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Jennifer D. Growe

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Reform the EEOC Guidelines: Protect Employees from Gender Discrimination as Mandated by Title VII

Jennifer D. Growe *

INTRODUCTION

Although Title VII of the Civil Rights Act of 1964 (“Title VII” or “the Act”)¹ expressly prohibits sex discrimination in employment, the courts and the Equal Employment Opportunity Commission (EEOC),² empowered with enforcing Title VII, have promulgated different standards for sexual harassment and sex discrimination.³ This phenomenon has had the effect of leaving a class of individuals in the untenable position of suffering discrimination in the workplace because of their sex,⁴ yet unable to avail themselves of Title VII protection. The following hypothetical best exhibits this disconnect in the law.

Plaintiff, Ann, was an assistant professor of biochemistry at a prestigious private university (“University”).⁵ She initially viewed the position as a stepping stone toward a fully tenured position. However, she quickly realized that as the only female in the department, she faced a rocky road to success. Within the first month

* J.D. (2007), Washington University School of Law; B.A.-Political Science with high distinction (2004), University of Illinois at Urbana-Champaign.

1. 42 U.S.C. § 2000e-2(a) (2000).

2. See *infra* notes 23–25 and accompanying text.

3. See L. Camille Hébert, *Sexual Harassment Is Gender Harassment*, 43 U. KAN. L. REV. 565 (1995) (comparing sex discrimination, with regard to gender stereotyping that disadvantages an employee or group of employees because of their sex; with sexual harassment, with regard to unwanted sexual advances or verbal abuse directed toward a female employee in order to fulfill the male perpetrator’s sexual desires and to subordinate the role of the female in the workplace).

4. For purposes this Note, the terms “sex” and “gender” are used interchangeably to describe the biological and social identities of men and women.

5. This hypothetical is based on the facts in *King v. Board of Regents of the University of Wisconsin System*, 898 F.2d 533 (7th Cir. 1990).

of Ann's employment, the assistant dean, Bob, began making sexually suggestive comments to her. As the semester progressed, Bob's comments became more explicit, and he often inappropriately rubbed up against her. His increasingly offensive behavior culminated with him following Ann into the restroom during a department social event where he forcibly kissed and fondled her, telling her that he "had to have her." Ann refused and quickly extricated herself from the situation. The next morning, she reported Bob's conduct to the University administrators, who began an investigation into the incident.

Deeply troubled by Bob's conduct, Ann sought the advice of an attorney to better understand her rights. At their first meeting, Ann described Bob's sexually explicit comments and actions, and she informed the attorney of the University's investigation.

She also confided that, although embarrassed and disgusted by Bob's behavior, she was most distressed by the more veiled conduct of the chairman of the department, Charles. Even though his actions were not of a sexual nature, Ann told her attorney that Charles had created a situation in which she could not succeed, thus making it almost impossible for her to meet the University's tenure requirements. For example, he assigned her a heavier workload than the male members of the department, and he insisted that she perform time-consuming menial tasks unrelated to her teaching responsibilities.

Charles also subjected Ann to an inordinate number of teaching evaluations followed by poor appraisals, and he publicly embarrassed her in faculty meetings. Ann truly believed that between Bob's sexually overt behavior and Charles' extraordinary demands, she worked in a hostile environment.⁶

The attorney advised Ann that she should file two Title VII claims against the University: one alleging hostile work environment sexual harassment based on Bob's blatant sexually based conduct, and another alleging a hostile work environment based on her sex.⁷

6. See *infra* note 31 and accompanying text (describing the judicially created Title VII "hostile work environment" claim).

7. See Marren Roy, *Employer Liability for Sexual Harassment: A Search for Standards in the Wake of Harris v. Forklift Systems, Inc.*, 48 SMU L. REV. 263, 279 (1994).

However, the attorney warned her that she should be prepared for success only on the sexual harassment claim. In other words, even though Ann had a deeper concern about the impact of Charles' actions on her ability to succeed in her job and attain her career goals, the legal system would be more apt to provide relief only for her endurance of sexual advances and would be reluctant to provide a remedy for her male superior's creation of roadblocks to her success on account of her being a female in an otherwise all-male department. This was true even though both Bob and Charles were motivated by the same purpose: to negate Ann's "right to participate in the workplace on an equal footing."⁸

Dilemmas like Ann's have become increasingly prevalent as women make up a greater percentage of all sectors of the workforce, leading to claims which reveal "cracks in the [sex discrimination] doctrine . . . that are in great need of repair."⁹ Sexually based workplace behavior, especially a male supervisor's advances on a less powerful female worker, has become the prototypical form of sexual harassment giving rise to hostile work environment claims.¹⁰ Yet, this trend fails to recognize that the most common form of discrimination women face in the workplace is not sexually based, but rather sex-based: forms of harassment designed to preserve a male hierarchy in the workplace. As noted by several legal scholars,

To establish a prima facie case of sexual harassment under the hostile [work] environment theory, a plaintiff must show five things: (1) that she belongs to a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment affected some term or condition or privilege of employment; and, if appropriate, (5) some ground to hold the employer liable.

Id.

8. *King*, 898 F.2d at 537 (quoting *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986)).

9. Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 692 (1997) (discussing the conflation of sex discrimination and sexual harassment still existing years after the EEOC and the Supreme Court first embraced the notion of sexual harassment as a form of Title VII sex discrimination).

10. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692 (1998). "The quintessential case of harassment involves a more powerful, typically older, male supervisor, who uses his superior organizational position to demand sexual favors from a less powerful . . . female subordinate." *Id.*

even though Title VII protects hostile workplace sexual harassment,¹¹ courts have created a doctrine narrowing the law's protection such that sexual harassment claims have been relegated to a mere legal recourse for the discomfort resulting from egregious sex-based conduct at work. Yet it is just as common for a woman to be the object of forms of harassment which are devoid of sexuality, but which still "undermine [her] perceived . . . competence to do work."¹² Unfortunately, there is scant recognition of this type of sex discrimination in the law, leaving women with little legal recourse if a man engages in behavior deflating her professional capacity because of her gender.

According to the theory developed herein, the Supreme Court's analysis of the "hostile work environment" doctrine has failed to provide a clear and unambiguous standard for analyzing a sex discrimination claim under Title VII that is based on non-sexualized gender discrimination.¹³ As a result, our legal system and scholars have spent more than two decades struggling to decipher what is and what is not a "hostile work environment" created by sexual harassment based on overt sexuality. At the same time, failure to create meaningful remedies for this pervasive type of sex harassment reinforces gender norms and preserves male-dominated authority in the workplace, otherwise known as gender discrimination.

This Note considers the growing disconnect in sex discrimination law in light of the fact that the EEOC and the Supreme Court have collectively excluded gender discrimination from legal remedy. First, this Note traces the jurisprudence of the sexual harassment doctrine and how the framework of hostile work environment claims provide victims of sexually offensive workplaces meaningful remedy under Title VII, while simultaneously excluding victims of sex discrimination from protection. Next, this Note examines previous scholarship recounting the limitations of the hostile work

11. See generally *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

12. Schultz, *supra* note 10, at 1687.

13. See *infra* Part II.B.

environment as sexual versus sex-based harassment,¹⁴ and the effects that such limitations have on reinforcing sex stereotypes in employment. After analyzing the failure of the EEOC and the federal judiciary to respond to this concern, this Note proposes that the EEOC reissue its Guidelines on Sex Discrimination in order to transform the current interpretation of sex discrimination law and to present an avenue by which lower courts can better afford Title VII protection to victims of sex discriminatory workplaces.¹⁵ This Note concludes that by disregarding this apparent shortcoming, courts and the EEOC are, in effect, ignoring the Title VII mandate to eradicate sex discrimination.

