How Sexual Harassment Law Failed its Feminist Roots

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Abstract

The dawn of sexual harassment law showed so much promise. But in spite of the hopefulness with which the legal recognition of sexual harassment was greeted, the intervening years have shown that the law of sexual harassment has not lived up to its potential. Rather than creating a cause of action empowering women to challenge degrading employment practices that have limited their workplace opportunities, courts have instead recognized a number of elements of a cognizable claim of sexual harassment that have effectively sanctioned the continuance of the conduct while blaming women for its occurrence. The judicial imposition of the elements of a sexual harassment claim and the judicial gloss placed on those elements have turned the cause of action for sexual harassment into something far different than the feminists who worked for its recognition envisioned. The courts have turned that promise into a cause of action that seeks to protect the workplace from women who would make claims of sexual harassment, rather than a cause of action that seeks to protect women from discriminatory workplaces. This article explores how some of that lost promise might be recaptured, first through a reshaping of the law by the courts and legislatures within the frame of the existing structure of the cause of action, explaining how the courts could apply the existing elements of the cause of action more consistently with the purpose of Title VII to assure women of the right to workplace equality. The article then imagines a more fundamental reshaping of the law of sexual harassment, by exploring what the law of sexual harassment might look like if it were designed by a feminist, forged by an overriding concern about ensuring women's workplace equality rather than protecting existing workplace norms.

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> *"[I]t may be too soon to know whether the law against sexual harassment will be taken away from us or turn into nothing or turn ugly in our hands."*
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> —Catharine MacKinnon[1]

I. INTRODUCTION

The dawn of sexual harassment law showed so much promise. The development of sexual harassment law in the United States can be tied directly to feminist scholars,[2] particularly to the work of Professor Catharine MacKinnon, who demonstrated that sexual harassment as practiced in the workplace was a form of sex

1. Catharine A. MacKinnon, *Sexual Harassment: Its First Decade in Court, in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 103, 105 (1987).

2. *See* Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature,* 4 UCLA WOMEN'S L.J. 37, 37–38 (1993) ("The legal claim for sexual harassment is notable for its distinctively feminist origins. Born in the mid-1970s, the term was invented by feminist activists, given legal content by feminist litigators and scholars, and sustained by a wide-ranging body of scholarship generated largely by feminist academics."). *See also* MacKinnon, *supra* note 1, at 103 ("Sexual harassment, the legal claim—the idea that the law should see it the way its victims see it—is definitely a feminist invention.").

discrimination prohibited by Title VII of the Civil Rights Act of 1964.[3] More than a decade after Congress made it an unlawful employment practice to discriminate with respect to terms and conditions of employment "because of . . . sex," feminist scholars began to argue, and courts began to agree, that those few words provided a statutory basis for making unlawful the prevalent and denigrating practices to which women long had been subjected in their workplaces.[4] The role that feminist scholars and feminist legal theory played in the initial development of sexual harassment law has been well documented.[5] The recognition of a cause of action for sexual harassment by the United States Supreme Court in 1986 was viewed, at least by some, as a watershed moment in women's fight for equality.[6]

But in spite of the hopefulness with which the legal recognition of sexual harassment was greeted, the intervening years have shown that the law of sexual harassment has not lived up to its potential. Rather than creating a cause of action that empowers women to challenge employment practices that have subjected them to degrading treatment while limiting their workplace opportunities, courts have instead recognized a number of elements of a cognizable claim of sexual harassment that have effectively sanctioned the continuance of such conduct, while blaming women for its occurrence.

I do not mean to suggest that all aspects of sexual harassment law have been a failure for women or workers generally. The recognition of the cause of action itself has led to some benefits for workers; the failure of courts to recognize the cause of action would have been quite harmful to attempts to prevent sexual harassment. Additionally, employers have become more aware of the harms of sexual harassment and have sometimes taken active steps to prevent or lessen the existence of sexual harassment in the workplace. This article, however, focuses on the failures of sexual harassment law.

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3. *See generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (Yale Univ. Press 1979). In her book, Professor MacKinnon demonstrates that sexual harassment meets the definition of sexual discrimination under an inequality approach, as a practice that reinforces the social inequality of women, and under a differences approach, as singling out women for particular treatment. *Id.* at 174–206.

4. *See* Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 361–77 (1980) (explaining why sexual harassment is a form of sexual stereotyping and therefore a form of sex discrimination).

5. A history of the development of the law of sexual harassment, and the role that Black women as litigants played in the development of the law, is discussed in Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813 (2002). A discussion of the role of feminist legal theory in the development and recognition of sexual harassment law is contained in Katherine M. Franke, *What's Wrong with Sexual Harassment?,* 40 STAN. L. REV. 691, 698–729 (1997).

6. *See* Stuart Taylor, Jr., *Sexual Harassment on Job is Illegal*, N.Y. TIMES, June 20, 1986, at A1 (quoting Ellie Smeal, President of the National Organization for Women, calling the decision "on balance a victory for working or employed women"); Al Kamen, *Court Rules Firms May Be Liable for Sexual Harassment,* WASH. POST, June 20, 1986 (noting that the *Meritor* decision has been "hailed by women's groups as a major victory").

This article focuses primarily on the interests of women in workplace equality and the right to be free of sexual harassment in the workplace. I recognize that sexual harassment in the workplace imposes particular and often additional burdens on people of color, disabled individuals, older workers, and gay, lesbian, bisexual, and transgender individuals. Although a detailed discussion of those burdens is beyond the scope of this article, I believe that many of the changes suggested by this article would protect the rights of all persons to be free of sexually- and gender-hostile behavior that makes it more difficult to survive and prosper in certain workplace environments.

Courts have recognized several elements of a sexual harassment claim and then have used those elements to find that discriminatory and denigrating sexual and gender-based conduct is not unlawful because one or more of those elements have not been satisfied. Courts have required that the conduct be "unwelcome," generally interpreted to mean that the target must not invite or otherwise solicit the conduct. The only element required by Title VII is that the conduct be "because of . . . sex," but courts have interpreted that language as requiring that the conduct be sexual in nature to be actionable, as well as requiring something like direct evidence that the conduct was motivated by the target's gender. Courts have also required that the harassing conduct be "severe or pervasive" to be actionable and have interpreted that requirement to mean that the conduct must be extremely serious, allowing a wide range of sexually derogatory and denigrating conduct to escape sanction. Finally, even when courts have found actionable harassment to have occurred, they have allowed harassers and employers to escape liability for that conduct, by adopting a range of rules about individual and employer liability and interpreting those rules in a way to benefit employers.

These aspects of a claim of sexual harassment have been deployed in such a way as to make it much more difficult for women to establish that harassing conduct to which they have been subjected is serious enough to be unlawful and, even if the conduct is unlawful, to establish that anyone has legal responsibility for that unlawful conduct.

This article explores how some of the lost promise of sexual harassment law might be recaptured. It first considers a reshaping of the law by the courts, and possibly by legislatures, within the frame of the existing structure of the cause of action, explaining how the courts could apply the existing elements of the cause of action more consistently with the purpose of Title VII to ensure women the right to workplace equality. The article then imagines a more fundamental reshaping of the law of sexual harassment, exploring what the law of sexual harassment might look like if it were designed by a feminist, forged by an overriding concern about ensuring women's workplace equality over protecting existing workplace norms. This more fundamental change in the law would require the legislative will to make good on Title VII's promise that all workers be allowed to participate in the workplace without having to endure denigrating sexual conduct and gender-based hostility that deprives them of job opportunities and job

advancement. Although sexual harassment law has developed in the way that it has over almost forty years, the focus on sexual harassment prompted by the most recent reiteration of the "MeToo" movement may provide the impetus for a reconsideration of sexual harassment law.

This article proceeds as follows: Part II details the ways in which sexual harassment law has lost its way and failed its feminist roots, focusing on the ways in which the elements of the cause of action have been imposed and interpreted by the courts. Part III suggests a number of ways in which sexual harassment law might regain some of its lost promise within the frame of the existing cause of action, through a reshaping of the law by the courts and legislatures. Part IV imagines a more fundamental reshaping of the law, exploring what the law of sexual harassment might look like if it had been designed by a feminist. Part V concludes with a summary of the changes suggested by this article and the implications of such changes.

II. HOW SEXUAL HARASSMENT LAW LOST ITS WAY

A. TURNING RESPONSIBILITY FOR SEXUAL HARASSMENT ON ITS HEAD: THE "UNWELCOMENESS" REQUIREMENT

What has traditionally been known as the "unwelcomeness" requirement of sexual harassment law has been used simultaneously to excuse the conduct of harassers and to blame women for their own harassment, the legal equivalent of indicating that women who are harassed and abused "asked for it." This requirement has been interpreted to require the targets of sexual harassment to bear the burden of proof that they did not invite or encourage the harassing conduct and that they found the conduct to be offensive.[7]

The existence of this requirement is insulting to women because of its implicit presumption that sexual conduct, even denigrating sexual conduct, is welcomed by its targets. In addition, the way in which the requirement has been applied changes the focus from the actions of the harassers to the actions of their targets, absolving harassers of their discriminatory conduct. Even though some courts and the Equal Employment Opportunity Commission (EEOC) appear to be moving away from the requirement, other courts continue to apply it with full force.

The very existence of the unwelcomeness requirement as an element of a sexual harassment claim, without regard to the way that it has been interpreted, is an affront to those subjected to degrading and denigrating sexual conduct in the context of the workplace. One of the primary reasons for the placement of a burden of proof upon a particular party is that the burden is placed on the person making

7. In its Policy Guidance on Current Issues of Sexual Harassment, the United States Equal Employment Opportunity Commission seemed to cite with approval a case defining conduct as "unwelcome" "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." The lower court case at issue was *Henson v. City of Dundee,* 682 F.2d 903 (11th Cir. 1982). U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990).

the assertion that is assumed to be less likely to be true, that is, the burden is placed on the person trying to establish the more improbable set of facts.[8] Accordingly, the placement of the burden of proof on the plaintiff in a sexual harassment case to prove that sexual conduct is unwelcome in the workplace suggests a general belief that such conduct would normally be welcome. It is no response to say that the burden of proving unwelcomeness is placed on the plaintiff because she must prove the elements of her claim; the allocation of burdens of proof is all about deciding what material elements form part of the plaintiff's claim and what elements are instead regarded as affirmative defenses that must be proven by the defendant.[9]

The belief that sexual conduct in the workplace is generally welcomed by its targets is not only factually incorrect, but it is also insulting to women whose main goal in the workplace is to be thought of as good and professional workers, not as an object of their co-workers' and supervisors' sexual interest or conduct. Women who are the targets of sexual conduct in the workplace generally report that they find that conduct to be inappropriate, threatening, and insulting, not complimentary.[10] Because the more improbable set of facts is that a woman welcomes sexual conduct in the context of the workplace, employers who seek to establish that fact should bear the burden of proof with respect to that issue. Accordingly, even if unwelcomeness or welcomeness were considered to be an important element for a claim of sexual harassment, it should be an affirmative defense imposed on the employer, not an essential element of the plaintiff's claim.

Curiously, the requirement that women demonstrate that they did not welcome the sexual, and even non-sexual but gender-related, conduct to which they were subjected became ingrained in the claim's legal requirements in the context of a case in which it should not have been at issue at all. In *Meritor Savings Bank v. Vinson*,[11] the first sexual harassment case to reach the United States Supreme

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8. *See* Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 12–13 (1959) ("A further factor which seems to enter into many decisions as to allocation is a judicial, *i.e.,* wholly nonstatistical, estimate of the probabilities of the situation, with the burden being put on the party who will be benefited by a departure from the supposed norm."); Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1217–19 (1981) (noting that courts give considerable weight in allocating burdens of proof to "estimates of the probability that an event occurred by a departure from a supposed norm").

9. Belton, *supra* note 8, at 7–11 (rejecting the notion that the plaintiff must prove all "essential" elements of a claim, noting that the law does not place the burden of proof of all elements on the plaintiff, but instead allocates some elements to the defendant in the form of defenses).

10. *See* Pamela J. Foster & Clive J. Fullagar, *Why Don't We Report Sexual Harassment? An Application of the Theory of Planned Behavior,* 40 BASIC & APPLIED SOC. PSYCH. 148, 148 (2018) (reporting the results of a number of studies indicating the negative consequences of sexual harassment, including decreased satisfaction with co-workers, supervisor, and work, as well as work withdrawal, mental and physical ill health, disengagement, and lowered life satisfaction); *see also* L. Camille Hébert, *Sexual Harassment* is *Gender Harassment*, 43 U. KAN. L. REV. 565, 578–79 (April 1995) (reporting studies indicating that the strongest feelings of women subjected to sexual conduct at work were disgust and anger).

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

Court, the defense of defendant Sidney Taylor was not that plaintiff Mechelle Vinson welcomed his conduct, which included allegations of fondling her at work, following her into the workplace restroom, coercing her to have sex, and forcible rape, but that the conduct did not occur at all.[12] It is hard to imagine how one could welcome sexual conduct that did not occur at all, unless Taylor's claim was that Vinson was the type of person who *would* have welcomed the conduct if it had actually occurred.

In spite of the seeming irrelevance of the issue of welcomeness to the case before it, the *Meritor* Court used the case to enshrine the unwelcomeness requirement in the cause of action. The Court indicated that the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[13] The Court also firmly rejected the court of appeals' indication that testimony about Vinson's "dress and personal fantasies" "had no place in this litigation";[14] instead, the Court noted that a "complainant's sexually provocative speech or dress" was "obviously relevant" to the issue of unwelcomeness.[15] The Court did not say why that evidence was "obviously relevant"; perhaps the Court assumed that women who engage in "provocative" speech and dress are the "type" of women who generally welcome sexual conduct or that engaging in that conduct leads men to believe that those women would not object to sexual conduct directed at them.[16]

The Supreme Court did not invent the concept of unwelcomeness. That concept was articulated by the federal EEOC when it promulgated its Guidelines on Discrimination Because of Sex in 1980, which provide that:

> Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other

12. *Id.* at 61 (noting that Taylor's response to Vinson's allegations were that "he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so").

13. *Id.* at 68–69. The dictionary definition of "gravamen" is "the essence or most serious part of a complaint or accusation," so the Court certainly seems to have been saying that the element of unwelcomeness is the most important element of a claim of sexual harassment. Oxford University Press, *Gravamen*, LEXICO, https://www.lexico.com/en/definition/gravamen (last visited Jan. 30, 2021).

14. Vinson v. Taylor, 753 F.2d 141, 146 & n. 36 (D.C. Cir. 1985). The court of appeals was not unanimous in its determination that this evidence should not have been admitted. In their dissent from denial of rehearing *en banc*, then Judges Robert Bork, Antonin Scalia, and Kenneth Starr, characterizing the plaintiff's allegations as "sexual dalliance," found it "astonishing" that evidence that "the plaintiff wore provocative clothing, suffered from bizarre sexual fantasies, and often volunteered intimate details of her sex life to other employees" would be inadmissible. Vinson v. Taylor, 760 F.2d 1330, 1331 (D.C. Cir. 1985) (Bork, C.J., dissenting).

15. *Meritor Sav. Bank*, 477 U.S. at 68–69.

16. *Id.* at 68. The Court's language is not helpful in determining its meaning. The Court indicated that "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Id.* The Court might have meant that the employee's conduct was relevant as an objective manifestation of her subjective feelings about the conduct, or it might have meant that the employee's conduct was relevant because she had an obligation to inform the harasser that his sexual conduct was unwelcome.

> verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[17]

These guidelines do not define the term "unwelcome," nor do they indicate who has the burden of establishing welcomeness or unwelcomeness in situations in which it is at issue.

More information about the EEOC's then position on the issue of unwelcomeness can be found in the agency's amicus curiae brief before the Supreme Court in *Meritor*. In arguing against the court of appeals' decision, the brief had the following to say about the unwelcomeness requirement:

> Whereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous.
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> The gravamen of any hostile environment claim must be that the alleged sexual advances were 'unwelcome.' In weighing such allegations, the trier of fact must determine whether the defendant's conduct was indeed unwelcome in light of all the circumstances, including evidence that the plaintiff substantially contributed to the allegedly distasteful atmosphere by his or her own 'sexually suggestive conduct.'[18]

This language suggests not only that sexual conduct is not presumptively unwelcome in the workplace, but also that the views of the "initiator"—the harasser—as well as the target are relevant to determining whether that conduct is unwelcome. This language indicates a punitive approach to women who engage in any form of sexual conduct in the workplace, as well as a skepticism about the credibility of women who make complaints of sexual harassment.

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17. U.S. Equal Emp. Opportunity Comm'n, Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,677 (Nov. 10, 1980). Eleanor H. Norton was Chair of the EEOC at the time that these guidelines were promulgated.

18. Brief for the United States and the Equal Emp. Opportunity Comm'n as Amici Curiae, Meritor Sav. Bank v. Vinson, 477 U.S. 50 (Dec. 1985) (No. 84-1979), 1985 WL 670162, at *13–14. Now Supreme Court Justice Clarence Thomas, himself accused of sexual harassment prior to his appointment to the Court, was Chair of the EEOC at the time that this brief was filed.

In 1990, the EEOC issued its Policy Guidance on Current Issues of Sexual Harassment.[19] This time, the EEOC indicated that unwelcomeness was indeed a requirement of a claim of sexual harassment by indicating that "only unwelcome sexual conduct that is a term and condition of employment constitutes a violation" of Title VII and that "sexual conduct becomes unlawful only when it is unwelcome."[20] The EEOC also suggested that a claim of unwelcomeness would be strengthened when a contemporaneous complaint or protest was made, but that such a complaint was not required to state a claim, noting that there may be reasons for failure to make a complaint, including fear of retaliation.[21] Additionally, the EEOC suggested that the target's conduct should be examined to determine if the conduct was unwelcome, rather than reliance on the subjective feelings of the target, particularly when these feelings were not communicated to her harassers.[22] Relevant conduct, the EEOC suggested, included whether the target of harassment acted "in a sexually aggressive manner, us[ed] sexually-oriented language, or solicit[ed] the sexual conduct."[23] However, the EEOC suggested that even that type of conduct would not excuse "more extreme and abusive or persistent comment[s] or a physical assault" or what the EEOC characterized as "quid pro quo" harassment, when employment decisions are based on toleration of sexual conduct. Past conduct of the target, the EEOC said, would be relevant only if it related to the alleged harasser, rejecting the notion that past sexual conduct be used to indicate that a target of harassment was the kind of person who would not be offended by sexual conduct generally.[24]

The Supreme Court's sanction of, and emphasis on, the unwelcomeness requirement has led to women being implicitly and explicitly blamed for the degrading conduct directed at them. In a number of early cases, the courts found that truly denigrating and hostile sexual conduct was welcomed because of the target's sexually tinged conduct, even when the target's sexual conduct was considerably different in kind from the sexual conduct to which she was subjected. For example, in *Reed v. Shepard*, the district court found, and the court of appeals agreed, that a female civilian jailer welcomed having her face pushed into a toilet and having an electric cattle prod placed between her legs, as well as being punched in the kidneys and maced, because she used offensive language at the jail, did not always wear a bra to work, and gave a sexually suggestive gag gift to a male co-worker.[25] The court rejected her assertion that she did not make a

19. U.S. Equal Emp. Opportunity Comm'n, Policy Guidance on Current Issues of Sexual Harassment, N-915-050 (Mar. 19, 1990). Evan J. Kemp, Jr. was Chair of the EEOC when this guidance was issued, having become Chair on March 8, 1990, succeeding Clarence Thomas as Chair.

20. *Id.*

21. *Id.*

22. *Id.* This language would seem to suggest that the EEOC, at least at that time, viewed unwelcomeness in the eye of the harasser, not that of the target of the harassment.

23. *Id.*

24. *Id.*

25. Reed v. Shepard, 939 F.2d 484, 486–87 (7th Cir. 1991).

complaint about the harassment even though the conduct was unwelcome because it was important for her to be accepted by her co-workers and her supervisors and because "[y]ou could get hurt" by "snitch[ing] on another police officer."[26]

In *Dockter v. Rudolf Wolff Futures, Inc.,* the district court found that even an employee's explicit rejection of sexual conduct was not sufficient to establish the unwelcomeness of the conduct.[27] The court held that the sexual conduct directed at the plaintiff, including making sexual overtures to her, patting her, kissing her, and once fondling her breast, which the court characterized as a "misguided act," was "essentially unoffensive and not even clearly unwelcome," because, the court said, her "initial rejections were neither unpleasant nor unambiguous" and therefore gave her harasser no reason to believe that his actions were unwelcome.[28] It is not clear how the plaintiff's rejection of her supervisor's sexual advances and sexual touching was ambiguous, unless the court was of the opinion that when women say "no" to sexual conduct, they really mean "yes." Otherwise, one would think that a rejection of a supervisor's sexual advances, even if done pleasantly, would clearly give that supervisor reason to believe that those advances were unwelcome.[29]

The import of the *Meritor* Court's declaration that Vinson's "sexually provocative speech or dress" was "obviously relevant" to unwelcomeness has been lessened by the extension of Federal Rule of Evidence 412 to civil cases, including sexual harassment cases, in 1994. As amended, Rule 412 places restrictions on evidence "offered to prove that a victim engaged in other sexual behavior" or "offered to prove a victim's sexual predisposition," allowing that evidence in civil cases only "if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[30] This amendment flipped the

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26. *Id.* at 491–92.

27. Dockter v. Rudolf Wolff Futures, Inc., 684 F. Supp. 532, 535 (N.D. Ill. 1988), *aff'd*, 913 F.2d 456 (7th Cir. 1990).

28. *Id.* at 533, 535–36. The district court did note that some of the incidents occurred after the employee made clear to her supervisor that "she did not want James courting her any longer," so the employee presumably did say "no" even before she "reprimanded" him for fondling her breast. In spite of the district court's suggestion that the plaintiff at one time did want her supervisor to court her, the court of appeals made clear that all of the supervisor's sexual advances toward the plaintiff were rejected. *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 459, 461 (7th Cir. 1990).

