SHIFTING PARAMETERS: AN EXAMINATION OF RECENT CHANGES IN THE BASELINE OF ACTIONABLE CONDUCT FOR HOSTILE WORKING ENVIRONMENT SEXUAL HARASSMENT

VIVIEN TOOMEY MONTZ*

I. ELEMENTS OF A PRIMA FACIE CLAIM FOR HOSTILE WORKING ENVIRONMENT 812
A. MEMBERSHIP IN A PROTECTED GROUP 813
B. UNWELCOMENESS 814
1. Federal Rule of Evidence 412 and Welcomeness 815
C. EMPLOYER LIABILITY 816
D. CONDUCT BASED ON SEX 819
1. Same Sex Harassment and *Oncale* 821
2. Limitations on Recovery 822
a. Equal Offensiveness and Hostile Aggression 822
b. Statements Involving Homosexual Stereotypes 826
II. UNREASONABLE INTERFERENCE WITH WORK ENVIRONMENT 830
A. UNREASONABLE INTERFERENCE WITH WORK PERFORMANCE: OBJECTIVE AND SUBJECTIVE COMPONENTS 830
B. JUDICIAL APPROACHES TO A GENDER-BASED PERSPECTIVE OF THE REASONABLENESS REQUIREMENT 832
C. SOCIAL CONTEXT AS LIMITING RECOVERY 835
III. THE BASELINE OF SEVERE OR PERVASIVE CONDUCT 836
A. CONDUCT QUALIFYING AS PERVASIVE OR SEVERE 837
1. Constant Sexual Innuendos and Humiliating Epithets . . . 837
2. Physical Contact 838
B. CONDUCT BELOW MINIMAL OFFENSIVENESS 839
IV. SCHOLARLY CRITICISM OF REASONABLENESS AND DIFFERING PERSPECTIVES OF HARASSMENT 844

INTRODUCTION

Claims under Title VII for hostile working environment sexual harassment have proliferated in the past ten years.[1] The average cost of defending such a suit

* Lecturer, University of Miami School of Law, during the writing of this article, which was supported by a summer research grant from the University of Miami School of Law.

1. *See* Employment Practices Solutions, *Sexual Harassment Trends*, *available at* http://www.epexperts.com/services/services_index.html (last modified June 25, 2001). "The number of sexual harassment complaints filed with the E.E.O.C. doubled from 1991 to 1998. Large companies (more than

is $150,000 per plaintiff, and monetary awards rose from $7 million in 1991 to $50 million in 1998.[2]

These claims have been buttressed by several Supreme Court decisions broadening the parameters of employer liability,[3] same sex harassment,[4] and the degree of psychological injury necessary to show damages.[5] Recognizing the difficulty in drawing manageable standards for hostile environment cases, the Court has recently cautioned that the law should not become a general civility code.[6] It emphasized that Title VII was not intended to reach "genuine but innocuous differences in the ways men and women routinely interact."[7]

District and appellate courts have subsequently raised the bar in assessing whether the harassment is "extreme" or beyond the "ordinary tribulations of the workplace."[8] In response to the marked increase in claims, courts are increasingly granting motions for summary judgment or judgment as a matter of law to "police the baseline for hostile environment claims."[9] In an attempt to remove some workplace conduct as actionable, courts are reverting to previous notions that a certain amount of sexuality in the workplace should be tolerated.[10] Courts are also rejecting claims that disparaging remarks about homosexuals are "based on sex" and thus discriminatory under Title VII. Newly developed "work-relatedness" and "social context" tests similarly reinforce the position that a certain degree of sexuality is both natural and expected in particular trades.[11]

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250 employees) are twice as likely to have a sexual harassment complaint as small employers and had three times the number of complaints as small employers between 1995 and 1998. Small employers (less than 250 employees) have five times the complaints per employee as do large employers." *Id.*

2. *Id.*

3. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

4. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

5. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); *see* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 680 (1999) (recognizing that a private Title IX damages action may lie against a school board from student-on-student harassment, where the funding recipient has actual knowledge of, and is deliberately indifferent to sexual harassment that is so objectively offensive that it deprives victims of access to educational opportunities). Justice Kennedy, in his dissent, observed that "the majority's limitations on peer sexual harassment suits cannot hope to contain the flood of liability the Court today begins." *Davis*, 526 U.S. at 680.

6. *Faragher*, 524 U.S. at 788; *Oncale*, 523 U.S. at 80-81.

7. *Oncale*, 523 U.S. at 81.

8. *Faragher*, 524 U.S. at 788 (quoting B. LINDEMANN & D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)).

9. Mendoza v. Borden, Inc., 195 F.3d 1238, 1244 (11th Cir. 1999) (quoting Indest v. Freeman Decorating, Inc., 164 F.3d 258, 264 n.8 (5th Cir. 1999)); *see* Black v. Zaring Homes, Inc., 104 F.3d 822 (6th Cir. 1997); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 119 (1999).

10. *See infra* Part III.

11. *See* Johnson v. Hondo, 125 F.3d 408 (7th Cir. 1997) and discussion *infra* Part IID. This idea reinvigorates notions underlying earlier decisions that sexually oriented statements are part of the "natural sex phenomenon" between males and females, Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979), and that "sexual jokes, sexual conversations and

Such decisions cumulatively are setting a new baseline for actionable conduct both on severity and pervasiveness grounds, and on gender-relatedness grounds.

This article will provide an overview of recent cases addressing the baseline of actionable conduct for hostile working environment sexual harassment. Part II will summarize areas where such claims have been expanded, concentrating on Supreme Court decisions. Part III will focus on the effect of *Harris v. Forklift Systems, Inc.*[12] and *Oncale v. Sundowner Offshore Services, Inc.*[13] in establishing both gender-relatedness and conduct sufficiently severe or pervasive to set forth a prima facie case of sexual harassment. Lower courts have reduced the expansive effect of these decisions by finding that stereotypical, disparaging comments directed against homosexuals are beyond Title VII's purview, and by using "social context" arguments to deny recovery for abusive language in particular trades.

Part IV will address the shifting baseline as to conduct sufficiently severe or pervasive to create a hostile working environment. It will focus on recent decisions addressing ambiguous conduct, demonstrating a trend to dispose of sexual harassment cases on severity or pervasiveness grounds. In spite of the Supreme Court's "totality of the circumstances" test, some courts are disaggregating the incidents of the defendant's conduct to find that each one, taken in isolation, would seem relatively harmless and thus allowing the defendant to prevail as a matter of law.[14] Such disaggregation techniques improperly prevent the jury from assessing the cumulative impact of pervasive conduct.

Part IV will also examine decisions applying the "reasonable person in the plaintiff's position" standard to determine the objective and subjective severity of the harassment. It will compare arguments for the "reasonable woman (or victim)"[15] standard to those advocating the "reasonable person"[16] test, including how courts have assessed the different perspectives of men and women to determine offensiveness.

Part V examines scholarly views of sexual harassment and makes suggestions for incorporating the victim's perspective into the reasonableness standard. It advocates a pluralistic use of the "reasonable person" test and a submission of close cases to the jury, to prevent a usurpation of the fact finder's role in deciding questions of reasonableness as to Title VII issues.

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girlie magazines may abound. Title VII was not meant to – or can – change this." Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620-21 (6th Cir. 1986).

12. 510 U.S. 17 (1993).

13. 523 U.S. 75 (1998).

14. *See generally Mendoza*, 195 F.3d at 1244, 1257, and discussion *infra* Part IVB.

15. *See* Crowe v. Wiltel Communications Sys., 103 F.3d 897, 900 (9th Cir. 1996); Burns v. McGregor Elec. Indus., 989 F.2d 959, 962 (8th Cir. 1993) (adopting a "reasonable woman" formulation); Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991).

16. *See* Fowler v. Kootenai, 918 P.2d 1185, 1189 (Idaho 1996) (stating "the use of a gender-conscious standard may unduly emphasize gender"); Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996).

I. ELEMENTS OF A PRIMA FACIE CLAIM FOR HOSTILE WORKING ENVIRONMENT

Sexual harassment is a form of sex discrimination prohibited under Title VII of the Civil Rights Act of 1964.[17] It is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[18] Two forms of unlawful sexual harassment are "quid pro quo" and "hostile environment" harassment. A quid pro quo claim involves unwelcome sexual advances by a supervisor, so that the employee must choose between submission or suffering adverse employment consequences.[19] It requires proof of actual or threatened economic injury in a "tit for tat" scenario.[20]

A hostile environment claim involves unwelcome sexual behavior that has adversely affected the employee's working conditions and does not require economic injury.[21] It may be based on the actions of supervisors, co-workers, or non-employees.[22] The claim is premised on the employee's "right to work in an environment free from discriminatory intimidation, ridicule, and insult."[23]

In order to establish a prima facie case for hostile working environment harassment, the employee must prove (1) membership in a protected group, (2) "unwelcome" conduct, (3) that the conduct complained of was based on sex, (4) that the conduct was sufficiently severe or pervasive to alter the conditions of employment and create a hostile or offensive working environment, and (5) employer responsibility.[24] The following section will briefly summarize the expansion of case law in the areas of group membership, unwelcomeness, and employer liability. While the interpretation of those elements has been broadened in the past decade, lower courts have balanced this expansion, as discussed later, by limiting recovery on the third and fourth elements.

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17. 42 U.S.C. § 2000e (2002).

18. 42 U.S.C. § 2000e-2(a)(1) (2002).

19. *See* Garcia v. Schwab & Valley Mortgage Co., 967 S.W.2d 883 (Tex. Ct. App. 1998).

20. *Id.* at 885 n.2.

21. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

22. *See* E.E.O.C. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2002).

23. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (recognizing that a violation of Title VII may be predicated on harassment that does not affect economic benefits). Available remedies include back pay, front pay, injunctive relief, attorneys' fees and costs, and compensatory and punitive damages. 42 U.S.C. § 2000e-5(g), (k) (2002); 42 U.S.C. § 1981a(b)(3) (2002). Limits on compensatory and punitive damages range from $50,000 for employers with 15-100 employees to $300,000 for employers with over 500 employees. Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3) (2002). "[R]etaliation is a separate offense from discrimination under Title VII; an employee need not prove the underlying claim of [sexual harassment] for the retaliation claim to succeed." Sullivan v. Nat'l R.R. Passenger Corp., 170 F.3d 1056, 1059 (11th Cir. 1999). The employee may make statutory claims for employment discrimination and workers' compensation, as well as state tort and criminal law claims. *Id.* One result of the expanding baseline may be to force plaintiffs to pursue state tort theories more frequently.

24. Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

A. MEMBERSHIP IN A PROTECTED GROUP

Group membership requires the plaintiff's stipulation that she or he is female or male.[25] For example, a male employee would not have standing to bring a harassment claim for conduct aimed at women.[26] At least one court has broadened this requirement by recognizing that members of a harassed class who have not themselves been a target of harassment may bring a claim where other members of their class are targeted.[27]

The facts and holding of *Leibovitz v. New York City Transit Authority*[28] exhibit the connection between standing and direct or personal abuse. The district court found that evidence of an employer's deliberate indifference to widespread gender-based harassment was sufficient to support a jury verdict for a female employee on her hostile work environment claim.[29] The plaintiff's injury rested solely on the alleged harassment of other women employed by the same company but in a different and separate department, with which the plaintiff did not regularly interact. She was not personally the target of inappropriate sexual behavior.[30]

On appeal, the Second Circuit reversed the judgment on a $60,000 jury verdict despite its agreement with the district court's determination that Leibovitz had standing to raise the claim.[31] Although the court determined that Leibovitz's injury was not vicarious, it found that her environment was not sufficiently hostile to support the claim because she experienced her own work environment as hostile by reason of the alleged harassment of other women.[32] The allegedly harassed women worked in a different job, out of Leibovitz's sight, had a different supervisor, and had experiences that only came to Leibovitz's notice via hearsay. Leibovitz thus could not demonstrate that she suffered harassment either in subjective or objective terms.[33] The court's enlargement of the standing requirement was tempered by its unwillingness to broaden the concept of the working environment to venues where the plaintiff did not work, in order to

25. Prescott v. Indep. Life & Accident Ins. Co., 878 F. Supp. 1545, 1549 (M.D. Ala. 1995).

26. *See* Childress v. City of Richmond, 134 F.3d 1205 (4th Cir. 1998) (affirming the dismissal of a hostile environment claim on the ground that the complaining officers did not have standing to bring an action for discrimination directed at others).

27. *See* Leibovitz v. New York City Transit Auth., 4 F. Supp. 2d 144, 150-52 (E.D.N.Y. 1998), *rev'd on other grounds*, 252 F.3d 179 (2d Cir. 2001); *see also* Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985), *aff'd in part and remanded on other grounds*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) ("Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive."); Maluo v. Nakano, 125 F. Supp. 2d 1224, 1231 (D. Haw. 2000).

28. 4 F. Supp. 2d 144 (E.D.N.Y. 1998), *rev'd*, 252 F.3d 179 (2d Cir. 2001).

29. *Leibovitz*, 4 F. Supp. 2d at 150-52.

30. *Id.*

31. *Leibovitz*, 252 F.3d at 190-91. District Court Judge Weinstein also awarded counsel for Leibovitz $129,575 in attorneys' fees and $13,194.10 in costs and expenses, for a total of $142,769.10. *Id.* at 183.