I. HISTORY

A. The Origins of Title VII and Anti-Sex Discrimination Legislation

Title VII, the central piece of employment anti-discrimination legislation,¹⁶ is premised on the ideology that people must be evaluated as “individuals, rather than as a member of a class.”¹⁷

14. Examples of non-sexual, sex-based conduct include calling male employees “men” and female employees “girls.” See EEOC Dec. No. 72-0679, 4 Fair Empl. Prac. Cas. 441, 441–42 (1971).

15. See Franke, *supra* note 9, at 723. “The words ‘sex’ and ‘sexual’ create definitional problems because they can mean either ‘relating to gender’ or ‘relating to sexual/reproductive behavior.’” *Id.* (quoting *Vandeventer v. Wabash Nat’l Corp.*, 887 F. Supp. 1178, 1181 (N.D. Ind. 1995)).

16. Interestingly, the statute was initially proposed solely to preclude racial discrimination against African American employees; however, Congress drafted a very broad, language-neutral statute preventing discrimination of several protected classes. See 110 CONG. REC. 2581 (1964) (“Whether we want to admit it or not, the main purpose of this legislation today is to try and help end the discrimination that has been practiced against Negroes.”); Kara L. Gross, Note, *Toward Gender Equality and Understanding: Recognizing That Same-Sex Sexual Harassment Is Sex Discrimination*, 62 BROOK. L. REV. 1165, 1172 (1996) (explaining that the original purpose behind Title VII was protection of African American employees from racial discrimination); Deborah N. McFarland, Note, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 FORDHAM L. REV. 493, 498 (1996) (stating that the initial purpose behind the enactment of Title VII was prohibition of workplace discrimination of African Americans).

17. Laura Hoffman Roppé, Case Note, *Harris v. Forklift Systems, Inc.: Victory or Defeat?*, 32 SAN DIEGO L. REV. 321, 321 (1995). In enacting Title VII, Congress sought to preclude the situation in which the employer treats some people less favorably than others because of their race, color, religion, sex, or national origin. Hébert, *supra* note 3, at 348.

Even though the term “sex”¹⁸ has been included in Title VII’s language since the time it was signed into law, in the decade following its enactment, scant attention was paid to offensive sex- or gender-related actions in the workplace as legitimate legal claims within the realm of illegal employment discrimination.¹⁹ Early cases seeking Title VII protection for sexually abusive conduct in the workplace were rejected on theories that sexual advances were the inevitable result of the gender-heterogeneous workplace.²⁰

18. The word “sex” was added as an amendment by conservatives in an attempt to defeat the bill. See Denise Merna, Note, *Getting it Straight: The Supreme Court Expands Title VII to Protect Against All Forms of Same-Sex Sexual Harassment*, 15 N.Y.L. SCH. J. HUM. RTS. 323, 325 (1999); see also 110 CONG. REC. 2577 (1964) (debating addition of the word “sex”); Amy Shahan, Comment, *Determining Whether Title VII Provides a Cause of Action for Same-Sex Sexual Harassment*, 48 BAYLOR L. REV. 507, 510 (1996); JUDITH A. BAER, *WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD EQUALITY FROM THE NEW DEAL TO THE PRESENT* 80 (2d ed. 1996).

19. Early claims of Title VII sexual harassment were unsuccessful for female plaintiffs seeking to pave the way in asserting their legal rights for relief from sexually abusive work environments. In the 1975 case of *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), female workers brought a claim for workplace sexual harassment alleging verbal and sexual harassment by their male supervisor. *Id.* at 161. Although the *Corne* court recognized that Title VII extends to offensive, discriminatory work environments, the Court found that the “sexual advances” alleged in the case reflected nothing more than a “personal urge,” and that there could not be a “potential federal lawsuit” under Title VII every time one employee made a sexual advance at another. *Id.* at 163. Similarly, in *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev’d and remanded*, 568 F.2d 1044 (3d Cir. 1977), a female employee was subjected to a business lunch during which her employer became intoxicated, made several sexual advances at her, and threatened to undermine her job security if she attempted to report his behavior. *Id.* at 555. In rejecting the plaintiff’s argument and ruling in favor of the defendant in its motion to dismiss, the court found that “an invitation to dinner” cannot be an “invitation to a federal law suit,” and that allowing the plaintiff to triumph in the case before the court would stop any superior from opening social dialogue with a subordinate, in effect opening the floodgates of litigation. *Id.* at 557.

20. Early cases endorsed the idea that workplace sexual harassment was a simple expression of male sexual desires for females, and claims by women alleging sexual harassment by male supervisors or co-workers were manifestations of their individual frustrations with their situations, rather than legitimate discriminatory grievances. See Catharine A. MacKinnon, *Sexual Harassment: Its First Decade in Court*, in *FEMINIST JURISPRUDENCE* 145, 148–49 (Patricia Smith ed., 1993). It was not until 1976 that sexual harassment was recognized as a legitimate claim of sexual discrimination under Title VII. See *Williams v. Saxby*, 413 F. Supp. 654 (D.D.C. 1976) (holding that a Title VII sex discrimination action existed when a male supervisor acted in a retaliatory manner against a female employee who had refused his sexual advances).

B. The Equal Employment Opportunity Commission; Enforcement of Title VII in America's Workplaces

The role of the EEOC in enforcing Title VII and promulgating rules and procedures to enforce the Act was established by Congress in the Civil Rights Act of 1964.²¹ Since its inception, the EEOC has played a central role in the development of what constitutes a viable Title VII claim.²² The EEOC has long recognized that sexual harassment in the workplace is an unlawful employment practice in violation of Title VII.²³

In 1980, to advance its position that sexual harassment is a form of sex discrimination covered by Title VII, the EEOC issued Guidelines on Discrimination Because of Sex (“EEOC Guidelines”) in which it specifically defined sexual harassment.²⁴ The EEOC Guidelines established criteria for determining conduct that constitutes sexual harassment in the hostile work environment: “Unwelcome sexual advances, requests for sexual favors and other verbal and physical conduct of a sexual nature, . . . when submission to such conduct is made . . . a term or condition of an individual’s employment, . . . or such conduct . . . creat[es] an intimidating, hostile, or offensive working environment.”²⁵ The EEOC Guidelines,

21. 42 U.S.C. § 2000e-4 (2000).

22. Catherine M. Maraist, *Faragher v. City of Boca Raton: An Analysis of the Subjective Perception Test Required by Harris v. Forklift Systems, Inc.*, 57 LA. L. REV. 1343, 1348 n.42 (1997).

23. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE PROGRAM MANUAL; Sex Discrimination Issues (1996) [hereinafter PROGRAM MANUAL]. “It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, condition of employment, because of the individual’s race, color, religion, sex, or national origin.” *Id.*

24. *See* 29 C.F.R. § 1604.11 (1980). The Guidelines were adopted and became effective upon publication in the Federal Register on November 10, 1980. *Id.* As set forth in its reference literature, the EEOC analyzes the totality of the circumstances of the claim, such as the nature of the sexual advances and the context in which the alleged incidents occurred. *Id.* § 1604.11(b).