29. It is interesting to note that when women respond to sexual harassment in an "unpleasant" manner, they can also be stripped of the protection of the law. *See* Cruz v. Coach Stores, Inc., 202 F.3d 560, 564, 566–67 (2d Cir. 2000) (holding that a female employee who slapped her harasser after he commented on her nipples, stepped extremely close to her, and called her a "fucking cunt" could not state a claim for retaliation for her resulting termination because her action was not "protected activity," because she had many options for resisting the harassment, "including leaving the room and reporting the incident to Human Resources").

30. FED. R. EVID. 412. Pub. L. 103–322, 108 Stat. 1918–19, Title IV, § 40141(b) (Sept. 13, 1994). The notes of the Advisory Committee with respect to the 1994 amendment indicates that "[t]he rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process," with the goal of "encourag[ing] victims of sexual misconduct to

presumption; rather than this type of evidence being presumptively admissible as relevant, it is now presumptively inadmissible. It is important to note, however, that this provision will not necessarily prohibit evidence about a harassment target's sexual conduct from being admitted, as long as the probative value of that evidence is deemed by the court to be particularly important in the context of the particular case. For example, the advisory committee notes to the amended rule suggest that, while non-workplace conduct will usually be irrelevant in sexual harassment cases, "some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant."[31]

Cases decided subsequent to the amendment of Rule 412 confirm that courts have indeed still considered a harassment target's workplace conduct in concluding that she welcomed the sexual conduct to which she was subjected. Courts have relied on that workplace conduct to find welcomeness even when the plaintiff's conduct was not with the harasser and even when the plaintiff had actually rejected the harasser's sexual conduct. An example is *Mangrum v. Republic Industries, Inc.,* in which the plaintiff, a used car salesperson, was found to have welcomed her supervisor's sexual conduct, including his requesting oral sex, patting her buttocks, suggesting that she would make more money on her sales if she accepted his sexual overtures, and propositioning her daughter in her presence;[32] he ultimately exposed himself to her, causing her to stop coming to work.[33] The court based its conclusion that she welcomed his conduct on the fact that she engaged in sexual banter with co-workers, sat on other employees' laps, and gave them scalp, neck, shoulder, and back massages.[34] Although the court acknowledged that the plaintiff told her supervisor "no," it suggested that the way she said it, often in a joking manner, "tend[ed] to negate the effect of the initial 'no,' making her intentions less clear."[35] The court therefore not only required that the plaintiff affirmatively say "no" to establish unwelcomeness; it also apparently required that she do so in a particular way. Perhaps even stranger is the court's conclusion that the supervisor could not have known that conditioning a subordinate's sales commissions on her receptiveness to sex would be unwelcome, unless she told him so and in a particular way.[36]

Scholars have long challenged the unwelcomeness requirement. Professor Susan Estrich has argued that the unwelcomeness requirement, like the issue of consent in rape law, has shifted the focus of the law from the perpetrator to the

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institute and to participate in legal proceedings against alleged offenders." Those notes make clear that the rule applies to sexual harassment cases under Title VII and that the term "behavior" includes sexual fantasies and dreams and that "predisposition" evidence includes "mode of dress, speech, or life-style." FED. R. EVID. 412 advisory committee's note (1994).

31. FED. R. EVID. 412 advisory committee's notes (1994).

32. Mangrum v. Republic Indus., Inc., 260 F. Supp. 2d 1229 (N.D. Ga. 2003).

33. *Id.* at 1238–40.

34. *Id.* at 1238, 1252–53.

35. *Id.* at 1253.

36. The court indicated that, because of the way that the plaintiff rejected what the court referred to as "sexual banter," she did not let the supervisor know "at any time" that his conduct was unwelcome. *Id.*

target of harassment—questioning her dress, her conduct, how she leads her life—and then judging her against some notion of how the idealized woman would act and blaming her when she comes up short.[37] Professor Margaret Moore Jackson has criticized the unwelcomeness requirement as indicating that "working women are sexually available unless they take affirmative steps to indicate otherwise," thereby reinforcing "the stereotypical treatment of women as objects—natural targets for desire and abuse."[38]

Some courts have also raised doubts about the "unwelcomeness" requirement. The United States Court of Appeals for the Seventh Circuit declared in *Carr v. Allison Gas Turbine Division, General Motors Corp.* that the concept of "[w]elcome sexual harassment' is an oxymoron,"[39] seeming to suggest that conduct cannot both meet the definition of sexual harassment and be welcomed by its target. After recounting the conduct directed at the female plaintiff by her supervisors and co-workers, including calling her a "cunt" and a "whore," placing offensive graffiti and pictures in her work area, exposing themselves to her, and urinating in her presence, the court of appeals rejected the district court's finding that Carr welcomed the conduct because she "used the 'F word' and told dirty jokes."[40] The court of appeals declared of the conduct directed at the plaintiff that "[o]f course it was unwelcome," noting that "Carr's violent resentment of the conduct of her male coworkers toward her is plain."[41] The court of appeals' analysis contrasts with that of the district court in *Carr*, which found that the conduct to which the plaintiff was subjected "crossed the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing," but concluded that she "invited" the conduct and therefore the conduct "was not unwelcome."[42]

In spite of the *Meritor* Court's view of the importance of the unwelcomeness requirement to sexual harassment claims, that requirement serves no necessary or even desirable role with respect to such claims. One might contend that the unwelcomeness requirement is needed to prevent women from actively encouraging sexual conduct from supervisors and other workplace actors and then later bringing actions challenging that conduct. But this requirement—which often causes adverse parties to seek to introduce information about a target's sexual practices or "proclivities" as a way to both challenge her credibility[43] and frame

37. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 826–831 (1991).

38. *See* Margaret Moore Jackson, *Confronting "Unwelcomeness" from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61, 67 (Fall 2007).

39. Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1008 (7th Cir. 1994).

40. *Id.* at 1009–12.

41. *Id.* at 1011.

42. *Id.* at 1010–11.

43. There has long been a claimed connection between the "chastity" of women and their perceived credibility. Once, this connection was explicitly written into the law of rape and sexual assault. Even now, a belief in that connection continues to play a role in the judicial treatment of claims of sexual misconduct against women. *See generally* Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854 (2008); Julia Simon-Kerr,

her as unworthy of the statute's protections—is entirely unnecessary as a way to prevent the perceived problem of untruthful women. After all, the law has generally found ways to deal with the fact that some witnesses will be untruthful without needing to build the assumption that they will lie into the elements of a cause of action.[44]

In addition, the remaining requirements of the cause of action for sexual harassment make any separate requirement of unwelcomeness entirely unnecessary. First, the requirement that harassing conduct be objectively offensive and abusive would seem to argue against any need that it also be unwelcome; it is very strange to think that women would generally welcome or invite abusive and degrading conduct directed at them. After all, welcomeness is rarely, if ever, thought to be relevant with respect to other forms of objectively abusive conduct covered by Title VII, such as harassment on the basis of race, religion, or national origin.[45] Second, the additional requirement that the harassment be subjectively perceived as abusive by the target of harassment makes any requirement that it also be unwelcome totally unnecessary: it is impossible to think that women (or anyone else) generally invite or welcome conduct that they subjectively find to be abusive and offensive.[46]

One might even argue against any requirement that conduct be subjectively offensive as well as objectively abusive. It is not clear why the law would want to allow objectively abusive conduct to occur in the workplace, even if a particular target of that abusive harassing conduct did not happen to find it subjectively offensive.[47] But it is particularly strange to think of the law sanctioning conduct when it *is* subjectively offensive to those exposed to it, as well as objectively abusive, all because of some sense that they must have invited the conduct by their behavior or, worse yet, because they are not the "type" of women who deserve to be protected from abusive sexual conduct.[48]

Credibility by Proxy, 85 GEO. WASH. L. REV. 152, 174–77, 199–201 (2017) (explaining the historical way in which chastity and credibility were linked and explaining the role that that connection still continues to play in rape prosecutions).

44. Courts routinely make credibility determinations concerning witnesses, and the possibility of pursuing perjury charges against a witness found to have testified falsely generally is deemed sufficient to guard against false testimony.

45. For example, the EEOC in its Enforcement Guidance on Harris v. Forklift Systems, Inc. noted that "[i]f one is subjected to taunts on the basis of race, national origin, etc. there is ordinarily no question that the comments are perceived as abusive and are therefore unwelcome." Enforcement Guidance on Harris v. Forklift Sys., Inc., No. 915.002 (Mar. 8, 1994).

46. One might argue that some aberrational targets would actually enjoy conduct that is abusive, but surely the law should not be shaped with the aberrational target in mind.

47. *See* Hébert, *supra* note 10, at 577–89 (arguing against the unwelcomeness requirement on a number of grounds, including that the requirement seeks to protect sexual and other conduct that almost everyone recognizes is inappropriate in the workplace and, as demonstrated by hundreds of sexual harassment cases, does nothing to enhance workplaces for most employees).

48. It is clear that this is precisely the thinking behind the finding of some courts that sexually harassing conduct was welcomed by its target, or at least that the target was not offended by the conduct. For example, the district court in *Burns v. McGregor Electronic Industries, Inc.*, 807 F. Supp. 506, 508–09 (N.D. Iowa 1992), found that although the supervisor's sexual advances and other sexual conduct in

The United States Supreme Court appears to be moving away from the unwelcomeness requirement. In sexual harassment cases after *Meritor*, the Court has not indicated that unwelcomeness is a requirement for actionable sexual harassment. In *Harris v. Forklift Systems, Inc.*, a case in which the Court addressed the definition of "a discriminatorily 'abusive work environment'" for actionable workplace harassment, the Court never once referred to any requirement that the harassment to which the plaintiff was subjected be "unwelcome."[49] Instead, the Court held that in order for a hostile work environment to be created, two requirements must be met: the conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment" and the target must "subjectively perceive the environment to be abusive."[50] As long as the target of the harassment subjectively perceives the conduct as abusive, the Court did not appear to have been imposing any additional requirement of unwelcomeness, that is, that the conduct has not somehow been invited. Instead, the Court appeared to have reasonably concluded that targets of harassment do not welcome abusive harassing conduct.[51]

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the workplace were not welcomed by the plaintiff, in the sense that they were not invited, she was not offended by that conduct "because of her character as revealed by the record," that is, "her manner of dress, her pierced, bejeweled nipples, the location of her tattoo, her interest in having her nude pictures appear in a magazine containing much lewd and crude sexually explicit material." The court of appeals reversed the district court, not once but twice, referencing the "grisly and shocking facts supporting a finding of unwelcome sexual harassment" and concluding that the district court erred in requiring proof that the conduct was both unwelcome and offensive because the "threshold for determining that conduct is *unwelcome* is whether it was uninvited and offensive." Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 961–62 (8th Cir. 1993). *See also* Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (noting the district court's conclusion that because of the plaintiff's past sexual conduct and use of foul language, the harassment to which she was subjected was "not unwelcome" even though she told her harasser to leave her alone, because "she was the kind of person who could not be offended by such comments and therefore welcomed them generally"; the court of appeals held that this conclusion was in error).

49. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993). The word "unwelcome" does not appear at all in the following Supreme Court decisions dealing with harassment under Title VII: Landgraf v. USI Film Prod., 511 U.S. 244 (1994); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998); Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999); Clark Cnty Sch. Dist. v. Breeden, 532 U.S. 268 (2001); Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); Pa. State Police v. Suders, 542 U.S. 129 (2004); Arbaugh v. Y&H Corp., 546 U.S. 500 (2006); Crawford v. Metro. Gov't of Nashville and Davidson Cnty., 555 U.S. 271 (2009); Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013); Vance v. Ball State Univ., 570 U.S. 421 (2013). The word "unwelcome" does appear in the case of Burlington N. and Santa Fe Ry. Co., 548 U.S. 53, 79 (2006) (Alito, J. concurring), but the word is used in a different context.

50. *Harris*, 510 U.S. at 21–22.

51. The district court in the *Harris* case, after remand from the Supreme Court, resurrected the "unwelcomeness" requirement, by concluding that it was not "until the August 18, 1987 meeting with Hardy that the plaintiff indicated by her conduct that the alleged sexual advances were unwelcome" and that prior to that time, "Hardy had no knowledge of the fact that plaintiff was offended by any of his conduct." Harris v. Forklift Sys., Inc., 1994 WL 792661, at *1 (M.D. Tenn. 1994). Quite apart from the district court's error in relying on a standard that the Supreme Court appears to have abandoned, one also has to wonder at the conclusion that the president of the company would not understand that a woman would be offended by being called a "dumb ass woman" and being asked to retrieve coins from

Other Supreme Court harassment cases follow the same pattern. In *Faragher v. City of Boca Raton*, in which the Court focused on the issue of employer liability for sexual harassment, the Court stated the requirements of an actionable "sexually objectionable environment" as one that is "both objectively and subjectively offensive, one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so."[52] The term "unwelcome" appears only once in that decision, in the context of the Court describing the actions of lower courts in addressing issues of employer liability.[53] In another decision focusing on employer liability, *Burlington Industries, Inc. v. Ellerth*, the term "unwelcome" appears only twice, but more prominently in the first line of the decision, in which the Court states the issue before the Court:

> We decide whether, under Title VII of the Civil Rights Act of 1964, an employee who refuses the unwelcome and threatening sexual advances of a superior, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions.[54]

The Court's use of the term "unwelcome" seems only to describe the conduct in this case, not to impose a requirement for actionability. After all, use of the word "threatening" to also describe the conduct would not seem to suggest that harassment has to be threatening to be actionable. The second time the term appears is in parenthetical citation quoting Justice Marshall's concurring opinion in *Meritor*.[55] Nothing about the Supreme Court decisions following *Meritor* suggest that a finding of unwelcomeness is a requirement for a claim of actionable sexual harassment.

The Supreme Court's apparent movement away from any separate requirement of "unwelcomeness," however, has not caused the lower courts to abandon the requirement. Lower courts routinely note that one of the elements that a plaintiff in a sexual harassment case is required to establish is that she was subjected to "unwelcome" sexual conduct, generally citing to cases that predate *Harris*.[56]

The EEOC also appears to have moved away from any independent "unwelcomeness" requirement. Although the current regulations of the EEOC still

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his front pants pocket as well as the other denigrating conduct to which he subjected Harris, until he was explicitly told so. *Harris*, 510 U.S. at 19.

52. Faragher v. Boca Raton, 524 U.S. 775, 787 (1998). *See* discussion of this case *infra* at notes 152–53 and accompanying text.

53. *Id.* at 794.

54. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 746–47 (1998).

55. *Id.* at 763.

56. *See, e.g.,* Miles v. City of Birmingham, 398 F. Supp. 3d 1163, 1178–79 (N.D. Ala. 2019) (listing unwelcomeness as one of the elements of the plaintiff's prima facie case for a hostile work environment under Title VII, relying on *Meritor v. Vinson*, 477 U.S. 57, 68 (1986), and the Eleventh Circuit's decision in *Henson v. City of Dundee,* 682 F.2d 897, 903 (11th Cir. 1982)).

define sexual harassment as "unwelcome" conduct of a sexual nature,[57] the EEOC, in its Proposed Enforcement Guidance on Unlawful Harassment, provided for public comment in January 2017, noted that the issue of unwelcomeness is part of the requirement that conduct be subjectively hostile and not an independent requirement for a cognizable claim of harassment.[58] The EEOC explained:

> In the Commission's view, conduct that is subjectively and objectively hostile is also necessarily unwelcome. Therefore, the Commission disagrees with courts that have analyzed "unwelcomeness" as an element in the plaintiff's prima facie harassment case, separate from the "subjectively and objectively hostile work environment" analysis.[59]

The EEOC went on to note that subjective hostility is to be determined by the statements of the complainant as to whether she found the conduct to be offensive and harassing, as well as by the existence of informal and formal complaints, although the EEOC noted that a delay in making a complaint does not indicate that the conduct was not subjectively offensive, because there may be other reasons for a failure to report harassment.[60] The EEOC also noted that whether conduct is subjectively hostile depends on the perspective of the complainant and that even participation in the challenged conduct does not negate a finding that it is subjectively hostile, because "an individual might have experienced the conduct as hostile but felt that she had no other choice but to 'go along to get along.'"[61]

Although the EEOC has taken the position that failure to complain does not equate with the welcomeness of the conduct, some courts have reached precisely that conclusion. In *Stuart v. General Motors,* a case in which the employee did complain about the placement of pornographic photographs on her locker and the presence of a pornographic computer program in the workplace, the court held that the plaintiff could not show that other conduct to which she was subjected was unwelcome, including frequent comments by male employees about her sex life and grabbing their genitals while making noises in her presence, because she did not complain about them while she was employed.[62] The court decided that her failure to complain to supervisors about the conduct when it was occurring indicated that she "failed to consider herself subject to unwelcome sexual harassment" prior to the date of her complaint; the court ultimately concluded that she had not "offered any evidence raising a genuine issue of material fact that she

57. U.S. Equal Emp. Opportunity Comm'n, Sexual Harassment, 29 C.F.R. § 1604.11 (2020).

58. U.S. Equal Emp. Opportunity Comm'n, Proposed Enforcement Guidance on Unlawful Harassment, EEOC-2016-0009-001 (proposed on Jan. 10, 2017).

59. *Id*. at 27.

60. *Id*. at 28–29.

61. *Id*. at 29.

62. Stuart v. General Motors Corp., 217 F.3d 621, 626–27, 632 (8th Cir. 2000).

considered her work environment to be hostile."[63] The court gave no indication that there might have been reasons for the plaintiff's delay in making complaints, which is particularly ironic given that she also claimed retaliation by being subject to unjustified discipline and then termination for making the complaints about sexual harassment. This type of conclusion gives insufficient attention to the numerous reasons why women who are subjected to sexual harassment fail to make contemporaneous complaints of sexual harassment or even why they fail to make complaints at all.[64]

What has been known as the "unwelcomeness" requirement serves no necessary purpose in sexual harassment law, because the remaining requirements of the cause of action are sufficient to prevent women from challenging conduct that they did not find to be offensive. And the manner in which that requirement has been interpreted has served to shift the blame for harassing behavior from the harassers to the target of that conduct, blaming women for the denigrating and abusive conduct to which they have been subjected as the price for participating in the workforce.

B. THE SEARCH FOR ANY OTHER MOTIVATION: THE "BECAUSE OF . . . SEX" REQUIREMENT

Because the prohibition on sexual harassment is tied to Title VII's prohibition on discrimination, the plaintiff in every case of sexual harassment must establish that the harassment occurred "because of sex."[65] This requirement has caused individual harassers and employers to offer, and courts and individual judges to accept, a number of different explanations for the harassment to which female employees have been subjected; those explanations include that women were not targeted because they were women, but because they were bad employees,[66]

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63. *Id*. at 632–34.

64. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1506 (M.D. Fla. 1991) (citing to expert testimony indicating that making a formal complaint is the least common way in which women who have been sexually harassed respond to harassment, because they fear escalation of the problem, retaliation from the harasser, embarrassment from reporting, that nothing will be done, and that they will be blamed for the harassment). *See generally* L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?,* 82 IND. L. J. 711 (2007) (discussing studies indicating that women often fail to make complaints or delay in making complaints about sexual harassment because of fear of retaliation, concerns about being blamed for the harassment, fears of not being believed, and concerns that making those complaints will affect their standing in the workplace and their ability to advance in their careers).

65. The Supreme Court made this clear in *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80 (1998) (emphasis in original), when it said "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat[ion]* . . . because of . . . sex.'"

66. The dissenting judge in *Carr v. Allison Gas Turbine Div., General Motors Corp.,* 32 F.3d 1007, 1009, 1015 (7th Cir. 1994), suggested that the verbal abuse to which the female plaintiff was subjected, including being called a "cunt" and a "whore," "might well have been due to factors other than her being a woman," including her "abysmal work attendance record." This belief in the motivation for the harassment to which Carr was subjected appears to have been shared by both the district court judge and the employer. *See id*. at 1015–16 (Coffey, C.J., dissenting).

because they were disliked generally,[67] or because they were "jerks."[68]

These types of arguments have led courts to accept that sexually explicit and sexually denigrating harassing conduct is not based on sex. In *Dohrer v. Metz Baking Co.,* the female plaintiff was subjected to a range of conduct by a co-worker, including: brushing up against her; making a crude comment about a "blow job;" referring to her as "meat," "boner," "meat wagon," and "meat slinger;" making derogatory comments about her husband after indicating that the co-worker wanted a relationship with her; and commenting to her about how she smelled.[69] The court avoided a finding of sexual harassment on a number of grounds, including refusing to consider certain conduct because it was time-barred, but noted that "[i]t is doubtful whether plaintiff has shown that the name-calling and the comments about her marriage were made because of her sex."[70] The court's refusal to understand that calling a woman "meat" and "boner" or, for that matter, demeaning her husband and marriage were sex-based smacks of willful blindness.

The reluctance of courts to recognize that sexually denigrating conduct—having one's body parts poked, prodded, and grabbed against one's will; being subjected to offensive comments about one's actual or assumed sexual practices; being subjected to propositions of sexual conduct in what is supposed to be a professional environment; and being called sexually offensive terms—is because of sex demonstrates a lack of understanding on the part of courts with respect to not only the effect that these actions have on women,[71] but also that those effects are

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67. *See, e.g.,* Weinsheimer v. Rockwell Int'l. Corp., 754 F. Supp. 1559, 1561, 1564–65 (M.D. Fla. 1990) (casting doubt on whether the explicitly sexual conduct directed at the plaintiff, including a co-worker pointing to her crotch and saying "give me some of that stuff" and instances of grabbing her breasts and her crotch, as well as non-sexual conduct, such as holding a knife to her throat, were based on sex because she had "a confrontational and abusive personality" and because other witness testified that their altercations "usually grew out of work or personal issues, rather than having a sexual animus").