32. *Id.* at 189.

33. *Id.*

prevent potentially unlimited liability.[34]

B. UNWELCOMENESS

Since the U.S. Supreme Court first addressed the issue in 1986 in *Meritor Savings Bank v. Vinson*,[35] courts have also broadened the requirements for recovery under the "unwelcomeness" requirement, making it easier for plaintiffs to show that the conduct was unwelcome.[36] To establish unwelcomeness, the employee must neither solicit nor invite the defendant's conduct, and must regard it as undesirable or offensive.[37] The Court in *Meritor* refused to find that voluntary conduct established welcomeness as a matter of law.[38]

The *Meritor* plaintiff alleged that her supervisor made repeated demands for sexual relations. Although she refused at first, she eventually agreed out of fear of losing her job. She estimated that she had intercourse with him forty or fifty times over a period of several years. He also allegedly fondled her in front of other employees, exposed himself to her, and forcibly raped her on several occasions.[39] The Court stated that the plaintiff's "voluntariness" or consent was not a defense to her claim.[40] The correct inquiry was whether she indicated that the advances were unwelcome rather than whether her participation was voluntary.[41]

The *Meritor* plaintiff's allegedly sexually provocative speech or dress was not found irrelevant as a matter of law in determining whether she found the advances unwelcome. The Court found the E.E.O.C. guidelines persuasive in emphasizing that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances."[42] It stated that "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact."[43]

Courts assessing the welcomeness element have often focused on whether the plaintiff's words or acts suggested that sexual comments were welcome or invited. In *McLean v. Satellite Technology Services*,[44] the court found sexual advances to be welcome where the plaintiff frequently displayed her body at work by showing photos of herself and lifting her clothes. However, a plaintiff's use of foul language or sexual innuendo would not, in itself, waive her protection

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34. *Id.*
35. 477 U.S. 57 (1986).
36. *See, e.g.*, Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987).
37. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982); *see also* Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 565 (8th Cir. 1992).
38. 477 U.S. at 68.
39. *Id.* at 60.
40. *Id.* at 68.
41. *Id.*
42. Meritor Sav. Bank , 477 U.S. at 69.
43. *Id.* at 68.
44. 673 F. Supp. 1458, 1459 (E.D. Mo. 1987).

against unwelcome harassment.[45] Consensual sexual relations with a supervisor also would not provide that supervisor, or co-workers, with a right to sexually harass the employee, as there is a time when "consensual sexual relations end and unwelcome harassment begins."[46] Evidentiary rules, such as Federal Rule of Evidence 412, offer the plaintiff additional protection in establishing that the harassment was unwelcome.

1. Federal Rule of Evidence 412 and Welcomeness

Evidence of the plaintiff's sexual behavior has been found inadmissible based on the "rape shield rule" in Federal Rule of Evidence 412. This rule excludes evidence to prove an alleged victim's sexual predisposition, or to prove the victim "engaged in other sexual behavior," in most civil actions involving alleged sexual misconduct. Such evidence is admissible in civil cases only where its "probative value substantially outweighs the danger of unfair prejudice to any party."[47] Moreover, evidence of an alleged victim's reputation is admissible "only if it has been placed in controversy by the alleged victim."[48]

Courts are to presumptively issue protective orders barring discovery, "unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery."[49] Thus, the presumption is against admitting evidence of sexual behavior, even though the *Meritor* Court recognized such behavior may be relevant. Additionally, while evidence of the alleged victim's sexual behavior or predisposition in the workplace can be relevant to the welcomeness inquiry, non-workplace conduct will usually be irrelevant.[50]

The use of evidence in violation of Rule 412 may result in a reversal. If such an error occurs, then the court must consider whether a substantial right of a party

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45. Swentek v. USAir, Inc., 830 F.2d 552, 557 (4th Cir. 1987).

46. Scelta v. Delicatessen Support Servs., Inc., 89 F. Supp. 2d 1311, 1318 (M.D. Fla. 2000).

47. FED. R. EVID. 412(b)(2). The Advisory Committee stated, regarding the 1994 Amendments to Rule 412,"[t]he reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping . . . do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. . . . Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for . . . sexual harassment." FED. R. EVID. 412 advisory committee's note.

48. FED. R. EVID. 412 advisory committee's notes. A party seeking to offer such evidence must file a motion fourteen days before trial; the motion must be made under seal, must describe the evidence in detail, and must state the purpose for which it is offered. *Id.* The record of proceedings on the motion is to remain sealed unless the court directs otherwise. *Id.* Before admitting the evidence, the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. FED. R. EVID. 412(c)(1)(2).

49. FED. R. EVID. 412 advisory committee's note.

50. *Id.* (citing Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962-63 (8th Cir. 1993) (holding that posing for nude photos in a magazine outside work hours was irrelevant to show that crude sexual comments at work were welcome)).

has been affected and whether the trial was unfair to the moving party.[51]

Rule 412 does not apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct."[52] This requirement has been applied in sexual harassment suits to protect the plaintiff from invasion of privacy.[53] It also extends to "pattern" witnesses whose testimony about instances of sexual misconduct by the person accused is otherwise admissible.[54] The rule prevents unnecessary and unfair focus to be placed on the victim's conduct rather than on the conduct of the alleged harasser.

C. EMPLOYER LIABILITY

An employer may avoid liability for sexual harassment if, upon receiving notice or otherwise becoming aware of alleged sexual harassment, it takes prompt remedial action reasonably calculated to end the harassment.[55] An employer is responsible for acts of sexual harassment in the workplace between fellow employees and even non-employees, where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.[56] In reviewing cases involving non-employees, the E.E.O.C. will consider "the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees."[57]

The U.S. Supreme Court delineated and broadened the extent of employer liability for the acts of its supervisors in *Faragher v. City of Boca Raton*[58] and

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51. *See* Socks-Brunot v. Hirschvogel Inc., 184 F.R.D. 113, 124 (S.D. Ohio 1999).

52. FED. R. EVID. 412 advisory committee's note.

53. *See* Stalnaker v. Kmart Corp., 1996 WL 397563, at *3-4 (D. Kan. July 11, 1996).

54. *Id.* at *3. Thus, in *Stalnaker*, where a plaintiff sought to question female witnesses about their sexual activities, the defendant's motion for protective order pursuant to Federal Rule of Evidence 412 was properly denied. The court noted that the defendant sought to protect non-party witnesses from embarrassment, humiliation, and invasion of privacy, but the witnesses themselves had raised no objections to the proposed discovery. *Id.* at *4. Rule 412 had no application to the facts because the plaintiff sought to use the discovery against the defendant and not the witnesses. *Id. But see* Woodard v. Metro I.P.T.C., 2000 WL 684101, at *7 (S.D. Ind. Mar. 16, 2000) (The court stated that an objection to evidence under Rule 412 was overruled where the defendant offered evidence about the plaintiff's work at a lingerie shop, her provocative clothing, and participation in sexual banter and horseplay, to prove that she did not subjectively consider her work environment hostile. The probative value of the evidence substantially outweighed any potential unfair prejudice on her hostile environment claim.).

55. E.E.O.C. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2002).

56. *Id.*

57. *Id.* Employers have been held liable on account of actual knowledge by high-echelon officials of harassing action by subordinates, which the employer did nothing to stop. Hall v. Gus Constr. Co., 842 F.2d 1010, 1016 (8th Cir. 1988) (holding employer liable for harassment by co-workers where the supervisor knew of the harassment but did nothing); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (upholding liability where the "employer's supervisory personnel manifested unmistakable acquiescence in . . . the harassment"). Harassing conduct by an individual within the class of officials who may be treated as the employer's proxy may be imputed to the employer. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993) (harasser was the president of the corporate employer); *see also* Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

58. 524 U.S. 775 (1998).

Burlington Industries v. Ellerth.[59] The Court in *Burlington Industries* addressed the relationship between quid pro quo and hostile environment harassment, as well as the extent of an employer's liability for the acts of its supervisors. Before *Burlington Industries*, lower courts routinely held that employers were automatically liable for quid pro quo sexual harassment, but were liable for hostile environment harassment only if they knew or should have known of the harassment and failed to take appropriate remedial action.[60] The Court determined that the distinction between the two types of harassment plays a significant role in employer liability only when the quid pro quo threat is carried out.[61]

In *Burlington Industries*, the employee was subjected to constant sexual harassment by her supervisor. In addition to repeated boorish and offensive remarks, the supervisor allegedly made comments that could be construed as threats to deny tangible job benefits.[62] The plaintiff, however, received a promotion. She did not inform anyone in authority about the supervisor's behavior but eventually quit, writing the employer a letter that she did so because of her supervisor's conduct.[63]

The court of appeals reversed a decision granting summary judgment for the employer.[64] The majority of judges agreed that her claim could be categorized as quid pro quo harassment, even though she had received a promotion and had suffered no tangible retaliation.[65]

The U.S. Supreme Court affirmed the appellate court's reversal, although on different grounds. The Court held that the plaintiff's claim should have been categorized as a hostile work environment claim, because the threats were unfulfilled.[66] Accepting the district court's finding that the alleged conduct was severe or pervasive, it held that a tangible employment action taken by a supervisor with immediate or successively higher authority becomes, for Title VII purposes, the action of the employer.[67] The Court added:

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by

59. 524 U.S. 742 (1998).
60. *See id.* at 751-53.
61. *See id.* at 754.
62. *Id.* at 747-48.
63. *Id.* at 748.
64. *Id.* at 749.
65. *Burlington Indus.*, 524 U.S. at 749.
66. *Id.* at 745.
67. *Id.* at 765.

the employer or to avoid harm otherwise.[68]

Proof of an employer's anti-harassment policy with a complaint procedure would be persuasive in showing attempts to prevent and correct harassing behavior. The employee's failure to avail herself of the complaint procedure would normally be sufficient to satisfy the employer's burden under the second element of the defense.[69]

The Court further developed the employer's affirmative defense in *Faragher v. City of Boca Raton*.[70] A former city lifeguard sued the city for hostile environment sexual harassment based on her supervisors' conduct. The Court held that an employer is subject to vicarious liability under Title VII for actionable discrimination caused by a supervisor, but the employer may raise an affirmative defense that looks to the reasonableness of its conduct in seeking to prevent and correct the harassment.[71]

The *Faragher* supervisors were granted virtually unchecked authority over their subordinates, and the lifeguards were completely isolated from the city's higher management. The district court found that the city failed to disseminate its sexual harassment policy among the beach employees, and its officials had not tried to keep track of the supervisors' conduct.[72] The city's policy also did not include any assurance that the harassing supervisors could be bypassed in registering complaints.[73] Therefore, the city had no "serious prospect" of presenting the affirmative defense.[74] The Court held as a matter of law that the city did not exercise reasonable care to prevent the supervisors' harassing conduct.[75]

An examination of federal court decisions on sexual harassment from 1986 to 1995 showed that critical factors for a successful case were the victim's complaint within the organization and the lack of a formal process to deal with such complaints.[76] The *Faragher* and *Burlington Industries* decisions delineated employer liability for supervisors' misconduct while providing guidance in the

68. *Id.* The Court remanded the case to allow the district court to decide, based upon the affirmative defense, whether it would be appropriate to allow Ellerth to amend her pleading or supplement her discovery. It recognized that no affirmative defense would be available when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. *Id.*

69. *Id.* at 765.

70. 524 U.S. 775 (1998).

71. *Id.* at 807.

72. *Id.* at 808.

73. *Id.*

74. *Id.*

75. *Faragher*, 524 U.S. at 809 (1990).

76. *See* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 549 (2000).

measures that employers could take to avoid liability.[77] The Court stressed that the primary objective of Title VII is "not to provide redress but to avoid harm."[78] The *Faragher* and *Burlington Industries* holdings were intended to complement E.E.O.C. enforcement efforts by allowing employers to prevent violations and to mitigate damages through remedial measures.[79] The Court nonetheless noted that its "demanding" standards on the other elements, "[p]roperly applied, [would] filter out complaints attacking 'the ordinary tribulations of the workplace.' "[80] Federal courts have responded, as discussed below, by limiting recovery on grounds of gender-relatedness and the insufficiency of abusive conduct.

D. CONDUCT BASED ON SEX

Title VII requires a showing that the employer discriminated against the plaintiff "because of such individual's . . . sex."[81] As a claim of disparate treatment, the plaintiff must show that "similarly situated persons not of plaintiff's sex were treated differently and better."[82] If the plaintiff cannot establish a triable issue as to this element of the claim, entry of summary judgment or judgment as a matter of law is authorized for the employer.[83]

The "because of sex" requirement historically was found to encompass several types of claims involving discriminatory treatment. First, sexual behavior

77. *Faragher*, 524 U.S. at 809; *Burlington Indus.*, 524 U.S. at 765-66 (1998). Prompt and appropriate remedial action would absolve the employer of responsibility for its agent's sexual harassment. Ellison v. Brady, 924 F.2d 872, 881-82 (9th Cir. 1991); Hall v. Gus Construction Co., Inc., 842 F.2d 1010, 1013 (8th Cir. 1988). The employer should consider the pervasiveness and seriousness of the misconduct in determining the appropriate remedy. *Ellison*, 924 F.2d at 882. Factors in such a determination include: (i) the identity of the harasser, (ii) the nature of the conduct, (iii) its frequency, (iv) severity and pervasiveness, (iv) the context in which it occurred, and (v) the conduct's effect on the complainant. *Id.* at 881 (citing Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983)) ("the reasonableness of an employer's remedy will depend on its ability to stop harassment . . . the court may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct"); *see* Madray v. Publix Supermarkets, Inc., 208 F.3d 1290 (11th Cir. 2000). The 11th Circuit has held that an employer exercised reasonable care to prevent and correct promptly sexually harassing behavior by establishing complaint procedures identifying various persons to whom complaints could be made, even if only one of those persons, the alleged harasser, was in the employees' store. *Id.* The procedures identified and provided phone numbers of persons to whom complaints could be made, and one of those persons visited the store once a week. *Id.*; Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987) (holding that an employer properly remedied harassment by investigating the allegations, issuing written warnings to refrain from discriminatory conduct, and warning the offender that a further infraction would result in suspension).