25. 29 C.F.R. § 1604.11a (1991). The EEOC has further developed a variety of circumstances in which sexual harassment can occur,

including but not limited to the following: [1] The victim as well as the harasser may be a woman or man. The victim does not have to be of the opposite sex. [2] The harasser can be the victim’s supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee. [3] The victim does not have to be the

however, failed to offer a definition of the type of discriminatory employer activity relating to hostile and denigrating non-sexual conduct motivated by gender-constituted sex discrimination under Title VII.²⁶

C. The Supreme Court on Sex: The Birth of the “Hostile Work Environment”

1. *Meritor Savings Bank v. Vinson*

In 1986, in the landmark case of *Meritor Savings Bank v. Vinson*,²⁷ the Supreme Court addressed the issue of whether a sexually aggressive hostile work environment is a form of sexual discrimination.²⁸ In considering whether the alleged harassment was actionable, the Court recognized Title VII as a vehicle to “strike at the entire spectrum of disparate treatment of men and women,”²⁹ and to provide injured plaintiffs a mechanism to establish “discrimination based on sex [that] create[s] a hostile or abusive work

person harassed but could be anyone affected by the offensive conduct. [4] Unlawful sexual harassment may occur without economic injury to or discharge of the victim. [5] The harasser’s conduct must be unwelcome.

Equal Employment Opportunity Commission, Facts About Sexual Harassment, <http://www.eeoc.gov/facts/fs-sex.html> (last visited May 8, 2007). The concept that Title VII prohibited a hostile working environment first surfaced in racial discrimination and national origin cases. *See Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (holding that the phrase “terms, conditions, or privileges of employment” in Title VII clearly protects against the practice of a working environment “heavily polluted” with racial discrimination such that it “destroy[s] completely the emotional and psychological stability of minority group workers”).

26. In 1993 the EEOC issued Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability. The proposed guidelines seem to recognize that sexual harassment need not be of a sexual nature. *See Hébert, supra* note 3, at 565. The 1993 Guidelines, however, were withdrawn in 1994. *See Schultz, supra* note 10, at 1732 n.246.

27. 477 U.S. 57 (1986).

28. *Id.* In *Meritor*, a female plaintiff alleged that her supervisor continuously demanded sexual favors, fondled her in front of co-workers, had intercourse with her forty to fifty times, followed her into the women’s bathroom when she entered alone, exposed himself to her in the workplace, and even forcibly raped her. *Id.* at 60. Because the conduct alleged in *Meritor* was so egregious, one significant theoretical problem that emerged from its holding is that lower courts applying the standard interpret “severe and pervasive” to require allegations of sexual conduct. *See infra* notes 31–33.

29. *Id.* at 64 (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

environment.”³⁰ In acknowledging the EEOC Guidelines’³¹ definition of hostile work environment, the *Meritor* Court held, for the first time, that Title VII coverage is not limited to tangible employment actions, and that Title VII does prohibit sexually hostile work environments.³² In so holding, the *Meritor* Court decreed that, in order for an alleged hostile work environment to rise to the level of sexual harassment, the abusive behavior must be sufficiently “severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”³³

30. *Id.* at 66.

31. The Court explained that the EEOC Guidelines supported the finding that economic injury is not a necessary requirement for a sexual harassment claim. *See id.* at 65 (citing 29 C.F.R. 1604.11(a)(3) (1985); 45 Fed. Reg. 74,676 (Nov. 10, 1980) (to be codified at 29 C.F.R. § 1604)). In defining “sexual harassment,” the EEOC had described workplace conduct such as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” 29 C.F.R. § 1604.11(a) (1985). The EEOC Guidelines provide an action for discrimination where “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.” *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3)); *see also* *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (explaining that sexual harassment victims need not be threatened with termination or denial of advancement, but “a pattern of sexual harassment inflicted on an employee because of her sex” will be enough).

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

Henson, 682 F.2d at 902.

32. *Meritor*, 477 U.S. at 66. Prior to *Meritor*, the Court had only recognized quid pro quo harassment, in which a person of authority demands sexual favors of a subordinate as a condition of keeping a job or benefit, as forbidden by Title VII. *See Roy*, *supra* note 7, at 265. A discussion of the quid pro quo doctrine of sexual harassment is beyond the scope of this Note. For an in-depth analysis of direct and consequential economic loss in a sexually harassing workplace, see Aric G. Elsenheimer, *Agency and Liability in Sexual Harassment Law: Toward a Broader Definition of Tangible Employment Actions*, 54 AM. U. L. REV. 1635 (2005).

33. *Meritor*, 477 U.S. at 67 (alterations in original) (quoting *Henson*, 682 F.2d at 904). In the years following *Meritor*, lower courts repeatedly fumbled in applying the “severe and pervasive” standard. Although *Meritor* listed elements for a hostile work environment, differences in interpretation arose among the circuits. *See Maraist*, *supra* note 22, at 1349 (explaining that the “federal circuits divided on two issues: (1) from whose viewpoint the offensive conduct should be evaluated; and (2) the effect of the conduct on the plaintiff (or injury plaintiff suffered”). *Compare Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (stating that the trier of fact “must adopt the perspective of a reasonable person’s reaction to a similar environment under essentially like or similar circumstances” and that the conduct must affect the psychological well being of a “reasonable person under like circumstances”),

2. *Price Waterhouse v. Hopkins*

In the 1989 case of *Price Waterhouse v. Hopkins*,³⁴ the Supreme Court recounted Ann Hopkins' failed efforts to become partner at a prominent accounting firm.³⁵ The Supreme Court determined that sex stereotyping motivated Price Waterhouse's decision not to offer Hopkins a partnership in the firm.³⁶ When informing Hopkins of the firm's employment decision, one of the existing partners told her that in order to improve her candidacy, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."³⁷

Hopkins avoided dismissal of her claim of gender discrimination disparate treatment by showing that she suffered an adverse employment action because the discrimination culminated in failure to promote.³⁸ However, one can speculate that Hopkins endured a

disapproved of by 510 U.S. 17 (1993), with *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (favoring a victim's perspective over a reasonable person's perspective and, for analysis of effects, a reasonable woman standard over a reasonable person standard).

34. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

35. *Id.* at 231–32.

36. *Id.* at 235–37. The Court paid particular attention to the district court's findings that Price Waterhouse's decision "stemmed from an impermissibly cabined view of the proper behavior of women" and that the company had "unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence . . . to . . . sex stereotyping." *Id.* at 236–37.

Also noted by the district court was that Hopkins had "played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract" that year, and "[n]one of the other partnership candidates . . . had a comparable record in terms of success[.] . . ." *Id.* at 234 (first alteration in original) (citation omitted). "[P]artners in Hopkins' office praised her character" and described her as "an outstanding professional" with "a strong character, independence and integrity." *Id.* (citation omitted). Another high-ranking partner praised her "decisiveness" and "intellectual clarity." *Id.* (citation omitted).

