attempt some remedial action, it was ineffective: some pictures were taken down, but not others; pictures were re-posted or new pictures posted in their place; and the words remained visible through the painting of the "Men Only" sign. R2-253-45, -47-48, -50, -83. JSI's primary response to the "Men Only" sign was to transfer Ms. Robinson out of the Mayport shipyard. R2-253-45, -52. Even as to sexual incidents the import of which Defendants did not deny, the actions taken by the Defendants demeaned the complainant and trivialized the woman's concerns. R2-253-41-42.

JSI instituted a new sexual harassment policy well after this lawsuit was filed, in April 1987, which had "little or no impact" on the environment of the shipyard. R2-253-54-56. Defendant Stewart took the policy from a newsletter that explained that "sexually offensive" pictures constitute sexual harassment and that it is better "if the pictures are not there at all than to argue that they are in an area where the employee shouldn't have been." R2-253-55; P.Ex. 55. However, JSI did not incorporate the advice of the newsletter in the policy and pornographic images remained posted throughout the workplace

after its issuance, with the explicit approval of Stewart. R2-253-56. Defendant Stewart, who was unresponsive to Ms. Robinson's complaints, was the only person listed in the policy as accepting complaints. R2-253-56. Moreover, JSI did not widely distribute the policy and did not give employees and supervisors any training to understand what constituted sexual harassment. R2-253-55-56. In sum, the district court found Defendants liable because their policies and practices were not effective in addressing the problem of sexual harassment.

(2) Proceedings Relating To The Denial of the Rule 35 Mental Examination

On June 23, 1987, Defendants also moved to compel a mental examination of Plaintiff under Fed. R. Civ. P. 35(a), but the motion did not include any of the specifications required by Rule 35(a), namely the "time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." After Magistrate Judge Snyder granted the motion, R1-96, and Robinson filed an objection to the order, R1-108, Defendants submitted a Notice and Supplemental Notice of Taking Mental Examination of Plaintiff on September 1 and November 20, 1987, respectively, to provide notice of the exams they proposed. R1-110; R2-165. In finally defining the scope of the examinations sought, Defendants indicated that the exam proposed would include every aspect of Plaintiff's life -- social, emotional and physical, public and private.[13] The district court reversed the

[13] The Supplemental Notice of November 1987 proposed to examine: a present statement of Plaintiff's complaint; all previous psychological or medical problems including "Plaintiff's educational, family and social history" including "relationships with friends, marital status, sexual functions, work history,

Magistrate's pre-trial ruling on January 19, 1988. R2-172.

SUMMARY OF ARGUMENT

The district court applied the appropriate legal standards, as set forth by the Supreme Court and this Circuit, in finding Defendants JSI, Larry Brown and John Stewart liable for maintaining a sexually hostile working environment. Defendants do not assert or demonstrate that the district court's findings of fact were clearly erroneous. Defendants' argument that the First Amendment precluded the district court from considering evidence of sexually harassing conduct not specifically targeting Lois Robinson was not asserted below and, thus, is not properly before this Court. This Court should reject the argument even if it had been properly raised below because of the compelling interest in eliminating employment discrimination. The court did not abuse its discretion by denying a discovery order for a mental examination, excluding certain evidence at trial or in ordering affirmative relief.

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recreational history, substance use, if any, criminal legal history," a review of the body systems addressing "gastrointestinal function, mental history, cardiovascular function, speech function history, appetite, sleep, mood and memory function;" a mental status examination "evaluating Plaintiff's current cognitive function and emotional status"; a neurological examination to test "the organ functions of Plaintiff's neurological system including cranial, cerebellar, and sensory functions"; a psychological examination including "projective intelligence testing" with additional psychological testing, if necessary. R2-165.

ARGUMENT

I. The District Court Properly Found Defendants Liable For Maintaining A Sexually Hostile Working Environment Based on Pornography, Sexual Graffiti And Sexual Comments And Did Not Violate The First Amendment in Doing So

The court below scrupulously applied the appropriate legal standard in finding Defendants JSI, Brown and Stewart liable for maintaining a sexually hostile working environment. The court applied the standards set forth in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-69 (1986), approving and adopting this Circuit's groundbreaking decision in Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982). Based on Henson, the district court assessed the evidence as to the five elements of a hostile environment claim:

(1) plaintiff belongs to a protected category;
(2) plaintiff was subject to unwelcome sexual harassment;
(3) the harassment complained of was based on sex;
(4) the harassment complained of affected a term, condition or privilege of employment; and
(5) respondeat superior, that is, Defendants knew or should have known of the harassment and failed to take prompt, effective remedial action.

R2-253-63-64. The district court found that Plaintiff proved each element. Because Defendants do not challenge the findings of fact as clearly erroneous, Anderson v. City of Bessemer, 470 U.S. 524, 528-29 (1985), they may obtain a reversal only by showing that the court below did not correctly apply the law.

Defendants argue that the trial court did not properly apply the law as to elements three, four and five of Henson. They argue that the court should have excluded any evidence of sexual conduct to which Ms. Robinson was exposed at work except acts that were uniquely, individually directed at Ms. Robinson. Defendants attempt to rationalize this by arguing that other

conduct degrading of women was not "intended to offend" Ms. Robinson and other women. The essence of Defendants' argument is that, in promoting its compelling goal of equal employment opportunity, the government must ignore any conduct demeaning of members of one sex or one race as a group.[14] To accept such an approach would nullify the antidiscrimination laws. Further, Defendants argue that the court should have considered only harassment for which JSI upper management received express notice through formal complaint at the time it occurred. By applying these crabbed standards, Defendants erroneously argue that there is insufficient evidence of sexual harassment for Plaintiff to make out a claim and that the finding of liability against them should be reversed.

A. The Sexual Conduct At JSI Discriminated Against Ms. Robinson And Other Women Based Upon Their Sex

The district court found the third Henson element satisfied because the Defendants engaged in discriminatory conduct based upon Ms. Robinson's and other female workers' sex. In Henson, this Circuit explained that:

> the case of sexual harassment that creates an offensive environment does not present a factual question of intentional discrimination which is at all elusive....it should be clear that sexual harassment is discrimination based upon sex.

Henson, 682 F.2d at 905 n.11.[15] Sexual harassment is facial

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[14] Under Defendants' argument, evidence of a hangman's noose hanging in a work area would be excluded unless it bore clear evidence of targeting. Compare Vance v. Southern Bell Telephone & Telegraph Co., 863 F. 2d. 1503 (11th Cir. 1989).

[15] Defendants mischaracterize Henson's footnote 11 as requiring proof of intent in hostile environment cases. Cr.-App. Brief at 25. In footnote 11, the Henson court set forth the evidentiary framework for a disparate treatment case only to

discrimination because discriminatory motive is obvious from the sexual content of the harassing actions, see Zabkowicz v. West Bend Co., 589 F.Supp. 780, 784 (E.D. Wisc. 1984) (considering sexual depictions sex-based), and can inferred from the resulting differences in treatment based upon sex.[16]

Defendants claim that the sexual conduct considered by the trial court "was never intended to offend Robinson or other females," Cr.-App. Brief at 25, because women employees were not specifically in the Defendants' minds when they posted or approved the graphic sexual pictures of women and condoned other sexual conduct.[17] However, Defendants do not claim that the conduct at issue was accidental or occurred during physical

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distinguish it from the straightforward inquiry of a hostile environment case. Courts in harassment cases sometimes refer to stages of proof such as "prima facie case" or "pretext," the Title VII method of analysis articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), which allows an employer to articulate a justification for its actions once the plaintiff has made out a prima facie case. However, this standard is generally inappropriate to a harassment claim. As the court in Moffett v. Gene B. Glick Co., 621 F.Supp. 244, 266 (N.D. Ind. 1985), explained: "[O]nce a plaintiff establishes that she was harassed and that the employer was involved..., it is hard to see how an employer can justify harassment."