78. *Faragher*, 524 U.S. at 806.

79. *Id.*

80. *Id.* at 788.

81. 42 U.S.C. § 2000e-2(a) (2002).

82. Mendoza v. Borden, Inc., 195 F.3d 1238, 1254 n.3 (11th Cir. 1999).

83. *See generally* FED. R. CIV. P. 50(b), 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Mendoza v. Borden Inc., 195 F.3d 1238, 1244 (11th Cir. 1999) (quoting Walker v. NationsBank of Florida, N.A., 53 F.3d 1548, 1555 (11th Cir. 1995)) ("A motion for judgment as a matter of law will be denied only if 'reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions.' ").

directed at women raises the inference that it is based on their sex.[84] Second, harassing behavior that lacks sexually explicit content and is not motivated by sexual desire, but is directed at one sex and motivated by animus against that sex, satisfies this element.[85] Thus, a woman could use derogatory terms toward a female co-worker due to her "hostility to the presence of women in the workplace."[86]

Third, behavior that is disproportionately more offensive or demeaning to one gender could satisfy this element.[87] For example, the element may be satisfied by behavior from an employer that expresses the message that women do not belong in the workplace, or that they only belong in the workplace "if they will subvert their identities to the sexual stereotypes prevalent in that environment."[88] "Evidence of sexual stereotyping may provide proof that an employment decision or an abusive environment was based on gender."[89]

A Florida federal district court took a broad view of the factors necessary to satisfy the "based on . . . sex" element in *Robinson v. Jacksonville Shipyards, Inc.*[90] In that case, the conduct involved the posting of pictures of nude and partially nude women in the workplace,[91] sexually demeaning remarks and jokes made by male workers, and signs, such as "Men Only."[92] The plaintiff also suffered incidents of directed sexual behavior after she lodged complaints about the pictures of unclothed women.[93]

The court found that the harassment was based upon the plaintiff's sex.[94] It reasoned that the pictures exhibited "behavior that did not originate with the intent of offending women in the workplace (because no women worked in the

84. *See* Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991).

85. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81-82 (1998); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990).

86. *Oncale*, 523 U.S. at 82.

87. *See Andrews*, 895 F.2d at 1485-86; Rabidue v. Osceola Ref. Co., 805 F.2d 611, 627 (6th Cir. 1986) (Keith, J., dissenting); *Robinson*, 760 F. Supp. at 1522.

88. *Robinson*, 760 F. Supp. at 1523; *see also* Samborski v. W. Valley Nuclear Servs., Co., 1999 WL 1293351, at *3 (W.D.N.Y. Nov. 24, 1999). In *Samborski*, the plaintiff asserted a hostile working environment claim where she alleged that she was regularly subject to ridicule by male co-workers. *Id.* She maintained that because she was a woman in a male-dominated work facility and did not exhibit her femininity in a stereotypical manner, she was exposed to different conditions of employment from her male co-workers. *Id.* "Such alleged harassment included being told she had a 'nice penis,' being offered a cigar because '[e]ven lesbians smoke cigars,' and being the subject of sexual fantasy. *Id.* The court found that the alleged conduct satisfied the 'because of sex' element, and denied the defendant's motion to dismiss the complaint." *Id.*

89. Galdieri-Ambrosini v. Nat'l. Realty & Dev. Corp., 136 F.3d 276, 289 (2d Cir. 1998).

90. 760 F. Supp. 1486, 1522 (M.D. Fla. 1991).

91. *Id.* at 1495 (The pictures included a picture of a woman, breasts, and pubic area inside a dry-dock area, a picture of a woman's pubic area with a meat spatula pressed on it, and drawings and graffiti on the walls at the Commercial Yard where Robinson was assigned to work.).

92. *Id.* at 1522.

93. *Id.* at 1523.

94. *Id.* at 1491, 1523.

jobs when the behavior began) but clearly ha[d] a disproportionately demeaning impact on the women . . . working at JSI."[95] The court relied on expert testimony that the presence of the pictures, even if not directed at any particular female employee, sexualized the work environment to the detriment of all female employees.[96]

The *Robinson* case recognizes that disparate treatment, even if originally unintended to cause subordination of particular workers, creates a hostile environment to the singled out gender. One way of viewing gender subordination is that sexual comments limit the demeaned group to a role "subordinate to the author and . . . inappropriate for the work environment."[97] Such an inquiry also focuses on whether the sexual conduct had a tendency to reinforce domination by the harassing group and thus to "render the workplace inhospitable."[98] As discussed below, this inquiry does not require that the harasser be a different gender from the victim, so long as the treatment offensively singles out one gender.

1. Same Sex Harassment and *Oncale*

The U.S. Supreme Court broadened the parameters of gender-based discrimination in *Oncale v. Sundowner Offshore Services.*[99] It recognized that claims for sexual harassment by members of the same sex are cognizable under Title VII.[100] The *Oncale* plaintiff was forcibly subjected to sex-related, humiliating actions by his male co-employees, physically assaulted in a sexual manner, and threatened with rape.[101] His complaints to supervisory personnel produced no remedial action and he eventually quit.[102] The Court held that Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women.[103]

The circuits had previously been divided as to whether same-sex harassment claims were cognizable at all, or whether they were cognizable only if the plaintiff could prove the harasser was homosexual and thus presumably motivated by sexual desire.[104] Other circuits suggested that workplace harassment which is sexual in content is always actionable, regardless of the harasser's

95. *Robinson*, 760 F. Supp. at 1523.

96. *Id.* at 1523.

97. *See* Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What is it and how Should it be Assessed after Harris v. Forklift Systems Inc.?*, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 421-22 (1995).

98. Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 245 n.197 (1994) (describing the view of Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX J. WOMEN & L. 95, 124-30 (1992)). *See also* discussion *infra* Part V on different views of harassment.

99. 523 U.S. 75 (1998).

100. *Id.* at 79.

101. *Id.* at 76-77.

102. *Id.* at 77.

103. *Id.* at 78-79 (citing Johnson v. Transp. Agency, 480 U.S. 616 (1987)).

104. *See Id.* at 79 (comparing McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) and Wrightson v. Pizza Hut of Am., 99 F.3d 138 (4th Cir. 1996)).

sexual orientation.[105]

The Court focused on discriminatory treatment as the gravamen for the claim and stated that "[t]he critical issue, [as] Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[106] It noted several methods of proof.[107] An inference of discrimination would be "easy to draw" if the harasser and the harassed employee are of opposite sexes and the conduct involves explicit or implicit proposals of sexual activity.[108] Credible evidence that the harasser is homosexual would also support the inference, but harassing conduct need not be motivated by sexual desire to establish discrimination on the basis of sex.[109] A same-sex harassment plaintiff could offer direct evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.[110] Thus, equal participation of both genders would prevent recovery where neither sex is singled out disadvantageously.[111] Alternatively, if the plaintiff demonstrates that he would not have been treated in the same way had he been a woman, then he has proven sex discrimination.[112]

The Court was not persuaded that recognizing liability for same-sex harassment would "transform Title VII into a general civility code for the American workplace."[113] It noted that workplace harassment is not automatically discrimination merely because the words are "tinged with offensive sexual connotations."[114] Limiting the effect of its holding, it observed that Title VII was not meant to "reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[115] The "ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing" would thus not be sufficiently hostile or offensive to change the conditions of employment.[116]

2. Limitations on Recovery

a. Equal Offensiveness and Hostile Aggression. Oncale's equal participation limitation has resulted in preventing plaintiffs' recovery in a variety of contexts, where lower courts were unwilling to recognize that demeaning, sexually charged interactions singled out a particular gender. A showing that language

105. *Oncale*, 523 U.S. at 79 (citing Doe v. Belleville, 119 F.3d 563 (7th Cir. 1997)).
106. *Id.* at 80 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)).
107. *Id.* at 80.
108. *Id.*
109. *Id.* at 80.
110. *Oncale*, 523 U.S. at 80-81.
111. *See id.*
112. *Id.* at 80.
113. *Id.*
114. *Id.*
115. *Id.* at 81.
116. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quoting B. LINDEMANN & D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)).

"tinged with offensive sexual connotation" is part of the way men and women "routinely interact" would fail to establish sex-based discrimination.[117]

For instance, in *Johnson v. Hondo, Inc.*,[118] the Seventh Circuit upheld a grant of summary judgment for the employer by finding the conduct resulted from hostile aggression rather than gender-based animus. The harasser repeatedly told the plaintiff, "I'm going to make you suck my dick," while touching himself as if masturbating.[119] The plaintiff called him names in return.[120] Eventually, a fight ensued, and the company terminated the employment of both men for fighting.[121]

The court did not find the conduct sufficient to raise the inference that the harasser acted because of the plaintiff's sex.[122] Making a distinction between sexual harassment and mere hostile aggression, the court noted that the sexual references were incidental to what was otherwise run-of-the-mill horseplay and vulgarity. It stated:

> Most unfortunately, expressions such as 'fuck me,' 'kiss my ass,' and 'suck my dick,' are commonplace in certain circles, and . . . (particularly when uttered by men speaking to other men), their use has no connection whatsoever with the sexual acts to which they make reference – even when they are accompanied, as they sometimes were here, with a crotch-grabbing gesture.[123]

The Tenth Circuit in *Gross v. Burggraf Construction, Co.*[124] similarly affirmed a summary judgment for the employer where crude language was used routinely by both male and female employees. Examining the language in its "blue collar" social context, it determined that "in the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior."[125]

The court separated the allegedly harassing comments into gender-charged and gender-neutral terms. For instance, it found that the statement, "Get your ass back in the truck" was gender-neutral because "the term 'ass' is a vulgar expression

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117. *Id.* at 81. Male heterosexuals' sexually charged conduct towards other males has been interpreted as "hazing" or some other type of male ritual behavior, rather than gender-based conduct. *See, e.g.*, Seamons v. Snow, 84 F.3d 1226, 1230, 1233 (10th Cir. 1996) (finding that sexual assault of high school football player by five of his upper-class teammates while other teammates looked on); Skinner v. City of Miami, 62 F.3d 344, 346, 438 (11th Cir. 1995) (plaintiff firefighter sustained injuries when fellow firefighters engaged in alleged "horseplay and hazing" involving sexual assault; "although Skinner was the victim of a state law tort, he has not shown a constitutional violation . . . under [42 U.S.C.] section 1983").

118. 125 F.3d 408 (7th Cir. 1997).

119. *Id.* at 410.

120. *Id.*

121. *Id.* at 410.

122. *Id.* at 412-13.

123. *Johnson*, 125 F.3d at 412.

124. 53 F.3d 1534 (10th Cir. 1995).

125. *Id.* at 1537-38.

that refers to a portion of the anatomy of persons of both sexes."[126] The statement "don't you just want to smash a woman in the face" was "isolated" and thus did not demonstrate gender discrimination.[127] Criticism directed at the plaintiff for abusing company equipment was not "sexual or gender-specific."[128] By disaggregating the allegedly harassing statements into gender-neutral comments or crude language routine to the construction trade, the court found no gender-based discrimination.[129]

Some circuits also limit recovery by finding that conduct which is offensive to both men and women would not support a Title VII hostile working environment claim.[130] Thus, sexual overtures or degrading epithets to both sexes would accord them like treatment and provide them no remedy under Title VII.[131]

The inquiry may focus upon whether both sexes were in fact treated equally or whether one gender was singled out. The Seventh Circuit in *Shepherd v. Slater Steels Corp.*[132] considered whether harassment allegedly directed at male employees and one female employee was harassment because of sex. The alleged harasser told the plaintiff that he was handsome, handled his penis four or five times a week in front of the plaintiff, and threatened to assault him sexually from the rear. There was evidence that the harasser had exposed himself to other male employees, as well as to a female co-worker.[133]

The court found that the harassment was not equally directed to both sexes, as it evinced specific sexual attraction to the plaintiff. Because the conduct had a "relentless sexual tenor," its sexual overlay was not merely incidental to a work-related provocation.[134] Distinguishing *Johnson*, the court added, "[t]he conduct described here goes far beyond the casual obscenity . . . . Although we readily acknowledge that the factfinder could infer from such evidence that Jemison's harassment was bisexual and therefore beyond the reach of Title VII

126. *Id.* at 1543. *But see* Patterson v. County of Fairfax, 2000 WL 639318 (4th Cir. May 18, 2000) (finding that the term "ass" in the context of calling an employee "cruiser ass" had some racial or sexual connotations to support the plaintiff's hostile environment claim).