37. *Id.* at 235. "'One partner described her as 'macho;' . . . [another] advised her to take 'a course at charm school.' Several partners criticized her use of profanity . . . only 'because it's a lady using foul language.'" *Id.* (citations omitted). The Court concluded that requiring a woman to fulfill sex-based stereotypes in order to obtain partnership, a position she would have procured based on ability and performance had she been male, constituted disparate treatment discrimination. *Id.* at 258. On remand, the district court ordered that Hopkins be made a partner in the firm. Price Waterhouse's assertion that the partnership decision was not reflective of Hopkins' gender was rejected. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1210 (D.D.C. 1990), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

38. *Price Waterhouse*, 490 U.S. at 258. "Disparate treatment generally concerns discrete employment decisions made because of sex or policies that disadvantage an employee or group

hostile work environment under *Meritor*'s severe and pervasive standard throughout her tenure with Price Waterhouse, although not sexual in nature.³⁹ *Price Waterhouse* presented the Court and Hopkins an opportunity to apply the hostile work environment claim to sex stereotyping discrimination as "severe or pervasive" in its alteration of a "condition[] of employment" based on sex discrimination, but failed to do so.⁴⁰

3. *Harris v. Forklift Systems, Inc.*

In November 1993, in *Harris v. Forklift Systems, Inc.*,⁴¹ the Supreme Court addressed the issue left open by the *Meritor* Court: whether a plaintiff alleging hostile work environment sexual harassment under Title VII must prove psychological injury in order to prevail.⁴² In *Harris* the Court attempted to create a less ambiguous framework for what constitutes a "hostile work environment."⁴³

Petitioner Teresa Harris filed suit against her former employer alleging sexual discrimination under Title VII,⁴⁴ claiming that on several occasions, she was the subject of both sexual harassment⁴⁵ and gender discrimination.⁴⁶

of employees based on their sex." Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1591 (2000). "The employment decisions or judgments at issue in these cases are usually those that businesses must make in the normal course of business, such as hiring, firing, and promotion. *Id.*; see also *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (describing Title VII disparate treatment claims as policies and actions resulting in differential treatment of men and women with respect to employment).

39. See *supra* note 33 and accompanying text (discussing the *Meritor* standard).

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

41. 510 U.S. 17 (1993).

42. *Id.* at 20.

43. See Roppé, *supra* note 17, at 323. "'Hostile work environment' sexual harassment and 'abusive work environment' sexual harassment are used interchangeably by the Supreme Court and are presumably synonymous terms." *Id.* at 323 n.12 (citing *Harris*, 510 U.S. at 24–25 (Scalia, J., concurring); *Meritor*, 477 U.S. at 66).

44. *Harris*, 510 U.S. at 19–20.

45. Forklift's president suggested that Harris accompany him to the Holiday Inn to negotiate a pay raise and implied on other occasions that it was likely that Harris had promised sex to clients in order to obtain their business. *Id.* at 19. Additionally, Forklift's president demanded that Harris, as well as other female employees, retrieve coins from his pants pocket, pick up objects that he threw on the ground so that he could make suggestive comments as they bent over, and continuously commented on the sexual appearance of Harris and other women employees in their work attire. *Id.*

46. Forklift's president stated to Harris on one occasion, while in the presence of several

The *Harris* Court echoed the decision in *Meritor* by defining a hostile work environment as one in which sexual harassment and discriminatory behavior creates an environment⁴⁷ that a reasonable person would find abusive and hostile, and that the victim subjectively perceives as abusive.⁴⁸ However, the Court did apply the standard set in *Meritor* to hold that the harassing conduct at issue need not dangerously affect the employee's psychological well-being⁴⁹ in order to rise to the level of a hostile work environment.⁵⁰

other employees, "You're a woman, what do you know" and that she was "a dumb ass woman." *Id.*

47. "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Id.* at 21 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

48. The *Harris* Court adopted both subjective and objective standards to evaluate whether the alleged conduct at issue rose to the level of illegal sexual harassment. *Harris*, 510 U.S. at 21–22. Under *Harris*' analysis, a trial court must preliminarily decide whether a reasonable person would objectively be offended by the environment; secondly, it should assess whether the individual plaintiff found the situation offensive or harmful, regardless of a reasonable person's judgment.

49. Legal commentators have repeatedly criticized this holding as ambiguous, drawing attention to the Court's narrow framing of the issue as a means of sidestepping the controversial and difficult legal conflicts of the day. See Anne C. Levy, *The United States Supreme Court Opinion in Harris v. Forklift Systems: "Full of Sound and Fury Signifying Nothing"*, 43 U. KAN. L. REV. 275, 276 (1995). Even though the Court cast *Harris* as its opportunity to truly consider the definition of a hostile work environment, commentators aptly note that the Court failed to sufficiently address the central issue: the lower courts' need for a practical, recognizable standard for analyzing claims of hostile work environment. *Id.* Critics contend that "*Meritor* left many open questions" and after *Harris* it appears that such "vague generalities . . . may never be clarified by the highest Court." *Id.* at 316; see also Roppé, *supra* note 17, at 338 (explaining that the standard purported in *Harris* is subject to several interpretations); Roy, *supra* note 7, at 78–79 (showing that despite *Meritor* and *Harris*, disagreement persists among the circuits as to what should be considered a hostile work environment).

In addition to criticizing the vagueness inherent in the *Harris* standard, legal commentators also criticize the decision's analysis as narrowly focused on the sexual aspect of the facts. Specifically, the *Harris* Court tacitly adopted a disaggregation of the facts determined by the lower courts by considering only the alleged sexualized conduct as relevant to the hostile work environment claim. See Schultz, *supra* note 10, at 1711. "The disaggregation of sexual and nonsexual conduct [in sex discrimination claims] was not inevitable, for hostile work environment harassment emerged as a variant of disparate treatment." *Id.* at 1714. Thus, "[t]he essence of a hostile work environment claim" stems from the concept that "the defendant is responsible [for] ma[king] the work environment more difficult for women (or men) because of their sex." *Id.* In considering the two claims as factually divergent, *Harris* conveyed the concept to the lower courts that the types of harassing conduct are legally divergent as well. See Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195, 208 (1995) (explaining that the magistrate in *Harris* overlooked non-sexual,

Based on its rejection of the “physiological harms standard” originally applied to *Harris* at the district court level, the Court reversed and remanded the case for a rehearing consistent with its newly delineated requirements.⁵¹

4. *Oncale v. Sundowner Offshore Services, Inc.*

In *Oncale v. Sundowner Offshore Services, Inc.*⁵² the Court had the opportunity to reassess the elements of a hostile work environment. The Court in *Oncale* held that the sexually harassing hostile work environment includes any discriminatory action taken against a person “because of sex.”⁵³ Yet, the court fell short of expounding how the standard applies to non-sexual facts.⁵⁴

In *Oncale*, the petitioner sought protection under Title VII for alleged same-sex harassment in the workplace.⁵⁵ *Oncale*’s allegations consisted of incidents of sexual assault, threats of homosexual rape,⁵⁶ and other sex-related actions.⁵⁷

discriminatory comments that did not contribute to the abusive workplace in that they did not constitute “unwelcome” sexual conduct).