[16] Harassing conduct that is not "sexual in nature" but is directed at one group may also be discrimination. See Bell v. Crackin' Good Bakers, 777 F.2d 1497, 1498, 1503 (11th Cir. 1985). See also Hall v. Gus Construction Co., 842 F.2d 1010, 1014 (8th Cir. 1988). Such disparate treatment in this case includes the differential pattern of speech regulation and rule enforcement described in sections 1(B) & (D) of the Statement of the Case.

[17] That pornographic materials were first put up when women constituted "the inexorable zero," Teamsters v. U.S, 431 U.S. 324, 342 n.23(1977), hardly aids the Defendants. As the district court noted, "[i]t is absurd to believe that Title VII opened the doors of such places in form and closed them in substance. A pre-existing atmosphere that deters women from entering...a job is no less destructive to and offensive to workplace equality than a sign declaring 'Men Only.'" R2-253-72.

unconsciousness;[18] they do not, and cannot plausibly, deny its sexual content.

This Circuit considered and rejected similar arguments in the racial harassment hostile environment case Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982). See also EEOC v. Beverage Canners, Inc., 897 F.2d 1067, 1068 (11th Cir. 1990). In Walker, the defendant argued "that the racial slurs used by Northgate personnel were either common parlance of an automobile dealership (i.e., 'nigger-rigged') or else were sporadic references and in most instances not aimed at Walker." 684 F.2d at 1358-59.[19] This Circuit found none of these arguments persuasive and affirmed the trial court holding that the racially demeaning conduct, whether or not aimed at the plaintiff, created a hostile working environment. Id. at 1359 & n.2.

The analysis adopted in Walker is thoroughly grounded in the hostile environment caselaw that this Circuit, and the former Fifth Circuit, as the standard-setters in the nation, have established. The relevant question is whether sex-based conduct to which Ms. Robinson was exposed demeaned the group of which she is a member. This principle was first articulated in the ground-breaking racial harassment decision, Rogers v. EEOC, 454 F.2d 234

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[18] They suggest that the sexual pictures in and around their workplace somehow came from a source other than Defendants, their agents or employees. Cr.-App. Brief at 23 n.3. In the few instances where it is not clear whether sexual depictions originated with Defendants, their agents or employees, the conduct occurred in a location that, at the relevant time, was part of the workplace under Defendants' direction and control.

[19] Defendants mischaracterize Walker when they suggest that it had more "directed" conduct than is present here. Cr.-App. Brief at 27.

(5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). In Meritor, 477 U.S. at 65-67, the Supreme Court applied Rogers to sexual harassment and adopted the rule that sexually or racially hostile conduct against others of the plaintiff's protected group be considered in determining the existence of a discriminatorily hostile environment as to the plaintiff,[20] and should be considered in assessing the "totality of the circumstances." R2-253-18, -67.

Defendants also suggest that the pornographic pictures of women are not sufficiently offensive.[21] They contrast this with the use of "nigger" in Walker, which Defendants acknowledge would be "perceived as racist and offensive by any reasonable person, including white persons." Cr.-App. Brief at 27. This Court has always found sex discrimination to be as noxious as race discrimination. The Supreme Court quoted this Circuit on this

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[20] See Vinson v. Taylor, 753 F.2d 141, 146 n. 41 (D.C. Cir.), aff'd sub nom. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (noting that excluded testimony of other female employees clearly relevant). See also Hall, 842 F.2d at 1015 (evidence of sexual harassment directed at employees other than plaintiff relevant to show a hostile work environment); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987) (evidence of harassment not directed at plaintiff relevant to hostile work environment); Jones v. Flagship Int'l, 793 F.2d 714, 721 n.7 (5th Cir. 1986) (reports of harassment suffered by other females relevant to the extent that incidents affected plaintiff's psychological well-being).

[21] Defendants also cite Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Circ. 1986), cert. denied, 481 U.S. 1041 (1987), in support of their claim that the third Henson factor is not satisfied here, Cr.-App. Brief at 26, but Rabidue has no meaningful application to element three. Although the trial court refused to find that unlawful sex discrimination had occurred, it drew the conclusion that sexual posters represented "conduct of a sexual nature," Rabidue v. Osceola Refining Co., 584 F.Supp. 419, 432 (E.D. Mich. 1984), and the Sixth Circuit did not disturb this holding.

very point:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Meritor, 477 U.S. at 67 (quoting Henson). See also Sparks v. Pilot Freight Carriers, 830 F.2d 1554 1556 n.13 (11th Cir. 1987) (not useful to distinguish between "ambiguously" and "patently" offensive).

If the pornographic pictures and the vulgar language were a sex-neutral act, sexual pictures and language that demean men and women equally would be present at JSI. As the trial court found, sexual or degrading images of men were never displayed at the shipyards, R2-253-8-9, and the record is devoid of any evidence of language that was degrading or sexualizing of men. Similarly, if these pictures were sex neutral, the shipfitters would not have painted a "Men Only" sign on the JSI shipfitters shanty door in response to Ms. Robinson's request to remove pornographic pictures of women. Finally, if the sexual pictures of women at JSI were devoid of intent to denigrate women, male workers would not have chosen those same pictures to target Ms. Robinson when they did so. See R2-253-12. The Defendant's intent is clear: "[T]he sexually offensive conduct and language used would have been almost irrelevant and would have failed entirely in its crude purpose had the plaintiff been a man." Zabkowicz, 589 F.Supp. at 784.

B. The District Court Properly Determined That The Sexual Harassment Was A "Term, Condition, Or Privilege" Of Employment Because It Was So Severe Or Pervasive As To Affect Seriously The Psychological Well-Being of Lois Robinson and Other Female Employees

1. The District Court Employed the Proper Standard of Law in Evaluating the Offensiveness and Hostility of the Workplace Conduct

In assessing the fourth Henson factor, whether the Plaintiff had proven a sexually hostile work environment that affected a term, condition or privilege of employment, the district court determined that the conduct was so severe or pervasive to affect seriously the psychological well-being of employees, as required under Meritor, 477 U.S. at 67, and Henson, 682 F.2d at 904. R2-253-66-69. The district court reasoned that if the harassment could seriously affect the psychological well-being of members of plaintiff's group and if Ms. Robinson herself were so affected, then liability attached. No other test, and no other articulation of the test, is needed. This test was properly applied by the trial court.

Defendants wrongly allege that the trial court only required Plaintiff to show unwelcomeness as to her, the second Henson element, but not the effect on her own psychological well-being, the fourth Henson element. Cr.-App. Brief at 34-35. Clearly the district court required that Plaintiff prove both unwelcomeness as to her and effect on her psychological well-being and concluded that she proved both. R2-253-64,-67-68. The Defendants ignore that the district court considered and rejected testimony of female witnesses offered on Defendants' behalf. R2-

253-22, 34.[22]

Defendants would have this Circuit abandon its precedent and adopt the test articulated in Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 401 U.S. 1071 (1987). Rabidue was never sound Title VII law, as Judge Keith's resounding dissent in that case expressly recognized, 805 F.2d at 623, and the Sixth Circuit tacitly recognized by reading Rabidue as a special lower standard applicable only in sexual harassment cases, see, e.g., Davis v. Monsanto Chemical Co., 858 F.2d 345, 348-50 (6th Cir. 1988), cert. denied, 490 U.S. 1110 (1989).[23] By creating a different standard under Title VII for race and sex hostile environment cases, and by misquoting the verbal formulation for proof of the fourth Henson element approved in Meritor, 805 F.2d at 619, the Sixth Circuit in Rabidue, deviated sharply from established hostile environment law. The trial court noted that Rabidue was the subject of widespread criticism in other Circuits, in the comment by the Equal Employment Opportunity Commission and in legal commentary. R2-253-71-73. See also Ellison v. Brady, 924 F.2d 872, 877-79 (9th Cir. 1991).[24]

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[22] Findings based on the credibility of witnesses "demand[] even greater deference... for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." Anderson, 470 U.S. at 569.