127. *Gross*, 53 F.3d at 1542-43.

128. *Id.* at 1545.

129. *Id.* at 1547.

130. *See* Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 290 (2d Cir. 1998) (finding that evidence that a female secretary was required to perform personal errands for her employer is insufficient to permit a finding of hostile environment, in the absence of evidence that gender played a role in those work assignments); *see also* Pasqua v. Metro. Life Ins. Co., 101 F.3d 514, 517 (7th Cir. 1996). "Pasqua's claim falls short of establishing the elementary requirement in this circuit that the alleged harassment was based upon the plaintiff's sex. There is not even a hint in the record that any rumors or vulgar statements concerning an illicit relationship between Pasqua and Vukanic were made because Pasqua was a male. By the very nature of such gossip, both Pasqua and Vukanic were made the subject matter . . . ." *Id.*; Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1180-81 (N.D. Ind. 1995); Goluszek v. H.P. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

131. Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

132. 168 F.3d 998 (7th Cir. 1999).

133. *Id.* at 1003.

134. *Id.* at 1010.

. . . the evidence is not so strong as to make that conclusion inevitable."[135]

Because Title VII requires that the victim of discrimination be singled out because of her or his protected group membership, widespread and pervasive abuse directed to both sexes would not be actionable, in spite of their mutual indignity.[136] As the Court cautioned in *Oncale* that not all sexually tinged conversation is gender-based, courts are concerned that eliminating the "equal opportunity harasser" defense would improperly change Title VII into a code of workplace civility.[137]

The E.E.O.C. argued in *Holman v. State of Indiana*,[138] that exempting equal opportunity harassers from Title VII would be bad policy, because it would "encourage harassers to manufacture a second harassment of a different sex so they could insulate themselves from Title VII liability."[139] The E.E.O.C. argued, "It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female."[140]

Steven S. Locke argues that the bisexual harasser's equal treatment should be actionable.[141] Pointing out the logical problems in differential recovery, he states:

> There is no denying the fact that the victims of an attack by a bisexual are no better off than victims of a heterosexual or homosexual attack. It is only because courts are locked into the traditional analysis requiring that in order for a harasser to be liable, he must have selected only one gender as the target that a bisexual/equal opportunity harasser's acts are not prohibited under Title VII. If the bisexual/equal opportunity harasser were to harass a man when he first became employed and then a woman some years later, he would likely be held liable for each. It is ludicrous to suggest that if he takes both on at once, his conduct should be excused.[142]

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135. *Id.*

136. *See, e.g.*, Pasqua v. Metro. Life Ins. Co., 101 F.3d 514, 517 (7th Cir. 1996).

137. Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000).

138. *Id.*

139. *Id.* at 403.

140. *Id.* at 403-04 (citing McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir.1996)). The *Holman* court rejected this argument, stating "We do not think, however, that it is anomalous for a Title VII remedy to be precluded when both sexes are treated badly. Title VII is predicated on discrimination. Given this premise, requiring disparate treatment is consistent with the statute's purpose of preventing such treatment." *Id.* It added, "[s]urely attorneys will not advise their employer-clients to instruct their employees to harass still more people – to commit, in most cases, state law torts – which could subject their clients to lawsuits and themselves to claims of malpractice and charges of professional misconduct. Moreover, if attorneys were actually to dispense such incredible advice, and their clients were to follow it, the clients would still be subject to Title VII liability. In such cases the harasser is not a bona-fide 'equal opportunity' harasser; he is manufacturing another harassment to avoid Title VII liability." *Id.* at 404.

141. *See* Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII*, 27 RUTGERS L.J. 383, 412 (1996).

142. *Id.* at 407.

The bisexual harasser may reinforce demeaning gender stereotypes that create an offensive environment for both genders. Locke advocates that courts differentiate between nonsexual harassment, "which comes in the form of a supervisor who mistreats both men and women, but who does not use a sex-based medium – from sexual harassment, which involves the equal mistreatment of both sexes by a supervisor who uses a sex-based medium."[143] A sex-based medium would be "rooted in sex, sexuality, sex roles, or sex stereotypes" and satisfy the "because of . . . sex" element in spite of both male and female targets.[144]

This test, after *Oncale*, is more difficult to apply to verbal disparagement due to the Court's admonition that not all sexually charged conversation is discriminatory.[145] Nonetheless, a showing that such statements have an insulting sexual overlay beyond ordinary trade usage could still support a finding of harassment, without turning Title VII into a general civility code. Particularly humiliating epithets satisfying the "severity" test and demeaning stereotypes would qualify under this analysis.[146] Such epithets may impact men and women differently, go far beyond the "casual obscenity," and are neither part of routine socializing nor related to job performance.

b. Statements Involving Homosexual Stereotypes. A further bar to recovery is the failure of courts to recognize that harassment directed at homosexual orientation is discrimination "because of . . . sex." Congress has rejected bills on numerous occasions that would have extended Title VII's protection to people discriminated against based on their sexual orientation.[147] Numerous courts have since held that Title VII does not proscribe harassment based solely on the plaintiff's homosexual orientation.[148]

Plaintiffs have attempted to establish a "sex-plus" theory, arguing that their employer discriminated only against men who possessed certain stereotypical qualities.[149] The U.S. Supreme Court held in *Price Waterhouse v. Hopkins*[150] that

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143. *Id.* at 413.

144. *Id.*

145. *Oncale*, 523 U.S. at 81.

146. *See* discussion *infra* Part IVA.1. For example, obscene epithets or pornographic pictures depicting both men and women in sexually humiliating positions may sexualize the work environment to the detriment of both male and female employees, but may affect each gender differently. *See infra* Part V; *see also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990) (recognizing that pornography and obscene language may be regarded differently by women and men).

147. Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (citing Employment Nondiscrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085-86 (7th Cir. 1984)).

148. *See* Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir. 1996); DeCintio v. Westchester County Med. Ctr., 807 F.2d 304 (2d Cir. 1986).

149. *Higgins*, 194 F.3d at 259 (citing Philips v. Martin Marietta Corp., 400 U.S. 542 (1971)).

150. 490 U.S. 228 (1989).

in "the specific context of sex stereotyping, an employer who acts on the belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[151] The *Price Waterhouse* plaintiff was denied a partnership in an accounting firm in part because she was "macho," and was told to speak more femininely, dress more femininely, wear make-up and style her hair.[152] The Court recognized that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[153] Plaintiffs have relied on *Price Waterhouse* to argue that gender discrimination under Title VII should include harassment for failure to conform to cultural gender norms.[154]

The Seventh Circuit rejected a sexual stereotyping claim in *Spearman v. Ford Motor Co.*[155] Spearman worked as a "blanker operator" at Ford's Chicago Heights Stamping Plant. A co-worker repeatedly called him a "ni—er," a "selfish bitch," and a "cheap ass bitch." Two years later, following Spearman's written complaint concerning an altercation over lunch breaks, the co-worker called him a "little bitch," told him that he hated his "gay ass," and threatened to go to Spearman's residence and "f– [his] gay faggot ass up."[156]

During an investigation by the company's labor relations department, a co-employee testified that other co-workers suspected that Spearman was a homosexual. The co-employee opined that other blanker operators were uncomfortable with Spearman because he "looked [them] over" like a man would "take a full look" at a woman and that he got too close to his male co-workers when he talked to them.[157] Spearman also discovered graffiti stating, "Ed Sperman [sic] is a fag and has AIDS" and "Edison Sperman [sic] is gay."[158] Another co-worker said to Spearman, "You f–ing jack-off, p[—]sy-ass," and saluted Spearman with his middle finger.[159]

The Seventh Circuit affirmed the district court's grant of summary judgment for the employer. It reasoned that Title VII's prohibition of discrimination based on sex was intended to mean "biological male or biological female," and not

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151. *Id.* at 250.

152. *Id.* at 235.

153. *Id.* at 251.

154. *See* Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000); *Higgins*, 194 F.3d at 261 n.4; *see also* Locke, *supra* note 141, at 403-04 ("Despite the potential for a differing perception by the harasser (i.e. that one is too masculine or that one is actually homosexual), the medium of exchange is the same. The perpetrator utilizes sex-based conduct to harass the victim. More importantly, the result is the same – the recipient is demeaned. The simple fact is that in the minds of harassers, traditional, stereotypical women are heterosexual (and supplicant). Those who do not act like a traditional woman can be 'returned to their place' with suggestions that they are not heterosexual. It is hard to understand how conduct recognized as prohibited when heterosexuals are involved becomes permissible when the actor actually believes that the victim is gay.").

155. 231 F.3d 1080 (7th Cir. 2000), *cert. denied*, 523 U.S. 995 (2001).

156. *Id.* at 1082.

157. *Id.* at 1082-83.

158. *Id.* at 1083.

159. *Id.*

one's sexuality or sexual orientation.[160] Therefore, it refused to find that harassment based solely upon a person's sexual orientation is an unlawful employment practice under Title VII.[161]

Spearman argued that the sexually explicit insults and graffiti of his harassers were motivated by the sex-stereotype that he was "too feminine to fit the male image at Ford."[162] The court rejected this argument, stating:

> Here, the record clearly demonstrates that Spearman's problems resulted from his altercations with co-workers over work issues, *and because of his apparent homosexuality*. But he was not harassed because of his sex (i.e. *not because he is a man*). His harassers used sexually explicit, vulgar insults to express their anger at him over work-related conflicts.[163]

The court thus carved out a further limitation to a sexual stereotyping claim, that of work-related dispute harassment. Applying reasoning similar to the "routine socializing" limitation discussed earlier, it observed that Title VII does not prohibit all harassment.[164] The Seventh Circuit held that, although unpleasant and sexually explicit, insults arising from work-related altercations would not violate Title VII.[165]

This decision allows the harasser to defend the claim by saying that derogatory language was the result of poor work performance, work-related anger, or some other work-related issue rather than harassment because of sex. This view would prevent recovery even if a court were willing to accept the "sex-plus" theory. It assumes that such epithets were not motivated by discriminatory, gender-based animus in spite of their sexual content and demeaning effect.

In contrast, a few federal courts have recognized that conduct demeaning the victim for failure to conform to stereotypical gender roles should be actionable.[166] For example, the Second Circuit in *Simonton v. Runyon*[167] diverged from the Seventh Circuit's analysis in considering whether derogatory comments based on homosexual stereotypes were cognizable as gender-based discrimination. Simonton's co-workers "repeatedly assaulted him with such comments as 'go f—k yourself, fag,' 'suck my d—k,' and 'so you like it up the ass?' "[168] Notes

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160. *See Id.* at 1085.

161. *Spearman*, 231 F.3d at 1085. (citing Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000)).

162. *Id.*

163. *Id.* at 1085 (citing Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997)) (emphasis added).

164. *Id.*

165. *Id.* (citing Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 78 (1998)).

166. *See also* E.E.O.C. v. Trugreen, Ltd., P'ship, 122 F. Supp. 2d 986, 993 (W.D. Wis. 1999) (recognizing that a plaintiff could recover on such a theory despite the limiting language of *Oncale*); Crawford v. Bank of Am., 181 F.R.D. 363 (N.D. Ill. 1998).

167. 232 F.3d 33 (2d Cir. 2000).

168. *Id.* at 35.

were placed on the employees' bathroom wall with Simonton's name and the names of celebrities who had died of AIDS. He also unwillingly received pornographic photographs, male dolls, and copies of Playgirl magazine.[169]

The court opined that harassment based upon nonconformity with sexual stereotypes could be cognizable under Title VII as discrimination because of sex. Such a theory would not "bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine."[170] It declined, however, to reach the merits of the issue, as Simonton had failed to plead sufficient facts for its consideration.[171]

Courts rejecting the "sex-plus" theory of recovery defy the logic that verbal conduct of a sexual nature includes verbal conduct of a homosexual nature, i.e. sexual orientation discrimination. By refusing to equate biological gender with cultural gender, courts purport to follow congressional intent to withhold Title VII protection from homosexuals.[172] Such decisions can also be seen as a method to limit the impact of *Oncale*'s recognition of actionable same-sex harassment, and further police the baseline of actionable conduct.

This approach circumvents *Price Waterhouse*'s recognition that gender stereotyping can violate Title VII.[173] To the extent "that the gravamen of sexual harassment is the inappropriate importation of sexuality into the workplace,"[174] the use of sexually oriented, disparaging comments directed at homosexuals should be actionable. Otherwise, such conduct reinforces the discriminatory practices and use of demeaning stereotypes that Title VII was meant to eradicate. Disparaging comments directed toward an employee's homosexuality are job-related, defy professional standards, and affront her or his dignity to the same degree as disparaging comments regarding biological gender status. As one commentator observes, "Title VII should be understood and applied in a way that encompasses and proscribes such affronts to equal opportunity in the work-

169. *Id.* at 38.

170. *Id.*

171. *Id.* at 37.

172. *See* Polly v. Houston Lighting and Power, 825 F. Supp. 135, 137 n.2 (S.D. Tex. 1993) ("It is well established, absent any change in the law by Congress, that Title VII does not protect homosexuals from harassment and discrimination in the workplace, since such treatment arises from their affectional preference rather than from their sex."); Dillon v. Frank, 1990 WL 358586 (E.D. Mich. 1990), *aff'd*, 952 F.2d 4031 (6th Cir. 1992).