50. *Harris*, 510 U.S. at 22. In applying the standard, the *Harris* Court applied a totality of the circumstances test to determine whether a workplace is sufficiently hostile or offensive. *Harris*, 510 U.S. at 23. The Court suggested factors in analyzing the circumstances of hostile work environment allegations such as: “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.” *Id.*

51. *Id.* at 23. Interestingly, the Supreme Court was considering *Harris* at a time when sexual harassment claims were flooding the legal system. See Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269, 272 (1996). Against that backdrop, one may glean that the Court was especially aware of the significance of the task before it: reconciliation of the indistinct and vague language of Title VII with the Court’s earlier decision in *Meritor* in order to provide the lower courts a standard by which to assess a discriminatory work environment. In his concurring opinion, Justice Scalia admits that the terms “abusive” and “hostile” do not seem to set a clear standard; nor does the addition of the word “objectively” appear to increase the standard’s clarity. *Id.* at 24 (Scalia, J., concurring). “As a practical matter, [this] holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough . . .” *Id.*

52. 523 U.S. 75 (1998).

53. *Id.* at 80–81; see Rebecca Hanner White, *There’s Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 733 (1999) (“The question is not whether the harassment is sexual but whether it is being directed against this particular individual because of . . . sex.”).

54. White, *supra* note 53, at 734.

55. *Oncale*, 523 U.S. at 76.

56. *Id.* at 77. The *Oncale* opinion resolved the issue as to whether harassment in the

The Court acknowledged the ease in inferring discrimination in mainstream sexual harassment claims due to the fact that the alleged conduct “typically involves explicit or implicit proposals of sexual activity.”⁵⁸ Yet, the Court conceded that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”⁵⁹ Instead, when a “harasser is motivated by gender hostility to the presence of [a certain gender] in the workplace,” and the conduct at issue was not “tinged with offensive sexual connotations,” the action can still constitute discrimination because of sex.⁶⁰

D. Alternative Approaches

Scholars have examined the social implications of treating sexual harassment differently from gender discrimination.⁶¹ Both “[i]ndividually and together, these scholars make powerful arguments

workplace can violate Title VII’s prohibition of discrimination “because of sex” when the harasser and the harassed employee are of the same sex. The Court held unanimously that same-sex sexual harassment is actionable under Title VII. *Id.* at 82.

The discussion of same-sex sexual harassment is beyond the scope of this Note. For a discussion of the effects of *Oncale* on the issue of same-sex workplace harassment, see Wendy M. Parr, Case Note, *When Does Male-on-Male Horeseplay Become Discrimination Because of Sex?: Oncale v. Sundowner Offshore Services, Incorporated*, 25 OHIO N.U. L. REV. 87 (1999).

57. *Oncale*, 523 U.S. at 77. In one instance, *Oncale*’s co-workers restrained him while another co-worker placed his penis on *Oncale*’s neck and arm. On a separate occasion, a co-worker restrained *Oncale* while he was showering at work and pushed a bar of soap into *Oncale*’s anus. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118–19 (5th Cir. 1996).

58. *Oncale*, 523 U.S. at 80.

59. *Id.*

60. *Id.* at 80–81.

61. What such scholars have asserted is the question of whether the human interactions at the core of sexualized harassment are different from the issues of human interactions involved in gender discrimination. Many believe that gender harassment differs from the issues of sexual harassment only in the choice of the weapon used, in that “both types . . . are motivated by the same purpose—to inform women of their role in the workforce—and have similar effects—to offend, humiliate, and embarrass.” Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816 (1991) (noting that the courts have severely limited the efficacy of the current cause of action for sexual harassment); see also Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1211 (1989) (focusing on “sexually oriented behavior” in the workplace, and arguing that “[i]f the defendant can demonstrate that the behavior in question was not likely to create a fear of sexual coercion or a sense of devaluative sexualization among women” then the court should not find the claim subject to Title VII).

about the failings of current sexual harassment doctrine and offer much [to be] consider[ed] in determining an alternative, gender-based theory of harassment.”⁶²

In her article, *Reconceptualizing Sexual Harassment*, Vicki Schultz explores what she names the prevailing “sexual desire-dominance paradigm.”⁶³ Schultz’s theory criticizes the hostile work environment doctrine as having evolved into a sexual model, and that “[t]o a large extent, the courts have restricted the conception of the hostile work environment harassment to . . . explicitly sexualized actions perceived to be driven by sexual designs.”⁶⁴

Furthermore, as Katherine M. Franke noted in her article, *What’s Wrong with Sexual Harassment*, “the link between sexual harassment and sex discrimination has been undertheorized by the Supreme Court.”⁶⁵ Franke proposes “a reconceptualization of sexual harassment as *gender harassment*” in that “sexual harassment is a kind of sex discrimination not because the conduct . . . is sexual, and not because men do it to women, but . . . because it is a technology of sexism.”⁶⁶

62. Linda B. Epstein, Note, *What Is a Gender Norm and Why Should We Care? Implementing a New Theory in Sexual Harassment Law*, 51 STAN. L. REV. 161, 168 (1998).

63. Schultz, *supra* note 10, at 1692. The prevailing paradigm, as Schultz explains, wrongly defines unwanted sexual advances as the core of modern-day sexual harassment claims.

64. *Id.* at 1710. Schultz notes that much of the gender-based hostility and abuse women (and some men) endure at work is neither driven by the desire for sexual relations nor even sexual in conduct. *See id.*

65. Franke, *supra* note 9, at 691. Franke provides two explanations for the Court’s ambiguous theorizing of the hostile work environment. “First, the lack of an articulated theoretical link between sexual harassment and sex discrimination could reflect an avoidance technique: The *Meritor* Court was not prepared to embrace [the] theory of sexual harassment that conflated male sexuality with the subordination of women.” *Id.* at 692. Thus, the Court believed that “the sexual harassment of women by men reflects a kind of gendered power that Title VII is designed to address,” therefore the Court “avoid[ed] [the] difficult doctrinal question [of gender discrimination] while recognizing the sexism in sexual harassment.” *Id.* Second, Franke asserts that the *Meritor* Court possibly “believed that nothing more need be said about why sexual harassment is sex discrimination.” On the egregious facts in *Meritor*, “where a man is charged with sexually harassing a woman, and the conduct is severe or pervasive, unwelcome, and hostile to a reasonable person, the Court may have regarded the conduct as a kind of per se violation of Title VII.” *Id.*

66. *Id.* at 696. Sexual harassment merely

perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men. Sexual harassment perpetuates these norms because it takes

Moreover, legal commentators attribute this dilemma partially to the fact that the most publicized sexual harassment claims and controversies have been of the over-sexualized model.⁶⁷ For example, the Anita Hill/Clarence Thomas controversy was the first sexual harassment controversy to receive widespread public scrutiny.⁶⁸ Even though the controversy did not wind its way through the courts, the situation did help to solidify the notion of sexual harassment stemming from sexual behavior.⁶⁹ Hill, who at the time of the alleged behavior was a lawyer in her mid-twenties, claimed that Supreme Court nominee Clarence Thomas, her former supervisor at the EEOC, sexually harassed her.⁷⁰ Hill accused Thomas of exposing her to “abrasive and vulgar language and repeatedly subject[ing her] to unwanted and unwarranted advances.”⁷¹

Naturally, the sexual overtones in the Hill/Thomas controversy caused Hill’s allegations to become “one of the most media-saturated scandals ever played out in Washington.”⁷² The public, however, was not drawn to the tale of a victimized woman alleging power domination by her male superior in the workplace. Instead, what intrigued Americans was the fact that a Supreme Court nominee was accused of referring to his genitals as a character in a pornographic film—“Long Dong Silver”—in a conversation with his female subordinate,⁷³ “and on another occasion, had remarked to her that someone had put a pubic hair on his can of Coke.”⁷⁴

place within a culture and history that in large part reduces women’s identity to that of a sex object, and reinforces men’s identity as that of a sexual aggressor.