[23] The district court noted in its discovery proceedings that any persuasive value of the citation to Rabidue in Williams-Hill v. Donovan, 43 Fair. Empl. Prac. Cas. 25 (M.D. Fla. 1983), was nullified by this Circuit's decision in Sparks. R2-172-13.

[24] Defendants also invoke the Seventh Circuit standard, citing Broom v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989), and the Fourth Circuit in Paroline v. Unisys Corp., 879 F.2d 100 (4th

The Rabidue court's standard excused workplace discrimination that mirrored discrimination in society, concluding that any plaintiff opposing such discrimination was unreasonable. 805 F.2d at 622. This Circuit rejected such rationale in Henson, Walker, Sparks and Vance v. Southern Bell Telephone & Telegraph Co., 863 F.2d 1503 (11th Cir. 1989), repeatedly reaffirming that the essential test is whether the alleged discriminatory conduct was sufficiently severe or pervasive to affect seriously the psychological well-being of the plaintiff. Consistent with that test, this Circuit necessarily considers the harm of alleged discriminatory conduct not to persons in the abstract but to the group, and members of it, for whom the discrimination laws are invoked.[25]

Defendants would eliminate consideration of group-based harm in the application of the antidiscrimination laws. They erroneously argue that "totality of the circumstances," a standard requiring the trier of fact to examine the alleged discriminatory conduct in context, Meritor, 477 U.S. at 69; see Vance, 863 F.2d at 1510, requires the court to ignore the part that a victim's membership in a group being demeaned may play in the harm of that conduct. See Cr.-App. Brief at 34. They raise

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Circ. 1989). Cr.-App. Brief at 33. Broom, 881 F.2d at 418-19, and Paroline, 879 F.2d at 105, both rely on Rabidue.

[25] The court below mistakenly described its test as a "reasonable woman" standard, in reaction to the Rabidue standard. However, the test it applied properly reflected the approach articulated in Henson. Language like "reasonable," "objective" and "subjective" confuse rather than clarify this standard, as is illustrated by the competing results justified by these labels in recent sexually hostile environment cases. It is important to note that reasonableness standards have been applied in cases involving sexually, but not racially, working conditions.

the spectre of the "supersensitive," "eggshell," or "neurotic" plaintiff,[26] id. at 35, to assert the need for newly stringent standards, as if courts have been unable to screen out claims of imagined discrimination. Defendants seek a standard that would exempt "behavior that creates a barrier to the progress of women in the workplace." R2-253-65.

2. The Trial Court Appropriately Found the JSI Sexually Hostile Working Conditions So Severe or Pervasive as to Affect Seriously the Psychological Well-Being of Ms. Robinson and Other Female Workers

The trial court properly found that the fourth Henson factor was satisfied here because the nude and semi-nude images of women at JSI were pervasive, the sexually demeaning language was constant, and the effects were seriously harmful to the psychological well-being of Lois Robinson and other female workers. R2-253, 52, 67-69. See App. Brief at 6-8, 21, 32-33. Defendants do not attempt to support a claim that the trial court's findings of fact were clearly erroneous,[27] as they must

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[26] If discrimination occurred, the fact that an individual plaintiff is "neurotic," Cr.-App. Brief at 35, or not "possessed of a pleasing personality," Kyriazi v. Western Electric Co., 461 F.Supp. 894, 941-42 (D.N.J. 1978), should not prevent that individual from making out a claim of discrimination. Moreover, if discrimination occurred and harmed an individual who was uniquely vulnerable to harm, that individual is entitled to obtain whatever recompense for the resulting harm that is available under prevailing law. See Valdez v. Church's Fried Chicken, 683 F.Supp. 596, 611-17 (W.D.Tex. 1988).

[27] Although Defendants do not challenge the district court's findings as clearly erroneous, they cite to portions of the record not accepted by the court to argue that the pictures were not offensive. For example, Defendants rely upon their attempt to prove, through their paid experts, that such pictures were not harmful or offensive. However, Defendants generated evidence that women find even the Playboy playmate picture offensive in the context of a workplace. R2-253-35-36. Therefore, considering all the evidence in its appropriate weight, the trial

do to dislodge these findings of fact.

Women were second class citizens at JSI, evidenced by several examples: the display of pornographic pictures of women, R2-253-7-9; the response of managers to Ms. Robinson's complaints in January 1985 that the shipyards are a "man's world," R2-253-49; the appearance of the "Men Only" sign on the door of the shipfitters' shanty, R2-253-48; the transfers of Ms. Robinson when she complained about the presence of pornographic pictures of women;[28] and the patterns of sex-based rule enforcement and trivializing of women's complaints.

All women workers at JSI were the target of an atmosphere of pervasive sexual innuendo. Pornographic pictures of women and Defendants' condonation of them inspired male supervisors and co-workers to view women as sexual objects which resulted in women, including the plaintiff, being the object of numerous daily sexualized interactions from male workers.[29] Women workers reasonably feared sexual assault[30] in these conditions of

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court concluded that the pornographic pictures of women were offensive to Ms. Robinson and other women workers. R2-253-33.

[28] See R2-253-52; R5-73 (Robinson was transferred after complaining about pictures); R5-123 (Robinson transferred after complaining that a ship was "dirty"); R5-176-77, R6-185-86 (Robinson complained about a dartboard in form of woman's breast; transferred after complaining).

[29] Those interactions might be sequential or simultaneous. Gail Banks gave a dramatic example of the simultaneous sexual harassment when she described clocking out from a shift of approximately fifty men when one yelled "if you fell into a barrel of dicks, you'd come up sucking your thumb." R2-253-19.

[30] As the Ninth Circuit Court of Appeals recognized, "Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to sexual assault." Ellison, 924 F.2d at 879.

unchecked sexual innuendo, and their fear was heightened by JSI's sex-based rule enforcement.

The district court clearly considered whether the conditions affected the psychological well-being of Lois Robinson, as well as other women workers, and concluded that it did. R2-253-67-69. Defendants argue that the court should have considered only the conduct uniquely targeted at Lois Robinson and ignored any other sexual conduct, no matter how pervasive. They also argued that each instance considered must be specifically severe. Cr.-App. Brief at 30-31. This is contrary to this Circuit's rule that the plaintiff need only prove the conduct to be severe or pervasive. See Vance, 863 F.2d at 1510-11. They do, however, acknowledge that sexual harassment was found in Sanchez v. City of Miami Beach, 720 F.Supp. 974 (S.D.Fla. 1989), and fail to show that the sexual conduct in that case was different than the conduct in this case.[31]

Ms. Robinson was uniquely targeted by many comments and images as well as other disparate treatment,[32] and Defendants

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[31] Two cases upon which Defendants rely, Cr.-App. Brief at 31, take Rabidue as the legal standard in determining that the plaintiff had not proven liability on element four. See Caleshu v. Merrill Lynch, 737 F.Supp. 1070, 1082-83 (E.D. Mo. 1990); Williams-Hill, 43 Fair Empl. Prac. Cas. at 254-55.

[32] Defendants argue that there were only seven incidents of directed abuse. Cr.-App. Brief at 8, 29. They reduce the harassment to seven incidents by counting types rather than incidents of harassment. For example, they count several targeted instances of graffiti as one "incident" and a pattern of abusive treatment by a co-worker as another single "incident."

Directed incidents include many cited in App. Brief at 12-20: (1) a welder told Ms. Robinson he wished her shirt would blow over her head so he could look; (2) a foreman candidate invited her to sit on his lap, (3) a co-worker waved a picture of a nude blond woman with a whip that Robinson felt targeted her, while

acknowledge that such conduct may properly form the basis for Title VII liability. See Cr.-App. Brief at 8, 22-23. Although the pervasiveness of harassment at JSI made it difficult for Ms. Robinson to recall every incident, R2-253-10, the examples of directed harassment were sufficiently severe and/or pervasive to affect the terms and conditions of employment.