173. *See also* Ronald Turner, *The Unenvisaged Case, Interpretive Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims*, 7 DUKE J. GENDER L. & POL'Y 57, 88 (2000) ("That the harassers used terms like 'fag' and 'queer' in carrying out their harassment does not alter the fundamental character of their objection (to the plaintiff's lack of gender conformity) and goal (to enforce their line between masculinity and femininity and ostracize those who have blurred or crossed over the line.")); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender, and Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161 (1996).

174. Mary Coombs, *Title VII and Homosexual Harassment After Oncale: Was it a Victory?*, 6 DUKE J. GENDER L. & POL'Y 113, 122 (1999).

place."[175] A focus on demeaning, stereotypical comments rather than the plaintiff's actual sexual orientation would not require employers to attempt to ascertain an employee's sexual practices. Thus this approach would not run the risk of creating a new protected class under Title VII.

II. UNREASONABLE INTERFERENCE WITH WORK ENVIRONMENT

A gray area in sexual harassment litigation exists as to the level of workplace conduct necessary to meet the statutory standard of unreasonable offense, allowing the plaintiff to recover. Whether an environment is sufficiently hostile or abusive must be judged by the totality of the circumstances, including the " 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' "[176]

This test looks at a multitude of factors, including the social context of the harassment, its cumulative impact, and the reasonableness of the plaintiff's reaction in determining liability. The inquiry is both "fact intensive, and contextually specific,"[177] therefore the line of discriminatorily abusive conduct, as opposed to merely rude conduct, is difficult to draw. In an attempt to discourage frivolous lawsuits, circuits are increasingly attempting to delineate a minimum level of pervasiveness or severity necessary for recovery. Several circuits have set a higher threshold for actionable claims and reverted to previous notions that a certain amount of sexuality in the workplace is tolerable.[178] The following will discuss the Supreme Court's delineation of the reasonableness inquiry, and its subsequent limiting application.

A. UNREASONABLE INTERFERENCE WITH WORK PERFORMANCE: OBJECTIVE AND SUBJECTIVE COMPONENTS

The Supreme Court delineated the objective and subjective components necessary to establish an abusive work environment in *Harris v. Forklift Systems, Inc.*[179] The plaintiff, a manager, was allegedly harassed by her company's president when he often insulted her because of her gender and made her the target of unwanted sexual innuendos.[180] The district court found that the conduct did not create an abusive environment.[181] It held that some of the comments

175. Turner, *supra* note 173, at 87.

176. Clark County School Dist. v. Breeden, 532 U.S. 268, 270-71 (2001) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1988); Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

177. Mendoza v. Borden, 195 F.3d 1238, 1258 (11th Cir. 1999).

178. *See infra* Part IIIA.

179. 510 U.S. 17, 23 (1993).

180. *Id.* at 19. He stated, in the presence of other employees, "You're a woman, what do you know," and told her that she was "a dumb ass woman." *Id.* He also suggested that they go to the Holiday Inn to negotiate the plaintiff's raise. *Id.* Additionally, the corporate president occasionally asked Harris and other female employees to get coins from his front pants pocket.

181. *Id.* at 19-20.

"would offend the reasonable woman" but that they were not "so severe as to be expected to seriously affect the plaintiff's psychological well-being."[182]

The Supreme Court reversed and remanded *Harris* due to the lower court's erroneous application of the psychological injury standard.[183] It held that the conduct need not seriously affect an employee's psychological well-being or lead the employee to suffer psychological injury to be actionable under Title VII. Evaluating the relevant factors from both an objective and subjective viewpoint, it stated:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a *reasonable person* would find hostile or abusive – is beyond Title VII's purview. Likewise, if the victim does not *subjectively perceive* the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is not a Title VII violation.[184]

The effect of the conduct on the plaintiff's psychological well-being is relevant in determining the plaintiff's subjective perception. However, "while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."[185]

Justice Ginsburg, in her concurrence, broadened the scope of liability by refusing to require that the plaintiff's tangible productivity has declined as a result of the harassment.[186] Ginsburg argues that it is sufficient to prove that a reasonable person would find, "as the plaintiff did, that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.' "[187]

Under the *Harris* standard, the plaintiff need not show that her work performance was impaired or that she was unable to accomplish her duties in order to establish abusiveness. The degree to which the plaintiff must show the damaging impact of harassment has thus been significantly broadened. For instance, in *Dey v. Colt Construction and Development Co.*[188] the plaintiff had not consulted a physician for psychological problems relating to the alleged harassment, nor had she been prompted to quit, avoid the office, or even to react angrily. However, the conduct had upset and embarrassed her, and made her feel

182. *Id.* at 20 (citing Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622 (6th Cir. 1986) (holding that sexual posters and anti-female obscenities did not seriously affect the psychological well-being of a reasonable woman and create a hostile working environment)).

183. *Id.* at 22.

184. Harris v. Forklift Sys., Inc. 510 U.S. 17, 21-22 (1993) (emphasis added).

185. *Id.* at 23.

186. *Id.* at 25 (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).

187. *Id.*

188. 28 F.3d 1446 (7th Cir. 1994).

uncomfortable.[189] The court reversed a summary judgment for the employer, finding factual issues existed as to whether the employee found her work environment to be abusive.[190] It reasoned that the employee should not reasonably be expected to completely disassociate herself from the harasser, particularly in a small office setting.[191]

B. JUDICIAL APPROACHES TO A GENDER-BASED PERSPECTIVE OF THE REASONABLENESS REQUIREMENT

The bifurcated standard in *Harris* did not resolve the extent to which the reasonableness of the plaintiff's viewpoint incorporates a gender-based perspective. Many courts have held that the objective standard ought to be based on the viewpoint of the reasonable victim, which incorporates the female perspective.[192] The Ninth Circuit adopted this standard in 1991 in *Ellison v. Brady.*[193] It observed that because many men consider conduct that offends many women to be unobjectionable, an understanding of the victim's viewpoint requires recognizing the different perspectives of men and women.[194]

Ellison demonstrates the level of actionable conduct required to satisfy a "reasonable woman" test. Ellison was invited to lunch by a male co-worker, Gray, whose desk was twenty feet from her desk. After she declined the initial invitation and further lunches, Gray wrote Ellison a note stating, in part, "I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]."[195] Ellison showed the note to her female supervisor, who concluded that it was sexually harassing.[196] Ellison asked a male co-worker to tell Gray to leave her alone, and left town for four weeks of training. Gray then mailed her a card and a single-spaced, three page letter stating, in part,

> I know that you are worth knowing with or without sex .... I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away .... Don't you think it odd that two people who have never even talked together, alone, are striking off

189. *Id.* at 1450.

190. *Id.* at 1457.

191. *Id.* at 1455.

192. Burns v. McGregor Elec. Indus., 989 F.2d 959, 964 (8th Cir. 1993) (adopting reasonable woman formulation); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485-86 (3d Cir. 1990) ("Obscene language and pornography quite possibly could be regarded as 'highly offensive to a woman who seeks to deal with her fellow employees . . . with professional dignity' . . . [a]lthough men may find these actions harmless and innocent." (quoting Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988)). See discussion *infra* Part V on scholarly criticisms of reasonableness.

193. 924 F.2d 872, 878-79 (9th Cir. 1991).

194. *Id.* at 878; *see* Crowe v. Wiltel Communications Sys., 103 F.3d 897, 900 (9th Cir. 1996) (explaining that there is no conflict between a standard that takes into account "the perspective of a reasonable person . . . with the same fundamental characteristics as plaintiff" and the Supreme Court's decision in *Harris*).

195. *Ellison*, 924 F.2d at 874.

196. *Id.*

such intense sparks.[197]

Ellison reacted by requesting her supervisor either transfer her or Gray and eventually Ellison filed suit. The district court granted summary judgment for the employer, finding that Gray's conduct was "isolated" and "genuinely trivial."[198]

The Ninth Circuit reversed, holding that a reasonable victim (or woman) could consider Gray's conduct sufficiently severe or pervasive to alter a condition of her employment.[199] Although Gray could be portrayed as a "Cyrano de Bergerac" trying to "woo Ellison with his words," her reaction was not unreasonable in light of the inequality and coercion many women associate with unexpected and unwelcome sexual conduct in the workplace.[200]

The court reasoned that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[201] The Court observed that "American women have been raised in a society where rape and sex-related violence have reached unprecedented levels . . . women as a group tend to hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate."[202]

The court noted that the reasonableness inquiry is not static, and thus the Title VII standard of acceptable behavior would change as reasonable women's views change.[203] Such a dynamic standard broadens the recognition of harassment and could reclassify conduct as unlawful "even when harassers do not realize that their conduct creates a hostile working environment . . . because Title VII is not a fault-based tort scheme."[204]

However, a number of courts have declined to accept the reasonable woman standard and have focused instead on a reasonable person standard.[205] The Fifth Circuit's rationale in refusing to apply the reasonable woman's perspective is the following:

> Any lesser standard of liability, couched in terms of conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality. In fact, a less onerous standard of liability would attempt to insulate women from

197. *Id.*
198. *Id.* at 876.
199. *Id.* at 880.
200. *Ellison*, 924 F.2d at 880.
201. 202. *Id.* at 879.
202. *Id.* at 879 n.9 (quoting Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205 (1989)).
203. *Id.* at 879 n.12.
204. *Id.* at 880.
205. Watkins v. Bowden, 105 F.3d 1344, 1356 n.22 (11th Cir. 1997) (holding that the district court did not err in instructing the jury as to a "reasonable person" standard, rather than a "reasonable woman" standard); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995) ("The test is an objective one, not a standard of offense to a 'reasonable woman.' ").

> everyday insults as if they remained models of Victorian reticence. . . . Now that most American women are working outside the home, in a broad range of occupations and with ever-increasing responsibility, it seems perverse to claim that they need the protection of a preferential standard.[206]

The Idaho Supreme Court refused to apply a gender-conscious standard in *Fowler v. Kootenai.*[207] It reasoned that such a standard would not only unduly emphasize gender, but also would undermine the consistency and uniformity that the reasonable person standard seeks to provide.[208] The Fifth, Eighth, and Eleventh Circuits similarly reasoned that an objective test would preclude an emphasis on the view of the reasonable woman.[209]

In *Oncale*, the Court, while not expressly rejecting the female perspective in assessing the reasonableness inquiry, reiterated the bifurcated standard used in *Harris.*[210] This standard judges the severity of harassment "from the perspective of a *reasonable person in the plaintiff's position*, considering 'all the circumstances.' "[211] The "reasonable person" inquiry appears to preserve the objective element and prevent recovery by the idiosyncratic or hypersensitive employee. However, the "plaintiff's position" language also incorporates the victim's, and woman's, subjective perspective.

The "reasonable person" test can also be read as a "reasonable juror" standard, allowing the juror to draw from his or her knowledge of the views of the average person in the community.[212] The *Oncale* Court added that this viewpoint requires courts and juries to use common sense and sensitivity to the social context.[213] For example, a professional football player's working environment is not pervasively or severely abusive "if the coach smacks him on the buttocks as he heads onto the field – even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office."[214] As discussed in the

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206. *DeAngelis*, 51 F.3d at 593.

207. 918 P.2d 1185, 1189 (Idaho 1996).

208. *Id.* (emphasis added).

209. *Watkins*, 105 F.3d at 1356 n.22 (holding that the district court did not err in instructing the jury as to a "reasonable person" standard rather than a "reasonable woman" standard); *DeAngelis*, 51 F.3d at 594 ("The test is an objective one, not a standard of offense to a 'reasonable woman.' "); *accord* Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996).

210. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)).

211. *Id.*

212. *See, e.g.*, Mendoza v. Borden, 195 F.3d 1273, 1278 (11th Cir. 1999) (Barkett, J., dissenting) (citing Smith v. United States, 431 U.S. 291 (1977)).

213. *Oncale*, 523 U.S. at 81.

214. *Id. Cf.* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (explaining the Supreme Court's perspective on the social context of classrooms and the liability of school districts). Those cases established that plaintiffs can only collect money damages from their school district under Title IX if a school district official with authority to institute corrective measures has actual notice of, and is deliberately indifferent to, the harassment.

following section, this context analysis has thus been used to reinforce collective assumptions of offensiveness, and has led to problems in determining whether it reinforces prevailing levels of discrimination in particular trades.