68. *See* Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 735–36 (April 1999) ("a woman in a male-dominated workplace may be harassed because she is a woman, or she may be harassed because she is a jerk").

69. Dohrer v. Metz Baking Co. No. 96 CC 50455, 1999 WL 60140, at *1–2. (N.D. Ill. Jan. 27, 1999).

70. *Id.* at *7.

71. The cluelessness of some courts, either actual or feigned, in this regard is truly staggering. In *Bennett v. Corroon & Black Corp.,* 517 So. 2d 1245 (La. Ct. App. 1987), a case in which the court was applying a state law similar to Title VII, the court found that the posting of cartoons that the court described as "sexually oriented, crude, deviant and personally offensive" in the toilet stall of the men's restroom, which were labeled with the female plaintiff's name, were not discriminatory as based on sex because some cartoons were labeled with the names of men. The court said that "[i]t is well settled that instances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment." As a factual matter, it seems unlikely that the cartoons were equally offensive to both men and women, because the plaintiff left her job and obtained psychiatric counseling after the discovery of the cartoons, and there was no indication in the opinion that any male employee acted similarly. *Id.* at 1246–47. But more importantly, the court failed to understand that even if it were true that men and women were treated similarly, which it likely was not—men tend to be treated as the "subjects" of sex, while women are generally treated as the "objects" of sex—that "equal" treatment

precisely why sexual conduct is chosen as the weapon by harassers. No one seriously questions that racially or ethnically hostile conduct is discriminatory; harassers presumably choose racial epithets precisely because of the racial hostility that they express. Similarly, there is no reason to believe that harassers choose sexually hostile behavior randomly or coincidentally. Instead, they presumably choose conduct that is sexually hostile in order to express their gender hostility toward women. The failure of courts to understand this dynamic allows harassers to engage in sexually harassing conduct with impunity.

Some courts have recognized that sexual conduct is often chosen by harassers precisely to show sexual or gender-based hostility. This understanding can be found in the decision of *Doe v. City of Belleville, Illinois,* which directly addressed the issue of whether same-sex harassment could be actionable under Title VII,[72] a question later resolved by the Court in the affirmative.[73] The court of appeals in *Doe* explained why sexually explicit conduct should generally be considered to meet the "because of sex" requirement for sexual harassment, whether in a same-sex or cross-sex context:

> When a harasser sets out to harass a female employee using names, threats, and physical contact that are unmistakably gender-based, he ensures that the work environment becomes hostile to her as a woman—in other words, that the workplace is hostile to her "because of" her sex. Regardless of why the harasser has targeted the woman, her gender has become inextricably intertwined with the harassment. Likewise, when a woman's breasts are grabbed or when her buttocks are pinched, the harassment necessarily is linked to her gender. . . . [T]he victim's gender not only supplies the lexicon of the harassment, it affects how he or she will experience the harassment; and in anything short of a truly unisex society, men's and women's experiences will be different.[74]

The court of appeals later made clear its understanding that this was not just the effect of sexually explicit harassing conduct in the workplace, but also its purpose: that the harassers in that case likely chose sexual conduct as a way to harass the target because of his gender.[75] And the court suggested that this would

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would likely constitute discrimination on the basis of sex against both the men and the women so identified in the cartoons.

72. Doe v. City of Belleville, 119 F.3d 563, 566 (7th Cir. 1997), *cert. granted, judgment vacated sub nom.* City of Belleville v. Doe ex rel. Doe, 523 U.S. 1001 (1998). This decision was vacated by the Supreme Court for further consideration in light of the decision in *Oncale v. Sundowner Offshore Servs. Inc.,* 523 U.S. 75 (1998). There is no record of the court of appeals' reconsideration of this case. For the reasons explained in L. Camille Hébert, *Sexual Harassment as Discrimination "Because of . . . Sex": Have We Come Full Circle?,* 27 OHIO N. UNIV. L. REV. 439, 451–55 (2001), the Supreme Court's vacation of the court of appeals' decision does not rob the court of appeals' analysis of force.

73. *See Oncale*, 523 U.S. at 81.

74. *Doe*, 119 F.3d at 578.

75. *Id.* at 578–79.

normally be the case: "[W]e have difficulty imagining when harassment of this kind would *not* be, in some measure, 'because of' the harassee's sex—when one's genitals are grabbed, when one is denigrated in gender-specific language, and when one is threatened with sexual assault, it would seem to us impossible to de-link the harassment from the gender of the individual harassed."[76]

Targets of sexual harassment have often pointed to the gendered nature of the comments directed at them as evidence of the gender-bias of the harassment.[77] A number of courts have recognized the gendered nature of sexual, and even non-sexual, comments directed at women.[78] But some courts have refused to find gender bias even when harassers telegraph their bias in this way, struggling mightily to explain why explicitly gendered comments did not demonstrate the existence of gender bias. A classic example is the decision of the United States Court of Appeals for the Seventh Circuit in *Galloway v. General Motors Service Parts Operations*, in which Judge Richard Posner explained why the use of the term "bitch" was not a gender-related term:

> It is true that "bitch" is rarely used of heterosexual males (though some heterosexual male teenagers have recently taken to calling each other 'bitch'). But it does not necessarily connote some specific female characteristic, whether true, false, or stereotypical; it does not draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect. In its normal usage, it is simply a pejorative term for 'woman.'[79]

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76. *Id.* at 580. The court of appeals made clear its understanding that while "sexual harassment *can* spring from the harasser's attraction to the victim," "[m]en sexually harass women in the workplace for reasons other than sexual desire." *Id.* at 586, 590.

77. *See, e.g.,* Passananti v. Cook Cnty., 689 F.3d 655, 663–64 (7th Cir. 2012) (female plaintiff alleged that supervisor's use of the terms "fucking bitch," "stupid bitch," and "bitch" was evidence of gender bias in harassment and discipline); Xueyan Zhoe v. Intergraph Corp., 353 F. Supp. 3d 1220, 1230, 1233 (N.D. Ala. 2019) (female Asian plaintiff relied on bathroom graffiti referring to "Asian sluts" as evidence of gender, racial, and national origin bias of harassing conduct); Burns v. McGregor Electronic Indus., Inc., 989 F.2d 959, 964 (8th Cir. 1993) (female plaintiff relied on co-worker's use of terms "bitch," "slut," and "cunt" to demonstrate gender bias of harassment).

78. *See, e.g.,* Forest v. Brinker Int'l Payroll Co., 511 F.3d 225, 229 (5th Cir. 2007) (noting that "[a] raft of case law . . . establishes that the use of sexually degrading, gender-specific epithets, such as 'slut,' 'cunt,' 'whore,' and 'bitch,' . . . has been consistently held to constitute harassment based on sex"); Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 810–12 (11th Cir. 2010) (noting that use of terms "bitch" and "slut" are "humiliating and degrading based on sex" and therefore are gender-derogatory terms; court noted that terms "whore" and "cunt" were also gender-specific, derogatory terms).

79. Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1168 (7th Cir. 1996). *See also* Reyes v. McDonald Pontiac GMC Truck, Inc., 997 F. Supp. 614 (D.N.J. 1998) (concluding, on a motion to dismiss, that the female plaintiff being called a "bitch" and a "Miss Fucking Queen Bee" was not evidence that these comments were directed at her because of her sex because "[s]ometimes words of frustration and anger are only meant in that spirit") (citing *Galloway*).

Judge Posner failed to explain why the use of a "pejorative term for 'woman'" was not evidence that the term was gender-related, as opposed to an inference that the "abuse of a woman was motivated by her gender rather than by a personal dislike unrelated to gender."[80] It is difficult to imagine that Judge Posner would have found that a pejorative term for Black or Latinx individuals was similarly not a race- or ethnicity-related term.

Even more pejorative terms for women have been found not to be evidence of gender bias sufficient to support a claim for sexual harassment. The court in *Wieland v. Department of Transportation* concluded, on summary judgment, that the plaintiff being called a "slut" by a female co-worker was not evidence of sex discrimination.[81] This type of analysis speaks of willful blindness on the part of courts, which are willing to overlook the obvious bias that animates sexually harassing behavior even when the harassers articulate the motivations behind their conduct.

The "because of sex" requirement has been used by courts to deny the gender hostility of even explicitly gender-based comments and behavior. Instead, courts have searched for some other reason to explain the harassment, often concluding that the women were harassed for reasons that allow the courts to find them to have been responsible for their own harassment.

C. THE RIGHT TO BE FREE FROM ONLY THE MOST HORRIFIC HARASSMENT: THE "SEVERE OR PERVASIVE" REQUIREMENT

The requirement that harassment be objectively abusive, measured by the "severe or pervasive" standard, is the requirement imposed by the courts that has perhaps placed the most significant obstacle in the way of women challenging sexually derogatory and denigrating conduct to which they have been subjected in the workplace. Courts have declared that the "severe or pervasive" requirement is a "high threshold."[82] While this requirement has not proved insurmountable in all cases, many courts have used this requirement to find much harmful harassment simply not serious enough to be unlawful.

The requirement that harassment be "severe or pervasive" arises from the *Meritor* case, in which the Supreme Court cited with approval to the EEOC Guidelines recognizing that hostile work environment sexual harassment violates Title VII, noting that the agency "drew upon a substantial body of judicial

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80. *Galloway*, 78 F.3d at 1168. Judge Posner did acknowledge that use of the term "bitch" sometimes might be gender-related in the sense that "[t]he word 'bitch' is sometimes used as a label for women who possess such 'woman faults' as 'ill-temper, selfishness, malice, cruelty, and spite,' and laterally as a label for women considered by some men to be too aggressive or careerist." *Id.*

81. Wieland v. Dept. of Transp., 98 F. Supp. 2d 1010, 1019 (N.D. Ind. 2000). *See also* Chisholm v. St. Mary's City Sch. Dist. Bd. of Educ., 947 F.3d 342, 350–51 (6th Cir. 2020) (under Title IX, court held that high school football coach's use of term "pussy" to male football players, even if used as an assault on their masculinity, was not evidence of sex discrimination because there was no evidence of the coach favoring one sex over the other).

82. *See, e.g.,* Duncan v. General Motors Corp., 300 F.3d 928, 934 (8th Cir. 2002).

decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[83] The Court held that in order for harassing conduct to affect a term and condition of employment and therefore be actionable under Title VII, "it must be sufficiently severe or pervasive 'to alter the conditions of [the target's] employment and create an abusive working environment.'"[84] The Court went on to note that the plaintiff's allegations in that case were "plainly sufficient" to meet this standard.[85] Those allegations, which involved a persistent pattern of sexual conduct, including coerced sexual intercourse and forcible rape, seem to have led some lower courts to believe that the conduct had to rise to that level in order to be actionable.

In *Harris*, the Court appears to have sought to correct the lower courts' overreading of the "severe or pervasive" requirement. The Court rejected the lower court's holding that the conduct did not meet that standard unless it inflicted severe psychological injury.[86] Noting that the "appalling conduct" alleged in *Meritor* did not "mark the boundary of what is actionable," the Court instead adopted the following standard:

> 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. Moreover, even without these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality . . . . This is not, and by its nature cannot be, a mathematically precise test . . . But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include 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.[87]

Accordingly, the Court in *Harris* seemed to be adopting a less rigorous standard than that used by lower courts. The Court contrasted "physically threatening or humiliating" conduct, which it suggested would be actionable, from "a mere offensive utterance," which would not, although its statement that "no single factor is required"[88] indicates that conduct need not be either physically threatening

83. Meritor Savs. Bank v. Vinson, 477 U.S. 57, 65 (1986).
84. *Id.* at 67.
85. *Id.*
86. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).
87. *Id.* at 22–23.
88. *Id.* at 23.

or humiliating to be actionable. The Court's language also suggests that harassing conduct that detracts from employees' job performance or keeps them from advancing in their careers would meet the standard for actionable harassment, although again, such a showing is not necessarily required in order for the harassment to be actionable.

A later Supreme Court case, however, can be read to indicate that the standard for actionable harassment is more rigorous and demanding. In *Faragher*, a case in which the standard for actionable harassment was generally not at issue, the Court announced that "conduct must be extreme to amount to a change in the terms and conditions of employment" and suggested that the lower courts had correctly "heeded this view" in concluding that many instances of harassment were not serious enough to be actionable.[89] The term "extreme," like "severe" and "pervasive," is subject to almost any interpretation that the lower courts want to place on it. However, at least one of the two cases that the Court cited as support for the lower courts heeding that view suggests that conduct that might not be viewed as "extreme" still meets the standard for actionable harassment.

In the first case cited in *Faragher*, *Carrero v. New York Housing Authority,* the employer argued that the conduct in that case, which involved the female plaintiff's supervisor touching her on the knee and arm on several occasions, kissing her neck, and attempting to kiss her, and then publicly criticizing her job performance after her rejection of this conduct, was not actionable because it was trivial.[90] But the court of appeals "emphatically" rejected the employer's argument, indicating that it was sufficiently pervasive to alter her working environment:

> 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 individual actions complained of is also a factor to be considered in determining whether such actions are pervasive.[91]

89. Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998). In addition to citing to two lower court cases, the Court also cited to a leading treatise for examples of conduct that the lower courts had not found to be sufficiently severe or pervasive. 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 805–06 n.290 (3d ed. 1996). It is difficult to know what to make of this citation. It is unclear whether one should assume that the Court was approving of each and every case cited in this footnote of the treatise or, if instead, that the Court was generally indicating that, in some cases, harassing conduct is not sufficiently serious to be actionable. It is difficult to believe, for example, that the Court really wanted to permit a supervisor to ask a female employee, while in his closed office, to remove all of her clothing, *see* Boarman v. Sullivan, 769 F. Supp. 904, 910 (D. Md. 1995), an action that would seem to be both threatening and humiliating.

90. Carrero v. New York Hous. Auth., 890 F.2d 569, 573, 578. (2d Cir. 1989).

91. *Id*. at 578.

The court noted that the fact that the harasser was her supervisor and held a position of power over her contributed to the conclusion that his conduct was pervasive and created a hostile work environment.[92]

The second case cited by the *Faragher* Court was *Moylan v. Maries County*.[93] This case involved allegations that the sheriff came into the female plaintiff dispatcher's office and attempted to kiss her, put his arms around her, and fondled her.[94] She also alleged that he raped her, although he claimed that they had consensual sexual intercourse.[95] While it is possible that the *Faragher* Court meant to cite this case for the proposition that sexual conduct must be as extreme as rape to be sufficiently severe, it instead seems likely that the Court was invoking the following language, which appears at the pages cited by the Court: "The plaintiff must show a practice or pattern of harassment against him or her; a single incident or isolated incidents generally will not be sufficient. The plaintiff must generally show that the harassment is sustained and nontrivial."[96]

The *Faragher* Court gave the following explanation for the requirement that it was imposing:

> These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing."[97]

This language suggests that the Court was imposing a standard considerably less rigorous than requiring conduct to be as serious as rape to be severe and a standard less rigorous than the word "extreme" would suggest.

Requiring sexually harassing conduct to be as "extreme" as the courts have required is not necessary to prevent claims from being recognized based on "ordinary tribulations of the workplace," unless those "ordinary tribulations" are viewed as including unwanted touching of one's breasts, buttocks, and genitals, use of denigrating sexual epithets, and gender-hostile and threatening behavior. Requiring conduct to be "extreme" in that sense before it is deemed unlawful strips women of *Meritor*'s promise of the "right to work in an environment free from discriminatory intimidation, ridicule, and insult"[98] and denies *Harris*' indication that women have a right to be free of conduct that "detract[s] from

92. *Id.*
93. Moylan v. Maries Cnty., 792 F.2d 746 (8th Cir. 1986).
94. *Id.* at 747–48.
95. *Id.*
96. *Id.* at 749–50 (citing Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983)).
97. *Faragher,* 524 U.S. at 788 (citations omitted).
98. Meritor Savs. Bank v. Vinson, 477 U.S. 57, 65 (1986).

employees' job performance, discourage[s] employees from remaining on the job, or keep[s] them from advancing in their careers."[99]

The standard articulated by the Court in *Faragher* seems to recognize only two categories of harassing conduct: that which is "extreme" and therefore actionable, and that which is "trivial" and therefore lawful. This dichotomy might not matter so much if the courts generally defined all conduct that cannot be dismissed as "trivial" to be "extreme"; the Court's language in *Faragher* indicating that, if the standards are "properly applied," they will filter out conduct it seemed to view as trivial can be read to support just such an interpretation. Instead, however, the lower courts generally seem to be taking the opposite approach—defining all conduct that they do not characterize as "extreme" to be "trivial."

Another Supreme Court case decided just a couple of months before *Faragher* may suggest that sexually harassing conduct need not be "extreme" to be actionable. That case, *Oncale v. Sundowner Offshore Services, Inc.*[100] involved not only the issue of whether same-sex harassment was unlawful,[101] but it also addressed the standard for actionable harassment.[102] The unanimous Court, as in *Faragher*, indicated that the "severe or pervasive" requirement was intended to prevent Title VII "from expanding into a general civility code," but also indicated that a purpose of the requirement was to "ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'"[103] The Court also emphasized that consideration of "the social context in which the particular behavior occurs and is experienced by the target" "will enable courts and juries to distinguish between simple teasing and roughhousing between members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[104] Here, the Court does not seem to require that the conduct be extreme; instead, the Court's language might be read to suggest that conduct that does not meet the standards of "ordinary socializing in the workplace" or "simple teasing or roughhousing" is the type of conduct that a reasonable person in the plaintiff's position would find hostile or abusive, that is, "an objectively hostile or abusive work environment."[105]

Many judges tend to trivialize the presence of sexual harassment in the workplace, discounting its effects in altering the atmosphere of the workplace and causing real harm to the women subjected to it. They seem to believe that it is not that serious because it is "just sex" and therefore neither harmful nor particularly

99. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

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

101. *Id.* at 76.

102. *Id.* at 76.

103. *Id.* at 81.

104. *Id.* at 82. An example given by the Court also seems to suggest that a coach smacking his secretary on the buttocks in the office might reasonably be experienced as abusive conduct.

105. *Id.* at 81.

threatening. But what these courts miss is that the conduct is particularly harmful because of its sexual nature. As Professor Estrich explained:

> What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely that it is sexual. Not only are men exercising power over women, but they are operating in a realm which is still judged according to a gender double standard, itself a reflection of the extent to which sexuality is used to penalize women.[106]

Putting sugar in a woman's gas tank or keying her car as a way to show hostility might reasonably be viewed as threatening behavior, but showing that hostility by grabbing her breasts, buttocks, or genitals is particularly threatening, because aggressive sexual behavior carries with it the suggestion of even more serious conduct, including rape. Sexual behavior directed at women in the workplace also serves to remind them that they are viewed as sexual objects, not serious workers.

Some courts do seem to recognize the humiliating and harmful effects of sexual conduct in what is supposed to be a professional workplace. The district court in *Breeding v. Cendant Corp.* acknowledged the harmful effect of sexually harassing conduct on women and their interests in workplace equality.[107] In rejecting the employer's argument that the sexual comments directed at the female plaintiff by her supervisor did not create a hostile environment, the court noted that those humiliating comments, in front of her colleagues, created a perception of her "as a sex object and a victim, rather than a competent professional and an equal."[108] The court remarked that this was "precisely the injury that Title VII seeks to prevent, as the repeated public humiliation of an employee in a sexual manner can undermine that employee's professional position just as surely as a failure to promote or a wrongful termination."[109]

Judges tend to find conduct not to be sufficiently severe even when it involves sexual touching—and would likely be criminal sexual assault[110]—and not to be pervasive even when it occurs over a period of years.[111] They often note how the

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106. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 820 (1991).

107. Breeding v. Cendant Corp., No. 01 Civ. 11563(GEL), 2003 WL 1907971 (S.D.N.Y. Apr. 17, 2003).

108. *Id.* at *5.

109. *Id.*

110. *See, e.g.,* Brooks v. City of San Mateo, 229 F.3d 917, 921–22, 926–27 (9th Cir. 2000) (finding that an incident in which a supervisor forced his hand under the female plaintiff's sweater and bra to touch her breast, and for which he pleaded no contest to misdemeanor sexual assault and spent 120 days in jail, was not actionable sexual harassment because the conduct was insufficiently severe).

111. *See, e.g.,* Cockrell v. Greene Cnty. Hosp. Bd., No. 7:17-cv-00333-LSC, 2018 WL 1627811 (N.D. Ala. 2018), *appeal dismissed*, No. 18-11857-GG, 2018 WL 6046418 (11th Cir. Sept. 19, 2018) (finding that the sexual conduct by a CEO over a period of two and one-half years was not pervasive, including: his comments on the buttocks, hips, and pubic hair of employees; his comments denigrating

conduct could have been much worse. These judges, often but not always male, seem to be deciding whether they themselves would find the conduct to be sufficiently serious, even though, statistically, it is much less likely that they themselves will ever be subject to this type of harassing conduct.

Judges who are inclined to find sexually harassing conduct not to be sufficiently severe or pervasive to be unlawful tend to reach this conclusion by searching for cases in which the conduct was even more serious but found not sufficient to meet the standard for actionable harassment, resulting in a ratcheting up of the required standard.[112] However, given the large number of sexual harassment cases with varying conduct and varying results,[113] judges with an inclination to find sexual harassing conduct to be sufficiently severe or pervasive could very well ratchet down the standard by finding cases in which the similar or even less serious conduct was found to be sufficient.[114]

A particularly egregious example of this ratcheting-up process can be found in the case of *Brooks v. City of San Mateo*.[115] In this case, the court found that the conduct directed at the plaintiff, which involved a senior co-worker placing his

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the intelligence and professional experience of female employees; and his suggesting to a female employee that he could take her from her husband if he paid the down payment on a car); Williams v. United Launch All., LLC, 286 F. Supp. 3d 1293, 1299–1300, 1304 (N.D. Ala. 2018) (finding that approximately twenty incidents of harassment by a supervisor over a year and a half, including commenting on her buttocks, making sexual jokes, telling her that he would be her "sugar daddy" and "work husband," discussing his wife's vagina around her, and suggesting that other workers would want to see her "down on all fours," were not pervasive, suggesting that the incidents would have had to occur daily to meet that standard).