Moreover, the harassing conduct must be examined within the context in which it occurred: a workplace generally hostile to women. Courts must examine the "totality of circumstances," see Henson, 682 F.2d at 904; they cannot weigh the harm caused by a picture of a woman with exposed breasts and genitals placed on the tool box for Robinson's arrival, R2-253-14, separate from the pervasive posting of degrading pornography that confronted Robinson and incited male co-workers. The court "cannot carve the working environment into a series of discrete incidents and

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yelling, "Hey look," in an enclosed space in front of plaintiff and half a dozen males; (4) a co-worker yelled "boola-boola" at Robinson in reference to a joke about sodomous rape and Robinson was told that some shipfitters had given her the nickname "boola-boola," which made Robinson feel threatened; (5) a male worker showed Banks and several male workers a picture of a nude woman with a welding shield, said, "Lois would really like this," and placed it on a wall in the welding trailer; (6) in response to Robinson's complaints to management about pictures in the shipfitters' trailer a "Men Only" sign was painted on the door; (7) on her way to a meeting with management, a male co-worker said "hey pussycat, come here and give me a whiff," to Robinson and the woman escorting her; (8) George Nelson, a shipfitter Robinson was often assigned to work with in the summer of 1986, subjected her to repeated, severe harassment; (9) a male co-worker handed Robinson a pornographic magazine; and (10) graffiti, including "lick me you whore dog bitch" and "eat me," was written in Robinson's work space. Ms. Robinson was also shunned because of her sex, R2-253-17, -66, and made the object of rumors that she was a lesbian or a victim of rape, R2-253-28; Leach Dep. at 47. She also suffered harassment when she complained about the conditions. R2-253-57. These, and other, incidents were all found as fact by the trial court.

measure the harm adhering to each episode," because the effect of a hostile environment is cumulative. R2-253-33, -68.[33] This Court should, therefore, reject Defendants' extreme argument that it must evaluate directed harassment in a vacuum.

C. The District Court's Analysis Does Not Violate the First Amendment

As a threshold matter, the issue of whether the district court's finding of liability violates the First Amendment is not properly before this Court because Defendants' Pre- and Post-Trial Briefs only challenged Robinson's proposed remedy on First Amendment grounds. 1SR-222-43-46; 1SR-245-49. Defendants cannot show that they raised First Amendment objections to the introduction of comments and materials not directed at Ms. Robinson. Because Defendants failed to challenge liability on a constitutional basis below, this Court cannot consider the issue. Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 619 n.2 (198-7) (refusing to address constitutional issues not raised below); Attwell v. Nichols, 608 F.2d 228, 231 (5th Cir. 1979) (same). See Industrial Chemical & Fiberglass Corp. v. North River Ins. Co., 908 F.2d 825, 833 (11th Cir. 1990) (no miscarriage of justice not to consider issue).

If this Court proceeds to the merits, it should note that

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[33] Defendants argue "no evidence indicates that [Robinson] was aware of incidents involving other women," Cr.-App. Brief at 29, and that the court improperly considered evidence of conduct targeting of other women. The record shows that Robinson was aware of discriminatory conduct experienced by other women targeting them and/or Robinson. R2-253-15, -48; R7-92; R8-56-57; D. Exh. 12. Moreover, the district court properly considered evidence of discriminatory conduct toward other women to assess notice, defendants' complaint handling and remedy. R2-253-8,-21, -28, -41-42.

this case does not implicate the broad free speech right of workers, as Defendant's and amicus suggest.[34] The degrading displays were, in effect, JSI's own invidious expression, because of JSI's tight control over materials in the shipyards and its endorsement of the pervasive pornographic pictures, discussed in the Statement of the Case, (1)B, supra. Defendants and the ACLU have not suggested that employers have the right to engage in such discriminatory speech. The facts of this case, moreover, are so compelling that the district court's finding of liability can survive First Amendment scrutiny on several grounds.

The right to free expression is not absolute and can be regulated when "its regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that end." Frisby v. Schultz, 487 U.S. 474, 481 (1988); accord Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984). Thus, the government's compelling interest in eliminating all forms of discrimination against women, Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987); Roberts, 468 U.S. at 623-24, can justify interference with First Amendment rights, see New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 12 (1988); Rotary Int'l, 481 U.S. at 549; Roberts, 468 U.S. at 623. See also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (upholding ordinance prohibiting newspapers from printing sex-segregated "help wanted" ads). Eradicating sexual harassment in the workplace serves this compelling interest because a hostile work environment is a form

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[34] The American Civil Liberties Union ("ACLU") filed an amicus brief on behalf of neither party.

of sex discrimination.

JSI's right to maintain a sexist atmosphere cannot outweigh the right of its employees to equal employment opportunities, just as its speech can be restricted to protect employees' right to associate freely in unions. See NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969). Courts "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[35] Id. at 617; see Weather Tamer Inc. v. NLRB, 676 F.2d 483, 488 (11th Cir. 1982). The holding of Gissel Packing justifies a finding of liability because a power imbalance at least as great exists between JSI and its female workers[36] and the state interest in eradicating discrimination is at least as compelling as protecting the right to unionize.

It was especially proper for the district court to partly base liability on JSI's speech, because JSI's approval of pornographic speech and prohibition of neutral messages is forceful evidence of an intent to discriminate against women. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality) (stereotyped remarks of partners evidence of gender

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[35] This inquiry "is an objective one which examines -- not whether the employer intended, or the employee perceived, any coercive effect -- but whether 'the employer's actions would tend to coerce a reasonable employee.'" Wyman-Gordon Co. v. NLRB, 654 F.2d 134, 145 (1st Cir. 1981).

[36] Because women at JSI are in the extreme minority and hold no supervisory jobs, R2-253-7, they face an even greater power imbalance than the employees in Gissel Packing.

discrimination). Moreover, such regulation is strikingly similar to the activities of companies that have been sanctioned for discriminatorily enforcing no-solicitation rules against unions.[37] See NLRB v. Southwire Co., 801 F.2d 1252, 1256-57 (11th Cir. 1986) (company violated law by discriminatorily enforcing rules for access to bulletin board). See also National By-Products, Inc. v. NLRB, 931 F.2d 445, 452 (7th Cir. 1991); Restaurant Corp. of America v. NLRB, 827 F.2d 799, 804-06 (D.C. Cir. 1987).

The official stamp of approval on the pornography intensifies its discriminatory effect and excludes women from meaningful participation in the workplace to the same extent as a "Women Will Not Be Tolerated" sign. See ACLU Brief at 12. Moreover, the direct impact on women is most exacerbated where, as here, there are no competing images. Even if one could argue that pornography would not affect a woman in an environment in which it constituted but one tile in a rich mosaic of ideas, the same cannot be said of a monolithic message that blankets the workplace from top to bottom.[38] JSI told women, through its own conduct and its regulation of its employees' speech, that the shipyard was a "man's world," R2-253-7, where women could either

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[37] The district court noted that the inequitable regulation of speech by JSI is analogous to time, place and manner regulations or public employer cases. See R2-253-90-92.

[38] Labor law cases also underscore the need to examine speech in context: "The scope of the inquiry must encompass the entire pattern of employer conduct. Remarks that may not appear coercive when considered in isolation may take on a different meaning when evaluated with respect to the totality of the circumstances." Weather Tamer, 676 F.2d at 488; see also Wyman-Gordon, 654 F.2d at 145.

conform to sexual stereotypes or leave. By demanding that its women employees run a "gauntlet of abuse" in exchange for their paychecks, JSI clearly violated their rights to equality in the workplace. Meritor, 477 U.S. at 67.

While Defendants argue that the court can consider only conduct directly and specifically targeting Lois Robinson, Cr.-App. Brief at 20-25, such a limited inquiry is inappropriate. Although enough such directed conduct was proven to support liability, see Part I(B)(2), supra, there is no meaningful distinction between conduct that was directed at Robinson and conduct that took place in her presence. A workplace pervaded by pictures degrading to women posted with the employer's imprimatur, including a nude female torso branded "USDA Choice," a woman's exposed genital area with a meat spatula pressed to it and a dart board of a woman's breast with her nipple as the bull's eye, R2-253-11, -15, carries the same message, and effectuates discrimination to the same extent, as the "Men Only" sign and may be equally proscribed. See R2-253-72.