C. SOCIAL CONTEXT AS LIMITING RECOVERY

The "social context" analysis has recently accorded profane or vulgar conduct greater protection in blue collar work environments. For instance, the Tenth Circuit in *Gross v. Burggraf Construction Co.*[215] used the social context to shield profanity on a construction site from a finding of harassment. It stated, "[W]e must evaluate Gross' claim of gender discrimination in the context of a blue collar environment where crude language is commonly used by both male and female employees. Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments."[216]

Similarly, in *Johnson v. Hondo*[217] the Seventh Circuit considered the social context, in part, to determine that profanity was not harassing where it is "commonplace in certain circles, and more often than not, when these expressions are used . . . their use has no connection whatsoever with the sexual acts to which they make reference."[218]

The Sixth Circuit, in contrast, rejected the notion that the social context should protect crude and offensive behavior in some environments but not in others. In *Williams v. General Motors Corp.*,[219] the plaintiff alleged that one employee "constantly used the 'F-word' " and made disparaging remarks about women.[220] Her supervisor allegedly looked at her breasts and said, "You can rub up against me anytime."[221] He also said, when she bent over, "You can back right up to me."[222] On another occasion, the supervisor put his arm around her neck and

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Gebser, 524 U.S. at 290. Peer harassment, to be actionable, must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633. The Court held that under the language of Title IX, schools that receive federal funds may be held liable for intentionally allowing a student to be subject to discrimination. *Id.* at 652. It stated, however, that damages are not available for simple teasing and name-calling, even where these comments target differences in gender. The behavior must be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. *Id.*

In *Gebser*, the Court held that damages are not recoverable for teacher-student sexual harassment in an implied private action under Title IX unless a school district official, who at a minimum has the authority to institute corrective measures on the district's behalf, had actual notice of, and was deliberately indifferent to, the teacher's misconduct. *Gebser*, 524 U.S. at 290.

215. 53 F.3d 1531, 1538 (10th Cir. 1995); *see also* discussion, *supra* Part II.D.2.

216. *Id.*

217. 125 F.3d 408 (7th Cir. 1997).

218. *Id.* at 411-12.

219. 187 F.3d 553, 564 (6th Cir. 1999).

220. *Id.* at 559.

221. *Id.* at 564.

222. *Id.*

leaned his face against hers, while making a sexual remark.[223]

The appellate court reversed a grant of summary judgment for the defendant employer. It found that the allegations, taken as a whole, raised a question as to whether the plaintiff was subjected to more than "genuine but innocuous differences in the ways men and women routinely interact."[224] Examining the social context, the court refused to follow the view that:

> A woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment; indeed, we find this reasoning to be illogical, because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove . . . a hostile work environment. Surely women working in the trades do not deserve less protection from the law than women working in a courthouse.[225]

These opinions demonstrate different views of Title VII as either transforming the mores of American workers, or of reinforcing existing social mores by excusing behavior in particular environments.[226] The Court's recognition in *Oncale* that a smack on the buttocks would be abusive in some environments, but not in others, appears to approve of the latter view. The social context analysis greatly diminishes recovery for nonphysical conduct and vulgar banter because a disproportionate number of plaintiffs in sexual harassment suits are blue collar workers.[227] The use of this analysis to limit recovery is in keeping with other decisions, discussed below, that find workplace conduct insufficiently hostile or abusive to allow recovery.

III. THE BASELINE OF SEVERE OR PERVASIVE CONDUCT

For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."[228] The contours of what comprises "severe" and "pervasive" conduct are imprecise. The more severe the behavior is, the less it needs to be pervasive in order to reach a level where Title VII liability attaches. Isolated remarks or occasional episodes generally will not merit relief under Title

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223. *Id.*

224. *Id.* (citing *Oncale*, 523 U.S. at 81).

225. *Williams*, 187 F.3d at 564. The court also found that the district court misconstrued the requirements of the subjective test in *Harris*, when it found that the plaintiff was not subjectively harassed because she took the supervisor's comments to be a joke. "Simply put, humor is not a defense under the subjective test if the conduct was unwelcome." *Id.* at 566. The court reiterated that the subjective component merely requires that the harassment make it more difficult to do the job. *Id.*

226. *See also* discussion *infra* Part V.

227. *See* Juliano & Schwab, *supra* note 76, at 549 (observing that in a study of 650 federal decisions over a ten year period, that plaintiffs in sexual harassment suits were disproportionately blue collar or clerical workers).

228. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

VII; in order to be pervasive, the incidents must occur regularly or in concert.[229]

However, conduct that is sufficiently severe, such as a single incident of sexual assault, may alter the plaintiff's conditions of employment without repetition.[230] As discussed above, assessments of "severity" and mildness employ underlying assumptions of reasonableness and the social context as excusing or tolerating harassing behavior. The following will summarize recent cases on both sides of the current baseline of actionable conduct.

A. CONDUCT QUALIFYING AS PERVASIVE OR SEVERE

1. Constant Sexual Innuendos and Humiliating Epithets

Numerous courts have found that a constant barrage of sexually charged innuendos and sexually oriented pictures would qualify as creating a hostile working environment. Plaintiffs alleging harm from pornography and graffiti in addition to personalized sexual conduct are overwhelmingly successful in establishing actionable harassment.[231]

For example, a sexually hostile work environment was produced in a police department when male officers subjected a female patrol officer to "a plethora of sexually offensive posters, pictures, graffiti, and pinups placed on the walls throughout the Police Department," and "innumerable childish, yet offensive sexual and obscene innuendoes and incidents aimed at her on the basis of sex."[232] Similarly, a daily and constant stream of sexual propositions, comments and gestures, including asking the plaintiff for oral sex, was sufficient to constitute an actionable hostile working environment.[233]

The use of particularly humiliating epithets, though sporadic, may also qualify as actionable conduct. In *E.E.O.C. v. A. Sam & Sons Produce, Co.*[234] the court held that an employee who was called a "whore" on five occasions in one month stated a claim for hostile environment harassment.[235] The court found that

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229. *But see* Carrero v. New York City Hous. Auth., 890 F.2d 569, 578 (2d Cir. 1989) ("A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII. It is not how long the sexual innuendos, slurs, verbal assaults, or obnoxious course of conduct lasts. The offensiveness of the individual actions complained of is also a factor to be considered in determining whether such actions are pervasive.").

230. *See* Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) ("even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability").

231. *See* Juliano & Schwab, *supra* note 76, at 589 (observing a success rate of 80% over the ten year period surveyed).

232. Sanchez v. City of Miami Beach, 720 F. Supp. 974, 977 (S.D. Fla. 1989).

233. Barna v. City of Cleveland, No. 96-3971, 1998 WL 939884, at *1 (6th Cir. 1998) (The harasser also squeezed the plaintiff so hard that her breasts were "crushed," while whispering "We're friends, aren't we honey?").

234. 872 F. Supp. 29 (W.D.N.Y. 1994).

235. *Id.* at 35. The statements included: "whore, what is the amount?"; girls in the office were "whores and all [they] knew how to do was f—k"; and "nothing but a little whore, just a whore" in the employee's presence." *Id.* at 34.

"[a]lthough the incidents were not numerous, they were repeated and severe."[236] The comments, by going far beyond simple vulgarity, affronted the employee's self-respect by reducing her to "an illicit sexual being."[237]

Similarly, six clearly sexual and disparaging remarks were sufficient to establish a hostile environment claim in *Smith v. Norwest Financial Acceptance, Inc.*[238] The supervisor told the plaintiff that she "would be the worst piece of ass that I ever had."[239] He later told her to "get a little this weekend" so that she would "come back in a better mood," and said that she "must be a sad piece of ass" who "can't keep a man."[240] The conduct had occurred in the presence of the plaintiff's male co-employees, who testified that it was "sexually inappropriate," "offensive," and "intimidating."[241]

2. Physical Contact

The occurrence of physical touching increases the likelihood of a finding of actionable conduct. In a comprehensive analysis of every federal district and appellate court opinion on sexual harassment in the employment context for the ten-year period following *Meritor*, when the plaintiffs did not allege physical contact of any kind, they were successful in only 45% of the cases.[242]

Physical harassment, including occasional strong squeezing and references to the plaintiff's body, would be sufficient to establish hostile environment sexual harassment.[243] Constant physical touching would also result in actionable harassment. For example, in *Howard v. Burns Bros., Inc.*,[244] a co-employee's constant use of sexual innuendos and intentional body contact, including jokes which involved lewd gestures and touching, constituted actionable harassment.[245] Similarly, a supervisor's unsolicited and unwelcome touching and attempts to bestow kisses for two weeks pervasively altered the plaintiff's working environment.[246]

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236. *Id.* at 35.

237. *Id.*

238. 129 F.3d 1408 (10th Cir. 1997).

239. *Id.* at 1414.

240. *Id.*

241. *Id.* at 1413. Similarly, the Second Circuit found that a prima facie case that conduct created a sexually and racially hostile work environment also existed where the employee's supervisor repeatedly referred to her as a "dumb c–t" and "dumb spic," suggested that she was in the habit of performing oral sex for money, commented on her anatomy and his desire to have sex with her, and allowed friends of his to make crude sexual remarks about her. Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997).

242. *See* Juliano & Schwab, *supra* note 76, at 571.

243. Dees v. Johnson Controls World Servs., Inc., 168 F.3d 417, 422 (11th Cir. 1999); *see* Splunge v. Shoney's, Inc., 97 F.3d 488, 490 (11th Cir. 1996) (recognizing that where the harassers grabbed the plaintiffs and commented on their physical attributes, showed them pornographic videotapes, offered them money for sex, and favored other employees who had affairs with them, their conduct was sufficient to establish a hostile working environment).

244. 149 F.3d 835 (8th Cir. 1998).

245. *Id.* at 838-39.

246. Carrero v. New York City Hous. Auth., 890 F.2d 569, 577 (2d Cir. 1989) (observing that "as Carrero's immediate superior and chief evaluator, he held a position of power over her that, in

B. CONDUCT BELOW MINIMAL OFFENSIVENESS

The Supreme Court recently enunciated the seriousness necessary to satisfy a baseline of actionable conduct in *Clark County School District v. Breeden*,[247] where it held that no reasonable person could have believed a single allegedly harassing incident violated Title VII.[248] In that case, the plaintiff's male supervisor met with her and a male employee to review the psychological evaluation reports of four job applicants. One of the applicants' reports disclosed that the applicant had commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon."[249] The plaintiff's supervisor read the comment aloud and stated, " 'I don't know what that means.' The other employee then said, 'Well, I'll tell you later,' and both men chuckled."[250]

The Court opined that "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' "[251] The supervisor's and co-worker's comments could not "remotely be considered 'extremely serious,' as our cases require."[252] The plaintiff even conceded that the file's statement did not upset her.[253]

This holding buttresses recent decisions by several circuits attempting to draw a baseline of actionable conduct. Approximately two-thirds of all Title VII sexual harassment claims in the U.S. circuit courts are dismissed when the claim involves stray remarks.[254]

For example, in *Baskerville v. Culligan International Co.*,[255] the Seventh Circuit reversed a jury verdict in favor of an employee because nine events occurring over seven months were not sufficiently severe or pervasive to establish a hostile environment.[256] The incidents included the supervisor calling the plaintiff a "pretty girl," making a grunting sound like "um um um" when she wore a leather skirt, and making a gesture that was intended to suggest masturbation.[257] The court noted:

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combination with his unwelcome sexual advances, was tantamount to coercion"); *cf.* Mendoza v. Borden, 195 F.3d 1238, 1247 (11th Cir. 1999) (finding that constant following and staring was insufficient to constitute actionable harassment).

247. 532 U.S. 268 (2001).

248. *Id.* at 271.

249. *Id.* at 269.

250. *Id.*

251. *Id.* at 271 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).

252. *Breeden*, 532 U.S. at 271 (citing Faragher v. City of Boca Raton, 524 U.S. at 788).

253. *Id.*

254. James Chow, *Sticks, Stones, and Simple Teasing: The Jurisprudence of Non-cognizable Harassing Conduct in the Context of Title VII Hostile Work Environment Claims*, 33 LOY. L.A. L. REV. 133 (1999).

255. 50 F.3d 428 (7th Cir. 1995).

256. *Id.* at 430.