112. *See, e.g.,* Takkunen v. Sappi Cloquet LLC, Civ. No. 08-1454 (RHK/RLE), 2009 WL 1287323, at *3 (D. Minn. May 6, 2009) (noting that "[t]he Eighth Circuit has rejected hostile-work environment claims based on facts more egregious than those presented here"). *See also* Mendoza v. Borden, Inc., 195 F.3d 1238, 1266–68 (11th Cir. 1999) (Tjoflat, J., concurring in part and dissenting in part) (noting that while the cases cited by the majority with approval "involved conduct so outrageous that it would shock the conscience of the court," other courts have found less egregious conduct sufficient to survive a motion for judgment as a matter of law).

113. *See, e.g.,* Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1009–10 (7th Cir. 1998) (upholding the jury's conclusion that actionable sexual harassment had occurred and that punitive damages were appropriate against the employer in a case in which a female plaintiff's co-worker snuck up behind her and grabbed her buttocks, ran his hand up her thighs, and made sexual comments and sexual propositions on a regular basis); Herring v. SCI Tennessee Funeral Servs., Inc., No. 2:15-CV-280, 2018 WL 2399050, at *3 (E.D. Tenn. May 24, 2018) (upholding a jury verdict in a sexual harassment case, because there was sufficient evidence that the harassment by a co-worker was severe and pervasive when the co-worker discussed his sex life, made comments about her body parts, shared photographs of his naked sex partner, invited the plaintiff to engage in sexual activity, ran his foot along her buttocks close to her private parts, sent her sexual text messages on her phone, and used a key to open the door to the bathroom and laugh at her while she was in her bra and underwear).

114. *See* L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?,* 22 EMP. RTS. & EMP. POL'Y J. 321, 330 & n.33 (2018) (discussing the way in which courts ratchet up the standard for actionable harassment and how they could instead ratchet down that standard).

115. Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000). This decision was written by Judge Alex Kozinski, who retired from the United States Court of Appeals for the Ninth Circuit after being accused of sexual harassment and other sexual misconduct by a number of attorneys and former law clerks. *See* Matt Zapotosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, WASH. POST (Dec. 18, 2017).

hand on the plaintiff's stomach and then, after being pushed away, forcing his hand underneath her sweater to fondle her bare breast, and, after being rebuffed again, suggesting that they have a sexual encounter, was not sufficiently severe or pervasive to be unlawful.[116] In reaching this conclusion, the court pointed to another case in which a single incident of harassment *was* deemed sufficiently serious to be actionable. That other case involved a woman who was slapped, whose shirt was torn off, who was hit on the head and choked, who was raped, and who was held captive overnight.[117] One might argue that the court was not necessarily saying that one had to be raped and kidnapped in order to state a claim of sexual harassment, but the court of appeals did say this:

> Brooks did not allege that she sought or required hospitalization; indeed, she did not suffer any physical injuries at all. The brief encounter between Brooks and Selvaggio was highly offensive, but nothing like the ordeal suffered by the unfortunate young woman in *Al-Dabbagh*, who was held captive from evening until early the next morning. Utilizing the *Harris* factors of frequency, severity and intensity of interference with working conditions, we cannot say that a reasonable woman in Brook's position would consider the terms and conditions of her employment altered by Selvaggio's actions. Brooks was harassed on a single occasion for a matter of minutes in a way that did not impair her ability to do her job in the long-term.[118]

This case has already been used as fodder for the contention that "only rape is sufficiently severe" by other courts applying the standards for actionable harassment.[119]

This case is not an outlier. There are dozens, if not hundreds, of cases in which courts find intrusive, denigrating, and even threatening conduct not to be

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116. *Brooks*, 229 F.3d at 926.

117. The case cited by the *Brooks* court was *Al-Dabbagh v. Greenpeace, Inc.,* 873 F. Supp. 1105 (N. D. Ill. 1994). 229 F.3d at 925–26 (citing Al-Dabbagh v. Greenpeace, Inc., 873 F. Supp. 1105, 1108 (N. D. Ill. 1994)).

118. *Brooks,* 229 F.3d at 926. The court indicated that this single incident did not impair her ability to do her job, but the employee took a six-month leave of absence immediately after the incident and began to see a psychologist. After returning from leave, she was ostracized by her co-workers and supervisors and ultimately left work and never returned. *Id.* at 922. The court even questioned whether a single incident, even one as severe as rape and kidnapping, could support a hostile environment claim. *Id.* at 925–26. Given that the standard for actionable harassment is "severe *or* pervasive," one would have thought that the Supreme Court had answered that question in the affirmative.

119. *See, e.g.,* Chesier v. On Q Fin. Inc., 382 F. Supp. 3d 918, 925–27 (D. Ariz. 2019) (relying on the decision in *Brooks* as support for the conclusion that a single incident of harassment must be "extremely severe" to be actionable and indicating that rape was the type of conduct that met this standard; the court found it "notable" that of the factual situations identified in which a single incident might be sufficient for hostile environment claim, all of the examples involved "the plaintiff being violently raped or enduring some similar form of physical assault").

sufficiently serious to state a claim for actionable harassment.[120] These cases are often decided on motions for summary judgment or motions to dismiss,[121] so employees are denied even the opportunity to establish their claims before a jury even though juries might be better able than federal judges to determine what is objectively offensive or abusive to a reasonable woman (or person).[122]

The actual effect of the harassment on the women subjected to it seems irrelevant to the courts, and women's claims about the seriousness of the harassment are often discounted, regardless of the way that they react to that harassment. For example, in *Takkunen v. Sappi Choquet LLC,* the female plaintiff took an extended leave of absence after a co-worker tugged on her shorts, patted his lap for her to sit down, ran his fingers through her hair, commented on the size of her breasts, suggested that they could go to places in the workplace to be alone, pretended to unzip his pants in front of her, and asked about whether she was having sex with a co-worker.[123] She was required to attend sexual harassment training with that co-worker, during which other participants asked questions that she felt were directed at her.[124] The district court, on summary judgment, found that the conduct did not create a hostile environment because she "was not physically

120. *See, e.g.,* Hancock v. Barron Builders & Mgmt. Co., 523 F. Supp. 2d 571, 574–76 (S.D. Tex. 2007) (finding that instances occurring at least weekly, in which supervisor described use of sexual toys, discussed sexual relations with his wife in demeaning terms, graphically described situations in which he date-raped women, requested employee to come to his house in a bikini, and entered employee's office and began to disrobe were not sufficiently severe or pervasive to be actionable); Williams v. United Launch All., LLC, 286 F. Supp. 3d 1293, 1304–05 (N.D. Ala. 2018) (collecting cases in which sexual conduct was found not sufficiently severe or pervasive to be actionable).

121. *See, e.g.,* Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526, 528–29, 534–35 (7th Cir. 1993) (upholding summary judgment for employer on female plaintiff's claim of sexual harassment based on supervisor's conduct in placing his hand on her leg above the knee and rubbing her upper thigh, grabbing and kissing her, lurching at her from behind some bushes, and then beginning to treat her with condescension when she told him not to act in that manner, noting that while she might have "experienced significant discomfort and distress," it was not frequent or severe and did not interfere with her work); Leeth v. Tyson Foods, Inc., 449 Fed. App'x 849, 851–53 (11th Cir. 2011) (upholding summary judgment for employer, finding sexual conduct of female plaintiff's superior not to be severe or pervasive, including: trying to pull her onto his lap when she entered his office; telling her that he wanted to "ram his tongue down her throat"; dropping by her house uninvited and, when she said that she did not answer the door because she was taking a shower and did not hear him, indicating that she could have let him in and let him watch her shower; calling her and asking her to meet him at a hotel; feeling her hand when she handed him something at work; and following her around the plant; court found the conduct not to be severe or pervasive because even though she was "annoyed" by his conduct, there was "no evidence of threats, *quid pro quo* offers and overt sexual actions other than a few insinuating comments").

122. *See generally* Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing,* 75 S. CAL. L. REV. 791 (2002) (explaining that social science research indicates that the views of federal judges on what is sufficiently severe or pervasive to be actionable sexual harassment differs from those of workers or community standards generally, suggesting that courts may be misapplying the "reasonableness" standard for such claims).

123. Takkunen v. Sappi Cloquet LLC, Civ. No. 08-1454 (RHK/RLE), 2009 WL 1287323, at *1–2 (D. Minn. May 6, 2009).

124. *Id.*

threatened and was reasonably able to perform her job responsibilities."[125] The court apparently found no irony in concluding that the harassment did not affect the plaintiff's ability to perform her job despite her having to leave her job as a result of the harassment to which she was subjected.[126]

But in *Cockrell v. Greene County Hospital Board*, the female plaintiff's sexual harassment claim was also rejected because the court concluded, on summary judgment, that the conduct was not severe or pervasive, in part because the plaintiff did not leave her job.[127] The conduct, which occurred over a two-and-a-half year period, included the following: comments by the Chief Executive Officer about employees' buttocks, hips, and the color of their pubic hair; his making of several comments that men are superior to women and denigrating the female employees' intelligence and experience; and his suggesting to the plaintiff that he could take her from her husband by giving her the down payment for a car.[128] The court found the conduct not sufficient to be actionable because the "conduct did not sufficiently interfere with or alter the terms" of the plaintiff's employment, in part because the conduct was not "'filled with intimidation' and ridicule" and in part because she continued to work after the harassment.[129]

The "catch-22" in which this type of reasoning places harassed women should be obvious. If women continue to work while being harassed, remaining competent employees, courts deem them not to have been subjectively harmed by the harassment or that the harassment objectively was not that bad. If they leave their jobs because of the harassment, they are often viewed as overreacting, so that even if the effects of the harassment are found to be subjectively abusive, their reactions are not objectively reasonable. If they stay on the job, but their work performance suffers, then they are likely to be judged not to be good employees, so that if they are terminated or demoted, the employer's action is viewed as reasonable and not retaliatory. One cannot help but wonder how courts expect women to react to sexual harassment in order to convince the courts both of their reasonableness and that the conduct was objectively "bad enough."

Courts have used the "severe or pervasive" requirement to allow denigrating and harmful harassing conduct to continue to pervade the workplace, essentially

125. *Id.* at *3.

126. *Id.* at *2.

127. Cockrell v. Greene Cnty. Hosp. Bd., No. 7:17-cv-00333-LSC, 2018 WL 1627811, at *6 (N.D. Ala. 2018), *appeal dismissed*, No. 18-11857-GG, 2018 WL 6046418 (11th Cir. Sept. 19, 2018).

128. *Id.* at *4.

129. *Id.* at *4–6. *See also* Guthrie v. Waffle House, Inc., 460 Fed. App'x 803, 804–05, 808 (11th Cir. 2012) (finding sexual conduct of co-worker against female plaintiff—including grabbing her buttocks on several occasions, indicating that he wanted to "fuck" her and lick her all over, repeatedly asking her to date him, and telling her that she could "just pee in his mouth" when she indicated that she had to take a bathroom break—and conduct of supervisor—who indicated that he wanted to "have" her and her friend in graphic terms, discussed his sexual exploits, and said that she could "shit in [his] mouth"—were not severe or pervasive, even though she transferred locations after complaining of sexual harassment, because the harassment did not "unreasonably interfere[]" with her work performance because she maintained her employment during the period of harassment).

finding that conduct trivial and the women who object to that conduct to be unreasonable. In this way, courts have found only the most horrific sexually harassing conduct to be unlawful.

D. HARASSMENT WITHOUT RESPONSIBILITY: STANDARDS FOR INDIVIDUAL AND EMPLOYER LIABILITY

Even when women are able to establish that they have been subjected to actionable sexual harassment, that is, when they successfully jump through all of the hoops discussed above, they often struggle to hold anyone responsible for that harassment. This problem is caused by the rules adopted by the courts with respect to the lack of liability on the part of individual harassers, as well as the way in which the courts have limited employer liability for the actions of co-workers and other non-supervisory actors through the application of negligence principles. In addition, although courts have imposed vicarious liability on employers for the harassment by supervisors, that liability has been limited both by a narrow definition of "supervisor" and the way in which the courts have applied an affirmative defense nominally imposed on employers.

Individual harassers, such as supervisors or co-workers, have generally not been found to be subject to liability under Title VII because they do not meet the definition of "employer."[130] The lower courts have been almost uniform in reading Title VII as not imposing individual liability for sexual harassment.[131] Accordingly, if liability is to be imposed for unlawful sexual harassment, it must generally be imposed on the employer of the harasser.

Employers can be liable for harassment by co-workers and other non-supervisory actors, such as customers and clients, based on a showing of negligence,[132] which generally requires a showing that the employer was aware or should have been aware of the harassment and failed to take remedial measures to stop it from occurring or continuing.[133]

Showing that an employer was aware of harassment generally requires demonstrating that the target of the harassment had brought the harassment to the

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130. This result does not appear to be dictated by the terms of Title VII, which defines "employer" to include "any agent" of an employer. *See* Title VII, § 701(b), 42 U.S.C. § 2000e(b). While it may well be true that a co-worker would not constitute an "agent" of the employer in most circumstances, it is not clear why a supervisor would not meet that definition.

131. *See, e.g.,* Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (holding that Title VII does not impose individual liability on employees, because the fact that Title VII applies only to employers of a certain size means that "it is inconceivable that Congress intended to allow civil liability against individual employees").

132. *See* Vance v. Ball State Univ., 570 U.S. 421, 445–46 (2013) (noting that with respect to holding employers liable for harassment by co-workers, "the victims will be able to prevail simply by showing that the employer was negligent in permitting this harassment to occur, and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent").

133. The Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759 (1998), indicated that "[a]n employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."

attention of the employer, normally by filing a formal or informal complaint.[134] The courts have generally required that the target be explicit about the nature of the harassment to which she has been subjected, holding that a failure of a plaintiff to be clear that the co-worker's conduct is sexual harassment relieves the employer of an obligation to act.[135] But some courts have found employers not to be negligent because they were not aware of the harassment, even when it appears that the employer acted to prevent its knowledge of the harassment. For example, in *Mullins v. Goodyear Tire & Rubber Co.*, the majority rejected the plaintiff's contention that the employer knew that she had "good reason" to fear a co-worker who had sabotaged her machine and indicated that, because he had served in Vietnam, "it would be nothing for me to kill someone."[136] On her final day of work, after which she took a medical leave and terminated her employment, the co-worker drove his forklift very close to her work area and blocked her exit.[137] The co-worker had previously engaged in sexually harassing conduct toward the plaintiff, the only woman in her job category.[138] The majority indicated that none of these incidents put the employer on notice of the sexual harassment, but the dissent, written by Judge Damon Keith, noted that, when the plaintiff had tried to report the harassment by the co-worker, the manager cut her off and suggested that they focus on the issue at hand.[139] The dissent concluded that it was therefore not unreasonable for the plaintiff to think that the employer did not want to know about the co-worker's previous harassment and that an employer "should not be allowed to evade liability by silencing an employee."[140]

Even if the target of harassment has not made a formal complaint, some courts have held that an employer might have constructive knowledge of the harassment, such as situations in which the harassment was so pervasive that the employer must have known about it.[141] But these courts have made clear that the

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134. *See, e.g.,* E.E.O.C. v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059, 1072 (C.D. Ill. 1998) (explaining standards for employer liability for sexual harassment based on negligence, indicating that employer must have notice in order for there to be liability and suggesting that that notice will normally be obtained through the plaintiff's complaint).

135. *See, e.g.,* Esquivel v. Int'l Union of Operating Eng'rs, Loc. 150, 573 F. Supp. 2d 1052, 1056–57 (N.D. Ill. 2008) (explaining standards for employer liability based on negligence and indicating that in order for employers to be liable, the employer must have been apprised of the harassment: "an employer cannot be held liable for asserted co-employee harassment that is not brought to its attention").

136. Mullins v. Goodyear Tire & Rubber Co., 291 Fed. App'x 744, 745 (6th Cir. 2008).

137. *Id.* at 745–49.

138. *Id.* at 751 (Keith, J., dissenting).

139. *Id.* at 745, 749–50; *id.* at 752 (Keith, J., dissenting).

140. *Id.* at 755–56 (Keith, J., dissenting). *See also* Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 335 (4th Cir. 2003) (holding that employer had constructive knowledge of harassment even in absence of plaintiff making a formal complaint to upper-level management because they prevented her from voicing those complaints by making themselves unavailable to her when she tried to report the harassment by her co-workers).

141. *See* Sandoval v. Am. Bldg. Maint. Indus., Inc., 578 F.3d 787, 802 (8th Cir. 2009) (quoting Fall v. Ind. Univ. Bd. of Trs., 12 F. Supp. 2d 870, 882 (N.D. Ind. 1998)) (indicating that the employer is charged with constructive notice of sexual harassment if "the harassment was so broad in scope, and so permeated the workplace, *that it must have come to the attention of someone authorized to do something*

standard of "pervasiveness" for constructive notice is a higher standard than the "pervasive" requirement for actionable sexual harassment—some courts have called this standard "pervasiveness-plus" and indicated that the conduct must be "egregious, numerous, and concentrated" to meet this standard.[142] Given the reluctance of courts to find conduct to be "pervasive,"[143] it seems unlikely that this higher standard will be found to be met in many cases. And other courts have ruled out the possibility of charging an employer with constructive notice, even if such a higher standard might be met, by declaring that the existence of an effective sexual harassment policy means that the employer cannot be charged with constructive notice of harassing conduct.[144]

Some courts have been quite accepting of the actions that employers take in response to sexual harassment complaints in allowing employers to defeat claims of negligence. For example, the court of appeals in *Knabe v. Boury Corp*.[145] held that the employer had adequately responded to the female plaintiff's complaint of harassment, which included several instances in which the harasser rubbed up against her body and ran his hands over her buttocks, even though the employer took no disciplinary action against the harasser; the employer had failed to discipline the harasser because of the belief that sexual harassment could not be found without other witnesses to the harassment, despite the employer's failure to interview witnesses to one of the acts of harassment.[146] Although the court acknowledged that the investigation was inadequate, the court said that the law did not require investigations to be "perfect."[147] The court held, as a matter of law, that the employer had taken effective remedial action in response to the complaint when the harasser was reminded of his responsibilities under the employer's sexual harassment policy, which the court indicated was reasonably calculated to end the harassment.[148] The court rejected any requirement that punitive action be taken against a harasser in order for an employer's response to be effective, but the court also suggested that sometimes non-punitive action would not be an effective response, because of the highly fact-specific nature of the inquiry.[149]

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about it"; incidents of harassment of which the plaintiffs were not aware could be used to show that the employer should have discovered the sexual harassment).

142. *See* Kramer v. Wasatch Cnty. Sheriff's Off., 743 F.3d 726, 757 (10th Cir. 2014).

143. *See supra* text accompanying footnotes 111 to 129.

144. *See* Minix v. Jeld-Wen, Inc., 237 Fed. App'x 578, 583 (11th Cir. 2007) (holding that an employer is insulated from liability for hostile environment sexual harassment claims premised on constructive notice if the employer has adopted and enforces an effective sexual harassment policy).

145. Knabe v. Boury Corp., 114 F.3d 407 (3d Cir. 1997). Although the harasser was a supervisor and we now know that negligence is not the proper standard of liability for supervisor harassment, this case was decided before *Ellerth* and *Faragher* made clear the standard for employer liability for supervisory harassment.

146. *Id*. at 408–12.

147. *Id*. at 412.

148. *Id*. at 412–13.

149. *Id*. at 414. Ironically, the court indicated that an investigation might be so flawed that that remedial action was not adequate, such as if the investigation "prevents the discovery of serious and

That this case was decided on summary judgment makes a mockery of the court's insistence that the employer's remedy was adequate as a matter of law.

Action taken by employers in response to harassment has generally been held to be effective when the harassment stops, but some of the same courts have held that an employer's actions in response to sexual harassment complaints can constitute effective remedial action even if it did not in fact stop the harassment.[150] It is a little hard to look at the courts' analysis on this issue as anything more than "heads, the employer wins, tails, the employee loses," particularly given that employees must generally be willing to subject themselves to the possibility of further harassment in order to see if the harassment will stop. Worse yet, employees' willingness to subject themselves to the possibility of further harassment may well be used as evidence that the harassment must not have been that bad; courts have cited the fact that a woman remained in the workplace in spite of harassment as evidence that the harassment was not sufficiently serious to be actionable or subjectively perceived as abusive.[151]

As the Court made clear in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton,* employers are vicariously liable for harassment conducted by a supervisory employee, subject to an affirmative defense in the event that the harassment does not result in a tangible employment action.[152] In the absence of a tangible employment action, employers can escape liability or limit damages for supervisory harassment if they can establish both that they acted reasonably to prevent or promptly correct harassing behavior and that the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer.[153]

The Supreme Court's decisions in *Ellerth* and *Faragher* were initially seen as plaintiff-friendly decisions because they imposed liability on employers for certain acts of harassment in the absence of employer fault or at least employer

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significant harassment." The investigation in this case did precisely that, because only a single incident of harassment was investigated by the employer, who did not ask the harasser about the other incidents reported by the employee, and the employer did not interview any witnesses to one incident for which there were witnesses. The court also seemed to suggest that an employer's non-punitive response to harassment might not be effective remedial action in the case of serious harassment, such as a rape, *id.* at 414 & n.13, as well as that a plaintiff would have a much easier time establishing that the employer's remedial action was not effective if she returned to the workplace after the harassment to see if it continued, *id.* at 414–15.

150. *See* Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 676 (10th Cir. 1998) (in discussing employer's liability in negligence for actions of co-workers, the court indicated that, while the "stoppage of the harassment by the disciplined perpetuator evidences effectiveness," an employer's response may be reasonably calculated to end the harassment "even though the perpetrator might persist").