JSI is certainly not a traditional forum for robust debate, see Frisby, 487 U.S. at 479-80, nor is it an institution such as a university, for which the free exchange of ideas is essential, see Rust v. Sullivan, 111 S.Ct. 1759, 1776 (1991); Doe v. Univ. of Michigan, 721 F.Supp. 852, 863 (E.D. Mich. 1989). JSI let other concerns trump free expression to an even greater degree than other employers. Cf. Connick v. Myers, 461 U.S. 138, 150-54 (1983). In this context, speech may be restricted when "the degree of captivity makes it impractical for the unwilling viewer or audience to avoid exposure." Erznoznik v. City of

Jacksonville, 422 U.S. 205, 209 (1975); accord Frisby, 487 U.S. at 484, 487; cf. Cohen v. California, 403 U.S. 15, 21 (1971) (people in courthouse not "captive"). As noted by Chief Justice Warren, "[e]mployees during working hours are the classic captive audience." NLRB v. United Steelworkers of America, 357 U.S. 357, 368 (1958) (Warren, CJ, dissenting on other grounds). Furthermore, protection of captive audiences need not be framed in content neutral terms. Erznoznik, 422 U.S. at 209; see Lehman v. City of Shaker Heights, 418 U.S. 298, 299-300 (1974). Cf. Renton v. Playtime Theaters, 475 U.S. 41, 47-49 (1986) (regulation of secondary effects of sexually explicit material does not violate content neutrality).

Ms. Robinson's situation is dramatically different from that of the people in the courthouse in Cohen who could avoid any harm by "simply averting their eyes" from the message on a jacket of someone passing through. See Cohen, 402 U.S. at 21. Contrary to Defendants' contention, Cr.-App. Brief at 23, the large size of the shipyards is irrelevant because Ms. Robinson's job required her presence in certain locations where the pornography was located. R2-253-6. To avoid the pervasive hostile conduct at JSI, Ms. Robinson would be force to keep her eyes cast on the ground, avoid offices, shanties and other central gathering places, and mentally block out the conversation of her co-workers, an extremely dangerous way to perform her job. See R2-253-6. The only way to avoid the harmful environment would have been to quit or, as Ms. Robinson did, take time off from work.

D. The District Court Properly Found That The Final Henson Factor Was Satisfied Because Defendants JSI, Brown and Stewart Engaged In Discrimination, Knew Or Should Have

Known Of The Sexually Hostile Working Conditions And Failed To Take Prompt And Effective Remedial Action

1. Defendant JSI Engaged in Discrimination And Knew Or Should Have Known Of The Sexually Hostile Conditions; No Further Notice Is Required

Finding a pervasively sexualized work environment, the district court properly ruled that JSI was liable because it engaged in discrimination and it knew or should have known of the conditions and failed to take prompt and effective remedial action. R2-253-76. Defendants protest this finding, arguing that the court should consider only the conduct they had express notice of, and that directly targeted Plaintiff. This illustrates what the trial court called the Defendants' "ostrich defense." R2-253-80. Defendants claim that they "promptly and effectively remedied" what they describe as "the most egregious conduct, George Nelson's remarks." Cr.-App. Brief at 32. Nelson's "remarks" constituted a concerted pattern of abuse by Nelson against Robinson while they were working in combination at the Mayport Yard over several weeks. Nelson made demeaning comments and exhorted others to shun and abuse Ms. Robinson. The district court found that the only action taken by defendants was an "informal conversation" between Nelson and the welding foreman, who did not document or report the problem. R2-253-42. After that time, Robinson was transferred away from Nelson and the record does not show that Nelson and Robinson worked together again. Defendants failed to effectively stop such conduct and to remove pictures after Robinson's extensive complaints. This failure constituted an express condition that JSI placed upon

women workers to accept such sexual conduct.[39] See 29 C.F.R. § 1604.11 (a)(1). Moreover, JSI's adoption of a sexual harassment policy in 1987 does not shield it from liability because, as the district court found, the procedures were inadequate, the policy was not sufficiently explained or distributed, and the hostile conditions continued. R2-253-55-56.

2. The District Court Properly Held Vice President Larry Brown And Industrial Relations Manager John Stewart Individually Liable for Their Discriminatory Conduct as Agent Employers

Defendants Brown and Stewart argue that they should not have been held individually liable as agent employers because "the District Court...held [them] liable merely because (1) they were generally responsible for discrimination policies and procedures which it found failed to work and (2) they failed to act upon Robinson's complaint concerning a picture in the shipfitter's trailer, (R2-253-66)." Cr.-App. Brief at 42. This misstates the district court's holding.

Both Brown and Stewart knew of Robinson's complaints about the pictures of women, but nevertheless ordered that such pictures should remain. R2-253-50-51.[40] In addition, the

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[39] This differs from the question addressed in Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315-1317 (11th Cir. 1989), whether the strict liability for supervisor's sexual harassment covered hostile environment harassment as well as quid pro quo harassment. At issue in Steele was whether a parent company was liable for the hostile conduct of a subsidiary officer where the evidence showed that the officer's sexual conduct ended after the plaintiff complained and the company intervened.

[40] Defendants' reliance on Brown v. City of Miami Beach, 684 F.Supp. 1081 (S.D.Fla. 1988), Hendrix v. Fleming, 650 F.Supp. 301 (W.D.Okla. 1986), and Duva v. Bridgeport Textron, 632 F.Supp. 880 (E.D.Pa. 1985), Cross-Appellants' Brief at 42-43, is misplaced. The "misfeasance" concept borrowed in Brown from Hendrix has its

district court held Brown liable because he was responsible for creation and implementation of sexual harassment policies that failed. R2-253-75. See also R2-253-50-51. Similarly, the district court held Stewart liable because he was responsible for sexual harassment complaint processing. R2-253-75. See also R2-253-50-51.

As the district court noted, the EEOC's "no cause" determination is unpersuasive, in view of the cursory investigation conducted by the EEO investigator.[41] R2-253-54-55. In addition, the cursory investigation was orchestrated by Stewart. Stewart Dep at 104-06.[42]

II. The District Court Properly Limited Rule 35 Discovery and Excluded Evidence of Plaintiff's Affiliations and One Witness's Attire

A. The District Court Did Not Abuse Its Discretion In Denying Defendants' Motion To Compel A Mental Examination Of Plaintiff Where Her Mental Condition Was Not In Controversy

The district court's denial of Defendants' motion to compel a mental examination of Ms. Robinson under Fed. R. Civ. P. 35(a) was within its sound discretion and cannot be overturned absent a showing of abuse of its discretion. See Real v. Hogan, 828 F.2d 58, 63 (1st Cir. 1987).

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genesis in New Jersey tort law inapplicable to the Title VII claim. The district court properly considered Brown's and Stewart's ratification of sexually harassing conduct in finding them liable. Id. at 75-76.

[41] For approximately the same time frame, the GAO documented the notably poor EEO investigations in 41 to 82 percent of cases closed out with a "no cause" finding. See EEO Developments, 6 Empl. Rel. Week (BNA) 1294 (Oct. 17, 1988).

[42] Mr. Stewart's current work circumstances are irrelevant to the individual issue at hand.

A mental or physical examination is a uniquely intrusive and burdensome discovery technique and is applied sparingly by the federal courts under Rule 35. Defendants sought ridiculously broad, intrusive and harassing examinations because, in their own counsel's words, Plaintiff was "fair game." R1-108-5-6 & n.6. The trial court properly rejected Defendants' Rule 35 motion because Defendants failed to satisfy the jurisdictional threshold of providing proper Rule 35 notice,[43] Ms. Robinson's "mental condition" is not "in controversy" and Defendants failed to show "good cause" for the proposed exam.