257. *Id.*

> [D]rawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures .... On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.[258]

The court held that the supervisor's comments, while vulgar, would only offend a woman of "Victorian delicacy."[259] The supervisor "never said anything to her that could not be repeated on primetime television."[260] Therefore, the court concluded that no reasonable jury could find that the remarks created a hostile working environment, although the jury awarded the plaintiff $25,000 in damages.[261]

The Seventh Circuit continued to establish its baseline in *Gleason v. Mesirow Financia, Inc.*[262] The plaintiff alleged that her manager referred to female customers as "bitchy" or "dumb," appeared to ogle other female employees, flirted with the plaintiff's female relatives, commented on a co-worker's anatomy, referred to a visit at a nudist camp, and told her he dreamt of holding her hand.[263] The court affirmed a summary judgment in favor of the defendant, holding that the conduct was insufficient to establish a sexually hostile work environment.[264] It reiterated:

> The central teaching of the *Baskerville* opinion [is that] 'low-level harassment' is not actionable. . . . Thus, it is established in this circuit as of this date that there is a 'safe harbor for employers in cases in which the alleged harassing conduct *is too tepid or intermittent or equivocal* to make a reasonable person believe that she has been discriminated against on the basis of sex.'[265]

The Fourth Circuit, in *Hartsell v. Duplex Products, Inc.*,[266] found a series of

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258. *Id.* at 431.
259. *Id.*
260. *Id.*
261. *Baskerville*, 50 F.3d at 430.
262. 118 F.3d 1134 (7th Cir. 1997).
263. *Id.* at 1137.
264. *Id.* at 1140.
265. *Id.* at 1144 (quoting Galloway v. General Motors, 78 F.3d 1164, 1168 (7th Cir. 1996)) (emphasis added). Infrequent contact over a short time has also been insufficient to establish a hostile environment claim. In Wenner v. C.G. Bretting Mfg. Co., Inc., 917 F. Supp. 640 (W.D. Wis. 1995), the district court granted summary judgment for the defendant, finding no same-sex hostile environment, where the conduct involved rubbing the plaintiff's leg under the table while "looking adoringly" at the plaintiff, telling the plaintiff he looked handsome, and rubbing the plaintiff's shoulders while asking, "What kinds of things do you think are pretty?" The incidents occurred over a two-day period and did not continue after the employee told the representative to stop. There was also no evidence suggesting that representative's behavior unreasonably interfered with the employee's work performance. *Id.* at 644-45.
266. 123 F.3d 766 (4th Cir. 1997).

statements insufficient as a matter of law to support a Title VII hostile work environment claim.[267] The plaintiff's co-workers made the following remarks: (1) "We've made every female in this office cry like a baby;" (2) upon seeing a buxom woman in a company magazine, "Why don't we have sales assistants like that?"; (3) a question to a sales representative as to whether she would be a "mini van driving mommy;" and (4) a statement to the plaintiff to "go home and fetch [her] husband's slippers like a good little wife."[268] Following *Baskerville*, the court found that the plaintiff failed to establish that she was ogled, flirted with, or inappropriately touched. Moreover, according to the court, the comments were neither vulgar nor obscene; thus the plaintiff at most had stated an unrecoverable claim for mere unpleasantness.[269]

Similarly, in *Brennan v. Metropolitan Opera Ass'n*,[270] an alleged daily display of sexually provocative pictures in an office, together with a single incident of lewd banter over a three-year period, did not create a sex-based hostile work environment.[271] The seven pictures at issue, one depicting nude men, were post-card sized and took up about one-quarter of the bulletin board. The Second Circuit court found that the pictures and banter could not reasonably be characterized as physically threatening or humiliating, and the plaintiff presented no evidence that the pictures or banter hampered her in her job.[272]

The Fifth Circuit similarly held that infrequent comments about female police officers in an employer's newsletter over thirty months, such as "dingy woman" and "[p]hysically, the police broads just don't get it" were not severe or pervasive enough to create an objectively hostile or abusive work environment.[273]

More recently, the Fifth Circuit held in *Shepherd v. The Comptroller of Public Accounts of Texas*,[274] that several incidents of sexually oriented conduct did not render the plaintiff's work environment objectively hostile or abusive.[275] The co-worker remarked "your elbows are the same color as your nipples," and, on a separate occasion said, "You have big thighs," while he simulated looking under

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267. *Id.* at 772.

268. *Id.* at 768-69.

269. *Id.* at 773; *see also* Indest v. Freeman, 164 F.3d 258, 264 (5th Cir. 1999) (Four episodes of crude sexual comments and sexual gestures, during a convention, were insufficient to show actionable harassment. The "vulgar remarks and innuendos (about his own anatomy) were no more offensive than sexual jokes regularly told on major network television programs.").

270. 192 F.3d 310 (2d Cir. 1999); *see* Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 977 (7th Cir. 2000) (finding that pictures in a "Frederick's of Hollywood" catalogue and a book with pictures of women in bondage and black leather did not rise to the level of sexual harassment).

271. *Brennan*, 192 F.3d at 315.

272. *Id*; *see* Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998) (holding that a supervisor allegedly telling employee that she had been voted the "sleekest ass" in the office and deliberately touching her breasts with papers was not sufficiently severe or pervasive to create a hostile work environment).

273. DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591 (5th Cir. 1995).

274. 168 F.3d 871 (5th Cir. 1999).

275. *Id.* at 874.

the plaintiff's dress.[276] He also attempted to look down her clothing, touched her arm on several occasions, and said, "here's your seat" while patting his lap at an office meeting.[277] The plaintiff affirmed that, apart from the above instances, she had a friendly relationship with the co-worker.

The court began by observing that "Title VII was only meant to bar conduct that is so severe and pervasive that it *destroys* a protected class member's opportunity to succeed in the workplace."[278] This standard is far harsher than the *Harris* requirement that the harassment simply makes it "more difficult [for the plaintiff] to do the job."[279]

Applying this extreme standard, the court unsurprisingly found that although the co-worker's comments were "boorish and offensive," they were not harassing.[280] It stated, "Moore's stares and the incidents in which he touched Shepherd's arm, *although they occurred intermittently for a period of time, were not severe.* None of Moore's actions physically threatened Shepherd. Nor would Moore's conduct interfere unreasonably with a reasonable person's work performance."[281] The court also found that the actions did not undermine the plaintiff's workplace competence.[282]

By isolating each episode, the court required each incident to rise to the level of "severity" even though "pervasiveness" does not require such a showing for each incident.[283] This disaggregation method robs the incidents of their cumulative effect and nullifies both the pattern and harassing nature of the conduct. It essentially requires the plaintiff to state a claim as to each instance of alleged harassment, despite the *Meritor* Court's recognition that severity or pervasiveness is disjunctively required.[284]

Another case illustrating the dangers of disaggregation in assessing hostile environment claims is *Mendoza v. Borden, Inc.*[285] Observing that motions for summary judgment or judgment as a matter of law are increasingly successful in policing the baseline of actionable conduct, a panel of the Eleventh Circuit

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276. *Id.* at 872.

277. *Id.*

278. *Id.* at 874 (citing Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 194 (5th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997)) (emphasis added).

279. Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring). Title VII "comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Id.* at 22.

280. *Shepherd*, 168 F.3d at 874.

281. *Id.* (emphasis added).

282. *Id.* (citing Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 269 (5th Cir. 1998) (considering, in addition to the other factors, that "[a] plaintiff . . . must show that implicit or explicit in the sexual content is the message that the plaintiff is incompetent because of her sex")).

283. *Id. See also* O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001) (rejecting the disaggregation method of analysis when assessing the pervasiveness element).

284. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

285. 195 F.3d 1238 (11th Cir. 1999).

affirmed a directed verdict for an employer on a hostile environment claim.[286]

The plaintiff, in essentially undisputed testimony, stated that her supervisor "constantly" followed her around the office and hallway over an eleven-month period, while looking her up and down in a sexually suggestive way.[287] On two occasions he stared at her groin area and made a sniffing sound, and another time he rubbed his hip against hers and touched her shoulder. He also allegedly made inappropriate comments, such as that he was "getting fired up" when she came into his office.[288]

The court concluded that the conduct was below the baseline of actionable conduct established by other circuits.[289] Examining each episode separately, and considering "normal office interaction," it found that the conduct was neither physically threatening nor humiliating, and it did not unreasonably interfere with Mendoza's job performance.[290]

Judge Edmondson, in a concurrence, added that the claim involved "objectively ambiguous conduct that a suspicious employee subjectively perceives to be improper."[291] He also stated that the case illustrated the "dangers of permitting litigation by perception" because Mendoza interpreted her supervisor's stares, following, and sniffing as offensive, although they could have been given benign and nonsexual interpretations.[292] This interpretation assumes that the only reasonable inference from the supervisor's conduct was that it was work-related and that Mendoza was prevaricating or hypersensitive to believe otherwise.

The dissent skillfully criticized the majority as improperly disaggregating the alleged harassing episodes in violation of the "totality of circumstances" test required by *Harris*, and then improperly viewing the evidence in the light most favorable to the defendant.[293] It found that a reasonable juror could have concluded the conduct constituted actionable harassment where the conduct, taken *cumulatively and in context*, allowed such an inference. It stated:

> Certainly an employee's bare allegation that her supervisor was "following" her around the office and that her supervisor often "stared" at her . . . would not be sufficient to support a claim for harassment. But when that supervisor has been "following and staring" at the employee "constantly" for over four months, stared at the employee's groin and made sniffing noises . . . and made sexually suggestive remarks . . . , then the "following and staring" begin to look more like "stalking and

286. *Id.* at 1243-44, 1257.
287. *Id.* at 1238.
288. *Id.*
289. *Id.* at 1247, 1251.
290. Mendoza v. Borden, Inc., 195 F.3d 1238, 1249 (11th Cir. 1999).
291. *Id.* at 1256.
292. *Id.* at 1257.
293. *Id.* at 1260 (Tjoflat, J., dissenting). The court must view the evidence in the light most favorable to the non-moving party in reviewing the district court's grant of a Rule 50(a) motion for judgment as a matter of law. *Id.* at 1259 (citing Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997)).

leering."[294]

The dissent observed that Congress specifically amended Title VII in the Civil Rights Act of 1991 to provide plaintiffs seeking compensatory or punitive damages with the right to a jury trial.[295] By repeatedly engaging in its own assessments of the credibility and value of Mendoza's testimony, in spite of reasonable inferences that could have been drawn in her favor, the majority improperly usurped the jury's role.[296]

IV. SCHOLARLY CRITICISM OF REASONABLENESS AND DIFFERING PERSPECTIVES OF HARASSMENT

The reasonableness and "social context" standards implicitly incorporate a personal and social vision of workplace norms; thus their judicial applications reflect disparate judgments about discrimination.[297] Although the objective "reasonable person" standard is meant to eliminate bias, some criticize it as incorporating male-biased perspectives.[298]

One view of sexual harassment is that it has emerged as a means of preserving male domination over the workplace.[299] Katherine Franke contends that sexual harassment should be seen as "gender subordination defined in hetero-patriarchal terms."[300] In her view, women's and men's identities are constructed according to "fundamental gender stereotypes" of sexually conquering men and conquered women.[301] Methods of preserving male control include demanding that female workers conform to stereotypical views of femininity that appear outside the workplace.[302] Men who depart from such stereotypes are similarly stigma-

294. *Id.* at 1262-63; *see* Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510-11 (11th Cir. 1989) (holding that the district court erred in requiring the plaintiff to establish a claim as to each allegation of harassment).

295. *Mendoza*, 195 F.3d at 1277-78 (citing 42 U.S.C. § 1981a(c)(1) (2002)).

296. *See id.*

297. *See* Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1205 (1990). "In equating 'reasonableness' with societal consensus (that is, in defining discrimination as deviation from the status quo) the . . . court (like all courts using this definition of reasonableness) necessarily assumes that the status quo itself is egalitarian, pluralistic, and nondiscriminatory." *Id.*

298. *See, e.g.*, Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 466 (1997).

299. *See* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1206 (1998); *see also* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1-23 (1979).

300. Katherine Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 760 (1997).

301. *Id.* at 693.

302. *Id.* Kathryn Abrams notes that "most forms of sexism involve a confinement of men and women to paradigmatically masculine and feminine roles. . . . The apparently inevitable association of males with valued (or superordinate) norms and of females with devalued (or subordinate) norms also rationalizes as 'natural' the subordination of women to men." Abrams, *supra* note 300, at 1209.

tized.[303] Kathryn Abrams suggests:

> One of the primary advantages of characterizing sexual harassment as a means of preserving male control and entrenching male norms in the workplace is the breadth and flexibility of such a characterization. It permits courts and commentators to understand sexual harassment as applicable to individuals and groups, as desire based and non desire based, as sexually violative and sexually stigmatizing . . . .[304]

Under this view, the "reasonable person" perspective, by incorporating male-based views of workplace behavior, entrenches masculine norms to the detriment of female employees.[305] An example of this perspective, linked to the social context, is that of *Rabidue v. Osceola Refining Corp.*[306] In that case, the Sixth Circuit found sexually oriented displays to minimally affect the work environment "when considered in the context of a society that condones and publicly features . . . open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places."[307]

This "social context" vision, by buttressing male-entrenched evaluations of reasonableness, reinforces prevailing forms of sexism, particularly in male dominated trades that are considered blue collar or "rough hewn." Profanity on construction sites, the occasional statement about a co-worker's nipples or thighs, or the continuous posting of a nude picture would not be considered actionable in a social context that condones open displays of mild sexuality and vulgarity.[308] Courts may thus readily award summary judgments and judgments as a matter of law by finding that the only "reasonable" inference to be drawn from such

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303. *See* Abrams, *supra* note 300, at 1199 ("The disciplining of an aggressive woman or a sexually inexperienced man may be driven by the impulse to enforce masculine norms in the workplace or by the almost aesthetic distaste all hetero-patriarchs feel for individuals who transgress gender stereotypes."). This article posits that the harassment of homosexuals for their failure to conform to gender stereotypes also would fit into this view and therefore justify their protection under Title VII. *Id.*

304. Abrams, *supra* note 300, at 1217.

305. The *Johnson* court implicitly incorporated this view by finding that sexualized comments while roughhousing were part of ordinary work-related interactions. Johnson v. Hondo, 125 F.2d 408, 412-13 (7th Cir. 1997).

306. 805 F.2d 611 (6th Cir. 1986).

307. *Id.* at 622.

308. E. Christi Cunningham, *Preserving Normal Male Fantasy: The "Severe or Pervasive" Missed Interpretation of Sexual Harassment in the Absence of Tangible Job Consequence*, 1999 U. CHI. LEGAL F. 199, 225. "My argument speaks to a particular use of fantasy by the courts. Put another way, the courts, in balancing male enjoyment of the exercise of sexual power with individuals' rights to be free from the exercise of that power, defend the right to be free from that exercise of power only under conditions not essential to a shared fantasy of ordinary male sexuality. The courts' protection of the right to be free from the exercise of power because of sex is thus limited, and that conditionality is as much a function of a fantasy of men's pleasure as it is of women's liberty. As the relationship of the sexual fantasy to ordinary heterosexual male pleasure increases, the scale tips away from the individual's right to be free from the imposition of the fantasy through Title VII protections." *Id.*

conduct is that the plaintiff must have "Victorian" or unrealistic sensibilities. The decisions in *Baskerville*, *Gleason*, *Shepherd*, and *Mendoza* are easily understood in this context. The Supreme Court's caution that Title VII is not meant to be a general civility code further fuels the higher bar for actionable claims.