151. *See supra* text accompanying notes 127 to 129.

152. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 744–45 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 777–78 (1998).

153. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The Court described the affirmative defense as follows: "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 the employer or to avoid harm otherwise."

negligence.[154] In fact, the decisions were criticized for precisely that reason, including by the Court's dissenters.[155]

But both the Supreme Court and the lower courts have succeeded in making the standards for employer liability for sexual harassment considerably less employee friendly. The Supreme Court has done so by restricting the factual circumstances in which the *Faragher*/*Ellerth* affirmative defense applies, by adopting a very restrictive definition of who counts as a supervisor. In *Vance v. Ball State University*,[156] the Court held that one is a "supervisor" for purposes of the affirmative defense only if that individual has the power "to take tangible employment action against the victim, *i.e.,* to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or decisions causing a significant change in benefits,'"[157] rejecting the contention that those with the authority to direct the work of subordinates are also supervisors.[158] By limiting the number of people in the workplace who qualify as supervisors, the Court has blunted the effect of its holdings imposing vicarious liability on employers for the actions of supervisors by instead requiring plaintiffs to prove the existence of negligence on the part of the employer for harassment conducted by a growing number of persons deemed coworkers, even though the employer has provided real workplace authority to those individuals that allow them to engage in the harassment.

The lower courts have been very active in interpreting the affirmative defense in a way to benefit employers and disadvantage employees. The most startling way that some lower courts have accomplished this is to write one of the prongs of the affirmative defense out of the law, suggesting that the Supreme Court could not have meant what it said—that the employer must establish both prongs of the affirmative defense in order to escape vicarious liability. For example, the Eighth Circuit held in *McCurdy v. Arkansas State Police*[159] that only the first prong of the affirmative defense should be applied in a case involving what the court characterized as "a single incident" of sexual harassment by a supervisor, in which the supervisor touched the female plaintiff's breast, suggested that her uniform should be "panties and a tank top," sat close to her and played with her hair, and

154. Not everyone saw these decisions as plaintiff-friendly, even when they were first decided. For example, Professor Joanna L. Grossman took the position in an early article that the conventional wisdom that the standards of employer liability adopted in those decisions were a "blow to employers" was "dead wrong." *See* Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment,* 61 U. PITT. L. REV. 671, 675 (2000).

155. *Ellerth*, 524 U.S. at 767 (Thomas, J., dissenting) ("An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur."); *id.* at 774 ("Moreover, employers will be liable notwithstanding the affirmative defense, *even though they acted reasonably*, so long as the plaintiff in question fulfilled *her* duty of reasonable care to avoid harm."); *Faragher*, 524 U.S. at 810–11 (Thomas, J., dissenting).

156. Vance v. Ball State Univ., 570 U.S. 421 (2013).

157. *Id.* at 431.

158. *Id.* at 431–46.

159. McCurdy v. Arkansas State Police, 375 F.3d 762 (8th Cir. 2004).

told her that she had a sexy voice and that "[you] kind of turn me on."[160] The plaintiff immediately reported the harassment, and the employer ultimately demoted the harasser.[161] When the plaintiff argued that the employer could not establish the affirmative defense to vicarious employer liability because it could not prove the second prong of the affirmative defense as she had immediately reported the harassment under the employer's policy, the court of appeals declared the second prong to be inapplicable:

> Strict adherence to the Supreme Court's two-prong affirmative defense in this case is like trying to fit a square peg in a round hole. We will not tire ourselves with such an exercise. . . Judicially adopted defenses should not be viewed in a vacuum and blindly applied to all future cases. In *Ellerth* and *Faragher,* the Supreme Court confronted cases involving repeated incidents of supervisor sexual harassment. In contrast, we are confronted with McCurdy's case involving a single incident of alleged supervisor harassment. Therefore, we ask whether the Supreme Court intended the *Ellerth*/*Faragher* affirmative defense to apply to this situation, or whether the Supreme Court intended employers in such situations to be strictly liable.[162]

The court went on to hold that the employer was entitled to the affirmative defense, even though it could not prove the second prong, and the court instead held that the employer had established the "modified" affirmative defense, in which the employer is required to prove only one of two necessary elements.[163] That is, because the court recognized that the employer could not establish the affirmative defense as adopted by the Supreme Court, the court decided to create an affirmative defense that the employer could meet.

The court of appeals' assertion that it had no obligation to "blindly" apply the affirmative defense mandated by the Supreme Court as written, but instead could modify the affirmative defense based on what it thought the Court must have meant—by eliminating the requirement that the employer could not satisfy—is startling. A review of *Ellerth* and *Faragher* makes clear that the rule adopted in those two cases was not based on the particular facts of those cases. The Court in those cases adopted a single rule for "vicarious liability for harm caused by misuse of supervisory authority" even though the facts of the two cases differed, and made clear that the affirmative defense "comprises two necessary elements."[164] The court of appeals seems not to have gotten the message that it had no power to decline to follow the Supreme Court simply because it found the results of

160. *Id.* at 764–65.
161. *Id.* at 765–67.
162. *Id.* at 771.
163. *Id.* at 772.
164. *Faragher,* 524 U.S. at 807; *Ellerth,* 524 U.S. at 765.

following the rules set down by the Court to be "absurd."[165] In addition, the *McCurdy* court was entirely wrong when it suggested that application of the affirmative defense would result in strict liability; instead, the employer in this case would face vicarious liability because of its failure to satisfy both prongs of the affirmative defense that would have relieved it of liability or reduced its damages. The existence of a defense to liability indicates that liability is not strict.

Other lower courts, while nominally requiring both prongs of the affirmative defense to be met, seem to have shifted the burden to employees to negate the requirements of the affirmative defense, rather than truly placing the burden of production and persuasion on the employer. For example, the court of appeals in *Barrett v. Applied Radiant Energy Corp.*,[166] in applying the first prong of the affirmative defense, said that the plaintiff had provided "no evidence" that the employer's sexual harassment policy was adopted in bad faith or was defective or dysfunctional.[167] But adoption of a defective or dysfunctional sexual harassment policy or adopting one in bad faith would be evidence that the employer acted unreasonably, thereby preventing it from meeting that prong of the defense. Placement of the burden of persuasion on the employer to establish both prongs of the affirmative defense means that the employer should have to prove the reasonableness of its action, including that the policy that it adopted was not defective or dysfunctional and that it did not act in bad faith. Similarly, the district court in *Conatzer v. Medical Professional Building Services, Inc.*,[168] in discussing the second prong of the affirmative defense, suggested that the plaintiff could "rebut a defendant's affirmative defense and create an issue of fact with evidence that she behaved reasonably under the circumstances," but that the plaintiff had presented "no such evidence."[169] But, of course, it is not the plaintiff's burden to establish that she acted reasonably; the placement of the affirmative defense on the employer means that it is the employer that is required to not only produce evidence but prove that the employee's actions were unreasonable under the circumstances.

But even lower courts that have not been so bold as to effectively "overrule" the Supreme Court by ignoring its precedent have acted to soften the

165. *McCurdy,* 375 F.3d at 773. This fact did not escape the dissent in *McCurdy*, which recognized that the court of appeals had the obligation to follow the rule set down by the Supreme Court and noted that, under that rule, "if there is supervisory harassment, whether it is a single or multiple incident, and the employer cannot prove the plaintiff employee unreasonably failed to take advantage of any corrective opportunities, the employer will be liable, regardless of how effective and prompt its remedial action might have been." *Id.* at 775 (Melloy, C.J., dissenting). The Tenth Circuit in *Harrison v. Eddy Potash, Inc.,* 248 F.3d 1014, 1026 (10th Cir. 2001), also recognized the need to follow the Supreme Court's lead, noting that "there was no reason to believe that the 'remarkably straightforward' framework outlined in *Faragher* and *Burlington* does not control all cases in which a plaintiff employee seeks to hold his or her employer vicariously liable for a supervisor's sexual harassment."

166. Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001).

167. *Id.* at 266.

168. Conatzer v. Med. Pro. Bldg. Servs, Inc., 255 F. Supp. 2d 1259 (N.D. Okla. 2003).

169. *Id.* at 1270.

requirements of the employer's affirmative defense by making it very easy for employers to establish those prongs. Some courts have accepted the most rudimentary employer actions, such as adopting a sexual harassment policy, as sufficient evidence of the employer's reasonable care,[170] even though the Supreme Court did not indicate that the mere adoption of such a policy would be sufficient to meet the first prong of the affirmative defense. Instead, what the Court said was that promulgation of such a policy would be relevant for the first prong of the affirmative defense, not necessary or sufficient: "While proof that an employer had promulgated an antiharassment policy with complaint procedures is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."[171] And the *Faragher* Court came close to suggesting that promulgation and effective dissemination of a formal policy against sexual harassment would be necessary in many cases to meet the affirmative defense, by holding as a matter of law that the employer in that case, which had adopted a policy but not disseminated it to the employees, could not satisfy the requirements of the affirmative defense.[172] Nowhere in the opinion, however, did the Court suggest that promulgation and dissemination alone would be enough to satisfy the first prong of the affirmative defense.

In contrast to the willingness of the lower courts to find the first prong of the affirmative defense to be satisfied by basic employer actions, courts have expected much more of employees who have been subjected to sexual harassment in considering whether employers have satisfied the second prong of the affirmative defense. In order to preserve their claims of sexual harassment against employers for actionable sexual harassment, courts have expected that women will immediately file a formal complaint of sexual harassment to the correct person,[173] in precisely the manner required by the employer's policy,[174] and otherwise will behave in precisely the manner that courts expect, even though empirical

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170. *See, e.g.,* Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 266 (4th Cir. 2001) ("Distribution of an anti-harassment policy provides 'compelling proof' that the company exercised reasonable care in preventing and promptly correcting sexual harassment"). *But see* Macias v. Southwest Cheese Co., 181 F. Supp. 3d 883, 894 (D.N. Mex. 2016) ("An employer who adopts a valid sexual harassment policy, disseminates this policy through a handbook, and periodically trains employees how to avoid sexual harassment will be found to have exercised reasonable care to prevent sexual harassment.").

171. *Faragher*, 524 U.S. at 807.

172. *Id.* at 808–09.

173. *See Barrett*, 240 F.3d at 267–69 (holding that the female plaintiff failed to act reasonably in failing to make her complaint of sexual harassment to one of the managers designated to receive sexual harassment complaints, even though she did tell two lawyers, seven of her colleagues, and the son of the CEO of the company about the harassment by her supervisor; court said that she presented "no evidence" that her conversations "filtered up to management").

174. *See* Minix v. Jeld-Wen, Inc., 237 Fed. Appx. 578, 582 (11th Cir. 2007) (holding that when an employer promulgates an adequate sexual harassment policy, employees must utilize the procedural mechanisms established by the policy to put the employer on actual notice of the harassment).

evidence indicates that most women do not behave in this manner.[175] Courts tend to treat women who do not make formal complaints as aberrations, while in fact the vast majority of women who are subjected to sexual harassment do not make such complaints.[176]

Some courts have been so demanding of the targets of sexual harassment that it is difficult to imagine that many real women who are subjected to sexual harassment, rather than the ideal women imagined by the courts, will be able to meet these standards. In one of the most extreme cases of application of the second prong of the affirmative defense, the court in *Marsicano v. American Society of Safety Engineers* found that the female plaintiff had acted unreasonably even though she made a complaint about sexual harassment by her supervisor on the ninth working day after she began employment and the eighth day after he began to harass her.[177] The supervisor's initial harassment included commenting on her body, standing close to her on her side of the desk in her office, and suggesting that other employees might think they were dating.[178] On her last day on the job, the supervisor took her to lunch, during which he asked her about her personal life, talked about sexual positions, caressed her hair and face, and suggested that they would have many more lunches together.[179] After the initial harassment, but before the lunch, the executive director of the employer stopped by and asked how the plaintiff was settling in, and the plaintiff did not report the supervisor's harassment to the executive director.[180] The next day, however, she did not come to work and reported the supervisor's harassment to the human resources director.[181] She refused to return to work when the employer indicated that there had likely been a misunderstanding because she might not understand that "people are casual in the Midwest" and that she should receive counseling in order to deal with the harassment.[182] She was also told that she could be moved to a position in which she would have less contact with the harasser, but that he would continue to oversee her work.[183] The court agreed that she had made a prompt complaint to the human resources director, but it also decided that she had acted unreasonably by not reporting the harassment the day before when the executive director stopped by her office, suggesting that, if she had done so, she could have

175. *See* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, U.S. EQUAL EMP. OPPORTUNITY COMM'N (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace# (reporting that the least common response of either men or women who have been harassed is to report the harassment internally or to file a formal legal complaint; only about 30% of targets of harassment talked to supervisor, manager, or union representative about the harassment, while 6 to 12% filed a formal complaint).

176. *Id.*

177. Marsicano v. Am. Soc'y of Safety Eng'rs, No. 97 C 7819, 1998 WL 603128, at *7. (N.D. Ill. Sept. 4, 1998).

178. *Id.* at *2.

179. *Id.* at *2–3.

180. *Id.* at *3.

181. *Id.* at *4.

182. *Id.*

183. *Id.* at *7–8.

prevented the harassment that occurred at lunch.[184] And, the court said, her failure to return to work and see if the harassment would stop was "unduly inflexible" and therefore unreasonable.[185]

The court's conclusion that the plaintiff was unreasonable in making a complaint to the human resources department when the harassment became more serious, rather than to the executive director wondering how she was "settling in," is grossly unfair; the plaintiff made a very prompt complaint in exactly the way she was supposed to under the employer's policy.[186] Anyone with an understanding of how workplaces actually function would have understood that she might not have wanted or been prepared to make a complaint to the executive director during her first few days on the job, in an unplanned meeting, particularly when the initial conduct of the harasser was at least more ambiguous. And her failure to return to work seems completely reasonable, when she had already been blamed for the "misunderstanding" and been recommended for counseling so she could deal with the harassment. That the employer actually did not seek to insulate her from the harasser and took no disciplinary action against the harasser, even though he admitted some of the conduct, suggests that her reluctance to return to work was eminently reasonable.

Nor is this case an anomaly. In *Conatzer v. Medical Professional Building Services Corp.,* the court of appeals held that a plaintiff who suffered two incidents of harassment—first with her supervisor leaning up against her and rubbing the side of her chest, and two weeks later, placing the plaintiff in a headlock with his thighs and directing her head towards his lap after she bent over to pick something up—acted unreasonably in failing to make a complaint until three or four days after the second incident;[187] her complaint was made a total of 17 days after the first incident.[188] The court's insistence that a new employee—she had only been working a couple of months at the time of the initial act of harassment and was still on probation—acted unreasonably in waiting 17 days to report harassment fundamentally misunderstands the dynamic of the workplace and the precarious position of probationary employees and imposes a standard of behavior on working women that few will be able to meet.

Courts that have imposed this unrealistic expectation that women who have been sexually harassed will respond to sexual harassment by immediately filing a formal complaint have been much more accepting of the delay of employers in deciding how to respond to a complaint of sexual harassment. An example is *Anderson v. Leigh*, in which the female plaintiff began to experience harassment from the third shift supervisor in mid-August and then progressively experienced more serious harassment over the next couple of weeks, including almost daily

184. *Id.* at *7.
185. *Id.* at *2–4, *7–8.
186. *Id.* at *7.
187. Conatzer v. Med. Pro. Bldg. Servs. Corp., 95 Fed. Appx. 276, 278–81 (10th Cir. 2004).
188. *Id.*

sexual propositions and other suggestive remarks.[189] She reported that she was being harassed to the second shift supervisor, and later, after the harassing supervisor issued an error report on her work, made a complaint to the human resources department.[190] After investigating her complaint, the company issued only a warning to the harasser because of what it deemed a lack of corroboration of her allegations.[191] In judging whether the employer could establish the affirmative defense to liability, the court noted that the eight-day delay between when the plaintiff initially reported the harassment to the second shift supervisor and when the employer began to investigate her formal complaint to the human resources director did not prevent the employer from meeting the first prong of the affirmative defense; the court held that that "short delay" did not show that the employer was unreasonable in responding to her complaint.[192] However, the court also found that the employer had met the second prong of the affirmative defense because the plaintiff delayed for approximately three weeks from the start of the harassment to when she made the informal report.[193] The court gave no explanation why the employer's delay was reasonable while the plaintiff's delay was not, even though it appears that the plaintiff made her complaint when she did largely because the harassing supervisor's conduct had escalated into threats to use her refusal to submit to his sexual advances to harm her job prospects. The court's willingness to forgive the employer's delay but not the employee's is fundamentally unfair; if anything, it would seem fairer to fault the employer for not acting consistently with its own sexual harassment policy.

Courts have also been quite dismissive of the explanations that women have given for their failure to make complaints or their delays in doing so, finding women to have acted unreasonably in spite of quite logical, and often compelling, explanations for their actions. The courts seem not to take into account the risks that women face in coming forward with complaints of sexual harassment or the particular circumstances of the individual woman, instead seeming to view reporting of sexual harassment complaints as an all-around good, in spite of the negative repercussions that women often experience when they do make complaints about sexual harassment.[194] Judges in these cases may be projecting what they think they would do if they were faced with sexual harassment, confident that they would make prompt formal complaints, but these predominately male judges, who are less likely to face harassment themselves, may not realistically

189. Anderson v. Leigh, No. 98 C 50169, 2000 WL 193075, at *1–2. (N.D. Ill. Feb. 10, 2000).

190. *Id*.

191. *Id*. at *2.

192. *Id*. at *2–3, *5–7.

193. *Id*. at *6–7.

194. *See* Mindy Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. OF APPLIED PSYCH. 203, 237 (2002) (reporting results of research indicating that targets of sexual harassment who report sexual harassment have more negative outcomes than those who do not report, including retaliation, lowered job satisfaction, and greater psychological distress, and concluding that those results suggest that not reporting is the more "reasonable" course of action for targets of harassment).

be able to put themselves in the position of the women facing workplace harassment.[195] Instead, they should be required to consider the empirical evidence of what women actually do, and why they do it, before they label women "unreasonable."

A common reason that women give for failing to make a complaint of sexual harassment either at all or immediately is a fear of retaliation.[196] Given the frequency with which retaliation occurs when women make sexual harassment complaints,[197] it would seem that fears of retaliation would generally be well founded. Courts, however, have often said that a generalized fear of retaliation will not excuse a failure to complain about sexual harassment; instead, plaintiffs must have "an objectively credible fear" of retaliation to justify a failure to complain.[198] But in *Sconce v. Tandy Corp.,*[199] the district court held that the female plaintiff's waiting to file an EEOC charge until after she transferred to another position not under the supervision of her harasser was unreasonable even though he had threatened her with termination if she told anyone about the harassment.[200] The court reasoned:

> Of course, when a supervisor threatens termination an employee may reasonably fear retaliation. To be sure, harassing supervisors often threaten termination in order to intimidate and manipulate their victims. Effective complaint procedures are designed to protect against precisely such retaliatory conduct. They are intended to divest a harassing supervisor of any power he has over the victimized employee.

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195. Perhaps male judges should not be faulted for their assumptions that reasonable women faced with sexual harassment will make prompt formal complaints. Even women who have not faced sexual harassment often predict that they would, if subject to harassment, challenge that behavior, while women who have actually been subject to harassment did not in fact make such a challenge. *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 28–30 (2005). This suggests that both male and female judges should be required to resort to empirical evidence before pronouncing judgment on the reasonableness of the responses of targets of sexual harassment.

196. *See, e.g.,* Joyner v. Woodspring Hotels Prop. Mgmt. LLC, 785 Fed. Appx. 771, 775 (11th Cir. 2019) (noting that plaintiff cited "fear of retribution" as reason for her failure to make a complaint of sexual harassment before her termination). *See also* Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671 (2021) (discussing empirical evidence indicating that women fail to report harassment because of fear of retaliation).

197. *See* Feldblum & Lipnic, *supra* note 175 (noting that the fears of employees in reporting harassment are "well-founded" and reporting results of a study indicating that as many as 75% of employees who report workplace mistreatment, including harassment, face some type of retaliation). *See also* Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OF OCCUPATIONAL HEALTH PSYCH., No. 4, 247 (2003) (reporting results of study in which targets of interpersonal mistreatment in context of workplace faced work related retaliation and social retaliation as the result of making complaints concerning that treatment); Bullock, *supra* note 196. (discussing empirical evidence indicating that the percentage of targets of harassment who suffer adverse action is much greater when the target reports the harassment).

198. *See* Breeding v. Cendant Corp., No. 01 Civ. 11563, 2003 WL 1907971, *7 (S.D.N.Y. Apr. 17, 2003); *see also* Weger v. City of Ladue, 500 F.3d 710, 725 (8th Cir. 2007).

199. Sconce v. Tandy Corp., 9 F. Supp. 2d 773 (W.D. Ky. 1998).

200. *Id.* at 775, 778.

> It follows that a threat of termination, without more, is not enough to excuse an employee from following procedures adopted for her protection.[201]

It is hard to imagine what more might be required to show that an employee acted reasonably because of fear of retaliation than an actual threat of retaliation.

The plaintiff in *Walton v. Johnson & Johnson Services, Inc.*[202] established considerably "more" to justify her delay in making a complaint about her supervisor's sexual harassment, but the court still concluded that she had acted unreasonably.[203] Her supervisor had tried to kiss her and had grabbed her breasts and buttocks and then raped her on at least two occasions; twice he pulled out a gun and showed it to her.[204] The court rejected her claim that her delay was justified by her fear of physical harm if she reported the harassment, even though it noted that the "severe harassment" that occurred "can be particularly traumatic."[205] The court noted that the supervisor did not threaten her when he showed her the gun and therefore her "subjective fear" that the supervisor might physically harm her did not justify her delay.[206] The court reasoned that "the second prong of the *Faragher* defense would be rendered meaningless if a plaintiff-employee could escape her corresponding obligation to report harassing behavior based on an unsupported subjective fear that the employee would suffer physical harm at the hands of her alleged harasser."[207] But the plaintiff's fear that the harasser would physically harm her was not unsupported, unless the court failed to consider rape to be physical harm; he had already raped her more than once. And the court's suggestion that brandishing a gun is not a threat sufficient to cause concern about the real possibility of further physical harm requires the court to have been ignorant of, or blind to, the reality that violence in the workplace often follows incidents in which the employer takes action against an employee for workplace misconduct.[208] That this case was decided in favor of the employer on summary judgment makes the court's conclusion all the more startling.