Ms. Robinson's mental condition was never "in controversy" within the meaning of Rule 35 and controlling caselaw. See Fed. R. Civ. P. 35(a). The Supreme Court has emphasized the stringency of the "in controversy" standard:

> [T]he "in controversy" . . . requirements of Rule 35 . . . are not met by mere conclusory allegations of the pleadings -- nor by mere relevance to the case -- but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy.

Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964) (emphasis added).

A claim that one has suffered invidious discrimination does not implicate one's mental condition, for "to hold otherwise would mean that every person who brings such a suit implicitly

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[43] As noted by Plaintiff in the discovery proceeding, R1-108, proper notice of time, place, manner, scope and by whom the examination is to be conducted is required so that the necessity of a particular examination can be assessed. The court is not permitted to determine whether a mental or physical examination may be conducted without such notice. See Fong Sik Leung v. Dulles, 226 F.2d 74, 79 (9th Cir. 1955); Shapiro v. Winsum Ski Corp., 95 F.R.D. 38, 39 (W.D.N.Y. 1982); Marroni v. Matey, 82 F.R.D. 371, 372 (E.D.Pa. 1979).

asserts he or she is mentally unstable, obviously an untenable proposition." Vinson v. Superior Court, 43 Cal.3d 833, 740 P.2d 404, 409, 239 Ca. Rptr. 292 (1987); see Acosta v. Tenneco Oil Co., 913 F.2d 205, 208-09 (5th Cir. 1990). Similarly a claim for emotional distress does not automatically open the door to a mental exam. See Cody v. Marriott Corp., 103 F.R.D. 421, 422 (D. Mass. 1984). Proof of damages for emotional distress does not require expert testimony, but is "customarily proved by showing the nature of the wrong and its effect on the plaintiff." See Carey v. Piphus, 435 U.S. 247, 263-64 & n.20 (1978); id. (injury "evidenced by one's conduct and observed by others").[44] Plaintiff's testimony, therefore, required no expert corroboration and Defendants were not prejudiced by the court's denial of a mental exam.

Courts do not order mental exams unless psychiatric testimony is required by the plaintiff's claim or employed in her method of proof. Coates v. Whittington, 758 S.W. 2d 749, 751 (Tex. 1988) (denying mental exam of plaintiff claiming emotional distress despite defendant's claim that plaintiff had pre-

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[44] Courts routinely allow awards for emotional distress without expert testimony for any party. See, e.g., Kinsey v. Salado Ind. School Dist., 916 F.2d 273, 282 (5th Cir. 1990) (plaintiff's testimony alone sufficient proof for damages); Carrero v. New York City Housing Authority, 890 F.2d 569, 581 (2d Cir. 1989) (sexual harassment plaintiff's testimony about her feelings, corroborated by testimony or co-workers who saw her crying, supports pain and suffering award); Hunter v. Allis Chalmers Corp, 797 F.2d 1417, 1425 (7th Cir. 1986) (award to racial harassment plaintiff supported by testimony of plaintiff and his wife and fact that conduct plaintiff subjected to was "very ugly and wounding"); Chalmers v. City of Los Angeles, 762 F.2d 753, 761 (9th Cir. 1985) (plaintiff's testimony about her feelings supported damage award); Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225, 1238 (D.C. Cir. 1984) (racial harassment plaintiff entitled to damages based solely on her testimony).

existing mental anguish). Accord Cody, 103 F.R.D. at 423; Boyles v. Mid-Florida Television Corp., 431 So.2d 627, 639-40 (Fla. App. 1983).[45] Mental condition is not "in controversy" where, as here, a plaintiff asserts stress and emotional suffering that any factfinder can assess as the natural consequence of a substantial injury.[46] Coates, 758 S.W.2d at 752.

In the only case cited by Defendants in which a mental exam was ordered, the plaintiff alleged severe emotional distress and planned to introduce the testimony of her treating psychiatrists. Lowe v. Philadelphia Newspapers, Inc., 101 F.R.D. 296, 298 (E.D. Pa. 1983).[47] Ms. Robinson does not claim any permanent

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[45] More than lay testimony about emotional hurt was presented in the cases cited by the district court in which a mental exam was ordered. See Anson v. Fickel, 110 F.R.D. 184, 185-86 (N.D. Ind. 1986) (plaintiff was confined to psychiatric ward after injury); Zabkowicz, 585 F. Supp. at 636 (mental exam allowed), later proceedings, 598 F. Supp. 780, 783 (E.D. Wisc. 1984) (two treating doctors testified about plaintiff's emotional state); Ryzlak v. McNeil Pharmaceutical Co., 38 Fed. Rules Serv. 2d (Callaghan) 443, 444 (E.D. Pa. 1982) (plaintiff alleged permanent damage to her emotional health requiring professional treatment and intended to have her psychiatrists testify).

[46] Defendants' claim that plaintiff's mental condition was also put in controversy by her back pay claim is likewise without merit. Sloane v. Thompson, 128 F.R.D. 13 (D. Mass. 1989) (holding plaintiff in contempt for failure to appear at physical exam and court proceedings), cited by Defendants, is inapplicable. In that case, plaintiff initially consented to the physical exam and then clearly put her condition in controversy by using it as an excuse for her failure to comply with several court orders.

[47] Similarly, the other cases cited by defendants to assert relevance of expert testimony involved plaintiffs who introduced, or sought to introduce, testimony of their treating psychiatrists or psychologists. See Busby v. City of Orlando, 931 F.2d 764, 784 (11th Cir. 1991) (district court should have allowed counselor to testify about psychological impact); Schneider v. NBC News Bureaus, 56 Fair Empl. Prac. 1602, 1604 (S.D. Fla. 1991) (treating psychologist's report entered into evidence); Wiensheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1566 & n.16 (M.D. Fla. 1990) (treating psychologist testified and

disability, she did not offer any testimony by a psychiatrist or psychologist, and her experts, Dr. Fiske and Ms. Wagner, did not evaluate Robinson's feelings or reactions, but described circumstances and common reactions of similarly situated women. The Eleventh Circuit has never ordered a plaintiff's "mental condition" examined in evaluating a harassment claim, even when the plaintiff testified to the negative feelings engendered by the abusive environment. Cf. Walker, 684 F.2d at 1359; Henson, 682 F.2d at 904. In sum, Ms. Robinson did not put her mental condition "in controversy," by testifying to the feelings of pain and humiliation which naturally flowed from the harassment.[48]

As the Texas Supreme Court stated, "[p]laintiffs should not be subjected to public revelations of the most personal aspects of their private lives just because they seek compensation for mental anguish associated with injury." Coates, 758 S.W.2d at 753. Sexual harassment plaintiffs should be accorded the same protection. If not, "[p]laintiffs in these cases would face

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treatment notes entered into evidence). Moreover, in none of these cases did the court order a mental exam.

[48] Denial of a mental exam should also be upheld because Defendants failed to prove "good cause," as required by Rule 35. See Fed.R.Civ.P. 35(a). The Supreme Court has stressed that the "good cause" requirement is "not a mere formality, but is a plainly expressed limitation on the use of [the] Rule." Schlagenhauf, 379 U.S. at 118. Good cause is not demonstrated "on the basis that something of interest may surface." Vinson, 740 P.2d at 409. Defendants, therefore, do not meet the requirement by their suggestion that an exam may uncover some other stressor that might have caused Robinson to miss work.

Moreover, the ability to obtain information from other sources undercuts any claim of good cause. See Marroni v. Matey, 82 F.R.D. at 372. Defendants had available to them, and did in fact depose or call to testify, Robinson's parents, other employees, friends, co-workers and managers, as well as their own experts.

sexual denigration in order to secure their statutory right to be free from sexual denigration [and] [r]eporting of sexual harassment claims would certainly be discouraged." R2-175-14-15 (citations omitted).