Id.

67. Vicki Schultz, *Talking About Harassment*, 9 J.L. & POL’Y 417, 418 (2001).

68. Schultz, *supra* note 10, at 1692.

69. *Id.*

70. *Id.* at 1692–93.

71. Charles B. Adams, *The Impact of Race on Sexual Harassment: The Disturbing Confirmation of Thomas/Hill*, 2 HOW. SCROLL SOC. JUST. REV. 1, 7 (1993).

72. David Brock, *The Media and Anita Hill*, NAT’L REV., June 21, 1993, available at http://www.findarticles.com/p/articles/mi_m1282/is_n12_v45/ai_13952948. When the Anita Hill hearings opened on Friday, October 12, 1991, reporters were seen lingering outside the EEOC headquarters in downtown Washington, offering bribes to agency employees to leak inside information. *Id.*

73. Neil A. Lewis, *Judge’s Backers Take Up His Defense*, N.Y. TIMES, Oct. 12, 1991, at A28.

74. *Id.*

E. Circuit Example: The Hostile Work Environment in the Eighth Circuit

Although legal scholars have continually commented on the discrepancy in the law as to the breadth of the sexual harassment hostile work environment and its failure to remedy sex-based harassment, the lower courts have failed to provide a legal outlet. Instead, circuits have continually held that plaintiffs alleging hostile work environment must assert sexual conduct in order to prevail. The following synopsis of hostile work environment claims considered by the Eighth Circuit Court of Appeals from the years 2000 to 2005 demonstrates this phenomenon.

The 2005 case of *Peterson v. Scott County*⁷⁵ involved allegations of sexual harassment by Peterson, a female correctional officer employed by the defendant county's sheriff's department.⁷⁶ Peterson alleged that she was subjected to repeated comments from her immediate supervisor, such as "she 'didn't have the right parts'" to do certain job-related tasks, that it was "too hard to train . . . ladies," and that "women were not needed . . . because they were lazy."⁷⁷ However, given the fact that Peterson's sexual harassment and discrimination claims were based primarily on gender-biased behaviors in the workplace, the Eighth Circuit found her claim insufficient to establish a hostile work environment.⁷⁸ Quoting previous Supreme Court analysis, the Eighth Circuit found that "mere offensive utterance[s]" in the form of "abusive language" or "gender-related jokes" did not amount to sexually discriminatory treatment.⁷⁹

Similarly, in 2003, the Eighth Circuit heard *Alagna v. Smithville R-II*,⁸⁰ involving an action by a former school district employee against the school district, asserting hostile work environment sexual harassment by an emotionally troubled co-worker.⁸¹ Alagna's fear of

75. *Peterson v. Scott County*, 406 F.3d 515 (8th Cir. 2005).

76. *Id.* at 519.

77. *Id.* at 519–20.

78. *Id.* at 523–24.

79. *Id.* at 524 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998)).

80. *Alagna v. Smithville R-II*, 324 F.3d 975 (8th Cir. 2003).

81. *Id.* at 975. Frequently, the co-worker entered Alagna's office to discuss "his failed relationships with other women, his relationship with his wife, and other intimate details of his personal life." *Id.* at 977. He regularly waited for Alagna outside of her office, and he would

her co-worker's conduct "led her to work with her door locked, stop eating in the cafeteria, avoid the hallways when possible, and carry pepper spray."⁸² The Eighth Circuit, however, emphasized that Alagna's co-worker "never discussed sexual activities . . . [and] never sexually propositioned her"⁸³ In finding that the co-worker's behavior was not "sufficiently severe or pervasive to satisfy the high threshold for actionable harm," the Court noted that the "absence of any sexual advances on his part" was indicative that he was not a "sexual predator."⁸⁴

On the contrary, in 2004 the Eighth Circuit decided *Baker v. John Morrell & Co.*,⁸⁵ holding that a former employee of the defendant meat-packing plant had alleged facts sufficient for claiming hostile work environment sexual harassment.⁸⁶ Here, Baker was subject to a co-worker "rub[bing] up against [her] . . . grabbing her, and pulling her into him."⁸⁷ Baker testified her co-worker "'would say something or yell or make a comment and then he would take his hands and grind his groin area' while he was right beside her."⁸⁸

On her claim for hostile work environment, the court found this to be a sufficient claim due to the "pervasive sexual innuendo and repetitive offensive touching."⁸⁹ The court drew its conclusions for

touch her arm and tell her that he "loved her" and that she was "very special." *Id.* He also repeatedly telephoned Alagna at her home to discuss feelings of inadequacy and isolation; and on one occasion, placed "romance novels" in her mailbox in the faculty lounge. *Id.*

82. *Id.* at 978.

83. *Id.* at 977. Alagna was not the only target of this inappropriate conduct. Several female members of the faculty and student body reported that Yates also invaded their personal space and told them that he loved them. *Id.* at 979. Female students requested to have their classroom assignments changed to avoid interacting with him. *Id.*

84. *Id.* at 980.

85. *Baker v. John Morrell & Co.*, 382 F.3d 816 (8th Cir. 2004).

86. *Id.* at 829.

87. *Id.* at 820. The opinion states that another former employee of the defendant left because of sexual harassment, and she stated as the reason for her leaving the defendant's position on the "frequent lewd behavior toward women." *Id.*

88. *Id.* at 822. On one particular instance, "Eichmann intentionally rubbed up against Baker's buttocks [and] . . . 'had his arms out . . . with a big smile on his face.'" *Id.* at 825. Such repeated incidents caused Baker extreme anxiety. She visited with a psychiatrist who "diagnosed her with major depressive disorder, . . . post traumatic stress disorder and panic disorder." *Id.* at 826.

89. *Id.* at 828. Here, the court cites several Eighth Circuit cases that found for the plaintiff on a hostile work environment claim given the sexuality of the offensive behavior. *Id.*; see *Howard v. Burns Bros.*, 149 F.3d 835, 838 (8th Cir. 1998) (describing a co-employee constantly

the plaintiff based primarily on the fact that the “sexual nature of the harassment” was well known to the defendant.⁹⁰

Similarly, in the 2001 case of *Beard v. Flying J, Inc.*,⁹¹ the plaintiff alleged several acts of unwanted sexual contact by her immediate supervisor.⁹² Beard, employed as an assistant manager at the defendant restaurant, alleged that her supervisor sexually harassed her by means of “frequently brush[ing] his body against her breasts, [and] once rubbed a pair of cooking tongs across her breasts.” On another occasion he “pointed to his groin in her presence and in the presence of a male employee and stated that he would ‘show them some experience.’”⁹³ Based on the sexually improper conduct, the court concluded that because Beard had been subject to occasions “in which her breasts had been touched,” that a “reasonable person could find that this was an environment sufficiently hostile to affect Ms. Beard’s working conditions.”⁹⁴ Thus the plaintiff presented “sufficient evidence to create a submissible case of sex discrimination.”⁹⁵

II. ANALYSIS

Courts are now faced with the task of deciphering the Supreme Court’s framework for determining what sexually harassing conduct constitutes a hostile work environment. The outcome relies heavily upon fact, yet the Supreme Court has failed to provide bright-line standards against which to assess whether repeated egregious conduct rises to the level of “severe or pervasive.” As a result, lower courts are forced to presume that conduct which is sexually harassing and conduct which is harassing because of sex are two disconnected judicial doctrines. The upshot of this phenomenon is that a woman who does not experience sexually explicit behavior in the workplace

making sexual innuendos, brushing up against plaintiff, and telling lewd jokes with gestures).