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201. *Id.* at 778.
202. Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272 (11th Cir. 2003).
203. *Id.* at 1289–93.
204. *Id.* at 1275–77.
205. *Id.* at 1290.
206. *Id.* at 1289–91.
207. *Id.* at 1291 & n.17.
208. *See, e.g.*, Mark Berman, *Fearing mass shooters, employers turn to workers to monitor their peers,* WASH. POST, (Jun. 1, 2019), https://www.washingtonpost.com/national/fearing-active-shooters-companies-turn-to-workers-to-monitor-their-peers/2019/06/01/a2dae30e-70f3-11e9-8be0-ca575670e91c_story.html (recounting incidents of workplace shootings, some of which appear to have been triggered by discipline or termination of employees and some of which were preceded by red flags, alarming behaviors, and threats of violence from those accused of opening fire); T. Stanley Duncan, *Death in the Office: Workplace Homicides,* 64 FBI LAW ENFORCEMENT BULLETIN 4, 20–25 (April 1995) (noting that workplace homicides are on the rise and that homicide is the leading cause of death in the workplace for women; reporting results of case studies indicating that the vast majority of non-stranger assailants are male and that guns are usually used in workplace homicides).

The expectations that the lower courts have about how women should respond to harassment cannot be supported by the Supreme Court's articulation of the second prong of the affirmative defense. That prong requires that the employee targeted by sexual harassment act "unreasonably." The Court explained the second prong with the following language: "while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense."[209] Even here, the Court did not say that an employee's failure to make a formal or even informal complaint was sufficient for the employer to establish this part of the affirmative defense; it is required that the employer prove that the employee's failure to do so was unreasonable under the circumstances. If courts are going to determine whether a failure to make a complaint or delay in making a complaint is unreasonable, they must make a serious effort to understand and take into account the circumstances that cause women who have been sexually harassed to act as they do.

Ironically, courts insist that targets of harassment report sexual conduct immediately, on the theory that a prompt complaint may keep the harassment from becoming more serious and stop the harassment before it becomes actionable, while refusing to protect them from retaliation when they do so. The Supreme Court in *Clark County School District v. Breeden*[210] concluded in a *per curiam* opinion that a woman who had made a prompt complaint about non-actionable sexual harassment and then suffered negative employment consequences for doing so could not state a claim for retaliation because no one could have reasonably believed that the conduct to which she was subjected was sufficiently severe or pervasive to constitute actionable sexual harassment.[211] Accordingly, employees who follow the suggestion, perhaps the requirement, of the Court in *Ellerth* and *Faragher* that they make prompt complaints about not-yet-actionable harassment can be subjected to perfectly lawful punishment from their employers for doing so. Even though the Court cited to both of those cases in *Breeden*, no member of the Court gave any indication that they thought it might be troublesome to allow employers to punish employees for doing precisely what the Court indicated that it expected those employees to do.[212]

The manner in which the courts have decided issues of liability for sexual harassment often means that, even when all of the other requirements of sexual harassment are established, no one is held responsible for that harassment. The

209. *Faragher*, 524 U.S. at 778.

210. Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001).

211. *Id.* at 269–71.

212. The Court in *Ellerth* indicated that one purpose of the affirmative defense was to encourage early reporting by the targets of sexual harassment: "To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose." 524 U.S. at 764.

courts have declined to hold individual harassers responsible for their harassing conduct and have used negligence and vicarious liability principles to shield employers from liability for harassment conducted by non-supervisory and supervisory personnel. Courts have imposed unrealistic expectations on how women will act when they are subjected to harassment, expecting them to take steps that few women actually take, and, even when they take these steps, courts often fail to protect them from the resulting employer retribution. The existence of harassment without responsibility fails to serve the interests of women who face discriminatory and harmful harassment in the workplace.

III. HOW SEXUAL HARASSMENT LAW MIGHT REGAIN SOME OF ITS LOST PROMISE

The promise that feminists originally saw for the judicial recognition of sexual harassment as a form of sex discrimination prohibited by Title VII has been largely defeated by the judicial addition of a number of requirements, and the judicial interpretation of other requirements, for the claims, making it much more difficult for women who have been harassed in the workplace to state a cognizable claim against their employers. But some of that lost promise could be reclaimed, without any amendment to the statute, by changes to the judicial gloss that courts have imposed on the statute. Alternatively, Congress could make amendments to the statute to alter legislatively some of the most damaging requirements and interpretations imposed by the courts.

The analysis that follows explains the ways in which some of the most damaging requirements of a claim of sexual harassment for women could be altered. First, the "unwelcomeness" requirement should be eliminated in favor of a proper interpretation of the requirement that harassing conduct be subjectively offensive to be actionable. Second, this analysis provides for a corrected application of the "because of sex" requirement. Third, the requirement that harassment be "severe or pervasive" to be actionable should be eliminated or transformed. Finally, the analysis calls for a redefinition of the standards for individual and employer liability to ensure that targets of actionable sexual harassment can obtain a remedy.

Congressional amendment of the statute is not necessary to make these changes. The statutory foundation for a claim of sexual harassment under Title VII is quite lean: Title VII prohibits discrimination with respect to the terms and conditions of employment on a number of grounds, including "sex."[213] The requirements for a claim of sexual harassment are generally not statutorily required; they are judicial gloss imposed on the statute. Just as the courts created those requirements, the courts could do away with or otherwise alter them. That the courts have added their own interpretations of the statute is not necessarily a criticism; some judicial guidance was undoubtedly required in order that employers would understand their obligations under the statute. But the precise judicial

213. Title VII of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a).

requirements imposed on a claim under the statute can be subjected to criticism, particularly when those requirements are imposed only on sexual harassment claims, not other claims under the statute, and in such a way as to deny the statutory promise of women's workplace equality.

A. ELIMINATION OF THE UNWELCOMENESS REQUIREMENTS AND PROPER INTERPRETATION OF THE SUBJECTIVENESS REQUIREMENT

An important change to sexual harassment law to fulfill the promise envisioned by the law's creators would be an elimination of any "unwelcomeness" requirement for claims of sexual harassment. Elimination of that requirement would have important consequences, both symbolic and practical. The symbolic value of elimination of that requirement would erase the law's explicit, or at least implicit, assumption that women in the workplace generally invite, encourage, or are complimented by sexual conduct directed at them, not only when that conduct consists of sexual invitations, but also when it is otherwise hostile and abusive. The practical value of the elimination of that requirement is that it would presumably prevent employers or individual harassers from trying to establish that the particular women actually invited or encouraged the denigrating and degrading conduct to which they were subjected, because that issue would no longer be relevant to the issues before the court. The only relevant issue would be whether the women subject to that denigrating and degrading conduct found it to be subjectively abusive.

Another reason to eliminate the unwelcomeness requirement is that such a move is consistent with the actions of the Supreme Court generally to provide consistency to the standards for workplace harassment, whether they are based on sex or gender or some other grounds.[214] In general, the courts have not imposed an unwelcomeness requirement when dealing with racial or religious harassment,[215] suggesting that harassing conduct on those grounds could not be considered to be welcome. For the same reason that courts are right to conclude that racially denigrating and abusive conduct cannot be welcome, they should also conclude that sexually denigrating and abusive conduct cannot be welcomed by its targets.

Even with the elimination of the unwelcomeness requirement, litigants and courts would have to be vigilant to prevent inquiries about a target's sexual history and practices from being introduced under the guise of determining whether the target found the challenged practices to be subjectively abusive. Under the subjectively abusive standard, the only inquiry should be the effect of the conduct on its target, that is, whether she found the conduct to be offensive or abusive. It

214. The Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998) indicated that "[a]lthough racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment."

215. *See supra* text accompanying note 45.

would no longer be relevant whether, by conduct or otherwise, the target was deemed to have somehow incited or invited the conduct. That she made any type of complaint about the conduct, even just to the harasser, would seem to answer the question of whether it was subjectively abusive, given that women rarely complain about conduct that they do not find offensive. Of course, given that women rarely make complaints, at least formal complaints, about conduct that they do find offensive,[216] the absence of a complaint would not show that the woman found the conduct not to be offensive or abusive. Instead, women who failed to make a complaint would be allowed to provide testimony about the effect of the conduct on them and the reasons why they failed to raise an objection to the conduct.

Arguably, a finding that the sexual or gender-based conduct to which the plaintiff was subjected was objectively abusive should create a presumption that the plaintiff found the conduct to be subjectively abusive. If a reasonable person in the plaintiff's situation—a reasonable woman when the plaintiff is female—would find the conduct to be offensive, it would seem that courts should presume that plaintiffs are in fact reasonable women, rather than assuming that they are not.

B. CORRECT APPLICATION OF THE "BECAUSE OF SEX" REQUIREMENT

The "because of sex" requirement for a claim of sexual harassment under Title VII cannot be eliminated without legislative amendment, because it is the only requirement for an actionable claim that is dictated by the language of the statute.[217] But that does not mean that the lower courts have been correctly interpreting this requirement. In fact, recent precedent from the Supreme Court suggests that they have not.

The Supreme Court's recent decision in *Bostock v. Clayton County, Georgia*[218] represents a significant broadening of the meaning of "sex" in the context of sexual harassment cases and other cases of sex discrimination. In this case, the Court concluded that discrimination based on sexual orientation and gender identity is prohibited sex discrimination because it is based on "traits or actions [the employer] would not have questioned in members of a different sex" and that therefore "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[219] Some of the implications of *Bostock* for the law of sexual harassment are immediately obvious: the hundreds of cases concluding that Title VII was not violated because the employee was harassed because of sexual orientation or gender identity, but not sex or gender, are obviously wrong. But the implications of *Bostock* go beyond this express ruling. Although the Court purported to proceed on the assumption that "sex" means "only biological

216. *See supra* text accompanying note 175.
217. 42 U.S.C. § 2000e-2(a).
218. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).
219. *Id.* at 1737.

distinctions between male and female,"[220] its language suggests that in fact it was adopting a definition of sex that goes beyond biological distinctions and instead reaches other aspects of gender. For example, the Court indicated that discrimination based on stereotypical assumptions about femininity and masculinity are indeed a form of sex discrimination:

> This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.[221]

The Court was even more clear about the role that sexual stereotyping plays in sex discrimination claims when it noted that "an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability";[222] this language indicates that acting on the basis of failure to fulfill traditional sex stereotypes against a person of any gender is a violation of Title VII.[223]

This language means that lower courts that have held sexual stereotyping claims not to be cognizable under Title VII, or that have otherwise sought to limit claims of sexual stereotyping, are wrong. The *Bostock* Court made clear that firing or failure to hire based on one's failure to comply with sexual stereotypes is unlawful. Although the Court used the term "traditional sex stereotypes," there is no reason to think that the Court thought that "Hannah" should be protected from discrimination only if she is insufficiently feminine, but not if she is "too" feminine. In each case, the treatment would seem to meet the requirement that the employer has acted "in part because of sex."

There is reason to think that many forms of sexual harassment are in fact motivated by sexual stereotyping. Harassment of gay, lesbian, bisexual, or transgender persons may well be motivated by a concern that the target of harassment is not sufficiently masculine or feminine or otherwise fails to conform to gender

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220. *Id.* at 1739.

221. *Id.* at 1741.

222. *Id.* at 1742–43; s*ee also id.* at 1749 (noting that when an "[e]mployer hires based on sexual stereotypes," the "simple test" for sex discrimination is invoked).

223. Justice Alito in dissent tried to put words in the majority's mouth with respect to the relevance of sexual stereotyping, but his attempt was unpersuasive. He argued that the majority did not rely on arguments about sexual stereotyping and therefore "apparently finds them unpersuasive," but he was wrong, as demonstrated above, that the Court did not rely on those arguments. *Id.* at 1763 (Alito, J., dissenting). He also asserted that the argument about sexual stereotypes is faulty because it is based on a "faulty premise" that "Title VII forbids discrimination based on sex stereotypes." *Id.* at 1764. Even if Justice Alito might have been right based on the Court's opinions in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), which is deeply doubtful, he is clearly wrong after the Court's decision in *Bostock*.

stereotypes.[224] Harassment of men by other men appears to often be motivated by a concern that the targets of harassment are not sufficiently masculine or otherwise gender-conforming.[225] Harassment of women by men may well be motivated by a gender stereotype that women are supposed to be sexually available to men[226] or should stay away from jobs that have been traditionally held by men.[227]

Sexual harassment that occurs based in part on gender-linked traits, whether those traits are biological or otherwise, would seem to meet the requirement that the harassment has occurred "because of sex" and therefore meet the discrimination requirement of Title VII. There is reason to think that the Court's definition of "sex" in *Bostock* might lead to findings that sexually harassing conduct directed at women in the workplace also should, at least in most cases, be considered to be based on sex.[228] The Court said that what Title VII forbids is when "[s]ex plays a necessary and undisguisable role" in a challenged employment action. When a harasser chooses to sexually harass a woman in a sexual manner, through words, physical touching, or gestures, it would be hard to argue that sex, or gender, has not played a role in that conduct. Calling a woman sexually derogatory names is about her sex; commenting about the details of her sex life, real or imagined, is about her sex; touching a woman's breast or genitals is about her sex; pretending to have sex with her or threatening to sexually assault her is about her sex. In each of these circumstances, sex would seem to play a "necessary and undisguisable role" in her harassment, precisely what the Court has said that Title VII forbids.[229]

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224. *See* L. Camille Hébert, *Transforming Transsexual and Transgender Rights,* 15 WILLIAM & MARY J. WOMEN & L. 535, 564–67 (Spring 2009) (explaining that discrimination against transgender individuals appears to be motivated at least in part by sexual stereotyping).

225. *See, e.g.*, E.E.O.C. v. Boh Brothers Co., 731 F.3d 444, 453–60 (5th Cir. 2013) (upholding a jury verdict for male plaintiff for same-sex harassment under Title VII, based on evidence of sexual stereotyping, including that a male supervisor subjected him to sexually humiliating conduct, including calling him a "pussy" and simulating sex with him, in part because he used Wet Ones instead of toilet paper, which supervisor said was "kind of gay" and "feminine").

226. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 162 (Yale Univ. Press 1979) (indicating that sexual harassment often seems to be motivated by a belief in men that women are sexually available for them); *id.* at 178–80 (discussing the role that stereotypes about sex roles, including the understanding of men as sexual aggressors toward women and women as being receptive to male sexual conduct, play in the occurrence of sexual harassment).

227. *See, e.g.*, Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007, 1009–10, 1012 (7th Cir. 1994) (describing the sexual harassment of the first woman to work in the tinsmith shop, including by use of sexual epithets, sexual pictures, and acts such as urinating in her presence and exposing penis, and statements made by male workers to the effect that "I'll never retire from this tinsmith position because it would make an opening for . . . a woman"; the court noted that problems of sexual harassment were foreseeable when "a woman is introduced into a formerly all-male workplace").

228. It is true that the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 80 (1998), said that it is not the sexual content of harassment that causes it to violate Title VII, but its discriminatory nature. What the Court's decision in *Bostock* adds to the analysis is an understanding that much, likely most, sexual harassment is in fact motivated by the Court's broader interpretation of the term "sex" and therefore discriminatory in nature.

229. *Bostock,* 140 S. Ct. at 1737.

C. ELIMINATING OR TRANSFORMING THE "SEVERE OR PERVASIVE" REQUIREMENT

The requirement that sexual harassment be "severe or pervasive" before it is actionable has arguably posed the biggest challenge to women's ability to establish that the harassing conduct to which they have been subjected is unlawful. Although the existence of that standard is said to be grounded in the statutory requirement that discriminatory conduct occur with respect to a term or condition of employment,[230] there is no indication that the current definition of the requirement or even the requirement itself is statutorily required. One could certainly reach the conclusion that the terms and conditions of one's employment are discriminatorily altered even if the conduct that alters those conditions is not considered severe or pervasive; after all, the very presence of discrimination in the context of the workplace—that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed"[231]—might be viewed as sufficient to alter the workplace environment by denying "Title VII's broad rule of workplace equality."[232] When the Supreme Court declared that Title VII affords employees "the right to work in an environment free from discriminatory intimidation, ridicule, and insult,"[233] nothing about that statement suggests that the Court meant to follow that conclusion with "as long as the conduct is truly awful."

But even if the "severe or pervasive" requirement is retained in order to show a discriminatorily abusive work environment, there is no reason that the courts are required to interpret those terms in the manner in which they have. The Supreme Court in *Harris v. Forklift Systems, Inc.* suggested that a "discriminatorily abusive work environment" was one that "can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[234] That standard can be met by conduct far short of what many courts have considered to be "severe or pervasive" behavior.

Alteration of the interpretation of the "severe or pervasive" requirement would not defeat the purposes for which the Supreme Court has suggested that it was adopted. Actionable sexual harassment need not be "extreme" or "extremely severe" in order to prevent Title VII from becoming a "general civility code" or to filter out complaints based on "the sporadic use of abusive language, gender-

230. *See* Rogers v. E.E.O.C., 454 F.2d 234, 239 (5th Cir. 1971) (noting that "terms, conditions, and privileges of employment" is an expansive concept that protects against creation of a discriminatory working environment "heavily charged with ethnic or racial discrimination"); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1988) (indicating that harassment must be extreme to amount to a change in terms and conditions of employment).

231. Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

232. *Harris*, 510 U.S. at 22.

233. Meritor Savs. Bank v. Vinson, 477 U.S. 57, 65 (1986).

234. *Harris*, 510 U.S. at 22.

related jokes, and occasional teasing."[235] The types of complaints that are being filtered out by the "severe or pervasive" requirement are sexual touchings, including criminal sexual assault, persistent and insulting sexual propositions, and deeply offensive sexual epithets.[236] This conduct cannot reasonably be considered "jokes" or "teasing" or "the ordinary tribulations of the workplace."[237] Nor is this conduct simply "annoying" to the women who are subjected to it. Instead, the conduct is deeply harmful and often debilitating and causes precisely the results that the Court in *Harris* identified as the hallmarks of "discriminatorily 'abusive work environment.'"[238] It would certainly not be unreasonable to interpret grabbing a woman's breasts, buttocks, or genitals (or maybe any part of her body, if it is done aggressively) as "severe" conduct, nor would it be unreasonable to find that calling her a "cunt," a "slut," or a "whore" (or even a "bitch") is "severe."

Similarly, in order for sexually harassing conduct to be "pervasive," it need not happen every day or be committed by everyone in the workplace. Instead, it must be the type of conduct that permeates the workplace. When a workplace becomes sexualized because of the general toleration of sexually harassing conduct, that conduct should be considered to be pervasive. While isolated conduct by a co-worker might not be considered pervasive, because that conduct is more easily discounted by its target, particularly if the conduct is not encouraged by others, even sporadic sexually harassing conduct by a supervisor or other member of management might well be considered to be pervasive, because conduct by someone of that level tends to set the tone of the workplace. Having a supervisor tell his subordinate that she is a "cunt" or that her job advancement is tied to her willingness to have sex rather than her job performance, even a single time, can profoundly affect the workplace environment and her willingness to stay in that environment.

If Title VII really aims at achieving equality between men and women in the workplace, the courts need to understand that the presence of denigrating sexual conduct in the workplace, far from being merely "annoying," profoundly affects the ability of women to achieve equal employment opportunities, not only when they are driven out of the workplace by that conduct, but even when they persist in the workplace in spite of the harassment to which they are subjected.[239]

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235. *Faragher*, 524 U.S. at 788.

236. *See supra* text accompanying notes 110-29.

237. *Faragher*, 524 U.S. at 788.

238. *Harris*, 510 U.S. at 18.

239. Some individual judges apparently have understood the effects of sexual harassment in the workplace. Judge Gerald Bard Tjoflat, joined by three of his colleagues on the Eleventh Circuit, in his concurring and dissenting opinion in *Mendoza v. Borden, Inc.,* 195 F.3d 1238, 1268 (11th Cir. 1999) (en banc) (Tjoflat, C.J., concurring in part and dissenting in part) (citation and footnote omitted), noted:

> We do not transform Title VII into a workplace "civility code" when we condemn conduct less severe than that which shocks our conscience. And when we raise the bar as high as the majority does today, it becomes more likely that we will miss the more subtle forms of discrimination that may still infest the workplace, and make it more difficult for women, especially, to participate on equal terms of equality with their male counterparts. The sexist remark, the offensive touch, the repeated request for an intimate outing: all of these may seem merely annoying and relatively harmless in isolation from one another.

D. REDEFINING THE STANDARDS FOR INDIVIDUAL AND EMPLOYER LIABILITY

Aligning the standards of liability for actionable sexual harassment in a way that would return the law of sexual harassment to the promise that it initially offered would require addressing issues of both individual liability for harassers and employer liability for the actions of its employees, both supervisory and non-supervisory, who engage in sexual harassment.

Although a full discussion of the legal issues involving individual liability for harassers is beyond the scope of this article, it does appear that imposing individual liability on harassers who occupy a supervisory or management position with the employer would be fully consistent with the language of Title VII. "Employer" in Title VII is defined to include "any agent of" a statutory employer.[240] Despite its current interpretation, this language would clearly seem to suggest that individuals who act as agents of an employer, including supervisory and management employees, would be liable under the same terms as an employer. And there is good reason from a policy perspective to impose individual liability on supervisory or management employees who engage in or participate in sexually harassing conduct. Not only would individual liability place responsibility for the harassment where it belongs and provide compensation to the targets of harassment in situations in which employer liability is not established, facing the possibility of paying substantial damages for their actions would provide more incentive for supervisors to not engage in such conduct. Individual liability on the part of supervisory and management employees would be in addition to, not a replacement for, employer liability.