B. The District Court Properly Exercised Its Discretion In Excluding Evidence Of Robinson's Affiliations Because Such Evidence Is Irrelevant To Robinson's Title VII Claim And A Collateral Inquiry

A district court's evidentiary rulings are discretionary and will not be disturbed absent a clear showing of abuse of discretion. E.g., Hessen v. Jaguar Cars, 915 F.2d 641, 645 (11th Cir. 1990). The district court correctly exercised its discretion to prevent Defendants from probing Ms. Robinson's connections with women's groups that have expressed concern about pornography and from presenting evidence that Ms. Robinson expressed a view with respect to pornography outside the workplace. Defendants argue that Ms. Robinson's affiliations and exposure "biased" her against pornography, see Cr.-App. Brief at 40, somehow invalidating Robinson's Title VII claim.

The information Defendants sought to elicit could add nothing to the already obvious fact that Ms. Robinson objected to pornography.[49] As to alleged distortion of Ms. Robinson's perceptions,[50] R6-83, Defendants have presented no evidence to

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[49] The district court analogized, "I suppose everybody is biased against burglary and biased against any other crime. And I suppose you could be biased against pornography...That doesn't make sexual harassment any different,...whether a particular factual incident is sexual harassment or not. It's not a matter of whether you're biased." R6-83-84.

[50] Even if the district judge did abuse his discretion in excluding Defendants' proffered testimony, the exclusion was not reversible error. When an evidentiary ruling concerns bias testimony, "the test is whether the jury had sufficient

support a claim that Robinson's testimony was based on misperception. Defendants mischaracterize certain criminal case holdings as stating the proposition that the trial court was required to allow cross-examination of Robinson to show her affiliations. Cr.-App. Brief at 40. These cases are simply inapplicable here because they implicate rights under the Confrontation Clause and because they did not involve the mere political or philosophical affiliation of witnesses.[51]

The central purpose of a bias inquiry, that properly involves taking testimony not directly relevant to the factual basis of the claim, is "to expose to the jury the witness's 'special motive to lie.'"[52] Defendants do not argue, nor could they, that Robinson had any motive to or did fabricate testimony. Although Defendants allege that Robinson had some improper motive to "seek out" pornography in the workplace, the trial court

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information to assess the witness's bias even without the excluded information." United States v. Jones, 766 F.2d 412, 414 (9th Cir. 1985). See also United States v. Smith, 831 F.2d 657, 662 (6th Cir. 1987). The record shows that the trier of fact had sufficient information to appraise any alleged bias of Plaintiff.

[51] See United States v. Abel, 469 U.S. 45 (1984) (evidence of defendant's and defense witness's membership in violent prison gang that pledged to lie, steal and murder for fellow members offered to impeach defense witness); Clark v. O'Leary, 852 F.2d 999 (7th Cir. 1988) (evidence of witness's membership in rival street gang offered to show bias against defendant); United States v. Jones, 766 F.2d 412 (9th Cir. 1985) (evidence of co-conspirator's "rebuffed homosexual advance" offered to show bias against defendant and motivation to lie); United States v. Hall, 653 F.2d 1002, 1008 (5th Cir. 1981) (evidence of co-conspirators' plea agreements with government offered to impeach them as witnesses and show their motivation to lie).

[52] United States v. Greenwood, 796 F.2d 49, 54 (4th Cir. 1986) (citation omitted). Such inquiry exposes this motive by revealing facts such as pecuniary interest in the trial, personal animosity toward the defendant, or a plea agreement with the government. Id. at 54. See also Abel, 469 U.S. 45 (1984).

concluded that Ms. Robinson and other female workers could not escape the pornography. See R2-253-11.

C. The District Court Properly Precluded Defendants from Asking Banks Whether She Ever Did Not Wear a Bra to Work

Defendants argue that whether a female witness, Ms. Banks, ever did not wear a bra to work is crucial to determining whether she "welcomed" the sexual harassment directed at her in the workplace. Cr.-App. Brief at 41. The Defendants' argument is shocking considering the facts about harassment of this witness.[53] Defendants failed to refute those facts and failed to produce any evidence to indicate that Ms. Banks' underclothing, or any harasser's perceptions about her underclothing, had any role in this harassment. The district court properly concluded that Ms. Banks' underclothing was irrelevant, R-7-198-99, a determination squarely within the discretion of the district court. There is no per se rule regarding the admissibility of evidence of allegedly "provocative dress."[54] The district court

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[53] The court found that at various times, among other things, supervisors and co-workers at JSI pinched Banks on the breasts; grabbed her ankles, spread her legs, and stood between them; and held a hammer handle, whittled to resemble a penis, near her face and told her to open her mouth. R2-253-19.

[54] Defendants inaccurately describe the holding in Reed v. Shepard, 939 F.2d 484, 487 (7th Cir. 1991), to suggest that not wearing a bra under a t-shirt shows welcomeness per se. Cr.-App. Brief at 41. In Reed, the court held that the plaintiff failed to show actionable sexual harassment for several reasons, including a finding that the plaintiff "welcomed" the "sexual high jinx" at the workplace. Reed at 492. While the court mentioned that the plaintiff once was instructed to wear a bra under her t-shirt at work, the court's "welcomeness" finding was not based on this reference. Id. at 487. Rather, the court's finding that the plaintiff "welcomed" sexual harassment was based on the finding of her instigation of sexual jokes, suggestions, and offers. Id. at 487, 491.

must "carefully weigh the applicable considerations in deciding whether to admit evidence of this kind." Meritor, 477 U.S. at 61. Banks testified that she always wore work clothes, R7-198, hardly the type of "sexually provocative dress" contemplated by Meritor.

III. The District Court Abused Its Discretion By Denying Back Pay Relief To Plaintiff

In her initial brief, Ms. Robinson challenged the district court's application of a constructive discharge standard to intermittent absences. Defendants cannot cite a single case in which a constructive discharge standard was applied to an employee who did not quit her job, and cannot provide caselaw contrary to Plaintiff's statement on burdens of proof.[55]

Defendants instead suggest that Ms. Robinson's evidence on lost wages is undermined by her alleged failure to respond properly to discovery. See Cr.-App. Brief at 16-17.[56] As set

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[55] Courts have awarded back pay for absence, rather than termination, without application of the constructive discharge standard. See Yates v. Avco, 819 F.2d 630, 637-38 (6th Cir. 1987); Arnold, 614 F. Supp. 853, 871. Defendants' argument that the plaintiffs in Yates and Arnold had more compelling reasons to receive lost pay than Robinson ignores the harm at issue here and fails to address the obvious fact that the constructive discharge standard was not needed to assess whether lost pay should be awarded in those cases. See Cr.-App. Brief at 18-19.

[56] On December 22, 1986, Defendants served their First Set of Interrogatories to Plaintiff. Interrogatory number 7 asked for the dates of each absence caused by sexual harassment and interrogatory number 8 asked for the dates of part-days missed. Ms. Robinson, based upon the notes she was taking at the time, See App. Brief at 22-23, supplied the dates of twelve absences and an estimate that she missed two part days every six months. D. Ex. 27 at 9-10. During the discovery period, Defendants never asked Plaintiff's counsel for more information pursuant to Local Rule 3.04 nor did they seek to compel additional information under Rule 37, Fed. R. Civ. P. Defendants have argued that Plaintiff was at fault because, in their Fourth Set of Interrogatories, D. Ex. 28, Defendants served a blanket

out in App. Brief at 22-23, during discovery Ms. Robinson was able to provide dates for a limited time in 1986 because she took contemporaneous notes during that period. At other times, Ms. Robinson did not keep notes and was thus unable to provide the exact dates of her absences, even with reference to her work records.[57] See id. at 23-24. Defendants cite no cases, either under Title VII or the Federal Rules of Civil Procedure, which impose upon a Title VII plaintiff a duty to keep notes during years of harassment.