90. *Baker*, 382 F.3d at 829.

91. *Beard v. Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001).

92. *Id.* at 797.

93. *Id.* Five other female employees of defendant testified to having been subject to similar sexually inappropriate conduct. *Id.*

94. *Id.* at 798.

95. *Id.*

has great difficulty prevailing on a claim of non-sexualized sex harassment.⁹⁶ As the doctrine has evolved, sexual conduct has become nearly an essential element in a claim for sexual harassment, not just one possible ingredient.⁹⁷ By accentuating sexual abuse, however, the law leaves without remedy those suffering other prevalent forms of gender-based discrimination.

A. *Where the EEOC Went Wrong*

Since the legislative intent of Title VII clearly states that the EEOC should develop guidelines to help determine the scope of Title VII,⁹⁸ courts generally look to the EEOC Guidelines to determine the standards for a viable sexual harassment claim.⁹⁹ The EEOC's focus on sexual harassment and silence with regard to discriminatory conduct based on gender indicates its policy to treat sexual harassment and gender harassment separately. Although offering specific guidelines for determining what constitutes sexual harassment, the agency offers no guiding principles for gender harassment (discrimination on the basis of sex). Other than the broad proscription that workplaces cannot discriminate in employment actions based on one's gender,¹⁰⁰ the EEOC gives very little guidance for its application.

Consequently, the EEOC's early interpretation of a sexually hostile work environment as "unwelcome sexual . . . conduct [that] unreasonably interfere[s] with an individual's work performance or creat[es] an intimidating, hostile, or offensive working environment,"¹⁰¹ juxtaposed with its differentiation of "sexual

96. Schultz, *supra* note 10, at 1710. "To a large extent, the courts have restricted the conception of hostile work environment harassment to male-female sexual advances and other explicitly sexualized actions perceived to be driven by sexual designs." *Id.*

97. See Colker, *supra* note 49, at 208–10.

98. See *supra* note 21 and accompanying text.

99. See *supra* notes 22–23 and accompanying text.

100. See generally PROGRAM MANUAL. The EEOC merely gives broad examples such as the illegality of labeling "men's jobs" and "women's jobs" as well as the refusal to hire an individual based on stereotyped characterizations of the sexes. Furthermore, the EEOC material explains that state laws and regulations that discriminate on the basis of sex conflict and are superseded by the Civil Rights Act of 1964. The guidelines do not define specific conduct or instances which give rise to actionable gender discrimination.

101. 29 C.F.R. § 1604.11(a) (2006).

harassment” within the concept of sex discrimination, sparked a number of district court cases to distinguish sexual harassment from non-sexual, gender-discriminatory conduct.¹⁰² These cases consistently take note of the EEOC Guidelines’ focus on the sexual aspects of sex discrimination as an “administrative interpretation of [Title VII] by the enforcing agency.”¹⁰³ These opinions indicate that “while not controlling upon the courts by reasons of their authority, [the EEOC Guidelines] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”¹⁰⁴

B. Where the Supreme Court Went Wrong

As noted above, in the seven-year period between 1986 and 1993 the Supreme Court developed the modern sexual harassment doctrine.¹⁰⁵ The birth of the hostile work environment concept in the Supreme Court’s first sexual harassment decision, *Meritor*, opened the door to sexual harassment claims falling short of tangible adverse employment actions.¹⁰⁶ Just three years later, in *Price Waterhouse*, the Court evaluated alleged employment discrimination based on archaic gender stereotyping.¹⁰⁷ There, however, sex-based

102. See *Turley v. Union Carbide Corp.*, 618 F. Supp. 1438, 1442 (S.D. W. Va. 1985) (granting summary judgment for the defendant in a hostile work environment claim by a brought by female employee alleging that her employer harassed her by “picking on [her] all the time” and treating her less favorably than her male co-workers). Although not bound by the EEOC Guidelines, the *Turley* court determined that “the plaintiff was not subjected to harassment of a sexual nature” based on the EEOC Guidelines defining harassment as “unwelcome sexual advances . . . and other . . . conduct of a sexual nature.” *Id.* at 1441; see also *Hosemann v. Technical Materials, Inc.*, 554 F. Supp. 659, 666–67 (D.R.I. 1982) (dismissing the plaintiff’s claim alleging discrimination because her co-workers were talking in a discriminatory manner about females, and her supervisors awarded her significantly less disability leave for an injury as compared with the leave granted to injured male employees; the court stated that she had not alleged sexual harassment as the term had come to be defined).

103. Levy, *supra* note 49, at 288.

104. *Id.* (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)).

105. See *supra* Part I.C.

106. See *supra* note 32 and accompanying text. Emerging from *Meritor* was a legal remedy for victims of aggressive sexual conduct in the workplace that, while not affecting a term or condition of employment, still warrants Title VII protection. See *supra* notes 27–33 and accompanying text.

107. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988); see *supra* notes 34–37 and accompanying text.

discrimination resulted in the plaintiff's failure to be promoted, and, thus, her claim was based on an adverse employment action warranting Title VII protection from disparate treatment.¹⁰⁸ Based on the facts, however, one can assume that Hopkins was the victim of "severe and pervasive" conduct because of her sex throughout her tenure at Price Waterhouse. Yet, the presence of a deliberate adverse employment action on the basis of her sex made her claim ripe for analysis under the disparate impact doctrine.¹⁰⁹

Interestingly, *Meritor* and *Price Waterhouse*, two of the three significant Supreme Court cases dealing with Title VII sex discrimination, create an apparent disconnect between sexualized and non-sexualized conduct in the sexual harassment claim. The underlying difference in legal analysis between *Meritor* and *Price Waterhouse* was the presence of an adverse employment action in the latter because adverse employment actions bring disparate impact claims.¹¹⁰ Although the hostile work environment doctrine evolved with the very purpose of creating a remedy for victims of sex discrimination who did not suffer a tangible employment action,¹¹¹ the message sent by the decisions in these two cases is that there is a different remedy for victims of egregious sex-based conduct in the workplace and those who experience discrimination on account of their sex.

In *Harris*, the Supreme Court had the opportunity to consider an alleged hostile work environment based on facts demonstrating both sexually explicit and non-sexually explicit sex discrimination.¹¹² Following the pattern of its recent analyses in *Meritor* and *Price Waterhouse*, the *Harris* Court disaggregated the claims based on sexual versus non-sexual conduct: claims of hostile work environment with respect to allegations involving behavior inherently sexual in nature and claims of disparate treatment for allegations based on sex.¹¹³ Clearly, *Harris* provided the Supreme Court the

108. *Price Waterhouse*, 490 U.S. at 228; see *supra* note 38 and accompanying text.