It is also fully consistent with the language of Title VII to impose vicarious liability on employers for the actions of their supervisory and management employees when they engage in sexual harassment. The Supreme Court has recognized this by providing for vicarious liability for the actions of supervisory employees; while the Court has allowed employers to attempt to establish an affirmative defense when no tangible employment action is taken, that decision

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> But add them up; see them in context; and then try to imagine what it must be like for an employee who merely wants to come to work and make a living to have to endure a daily barrage of sexual assault. Then we might begin to understand the power that these "little" sexual offenses, when considered collectively, can have in reproducing a workplace in which women, especially, are often still thought of by their male employees as incompetents and playthings.

Similarly, Judge Rosemary Barkett, in the same case, noted that "the correct question in a sexual harassment case is whether the conduct, sexual or not, ridicules women, treats them as inferior, or is intended to humiliate or intimidate them such that they are subjected to unequal treatment in the workplace." *Id.* at 1275 (Barkett, C.J., concurring in part and dissenting in part).

240. Title VII of the Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (2018). Similar language in the Family and Medical Leave Act, 29 U.S.C. § 2611(4)(A)(ii)(I) (2018), defining an employer to include "any person who acts directly or indirectly in the interest of an employer," has been interpreted to impose individual liability under that statute. *See* Cantley v. Simmons, 179 F. Supp. 2d 654, 656–58 (S.D. W. Va. 2002) (noting that courts find individual liability under both Family and Medical Leave Act and Fair Labor Standards Act based on this language). Someone who acts in the interest of an employer would seem to be an "agent" of that employer.

appears to be based more on policy issues than the statutory language. That is, it would be consistent with the language of Title VII, particularly its definition of "employer," to hold employers vicariously liable for the harassment engaged in by supervisory and management employees, whether or not the harassment results in tangible employment action, without providing employers the option to limit remedies or avoid liability by establishing the affirmative defense.

But even if the current rules concerning employer liability for the actions of supervisory employees are maintained, the way in which the lower courts have been interpreting those rules is subject to challenge and should be altered. The lower courts have allowed employers to establish both prongs of the *Ellerth* and *Faragher* affirmative defense in ways that do not appear to be consistent with the Court's original analysis and which make it very difficult for employees to hold employers liable for the actionable sexual harassment to which they have been subjected.[241]

A proper interpretation of the first prong of the affirmative defense would require employers to take preventive action with respect to sexual harassment beyond merely adopting and promulgating a sexual harassment policy. Employers should have to take action that makes it clear that they take sexual harassment seriously, such as by providing support for the policy at the very highest levels of management of the employer. One way to do this might be to tie supervisory and management performance appraisals to their actions to enforce the policy, so that both they and their subordinates know that the employer stands behind the policy. Other ways in which an employer might act to take effective preventive action would be to make sure supervisory and non-supervisory employees are fully aware of the provisions of the sexual harassment policy, whether by training or otherwise. But in order for training to be part of adequate preventive action, the training must be demonstrated to be effective, rather than just a method by which employers seek to limit their liability for sexual harassment.

Effective corrective action on the part of employers would require that employers effectively respond to sexual harassment complaints when they are received and that employers deal effectively with sexual harassment that they learn about, even when no complaint is made. It should go without saying that employers should not retaliate in any way against employees who make sexual harassment complaints, in part because that retaliation is also a violation of Title VII, but simply not retaliating does not signal employer seriousness about the need to deal with sexual harassment complaints. Employers should be required to conduct effective investigations, not just adequate ones, and must not be allowed to fall back on a lack of corroboration in deciding not to take action with respect to a complaint. The nature of sexual harassment means that corroboration often will not exist, so it would be wrong for the employer to require witnesses for sexual

241. *See supra* text accompanying notes 170-209.

harassment that often occurs without witnesses. Employers must be required to make credibility determinations between the accounts of harassers and their targets, and they must not be allowed to assume that women who make complaints of sexual harassment are less credible than the men who deny such harassment. Employers should not be automatically shielded from liability when they make mistakes in those determinations, even when they act in good faith.

A proper application of the second prong of the affirmative defense would take into account the reasons that women often do not make formal or even informal complaints of sexual harassment, or delay in making those complaints, rather than automatically assuming that they were unreasonable in those actions.[242] A credible fear of retaliation should serve to excuse a failure to promptly report and a determination of the credibility of such a fear should take into account that one of the most common responses of employers to a sexual harassment complaint is in fact retaliation, whether it takes the form of loss of employment or loss of job opportunities.[243] The reality that women who report sexual harassment are so often subjected to retaliation should make that fear quite credible, and women who act with that reality in mind should not be found to be unreasonable. The other reasons that women fail to promptly report, including a belief that they might be able to deal with the harassment themselves without making a complaint,[244] should not be deemed presumptively unreasonable. Similarly, a belief that reporting will be futile, when they can see that similar reports by other employees were not taken seriously,[245] should be viewed by the courts as completely reasonable behavior.

Effective behavior should also be demanded of employers who face liability in negligence for harassment engaged in by non-supervisory employees and other workplace actors. Employers should be found to be on notice of the existence of harassment when the harassment occurs in front of them, whether or not a formal complaint is made by the target of the harassment. They should be charged with constructive knowledge of sexual harassment when its existence is an open secret in the workplace; if supervisory or management employees are aware of the harassment, the employer should be deemed to have notice, because those

242. *See* Foster & Fullagar, *supra* note 10, at 156–157 (reporting research indicating that the existence of a sexual harassment policy with a reporting process is generally not enough to encourage targets of harassment to report, because of reasons that women generally do not report, including concerns about retaliation, uncertainty about whether the harasser will be punished, concern about protecting their reputations, concern about being embarrassed, concern about whether they will be believed, and shame and guilt).

243. *See supra* text accompanying footnote 197.

244. *See* Hébert, *supra* note 64 (citing a study explaining that women indicated that they failed to report harassment because they "took care of the problem" themselves).

245. *See* Elissa L. Perry et al., *Blowing the Whistle: Determinants of Responses to Sexual Harassment*, 19 BASIC & APPLIED SOC. PSYCH. 457, 476–78 (1997) (reporting results of a study indicating that women are more likely to make complaints of sexual harassment when they perceived that their institutions took effective action with respect to other sexual harassment complaints and that organizations in which claims of sexual harassment are met with disbelief or inaction are unlikely to inspire reporting of harassment).

supervisory employees should have the obligation to report the harassment up the chain of command, whether or not the employer's policy explicitly imposes such an obligation. Employers who are generally aware of the existence of sexually harassing conduct in their workplaces should not be able to assume that disputes between workers and the discomfort voiced by female workers about workplace relationships is based on something other than harassment and gender-hostility, particularly when those female workers are in traditionally male positions, who face harassment at high levels. Employers who look the other way and fail to deal with the harassment of which they are aware, even if no complaint is made, should be found to be negligent and therefore liable for that harassing conduct.

Some of the lost promise of sexual harassment law might be regained by the changes to the law discussed above, within the frame of the existing cause of action. Those changes include an elimination of the "unwelcomeness" requirement in favor of a correct application of the subjectiveness requirement, a corrected application of the "because of sex" requirement, an elimination or transformation of the "severe or pervasive" requirement, and a redefinition of the standards for individual and employer liability. But a more fundamental restructuring of the law of sexual harassment is needed in order to fulfill the promise that feminists envisioned when the cause of action was first recognized.

IV. HOW A FEMINIST MIGHT STRUCTURE A CAUSE OF ACTION FOR SEXUAL HARASSMENT

Against a background of forty-some years of sexual harassment law, it might seem fanciful to wonder what a cause of action for sexual harassment might look like if it had been designed by a feminist,[246] with an eye toward protecting women and their equality in the workplace, rather than by courts, many of which seem to be much more interested in protecting prevailing workplace norms and to be generally blind to the reality that those workplace norms are a major cause of women's failure to achieve equal opportunities in the workplace.[247] But if there were a

246. Although feminist legal theory involves a number of different approaches to the law, one recognized form of feminist legal theory involves a focus on the importance of women's experiences in shaping the law. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 4-6 (3d ed. 2013). My approach to the structuring of a cause of action for sexual harassment insists on thinking about sexual harassment from the point of view of the targets of harassment, who are primarily women, rather than from the perspective of harassers, who are primarily men.

247. A prominent example of this view can be found in Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) (quoting Rabidue v. Osceola, 584 F. Supp. 419, 430 (E.D. Mich. 1984)), *abrogated by* Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). In that case, the court of appeals quoted with approval the following language from the district court's opinion:

> [I]t cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

time in which it might be possible to correct some of the mistakes of the past, this might be such a time. The attention that the "MeToo" movement has focused on issues of sexual harassment and sexual assault has led to the willingness of some legislative bodies, if not yet Congress, and perhaps some courts to act to reshape some of the law relating to sexual harassment.[248]

I do not claim to speak for all feminists. Feminists do not speak with one mind with respect to sexual harassment and issues of women's equality. This section describes what a cause of action for sexual harassment would look like if it had been designed by *this* feminist, guided by a career-long study of the area of sexual harassment, which was assisted by the feminists who came before me.

In this section, I explain how I would restructure a cause of action for sexual harassment, in order to protect the interests of the targets of harassment and to eliminate or at least decrease the prevalence of workplace sexual harassment. I first discuss the role that sex and gender should play in claims of sexual harassment. Next, I discuss ways to move beyond the current element-based approach to sexual harassment, which has served to severely restrict the usefulness of the cause of action. Finally, I discuss a proper allocation of responsibility for sexual harassment among individual harassers and employers.

A. THE ROLE OF "SEX" IN A SEXUAL HARASSMENT CLAIM

A feminist-designed cause of action for sexual harassment would look with extreme skepticism at the presence of any sexual conduct[249] in the context of the

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The concurring and dissenting opinion by Judge Damon Keith challenged the notion that "an abusive, anti-female environment" has "an innate right to perpetuation" and indicated that "Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act." *Rabidue*, 805 F.2d at 626 (Keith, C.J., concurring in part and dissenting in part).

248. *See generally* L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?*, 22 EMP. RIGHTS AND EMP. POL'Y 321 (2018); L. Camille Hébert, *Comment le movement ûMeToo ý refond le droit du harcèlement au travail aux États-Unis?*, (How the "MeToo" Movement is Reshaping Workplace Harassment Law in the United States), in VIOLENCE(S) ET RELATIONS DE TRAVAIL, LIBER AMICORUM EN HOMAGE À SANDRINE LAVIOLETTE (Auvergnon, P. & Lavaud-Legendre, B., eds.) (University of Bordeaux Press forthcoming 2021) (English version available on SSRN: L. Camille Hébert, How the "MeToo" Movement is Reshaping Workplace Harassment Law in the United States (Ohio State Pub. Law, Working Paper No. 523), https://ssrn.com/abstract=3518414). The United States response to the "MeToo" movement should be seen within the context of the broader global response to that movement and similar movements. *See generally* UN WOMEN, TOWARD AN END TO SEXUAL HARASSMENT: THE URGENCY AND NATURE OF CHANGE IN THE ERA OF #METOO (2018), https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/towards-an-end-to-sexual-harassment-en.pdf?la=en&vs=4236; *see also* UN WOMEN, WHAT WILL IT TAKE: PROMOTING CULTURAL CHANGE TO END SEXUAL HARASSMENT 25 (2019), https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2019/discussion-paper-what-will-it-take-promoting-cultural-change-to-end-sexual-harassment-en.pdf?la=en&vs=1714 (discussing the consequences of cultural shifts reflected in the "MeToo" movement in shaping legal doctrine and outcomes around the globe).

249. When I refer to "sexual conduct," I do not mean conduct that might reveal one's sexual orientation, such as a picture of one's romantic partner on a desk; a non-sexualized picture of either a

workplace,[250] as well as arguments that prohibitions against such conduct infringe on the rights of workers or otherwise prohibit positive workplace behavior, such as workplace collegiality or the establishment of personal and romantic relationships. The rights of workers are already subject to substantial limitations, including with respect to freedom of expression;[251] in this context, an argument that free expression allows workers to make derogatory sexual or gender-based comments about their co-workers rings hollow. Nor is the argument that allowing sexual "jokes" and other expressions of sexuality in the workplace contributes to workplace comradery a convincing argument; the hundreds of sexual harassment cases challenging this type of workplace behavior should provide convincing evidence that this type of behavior does not contribute to good workplace environments. One might argue that such conduct is essential to male bonding, but that argument seems insulting to men, suggesting that they can effectively relate to each other only by denigrating women. Nor is "but I met my spouse in the workplace" a compelling argument. Not only do employees not have an innate right to use the workplace as a dating service, but a review of sexual harassment cases suggests that sexual advances in the workplace are more likely to contribute to coerced and inequitable sexual or personal relationships rather than happy, equitable, and fully consensual relationships.[252]

This skepticism would not necessarily mean that all sexual conduct in the workplace would be actionable sexual harassment, only that when courts and

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cross-sex or same-sex partner is not sexual conduct. Neither is a discussion of what one did with one's romantic partner over the weekend sexual conduct, unless, of course, the discussion is of explicitly sexual conduct.

250. I understand that my approach to this issue may be controversial with certain feminists who emphasize the autonomy of women to choose to engage in sexual conduct in the context of the workplace. *See* Katherine M. Franke, *What's Wrong with Sexual Harassment?,* 40 STAN. L. REV. 691, 746 (1997) (indicating that "[s]hutting down all sexual behavior seems like an overreaction to the problem of sexual harassment" and discounts the possibility of female sexual agency). I think the autonomy issue goes both ways, so that women should have the right to work in a non-sexualized environment in which they are not cast as sexual objects rather than valued workers. In addition, I see any possible benefit from the presence of sexual activity in the workplace to be vastly outweighed by its costs, given the harms that sexual harassment imposes on the interests of its targets and the workplace itself.

251. *See* George Rutherglen, *Public Employee Speech in Remedial Perspective,* 24 J. L. & POL. 129, 129–35 (2008) (tracing the development of First Amendment speech rights of public sector employees, noting that they went from having "no First Amendment rights to having hardly any" and that the succession of issues on which public sector employees must prevail "pose a nearly insurmountable series of obstacles to any ultimate recovery by the employee"). While public sector employees have quite limited rights to expression, private sector employees have even less protection for their expression, because of the lack of governmental action when their employers seek to suppress their speech.

252. It is true, of course, that workplace sexual conduct that leads to happy and fully consensual sexual or personal relationships rarely result in sexual harassment complaints or litigation. It is also true that such relationships are likely to develop, or not, regardless of the law of sexual harassment. To the extent that seeking to rid the workplace of sexual behavior means fewer romantic or personal relationships arising out of the workplace, that cost seems worth it in terms of decreasing the level of sexually harassing conduct, including coerced sexual relationships, in the context of the workplace.

others were balancing the interests in preventing sexual harassment with other countervailing interests in allowing sexual conduct in the workplace, the other countervailing interests category should be considered a very small or null set. It would seem that there are very few, if any, interests of employers and co-workers that should justify allowing women to be subjected to sexually explicit and denigrating conduct as a price of having a job.

By arguing for the inappropriateness of sexual conduct in the workplace generally, I do not mean to suggest that sexual conduct is necessarily more harmful to women than harassing conduct that is gender-based but not sexual.[253] A feminist-designed cause of action for sexual harassment would not distinguish between harassing conduct that is sexual—most often called "sexual harassment"—and harassment that is gender-based but not sexual—often referred to as "gender harassment."[254] Such a cause of action would recognize that gender hostility comes in both sexual and non-sexual forms and that both forms of harassing conduct are detrimental to the interests of women's equality in the workplace. Sexual conduct in the workplace tends to harm women not because sex is inherently harmful to women[255] but because the misplacement of sexual conduct into the workplace tells women that they are sexual objects rather than serious workers and that their sexual attributes are more valuable to the employer and the workplace than their professional talents. Gender-based derogatory and denigrating conduct, whether or not it is sexual in nature, communicates to women that they are not welcome in the workplace or are welcome only on the terms established by the harassers.

A feminist-designed cause of action for sexual harassment would retain the "because of sex" requirement, because it would likely be better for sexual harassment to be categorized as a form of sex discrimination rather than a freestanding tort;[256] tort law has generally not been very friendly to the interests of women in

253. Professor Vicki Schultz has argued that sexual harassment law has focused too much on sexual conduct to the exclusion of non-sexual conduct and that non-sexual conduct may be as or more harmful to the equality interests of women than sexual conduct; she has also argued that there may be harms to what she calls "sanitization" of the workplace. *See* Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It,* 29 T. JEFFERSON L. REV. 1, 18–22, 37–42 (2006).

254. *See* Hébert, *supra* note 10, at, 565–68 (1995) (noting the different ways that gender harassment and sexual harassment have been defined and equating the two: "Sexual harassment is not different from gender harassment; sexual harassment *is* gender harassment") (emphasis in original).

255. I do not believe that sexual activity is inherently harmful to women or necessarily a form of gender oppression, nor do I believe that sexual conduct between men and women necessarily is based on inequality and coercion. *But cf.* Catharine A. MacKinnon, *Sex and Violence, in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 85–92 (1987) (discussing the ways in which sex is used to oppress women and that sexual intercourse can be viewed as a form of coerced sex not that dissimilar from rape). I do believe that some sexual conduct between men and women is the result of coercion and gender oppression, but that not all such conduct is coercive or oppressive. I believe that it is sexual coercion that is harmful to those who are so coerced, regardless of their gender, sexual orientation, or gender identity.

256. One of the reasons that Catharine MacKinnon argued for recognition of sexual harassment as a form of sex discrimination was the inadequacy of tort law to deal with the problem. CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 164–73 (1977).

the workplace.[257] While sexual harassment implicates both discrimination and dignity, a focus on discrimination seems to recognize harassment as a structural problem of inequality, rather than just as a problem depriving individual women of the dignity to which they are entitled.[258]

But such a cause of action would recognize that the "because of sex" requirement could be proved in a number of ways. A feminist-designed cause of action would look skeptically on the Supreme Court's assertion in *Oncale v. Sundowner Offshore Services, Inc.* that most cases of cross-sex sexual harassment involve "explicit or implicit proposals of sexual activity" and therefore are motivated by sexual desire, which the Court indicated was sufficient to "support an inference of discrimination on the basis of sex."[259] Many sexual harassment cases, including some of the ones cited in this article,[260] did not involve proposals of sexual activity and seemed to have little to do with sexual desire. Most cases of sexual harassment seem to be motivated not by sexual desire, but by gender hostility,[261] and this gender hostility could be established in a number of ways other than the one highlighted by the *Oncale* Court—the use of "sex-specific and derogatory terms" for the target or women in general.

Use of "sex-specific and derogatory terms" would certainly be one way to establish that the harassment was motivated by gender hostility and therefore "because of sex," because use of those terms would provide direct evidence of the motivation behind the harassment. Unlike in other cases of discrimination, such comments could not be dismissed as "isolated comments" that do not prove discrimination, because those comments would be part of the discrimination itself. Calling a woman a "cunt," "slut," a "whore," or a "dumb ass woman" would demonstrate that that harassment was based on sex and would provide evidence that other harassing conduct that accompanied those terms was also so motivated.[262]

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257. *See* L. Camille Hébert, *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort,* 75 OHIO ST. L.J. 1345, 1363–64 (2014) (exploring the potential disadvantages of treating sexual harassment as a tort, including the difficulty that plaintiffs have had in establishing tort liability for claims of sexual harassment).

258. *See* L. Camille Hébert, *Dignity and Discrimination in Sexual Harassment Law: A French Case Study,* 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. 3, 41–48 (2018) (discussing implications of focusing on dignity and discrimination, including a recognition of the collective and individual harms caused by sexual harassment).

259. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

260. *See, e.g.*, Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007, 1009–10 (7th Cir. 1994) (describing sexual harassment reported by plaintiff, which included her co-workers calling her a "whore" and a "cunt," cutting the seat out of her coveralls, hanging nude pin-ups around the shop, exposing a penis, urinating in her presence, and throwing a burning cigarette at her).

261. *See* L. Camille Hébert, *Sexual Harassment as Discrimination "Because of . . . Sex": Have We Come Full Circle?,* 27 OHIO. N. UNIV. L. REV. 439, 480–83 (2001) (explaining why sexually explicit conduct is often based on gender hostility).

262. The court of appeals in *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798 (11th Cir. 2010), indicated that use of gender-specific terms establishes intent to discriminate on the basis of sex even if those terms are also directed at men. The court reasoned:

But the existence of "sex-specific and derogatory terms" would not be necessary to establish the existence of gender hostility. The existence of discriminatory intent can be proven both directly and indirectly. Accordingly, the existence of hostile workplace behavior directed at women would be indirect or circumstantial evidence of the existence of gender hostility motivating that conduct. This would be true particularly if the conduct was not also directed at men, but the existence of hostile behavior also directed at men would not preclude a finding of discrimination because it is entirely possible for both men and women to be harassed because of their sex. And, regardless of the motivation behind sexually harassing conduct, when women are targeted for harassment and men are not or when women are targeted for harassment in different ways than are men, that different treatment can also be used to establish that the harassment is because of sex.[263]

There is some question whether the sexual nature of harassment other than the use of sex-specific and derogatory terms is direct or indirect evidence that the harassment is motivated by sex. One might well argue that using sexual conduct to harass women constitutes harassing women precisely because they are women and therefore that the sexual nature of the conduct is direct evidence of its motivation. After all, in the racial context, courts do not spend a lot of time trying to decide whether hanging a noose over a Black employee's workstation or graffiti invoking the Ku Klux Klan or "White Power" is evidence of the racial bias of the harassment;[264] the very nature of the racial conduct is apparently sufficient to establish its intent. A similar rule might be invoked in sexual harassment cases—that the very nature of the sexual conduct, whether it be sexual touchings or sexual propositions, should be sufficient to establish the gender bias behind the harassment.