Defendants were not prejudiced by Ms. Robinson's inability during discovery to provide precise dates because at trial she offered estimates of the approximate amount of time lost, not exact dates. R5-140-48. See Bunch v. U.S., 680 F.2d 1271, 1281-82 (9th Cir. 1982) (defendant not prejudiced when trial testimony not different from deposition testimony); Labadie Coal Co. v. Black, 672 F.2d 92 (D.C. Cir. 1982) (plaintiff prejudiced when defendant withheld crucial document during discovery and attempted to introduce it at trial). Second, Defendants received Ms. Robinson's estimates during settlement negotiations, although they never requested such estimates. Accordingly, the alleged discovery dispute does not provide any basis for ignoring Plaintiff's back pay evidence.

Defendants argue that Ms. Robinson's interrogatory answers

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interrogatory asking Plaintiff to supplement all previous interrogatories.

[57] Defendants do not provide any citation for their assertion that the district court found Ms. Robinson capable of documenting lost work time before she obtained counsel, Cr.-App. Brief at 17, because the court never made any such finding.

undermine her claim that Mayport conditions were somewhat worse than the conditions at the Commercial Yard, R2-253-59; R5-138-39, because she was not absent more while working at Mayport than at the Commercial Yard, Cr.-App. Brief at 16. It is precisely plaintiff's contention that there is not an immediate or one-to-one correlation between harassing events and absences. See App. Brief at 37-41. Moreover, there is significant correlation between Ms. Robinson's absences and work at Mayport in the March through August 1986 period.[58] Five absences occurred while Ms. Robinson was assigned to Mayport and four more occurred within a week of her last day of work at Mayport. This evidence supports Ms. Robinson's testimony regarding the atmosphere at Mayport.

The district court erred as a matter of law in applying a constructive discharge standard to Ms. Robinson's claim for back pay, as set forth in Appellant's Brief. Furthermore, Defendants' arguments do not and should not detract from the substantiated evidence of lost wages Ms. Robinson provided at trial.

IV. The District Court Acted Within Its Discretion in Fashioning A Remedy Broad Enough To Reach All Harmful Sexual Conduct In A Workplace With a History of Pervasive, Deeply Rooted Sexual Harassment

The district court acted well within its discretion in fashioning a remedy in the form of policies and training designed to eliminate the hostile working conditions and end related harassment. See Ford Motor Co. EEOC, 458 U.S. 219, 226 (1982). As the Supreme Court declared in Albemarle Paper Co. v. Moody,

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[58] Ms. Robinson specified twelve harassment-induced absences for this period: March 3, 7 and 12; April 23; May 1; June 26; July 1, 30 and 31; and August 5, 13 and 14. Her work records indicate that she worked at Mayport February 25 through March 5, March 25, and June 27 through August 8. D.Ex. 27 at 9-10.

422 U.S. 405, 417 (1975), in Title VII cases courts have a "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[59] Courts' broad discretion includes the power to take affirmative steps to remedy the harm even where other employees are affected by that action.[60] See, e.g., United States v. Paradise, 480 U.S. 149, 171-85 (1987).

Defendants err in asserting that an individual discrimination claim bars a remedy that eliminates the hostile environment. In a case involving racially segregated public facilities and "white only" signs, the Fifth Circuit granted broad injunctive relief:

> Appellants...seek the right to use facilities which have been desegregated, that is, which are open to all persons, appellants and others, without regard to race. The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated.

Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963). The order here parallels injunctions in other individual hostile environment cases that are designed to undo the proven effects of harassment in the workplace. See Ways v. City of Lincoln, 871

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[59] The broad standard for make whole relief under Title VII is discussed more fully in the App. Brief at 29-30.

[60] The primary cases upon which Defendants rely to argue that the injunction is too broad, Califano v. Kamasaki, 442 U.S. 682 (1979), and Zepeda v. United States 753 F.2d 719 (9th Cir. 1983), Cr.-App. Brief at 45, do not apply to the Title VII context. Moreover, even in contexts other than a Title VII case an injunction is not necessarily made overbroad by extending benefit to persons other than prevailing parties in the lawsuit -- even if it is not a class action -- if such breadth is necessary to give prevailing parties to relief to which they are entitled." Brasgal v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (emphasis in original).

F.2d 750, 752 (8th Cir. 1989); Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981); Sanchez, 720 F.Supp. 974; Butler v. Coral Volkswagen, Inc., 629 F.Supp. 1034, 1041 (S.D.Fla. 1986); Arnold, 614 F.Supp. 853.[61]

Defendants' chief complaint is that they should not be required to undertake the "great expense" of training the women workers. Cr.-App. Brief at 45. For the policies and procedures to remedy sex discrimination at the workplace effectively, other women workers at JSI must be willing and able to use them. Women testified that at JSI they learned to accept and cope with, without any complaint, a high level of daily sexual harassment. R5-92-95; R7-32-34, -48-49, -51-52, -58-59, -86, -147-148; R8-27-28, -33-40. To undo the historic effects of discrimination at JSI, it is essential to train female as well as male workers to ensure that female workers know and can exercise their rights.

Defendants' and the ACLU's suggestion that the remedy violates the First Amendment must likewise fail. The district court recognized that its broad remedial powers in Title VII cases justify some infringement on constitutional rights if the remedy is narrowly tailored to serve a compelling governmental purpose. R2-253-91; see Paradise, 480 U.S. at 171-85. Defendants and the ACLU fail to acknowledge that numerous courts have upheld remedial orders in race discrimination cases that infringe on

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[61] That the district court in Hopkins v. Price Waterhouse, 737 F.Supp. 1202 (D.D.C. 1990), aff'd, 920 F.2d 967 (D.C. Cir. 1990), cited in Cr.-App. Brief at 45-46, declined to order a policy and record-keeping procedure, which the court below duly noted, R2-253-88, does not demonstrate that the district court abused its discretion here. In Hopkins the harm at issue was discriminatory non-promotion, not maintenance of a hostile work environment.

Fourteenth Amendment equal protection rights to a much greater extent than this order infringes on First Amendment rights.

Applying similar factors to this case demonstrates that this remedial order does not unnecessarily trammel constitutional rights of third parties. The court's prohibition of pornographic materials and lewd comments at JSI impacts much less severely on third parties than the public employer's use of race to make promotion decisions, which was upheld in Paradise. The government's compelling interest in eradicating the pervasive harassment at JSI justifies the narrowly tailored relief here. In light of the failure of JSI and its employees to understand the nature of sexual harassment, see R2-253-16-49, the detailed order is necessary to provide Ms. Robinson with complete relief. See Snell v. Suffolk Cty., 611 F.Supp. 521, 531 (EDNY 1985) (ordering specific workplace policy to remedy racial harassment), aff'd, 782 F.2d 1094 (2d Circ. 1986).

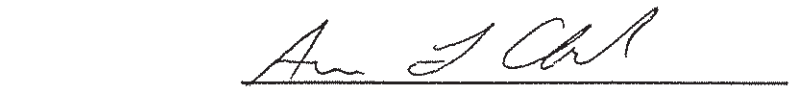
There are no alternative remedies that would be effective since, by Defendants' own admission, the shipyards are large and hard to monitor. For example, the policy bans possession of pornography to prevent enforcement problems. Under the policy, possession is per se evidence of harassment. Because JSI, reasoning that one woman's word was not enough, R6-37-38, refused to act when harassers denied targeting women with pornography, rules guaranteeing simplicity of enforcement create "'breathing room' for the victim's of that harassment." R2-269-2. Moreover, the comprehensive order avoids potential vagueness problems that a general order might have; ordering the employer to adopt specific and detailed rules with distribution and training

enhances fairness to all workers because it guarantees that workers will receive adequate notice of the conduct that will result in sanctions. As the district court noted, "JSI had the option to introduce evidence on a remedy. It did not." R2-269-2. This Court, therefore, should not disturb the relief that the district court so carefully considered. See R2-269.

CONCLUSION

This Court should affirm the district court's decision on liability and affirmative relief. This Court should reverse and remand the issue of back pay relief.

Respectfully submitted this
24th day of April, 1992,



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Cross-Appellee/Reply Brief of Appellant sent by first-class U.S. mail on this

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