109. *Id.*

110. *Price Waterhouse*, 490 U.S. at 239.

111. See *Meritor*, 477 U.S. at 64; see also *supra* notes 32–33 and accompanying text.

112. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993); see also *supra* notes 45–46 and accompanying text.

113. See *supra* notes 49–51 and accompanying text.

“opportunity to transcend this unduly restrictive focus [and] expand the concept of hostile work environment harassment to include all conduct that is rooted in gender-based expectations about work roles”¹¹⁴ Instead, what resulted is a Supreme Court failure to perceive the correlation between a sexualized hostile work environment and a sex-discriminatory hostile work environment.¹¹⁵

This disconnect begs the question: If a sex disparate treatment claim requires an adverse, tangible employment action, and the hostile work environment claim need not allege tangible employment actions, yet requires sexual conduct as the underlying element, then what is the judicial remedy for an employee who does not experience a direct adverse employment action, yet labors in a workplace severely hostile and abusive to her because of her sex?

III. PROPOSAL

Whether a workplace is polluted with sexually based egregious and abusive harassment, gender-based aggression, or a combination of the two, the central issue under Title VII is whether an individual has been subjected to an abusive workplace indicative of sex discrimination. However, the employee suffering discrimination as a result of behavior intended to protect male hierarchy in the workplace faces an uphill battle for Title VII relief. This dichotomy is the result of the Supreme Court’s creation of ambiguity for the lower courts in interpreting the breadth of the judicially created hostile work environment claim, juxtaposed with the EEOC’s definition of the hostile work environment as blatantly sexual in nature. Together, these phenomena have left claims for abusive gender discrimination without a legal remedy.

The legislative intent of Title VII—to outlaw sex discrimination in employment—provides that an employee’s compensation, terms, conditions, or privileges of employment¹¹⁶ must not be provided in a sexually discriminatory manner. Title VII’s vision demands the creation of a hostile work environment cause of action encompassing

114. See Schultz, *supra* note 10, at 1712.

115. See *id.* at 1712–13.

116. 42 U.S.C. § 2000e-2(a)(1) (2000); see also *supra* notes 16–17 and accompanying text.

gender-motivated conduct that constructively alters an employee's terms of employment.¹¹⁷

The evolution of the sex discrimination claim, however, reveals an apparent disconnect between judicial interpretation and the legislative intent of Title VII. It is undeniable that when a supervisor or co-worker makes unwelcome sexual advances toward a member of the workplace, such action constitutes unlawful sexual harassment. However, where a woman experiences a workplace with a set of norms manifested by hostile and offensive, yet not sexually demeaning, behavior because of her gender, she should not be denied Title VII protection. To do so fails to recognize that the very purpose of Title VII is to protect her from such conduct.

It is socially injurious to leave the status of the hostile work environment doctrine in this under-inclusive state. Ideally, the Supreme Court could remedy this issue with a re-analysis of the hostile work environment to better clarify that "severe and pervasive" conduct results not only from discrimination that is sexual, but equally from discrimination because of sex.¹¹⁸ Yet, in view of the realities of judicial economy, it is doubtful that the Court will consider another hostile work environment claim in the near future.

Perhaps cognizant of the limitations of the judicial process, Congress charged the EEOC as the administrative body accountable for enforcing Title VII in America's workplaces.¹¹⁹ Although courts are not bound by the EEOC Guidelines, vagueness in the judicial evolution of the hostile work environment claim has resulted in courts relying on the EEOC to provide a strong frame of reference.

However, where the EEOC provides employers, employees, and courts with a comprehensive definition of a sexual harassment claim

117. See Chambers, *supra* note 38, at 1642 (stating that "disparate treatment, quid pro quo, and hostile work environment were once distinct causes of action that shared some resemblance," and they should still be considered variations on the same theme).

118. Note that the Court's majority "opinion in *Oncale*, iterating that same-sex harassment is sex discrimination if it occurs because of sex, fails to resolve it." Epstein, *supra* note 62, at 162. "If we could answer th[is] question definitively, we would go far toward implementing the vision of Title VII . . ." *Id.* Unquestionably, the allegations in *Oncale* were sexually aggressive in nature, which only further attached the notion of sexual conduct to the hostile work environment despite the Court's acknowledgement that harassing conduct does not have to be sexual in nature. See *supra* note 60 and accompanying text.

119. See *supra* note 21 and accompanying text.

in the hostile work environment context, the EEOC merely acknowledges the existence of a Title VII claim for “discrimination because of sex.”¹²⁰ In failing to define or characterize conduct that falls under the paradigm, the EEOC provides no guidance as to its application.

It is imperative that the EEOC regulations mirror the legislative intent of Title VII. Therefore, the EEOC should recognize the under-inclusive state of workplace sex discrimination law and refine its Guidelines in response. Thus, the Guidelines should read:

Title VII’s prohibition of employment discrimination on the basis of sex includes: (1) sexual harassment in the form of unwelcome sexual conduct that unreasonably interferes with an individual’s work performance or creates an intimidating, hostile, or offensive work environment; or (2) sexual discrimination in the form of abusive verbal conduct or employment actions that negatively effect working conditions and create a hostile and offensive work environment on the basis of gender.

Furthermore, the Guidelines defining hostile work environment should reflect such and be refined to read:

A hostile work environment claim is brought when discriminatory conduct as defined in either parts (1) or (2) (or both) of § 1604.11 interferes with an individual’s work performance or creates an intimidating, hostile, or offensive work environment falling short of an adverse employment action.

As the administrative body empowered to act, it is imperative that the EEOC carry out the intent of Title VII with a close inspection of the legislative mandate. The statute clearly dictates the purpose to defend “sex” as a protected class in the workplace and to guard against employment actions offensive and adverse to that mission.

120. 29 C.F.R. § 1604 (2006); *see supra* notes 24–26 and accompanying text for the current definition of sexual harassment in the EEOC Guidelines.

CONCLUSION

By ignoring the disconnect illustrated above, and rationalizing sexual harassment based on societal views of sexuality, courts and the EEOC are ignoring Title VII's mandate that employers provide a workplace free from offensive behavior.¹²¹ Title VII is the legislative symbol of the struggle for equal employment opportunities for females in the workplace, not merely a legislative design to magically abolish the sexual mores wedged into our society.

According to the current state of the law, men should keep their hands off of women in the workplace, refrain from sexual comments or expressions, and any attempt at sexual relations between co-workers or subordinates should be deemed inappropriately hostile. "Workplace sexual conduct may injure women because it objectifies them as sexual objects" and "assumes that all men conform to and join into a kind of sexualized . . . masculine culture."¹²² Yet, the over-determination of the hostile work environment claim as a legal recourse for workplace sexual desires essentially misstates the "wrong" of sexual harassment. Far more detrimental is the fact that it trivializes the nature of the harm at issue in sex discrimination cases generally.

Such interpretation of the hostile work environment is therefore harmful to anti-gender discrimination laws, and must be carefully scrutinized for consistency with the recognized purpose of Title VII, rather than hastily interpreted as a basis on which to regulate the discomforts of sex in the workplace.

121. Roy, *supra* note 7, at 278.

122. Franke, *supra* note 9, at 759.