But even if the sexual nature of harassing conduct is not deemed to be direct evidence of the intent behind such conduct, it is powerful indirect or circumstantial evidence of discriminatory intent. Why would a harasser with a non-discriminatory motivation for mistreating a woman choose sex as a weapon? The

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> It is undeniable that the terms "bitch" and "whore" have gender-specific meanings. Calling a man a "bitch" belittles him precisely because it belittles women. It implies that the male object of ridicule is a lesser man and feminine, and may not belong in the workplace. Indeed, it insults the man by comparing him to a woman, and, thereby, could be taken as humiliating to women as a group as well.

Id. at 813.

263. The *Oncale* Court recognized that the "because of sex" requirement could be established by "direct comparative evidence of how the alleged harasser treated members of both sexes in a mixed-sex workplace," 523 U.S. at 80–81, but this type of showing could be made even in a single-sex workplace, by evidence that the employer treated women in a manner in which it would not have treated men.

264. *See, e.g.*, Daniels v. Essex Group, Inc., 937 F.2d 1264, 1269–73 (7th Cir. 1991) (declining to analyze whether explicitly racial conduct, including incidents such as graffiti referencing the "KKK" and stating that "[a]ll niggers must die" and the hanging of a dummy with a black head in a doorway, was based on race, instead only addressing that issue with respect to a gunshot near plaintiff's home, which the court said was "a predicate act in establishing racial harassment in a hostile work environment, because it would not have occurred but for the fact that Daniels was black").

harasser's choice of sexual conduct would at least raise an inference that the harassment was based on sex, an inference that, under the normal rules of discrimination under Title VII, the employer should be required to rebut. After all, if sexual harassment is categorized as a form of disparate treatment,[265] as most courts seem to assume,[266] then the rules concerning indirect or circumstantial evidence from *McDonnell Douglas Corp. v. Green*[267] and its progeny would presumably apply, requiring employers to rebut an inference of discrimination raised by indirect evidence by bearing the burden of producing evidence to explain the non-discriminatory basis for the challenged employment action, here the harassment.[268]

The existence of sexual stereotyping would be another way to establish that sexual harassment is based on sex. The lower courts have long recognized sexual stereotyping as a way to meet the "because of sex" requirement and the Supreme Court has recently confirmed that this is the case.[269] And, as discussed above,[270] it is likely that many forms of sexual harassment in the context of the workplace are in fact the result of sexual stereotyping.

While sexual harassment is usually the product of a discriminatory motivation and therefore properly addressed as a matter of disparate treatment, a feminist cause of action for sexual harassment would recognize the potential for a disparate

265. There are two main types of discrimination claims under Title VII. "Disparate treatment" claims are those in which the claim is that employers treat members of protected groups less favorably than others because of protected characteristics, and proof of discriminatory intent is necessary to establish disparate treatment claims. "Disparate impact" claims are claims in which facially neutral practices or equal treatment results in disproportionate effects on protected groups that cannot be justified, regardless of the existence or non-existence of intent to discriminate. *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

266. The Supreme Court in *E.E.O.C. v. Abercrombie & Fitch Stores, Inc*., 575 U.S. 768, 135 S. Ct. 2028, 2032 (2015), declared that there are only two causes of action under Title VII: disparate treatment and disparate impact, although harassment was not at issue in the case. This would suggest that harassment cases must be brought either under the disparate impact or disparate treatment theories. Although some courts have recognized that hostile environment claims might be brought under the disparate impact theory, *see* Maldonado v. City of Altus, 433 F.3d 1294, 1304 (10th Cir. 2006) (citing L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?,* 53 U. KAN. L. REV. 341 (2005)), most courts have indicated that these types of claims are disparate treatment claims. *See, e.g*., Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 808 & n.2 (11th Cir. 2010) (holding that disparate treatment is the proper framework under which to evaluate hostile work environment claims).

267. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Although the death, or at least irrelevance, of *McDonnell Douglas* has been often reported, *see, e.g.,* Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead. Whither McDonnell Douglas?*, 53 EMORY L. J. 1887 (2004), the case continues to be cited by the lower courts. *See, e,g.,* Kaminsky v. Wilkie, No. 5:19-cv-20, 2020 WL 3893521 (N.D. Ohio Jul. 10, 2020).

268. *McDonnell Douglas Corp*., 411 U.S. at 802–03. It would not be sufficient for employers to simply assert that the harassment was motivated by non-discriminatory reasons; the employer would actually have to produce admissible evidence of those motivations.

269. See discussion of Supreme Court decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), *supra* text accompanying notes 218–23.

270. *See supra* text accompanying notes 224–27.

impact claim based on sexual harassment.[271] Under a disparate impact claim, sexual harassment would have to be shown to disproportionately harm women rather than men without regard to the motivation behind that harassment; it is the effect of conduct, rather than its motivation, that is relevant to a claim of disparate impact. And once that disparate impact is shown, the conduct can be justified by the employer only by proving that it is related to the job and justified as a matter of business necessity.[272]

Not only is sexual harassment generally motivated by sex or gender, but it also disproportionately disadvantages women because of sex.[273] Even courts that have not expressly invoked the disparate impact theory in addressing sexual harassment have recognized that the effect of sexual harassment on women might be used to establish the "because of sex" requirement. For example, the district court in *Robinson v. Jacksonville Shipyards, Inc*.[274] noted that some of the harassment to which the women in that workplace were subjected, including numerous pictures of nude women, many in submissive positions, throughout the workplace, was based on sex because of the "disproportionately demeaning impact on the women now working" at the employer, even though no women worked there when the behavior began.[275] In support of its conclusion, the court noted the expert testimony that the presence of such pictures "sexualizes the work environment to the detriment of all female employees."[276]

If a disproportionate disadvantage for women could be shown, it is difficult to imagine how employers could justify the presence of sexual harassment in the workplace under the job-relatedness and business necessity defense, because harassment does not seem to be related to any particular job and could not be shown to be necessary to any business, given that many businesses continue to operate effectively in the absence of sexually harassing conduct.

That sexual harassment might be challenged under the disparate impact theory as well as the disparate treatment theory is also supported by the language of the EEOC's Guidelines on Discrimination Because of Sex, which provide that a hostile work environment is created when the challenged conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[277] While

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271. *See generally* Hébert, *supra* note 266 (explaining how a disparate impact claim challenging sexual harassment might be established).

272. *Id*. at 350.

273. *Id*. at 383–95.

274. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

275. *Id*. at 1523.

276. *Id*. The plaintiff's expert in that case, Dr. Susan Fiske, testified that the presence of sexualized workplaces "imposes much harsher effects on women than on men" and that women suffer emotional upset, reduced job satisfaction, deterrence in seeking jobs and promotions, and an increase in quitting jobs and getting transferred or fired, while the effect on men from sexualization of the workplace is "vanishingly small." *Id*. at 1505.

277. U.S. Equal Emp. Opportunity Comm'n, Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,677 (Nov. 10, 1980).

the term "purpose" clearly invokes the concept of intent required for a disparate treatment claim, the term "effect" would seem to invoke the concept of disproportionate disadvantage required for a disparate impact claim.

B. ABANDONING THE ELEMENTS APPROACH TO SEXUAL HARASSMENT CLAIMS

Courts have developed a number of elements of a claim of sexual harassment, which have been used to narrow the ability of the targets of sexual harassment to establish the existence of actionable sexual harassment. A feminist-designed cause of action would eliminate many of those elements, instead focusing on the discriminatory nature of harassment and the real harm that harassment in the workplace imposes on its targets and the workplace in general. After all, other claims of discrimination under Title VII generally require only that the existence of discrimination and harm be established; plaintiffs are not required to show that they did not invite or consent to the other forms of discrimination and are not required to establish that the discrimination is extremely serious in order for that discrimination to be unlawful.[278]

A cause of action for sexual harassment designed by a feminist would include no requirement that the conduct challenged be "unwelcome." Just as the law recognizes that racially denigrating behavior is not welcomed by its targets, the law should recognize that conduct that is denigrating to women, whether sexual or not, is not welcomed by its targets. It is ludicrous to believe that women invite, incite, or encourage gender hostility or denigrating conduct based on gender. It is similarly ludicrous to believe that women want to have their intimate body parts grabbed, poked, and prodded or that they want to be propositioned in the context of the workplace or have their job advancement conditioned on their receptiveness to, or willingness to tolerate, sexual conduct. Women do not ask to be called "sluts" and "whores" because they use profanity in the workplace, even if they might violate workplace rules by doing so. They do not ask to have their breasts touched or grabbed because they are not wearing a bra, even if they violate the employer's dress code by doing so. And they do not ask to be propositioned by their colleagues and supervisors by having a consensual sexual relationship with a co-worker, even if it is not wise to do so.

Abandonment of the "unwelcomeness" requirement would not necessarily make all sexual behavior in the workplace into sexual harassment; it is at least theoretically possible that some sexual conduct occurring in the context of the workplace is not denigrating in purpose or effect to women. But any conduct that can be said to be hostile or offensive could not be justified by arguments that the women subjected to it invited or encouraged it.

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278. For example, employers cannot justify paying a woman less than a man simply because she agreed to a lower salary, nor can discrimination in compensation be justified because the pay differential is not significant enough. *See* Chepak v. Metro. Hosp., 555 Fed. App'x 74, 76 (2d Cir. 2014) (discussing elements of a sexual pay discrimination claim under Title VII as requiring only a showing of discrimination, adverse action in the form of inequal pay, and comparison to similarly situated males).

Any requirement that sexually harassing conduct be subjectively abusive to the target of harassment would be replaced in a feminist-designed cause of action with the general requirement under Title VII that the person seeking to bring a cause of action be a "person aggrieved" by an unlawful employment practice, someone who is within the "zone of interests" sought to be protected by the statute.[279] After all, with respect to no other form of discrimination does the law impose a requirement that the target of discrimination find it subjectively objectionable.[280]

The "zone of interests" would include a woman who is subjected to a hostile work environment, whether or not the conduct is directed at her or is part of the ambient environment. A woman could establish that she was aggrieved as long as she could demonstrate some personal harm from the harassing conduct, including that it had an adverse effect on her working environment. The existence of a complaint, even to the harasser, to a work colleague, or to another confidant, would presumably be sufficient to demonstrate that she found the conduct to be objectionable or harmful, although the absence of such a complaint would not prevent this conclusion, because there are many reasons that women do not make complaints of sexual harassment, even privately.[281] In this situation, a women's own credible testimony that she found the conduct to be objectionable should also be sufficient to establish this harm, as is true with respect to sworn testimony generally. Courts or juries would then be required to judge the credibility of the testimony like all other testimony, without the credibility discount that often occurs when women testify about sex.[282]

The existence of an adverse effect on a woman's working environment could be shown by the ways in which she reacted to the environment, including efforts to avoid the conduct, such as walking away and absenting herself from the harassing environment, although courts would have to recognize that it is not so easy to walk away from a supervisor or a powerful co-worker, who may hold the tools of job advancement in their hands. Even silent toleration of offensive workplace conduct should not prevent a showing that one is aggrieved by the conduct, when that silence is understood as necessary or conducive to survival in a hostile workplace situation.[283]

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279. *See* Thompson v. North American Stainless, LP, 562 U.S. 170, 177–78 (2011) (adopting the "zone of interests" test for determining whether one is a "person aggrieved" and therefore able to sue for a violation of Title VII's prohibitions; the relevant standard is whether one has an interest arguably sought to be protected by the statute).

280. Discrimination in compensation on the basis of sex or any other ground is unlawful, for example, even if employees do not subjectively object to being paid less than other employees on the basis of a protected characteristic and even if they were to agree to such a compensation scheme. *See supra* note 278.

281. *See supra* text accompanying note 64.

282. *See supra* text accompanying note 43.

283. *See* O'Rourke v. City of Providence, 235 F.3d 713, 718 (1st Cir. 2001) (noting that one of the first female firefighters with the Fire Department did not complain about sexual conduct of male trainees

A feminist-designed cause of action for sexual harassment would not impose a requirement that harassing conduct be objectively "severe or pervasive" in order to be actionable. Sexually harassing conduct in the workplace can have serious repercussions for women's workplace equality without being "extremely serious"[284] or "particularly egregious"[285] or creating a "hellish" environment.[286] Instead, in order for harassment to constitute discrimination with respect to a term or condition of employment, all that should be required is for harassing conduct to create a workplace atmosphere that disadvantages women and deprives them of equal job opportunities and job advancement. When women lose sleep, suffer stress, or stop enjoying their jobs because of harassment, whether or not their ultimate productivity or job performance suffers, they have been deprived of job opportunities and job advancement. When women alter their workplace activities or call in sick to avoid harassment or their harassers, they have been deprived of job opportunities and job advancement. When women transfer to another location or leave their job because of harassment, they have been deprived of job opportunities and job advancement. Harassment that is sufficient to cause any of those effects has created an objectively hostile environment that has altered the terms and conditions of their employment.

C. ASSIGNING RESPONSIBILITY FOR SEXUAL HARASSMENT

A feminist-designed cause of action for sexual harassment would not only hold harassers individually liable for their conduct, but would hold employers vicariously liable for harassment by their supervisory and management employees, just as those employers are liable for other employment actions taken by those employees, even if the employer cannot be said to be "at fault" with respect to the harassment and whether or not the harassment takes the form of or otherwise results in what the courts deem a "tangible" employment action; there would be no affirmative defense to employer vicarious liability for supervisory sexual

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because she "didn't want to cause any waves" and "just wanted to get through the academy" and did not make a complaint while on assignment after training "for fear of being labeled a whiner").

284. *See* Meriwether v. Caraustar Packaging Co., 326 F.3d 990, 992–93 (8th Cir. 2003) (holding that isolated instances of sexual harassment must be "extremely serious" to be actionable, and that female plaintiff's allegations that co-worker grabbed her buttocks, then joked about it with another employee while blocking her passage, did not meet that standard).

285. *See* Paul v. Northrop Grumman Ship Sys., 309 Fed. App'x 825, 826, 829 (5th Cir. 2009) (granting summary judgment in a case in which a co-worker "chested up" to female plaintiff by pressing his chest against her breasts for 30 seconds, followed her and placed his hand on her stomach and waist, and then rubbed his pelvic area against her hips and buttocks, because the isolated incident was not "particularly egregious").

286. *See* Baskerville v. Culligan Int'l. Co., 50 F.3d 428, 430–31 (7th Cir. 1995) (holding that the conduct did not constitute sexual harassment, the court of appeals reversed judgment after jury awarded female employees $25,000 in damages for sexual harassment, indicating that "[t]he concept of sexual harassment is designed to protect working women from the kinds of male attentions that can make the workplace hellish for women"; the court noted that the supervisor "never touched the plaintiff," "did not invite her, explicitly or by implication, to have sex with him," made no threats, and "did not expose himself" or "show her dirty pictures").

harassment. There is nothing special about tangible employment actions, other than that the remedies for those types of unlawful actions might differ from the remedies available for intangible employment actions. Anyone who has been in a workplace, at least a workplace with supervisors,[287] would understand the power that supervisors have to shape the workplace, and not just by hiring, firing, promoting, and demoting. Instead, what supervisors allow to occur in the workplace, whether from their active encouragement or their passive tolerance, matters as much as their more tangible actions. And it is the authority that supervisors are given by employers, which does not stop at tangible employment actions, that allows them to shape the environment, including by allowing or engaging in harassing conduct.

A feminist-designed cause of action would hold employers liable for the actions of supervisors because they hired the employees engaging in those actions, thereby assuming responsibility for the harassment by the people that they put in the position to engage in that harassment. A feminist-designed cause of action would also recognize that, if an individual has the power to direct the work of another, even for only some of the time, he or she is a supervisor, not a co-worker, because the ability to direct that work puts that individual in a position of power that facilitates the ability to engage in harassment.

Employers who face this type of liability would still have an incentive to do what they can to prevent harassment and to stop it when it occurs, in fact, likely even more of an incentive than the *Ellerth*/*Faragher* affirmative defense currently provides them. After all, if employers act effectively to prevent or lessen the presence of harassment in the workplace, they will reap the benefits not only of a more productive workplace but will avoid liability for the harassment prevented or lessened as well. If employers act effectively to address harassment when they learn of it, they will again benefit from a better workplace environment and reduce their liability from the further harassment that might have otherwise resulted. That employers will remain liable for harassment that they could not have prevented becomes a cost of doing business, just as employers face other business costs that cannot be said to be their fault, including for other types of employee misconduct. As between employers and the targets of harassment, it is not unfair to impose that burden on the party better able to bear it.

With respect to employer liability for harassment by other parties, such as (true) co-workers and customers or clients, a feminist-designed cause of action for sexual harassment would impose employer liability based on a showing of negligence, unless the employer or its supervisors had acted in such a way as to

287. Judges, particularly federal judges, might actually work in a workplace in which they do not have supervisors in the normal sense and therefore may not actually understand how most workplaces actually work. But even federal judges presumably once had jobs with "real" supervisors and therefore should have a greater appreciation for the power that supervisors have in the workplace and the ways in which they can affect the terms and conditions of employment. Law professors, including this author, do not really have "real" supervisors either, with my apologies to deans and associate deans.

not just allow the harassment to occur, but to actually facilitate the harassment, such that that action is effectively supervisory action, and therefore action for which the employer would be held vicariously liable. Employer negligence could be shown in a number of ways, including not taking effective action to try to prevent sexual harassment in the workplace. Simply having a sexual harassment policy would not prevent a finding of negligence; the employer would have to take effective action to not only let employees know of the policy, but also make clear that the employer intends to take the policy seriously. Nor would taking any action in response to knowledge that sexual harassment is occurring—whether by an informal or formal complaint or otherwise—be sufficient to prevent a finding of negligence; the employer would actually have to take real and effective action to remedy harassment, including, in most cases, significant disciplinary action against the harassers. Real and significant disciplinary action would be the type of action that employers take with respect to what they view as serious incidences of misconduct.[288]

V. CONCLUSION

The judicial imposition of the elements of a claim for sexual harassment and the judicial gloss placed on those elements has turned the cause of action for sexual harassment into something far different than the feminists who worked for recognition of the cause of action envisioned. Gone is much of the optimism that the claim might rid the workplace of the degrading and denigrating conduct that women have long been forced to tolerate as the price of entry into the workplace. The courts have turned that promise of the cause of action into one that seeks to protect the workplace from women who would make claims of sexual harassment, rather than one that seeks to protect women from discriminatory workplaces.

288. An employer who terminates an employee for drinking or taking drugs while on the job but merely warns an employee for engaging in sexual harassment would not be deemed to have taken real and significant disciplinary action with respect to the harassment, given that both sexual harassment and working while impaired should be considered to be serious incidences of misconduct.

The current interpretation of the elements of a sexual harassment claim has caused courts to find the targets of harassment, rather than the perpetrators, to be responsible for that harassment, based on the "unwelcomeness" requirement and conclusions that targets invited or provoked the harassment. Courts have been inclined to find even sexually explicit and gender derogatory comments and conduct to have been motivated by reasons other than "sex." And many courts have found sexual harassment not to be actionable because it was not sufficiently "severe or pervasive," applying an incredibly high standard for such conduct. Finally, even when cognizable harassment has been found, courts have often failed to find the employer liable for that harassment, applying the standards of liability in such a way as to demand much of the targets of harassment and little from employers.

Some of these problems could be addressed within the current framework of sexual harassment law, either with legislative action to accomplish the changes or judicial reinterpretation of the elements of a sexual harassment claim, given that most of the law of sexual harassment is judicial gloss on the statutory language. An elimination of the "unwelcomeness" requirement, a proper interpretation of the "because of sex" requirement, an elimination or transformation of the "severe or pervasive" requirement, and a redefinition of the standards for individual and employer liability, all consistent with the statutory language of Title VII, would restore much of the lost promise of sexual harassment law.

A more fundamental reimagining of sexual harassment law from the perspective of a feminist shows the ways in which the law could have been structured to focus attention on protecting women from workplace harassment and promoting equal employment opportunities rather than reinforcing existing workplace dynamics. Such a reimagining would recognize the significance of the harm caused to workplaces and to women by both sexual and gender-denigrating conduct and make it much easier to prove the discriminatory nature of the conduct. In addition, that reimagining would move away from the special burdens imposed on harassment plaintiffs to show that the discrimination to which they are subjected is subjectively offensive, as well as objectively extreme in nature. And that reimagining would hold harassers and employers liable for the harassment that they and their workplaces impose upon workers, not allowing them to escape that liability by holding women to standards that empirical evidence indicates few of them will be able to reach. If there is a time in which such a reimagining might be possible, the wake of the "MeToo" movement may be such a time.

That the renewed focus on sexual harassment caused by the latest reiteration of the "MeToo" movement might make possible change to the law of sexual harassment is demonstrated by changes that have been made to the law by some

states.[289] Whether such changes are possible at the federal level, by amendment of Title VII or reinterpretation of that statute by the Supreme Court, is more uncertain, in part because of extreme partisanship following the November 2020 general election. But one might at least hope that interests in workplace equality might not be viewed as a partisan issue, but instead as an issue that serves the interests of both employers and employees.

289. For example, New York has eliminated the "severe or pervasive" requirement for sexual harassment claims under that state's law. S.B. 6594, 242d Leg. Sess. (N.Y. 2019); N.Y. SESS. LAW § A. 8421 (McKinney 2019). California has altered standards of employer liability for sexual harassment under state law, including by providing that employees engaging in sexual harassment can be personally liable. CAL. GOV'T CODE § 12940 (West 2019). Maryland has expanded employer liability for sexual harassment under its state statute to provide that employers are liable for the actions of individuals who do not have authority to take tangible employment action but who direct or evaluate the work of employees. MD. CODE ANN., STATE GOV'T §§ 20-601, 20-611 (West 2019).