However, as pointed out by Judge Keith's dissent in *Rabidue*:

> To condone the majority's notion of the "prevailing workplace" I would also have to agree that if an employer maintains an anti-semitic workforce and tolerates a workplace in which "kike" jokes, displays of nazi literature and anti-Jewish conversation "may abound," a Jewish employee assumes the risk of working there, and a court must consider such a work environment as "prevailing." I cannot. As I see it, job relatedness is the only additional factor which legitimately bears on the inquiry of plaintiff's reasonableness in finding her work environment offensive.[309]

The "reasonable woman" standard incorporates a different view of the workplace. It recognizes women's historical vulnerability in the work force, so that they are more likely to regard sexually charged comments as degrading and coercive. Such comments remind women that they are "viewed more as an object of sexual desire than as a credible co-worker deserving of respect."[310] Statements about physical attributes and ogling could reasonably be interpreted by a woman as attempts to trivialize and humiliate her, and thus undermine her feelings of workplace competence and equality.[311]

Jane Dolkart suggests an "individualized" reasonable victim standard that is sensitive to the voice of the victim.[312] She observes that women respond to sexual harassment against a background of a subordinate social role status, and that victims should be entitled to compensation for any increase in damages brought on by their previous histories of victimization.[313]

Some commentators criticize the "reasonable woman (or victim)" standard as falsely universalizing women's views and perpetuating stereotypes that ultimately work to women's detriment.[314] This standard would essentially "discrimi-

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309. Rabidue v. Osceola, Ref. Corp., 805 F.2d 611, 626 (6th Cir. 1986).

310. Radtke v. Everett, 471 N.W.2d 660, 664 (Mich. Ct. App. 1991).

311. *See* Dolkart, *supra* note 98, at 224-25. "To varying degrees, women internalize the social stereotypes and prejudices that devalue them. 'Normal' aspects of women's psychological development are self-devaluation, low self-esteem, self-doubt, and reliance on the opinions of others. This internalized oppression is reinforced by threats of sexual and physical abuse which are so prevalent as to constitute a normative aspect of female development. For instance, in a random sample of 930 women, 44% reported being the victim of a completed or attempted rape, one-half of these reporting more than one such incident." *Id.*

312. *Id.* at 229, 243.

313. *Id.* at 229.

314. *See* Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1035 (1992).

nat[e] to avoid discrimination,"[315] and reinforce a biological construction of gender.[316] Nancy Ehrenreich also observes that "to the extent a reasonable woman standard fails to draw the court's attention to race and class, it may perpetuate existing inequities based on those factors in the same way that the reasonable person standard does when it fails to consider the woman's point of view."[317]

Anita Bernstein contends that sexual harassment should be viewed from the perspective of the "respectful person," rather than the "reasonable person."[318] She criticizes the reasonable person test as vague, stating that it "pushes under the rug an embarrassing mass of evidence indicating that gender affects the way men and women perceive sexual behavior in the workplace."[319] Professor Bernstein posits that the concept of reason was formed by "centuries of inequality, monarchy, and white-male supremacism," which discounts emotion and mischaracterizes the experience of sexual harassment.[320] She also criticizes the "reasonable woman" standard as containing "the manacles of gender-based oppression, even though it seeks to reduce the effects of this oppression."[321]

Under the respectful person standard, "the duty not to humiliate another requires the agent to consider the dignity of the other and to refrain from injuring that dignity, unless injury is either justified or unavoidable."[322] She proposes a jury instruction stating, in part:

> If ABC treated X as a respectful person would, then ABC is not liable to X . . . For purposes of the law, the respectful person must refrain from doing to other people what he or she would not want done to him or her, except when that is impossible to avoid. . . . The respectful person appreciates the dignity of another person. This obligation does not mean that X is entitled to feel good about her job all the time, nor that ABC must spare her feelings at all times.[323]

Although a laudable, aspirational guide, the respectful person test runs the risk of turning Title VII into a general civility code. The proposed jury instruction to "refrain from doing to other[s] . . . what he or she would not want done to him or

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315. Cathleen M. Mogan, *Current Hostile Environment Sexual Harassment Law: Time to Stop Defendants from Having Their Cake and Eating It Too*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543, 566 (1992).

316. Dolkart, *supra* note 98, at 218.

317. Ehrenreich, *supra* note 298, at 1218.

318. Bernstein, *supra* note 299, at 464.

319. *Id.* at 465-66 (noting that empirical findings show that men are "relatively likely to feel flattered or amused, whereas women are relatively likely to feel frightened or insulted by sex-related displays at work").

320. *Id.* at 460-62.

321. *Id.* at 474.

322. *Id.* at 490.

323. Bernstein, *supra* note 299, at 523.

her" may also violate the "golden rule" argument, which state and federal courts almost uniformly prohibit.[324]

While this respectful person standard is helpful in recognizing the dignitary problems in sexual harassment cases, it is problematic in curing the deficiencies of the reasonableness standard. Dignitary injuries can incorporate diverse perspectives as to respectful behavior. "Indignity" could mean different things in different trades, thus adding to the "social context" problems of the reasonableness inquiry. The standard requires an appraisal of the value of other persons, therefore it uses both the "objective" qualities implicit in "reasonableness" and its underlying attitudinal judgments. As Professor Abrams states, "[J]udgments of respectability . . . are often deeply influenced by assumptions regarding gender, race, class, and other group-based characteristics."[325] The respectful person standard thus substitutes "respect" for reasonableness while retaining much of its inherent ambiguity.[326]

Sarah Burns, in contrast, suggests following the proposed E.E.O.C. Guidelines at the time *Harris* was decided.[327] This practical standard inquires whether "a reasonable person in the same or similar circumstances" would find the conduct abusive, including "considerations of the perspective of persons of the alleged victim's . . . gender"[328] She observes that "the plaintiff deserves the benefits of an objective test . . . whether or not the plaintiff or her reactions personally fit the jury's profile of a reasonable person or response."[329] A court may balance the test by ruling on the admissibility of evidence and allow the jury to hear "both the cultural narratives and the related situational factors that tend to . . . subordinate the woman because of her gender."[330]

Similarly, Professor Abrams suggests that the "reasonable person" standard should mean "a person with a solid base of political knowledge regarding sexual

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324. *See* World Wide Tire Co. v. Brown, 644 S.W.2d 144, 145-46 (Tex. Ct. App. 1998). In *Brown*, the plaintiff's counsel argued, "We are instructed that we should do unto others as we would have them do unto us," and asked the jurors to give the plaintiff what they would want if they were injured. *Id.* at 145. The court ruled that the argument improperly asked the jury to put themselves in the plaintiff's shoes, and was reversibly harmful error. *Id.* at 146. *See also* DeJesus v. Flick, 7 P.3d 459, 464 (Nev. 2000) ("Mainor impermissibly asked the jurors to place themselves in Flick's position when he asked them to 'tap into feelings' about Flick's fears. . . . We have previously held that such 'golden rule' arguments are forbidden because they interfere with the jury's objectivity."); Boyd v. Pernicano, 385 P.2d 342, 343 (Nev. 1963); *accord* DuBois v. Grant, 835 P.2d 14 (Nev. 1992). *See generally* Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 OHIO N.U. L. REV. 67 (2001).

325. Abrams, *supra* note 300, at 1180.

326. This standard could also be subject to gender differences in its application by incorporating assumptions of social hierarchy as to the degree of "respect" owed particular workers. That is, would the "respectful" man treat females with additional sensitivity to their "dignity" in rough hewn work environments, or would such treatment reinforce gender stereotypes?

327. Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What is it and How Should it be Assessed After Harris v. Forklift Systems, Inc.?*, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 430 (1995).

328. *Id.* (quoting proposed C.F.R. §1609(c)).

329. *Id.*

330. *Id.* at 431.

harassment."[331] This knowledge includes "understanding the ways in which sexism has operated on women in the workplace and elsewhere. It also means understanding the ways in which a sex and gender hierarchy impinges on nonconforming men and women."[332] This method of amplifying the *Harris* and *Oncale* Courts' bifurcation of the reasonableness standard is in keeping with the remedial purpose of Title VII to promote equal opportunity in employment.[333]

A reasonable juror standard, by including both men and women drawn from a cross-section of the community, incorporates the views of the average person in assessing harassment. Evidence including the different cultural views of men and women should also be admissible in establishing both the plaintiff's perspective and the reasonableness of Title VII issues. Such evidence would counteract recent judicial tendencies to impose male norms of reasonableness in assessing motions for judgment as a matter of law. As the Court stated in *Smith v. United States*,[334] "It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard of appeal to prurient interest."[335]

CONCLUSION

The higher bar to establish harassing conduct can be understood by the rationale that sex is part of normal human interaction and never will be fully eradicated from the workplace. Title VII would thus be meant to deal with the more severe forms of sex discrimination rather than merely boorish or annoying conduct. A portrait emerges where occasional comments such as "dingy woman," profanity, and constant staring, ogling, and following are allowable in the workplace due to human nature and a sex-saturated society, particularly in trades where vulgarity is rampant. The work-relatedness exception and allowance for demeaning, stereotypical comments about homosexuals complete a view of Title VII as far from a general civility code.

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331. Abrams, *supra* note 300, at 1224.

332. *Id.* (footnotes omitted). The jury instruction given in Hurley v. Atlantic City Police Dept., 174 F.3d 95, 116 (3d Cir. 1999), involving a female plaintiff, is helpful in its specificity: "In evaluating plaintiff's hostile work environment claims you should consider the following factors: one, *plaintiff's reasonable expectation upon entering the workplace*; two, the total physical environment of the area in which plaintiff worked; three, whether plaintiff was exposed to sexually explicit words or comments, drawings, graffiti, or obscenity in the workplace, and, if so, the degree, persistence, and type such [sic] obscenity to which exposed; four, whether the sexually explicit words or comments, drawings, graffiti or obscenity were directed at plaintiff, and, if so, the frequency of the offensive encounters; five[,] severity of the conduct and the context in which it occurred; six, whether the conduct was unwelcome, that is, conduct plaintiff regarded as unwanted or unpleasant; seven, *the likely effect on a reasonable woman's psychological well-being*; eight, whether the conduct reasonably [sic] interfered with plaintiff's work performance; nine, the extent to which supervisors upon learning of sexually harassing conduct, acted promptly and effectively to respond to such conduct . . . ." (emphasis added).

333. *See* Dolkart, *supra* note 98, at 191-93.

334. 431 U.S. 291 (1977).

335. *Id.* at 302, *quoted in* Mendoza v. Borden, 195 F.3d 1238, 1278 (11th Cir. 1999) (Barkett, J., dissenting).

This view has the advantage of resolving some of the ambiguity surrounding the fact-based test for severity and pervasiveness. It also abates employers' and employees' fears that the occasional off-color joke, compliment, and humorous innuendo could be construed as actionable harassment. However, this view also undervalues the damaging effect of sexual harassment. Verbal harassment, such as sexual jokes, teasing or remarks, has been the most prevalent form of unwanted workplace behavior, and harassing conduct takes a serious toll in terms of psychological stress, decreased productivity and job turnover.[336]

Although the Court recognized the Title VII claim is premised on the "right to work in an environment free from discriminatory intimidation, ridicule, and insult,"[337] it has recently been applied to mean constant and severe conduct, or heterosexual insult. Courts' method of disaggregating conduct into isolated tepid episodes improperly circumvents the pervasiveness requirement, which allows recovery for mild conduct occurring in concert. As stated in *Mendoza*, "The whole of a hostile environment case may be greater than the sum of its parts."[338] Courts' eagerness to police the baseline of actionable conduct is preventing juries from making such determinations, when different reasonable inferences can be drawn from ambiguous or cumulative conduct.

The decisions in *Meritor*, *Harris*, *Oncale*, *Faragher*, and *Ellis* collectively do not support a return to severe restrictions on the ambit of Title VII. Title VII protections should include the ability to work free from disparaging comments involving homosexual stereotypes because it was meant to strike at the " 'entire spectrum of disparate treatment of men and women' in employment."[339] The Civil Rights Act of 1991, by allowing the right to a jury trial, further broadened Title VII's scope in maintaining equal opportunity in employment. The reasonable person test, including the victim's subjective perspective, allows a reasonable juror to understand the experiences of both men and women in assessing harassment. Courts should submit close cases to the jury, which should assess the evidence with appropriate narratives of male and female perspectives on harassment.

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336. *See* U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace*, at 14, 23, *available at* http://www.mspb.gov/studies/sexhar.pdf (last visited Sept. 10, 2002). "Nearly 37 percent of women and 14 percent of men reported experiencing this sort of verbally harassing behavior. For both male and female employees, this is also the only one of the unwanted behaviors that has shown a slight but steady increase." *Id.* at 14.

337. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

338. *Mendoza*, 195 F.3d at 1263 (Tjoflat, J., dissenting).

339. *Meritor*, 477 U.S. at 64 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).