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How the "Equal Opportunity" Sexual Harasser Discriminates on the Basis of Gender Under Title VII

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NOTES

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I. INTRODUCTION

Americans commonly know that federal law prohibits workplace sexual harassment. Many might be surprised to find, however, that generally courts have not found liability in the case of the so-called "equal opportunity" harasser.¹ A simple hypothetical will explain the nature of this peculiar species of harasser. Suppose Ken and Carol are both employed at Happyfun, Inc. as manufacturers of reindeer Christmas ornaments under the direction of their supervisor, Fred. Fred corners each of them daily and asks, "How about some sex today?" No doubt he is sexually harassing both Ken and Carol. If they sue for relief, however, a judge would very likely tell them that because Fred harasses both a man and a woman there is no sex "discrimination" and, therefore, Title VII does not provide a remedy for their grievances.

In 2000, the Seventh Circuit squarely addressed and upheld this doctrine in *Holman v. Indiana*,² a case that has received considerable attention in academic literature and case reviews for its stark denial of relief to victims of equal opportunity harassment.³ The

1. Related to "equal opportunity harassment" are the "hisexual harasser" and "bisexual harassment." The "hisexual harasser" is one who, having harassed members of only one gender, defends against a Title VII suit on the basis of his bisexuality alone, without arguing that he actually harassed both genders. "Bisexual harassment," on the other hand, is sexual harassment by a bisexual person directed towards members of both genders. In contrast, "equal opportunity harassment" is the creation of a hostile work environment for both genders (which may or may not involve actual sexual propositions or conduct). This Note primarily addresses equal opportunity harassment, though it does relate also to bisexual harassment in that its primary focus is on sexual propositions or conduct.

2. Discussed *infra* at Part II.B.3.

3. *Holman v. Indiana*, 211 F.3d 399, 405 (7th Cir. 2000). See Robert B. Fitzpatrick, *Review of the Supreme Court's Employment Cases (2000-2001 Term) and Emerging Issues*, in CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 85 (ALI-ABA Course of Study, July 26-28, 2001) ("In *Holman* . . . the court held that harassment did not occur because of sex where a husband and wife were sexually harassed by the same supervisor." In so holding, the court said: "Title VII does not cover the 'equal opportunity' or 'bisexual' harasser . . . because such a person is not discriminating on the basis of sex."); Penny N. Kahan & Lori L. Deem, *Current Developments in Employment Law: Sex and Race Harassment Update*, in 30TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, 1229, 1291-92 (PLI Litigation and Administrative Practice Course Handbook Series No. H0-00AP, 2001) ("*Holman* . . . upholding dismissal of complaint by married couple who claimed that they were both sexually harassed by the same supervisor because plaintiffs

responses to *Holman* are divergent, and those who oppose the result have taken a variety of tacks in arguing against the court's decision. The larger issue *Holman* raises has a much longer history than the case itself, and has been a matter of academic debate since the 1970s.⁴

Surely, most judges would not particularly want to deny relief to victims of equal opportunity harassment. But, while the Supreme Court has never held that Title VII does not prohibit equal opportunity harassment, lower courts generally have not found a proper theory of discrimination on which to base liability for equal opportunity harassment. This Note provides such a theory. The theory uses disparate treatment, disparate impact,⁵ and expanded standing

could not show that one gender was subjected to a different working environment than the other gender."); THEODORA R. LEE, 30TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 130-31 (PLI Litigation and Administrative Practice Course Handbook Series No. H0-00AP, 2001); Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 574 n.105 (2001) (noting that *Holman* interprets *Oncale* to require differential treatment, not merely sex-based treatment); Kiren Dosanjh, *Calling on Oncale: Federal Courts' Post-Oncale Approach to the "Evidentiary Routes" to Discriminatory Intent in Title VII Same-Sex Harassment Claims*, 33 URB. LAW. 547, 558-59 (2001) (discussing *Holman* in relation to plaintiffs' use of evidence of comparative treatment to show discriminatory intent); Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 889 (2000) (noting that "several insensitive lower courts have read *Oncale*" to require differential treatment between women and men and have denied relief to victims of equal opportunity sexual harassment); Michael P. Maslanka & Veronica A. Cuadra, *Sex Discrimination Myths and Truths*, 64 TEX. B. J. 148, 149 (2001) (noting that egregious sexual harassment does not always violate the law thanks to the *Holman* precedent); Shylah Miles, Note, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 604-05 (2001) (arguing that to eliminate the equal opportunity harasser defense courts should resolve Title VII claims through an analysis individualized to the plaintiff, rather than comparing the plaintiff to other employees in the same workplace).

4. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 203 (1979):

[I]f a sexual condition of employment were imposed equally upon both women and men by the same employer, the practice would no longer constitute sex discrimination because it would not be properly based on the gender difference. Title VII, as interpreted, does not concern itself with abuses of human sexuality, only with impermissible differential consequences of the gender distinction in employment . . . [but that] [a]rguably a sexual requirement placed on a man and a woman would have a [disparate impact] [.]

Jennifer A. Drobac, *The Oncale Opinion: A Pansexual Response*, 30 MCGEORGE L. REV. 1269, 1278-79 (1999) (agreeing with courts that have found that equal opportunity harassment discriminates against both men and women); Margaret S. Stockdale et al., *The Sexual Harrassment of Men: Evidence for a Broader Theory of Sexual Harrassment and Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y L. 630, 630-31, 661 (1999) (exploring psychological differences between harassment of men and harassment of women and arguing that sexually harassing men does not cure the discriminatory harm inflicted on female victims).

5. Disparate treatment occurs where supervisors treat one class of employees differently than they treat another. For instance, a policy of paying male employees at a higher rate than female employees would be an example of disparate treatment. In contrast, disparate impact occurs where a uniform policy affects one class of employees differently from another. For

concepts to provide a framework for finding sex discrimination in the full range of equal opportunity harassment cases and eliminate the equal opportunity exception from Title VII jurisprudence.

Unlike some previously proposed theories, which seek to fundamentally alter sexual harassment analysis from the traditional method of analyzing the comparative burdens experienced by male and female employees to an entirely different method of analysis that is more easily conducive to providing full protection from sexual harassment, this Note seeks only to stretch the existing framework in order to show that it already has the capacity to prohibit equal opportunity harassment. This Note suggests that by analyzing equal opportunity harassment through the lens of disparate impact and by tightly and concretely analyzing the impacts that harassment victims suffer, courts will tend to find that equal opportunity harassment can result in qualitatively different disparate burdens on both male and female victims. In other words, equal opportunity harassment can harm men in ways that it does not harm women and women in ways that it does not harm men. Thus, it exposes each to "disadvantageous terms or conditions of employment to which the other gender is not exposed."⁶

This Note proceeds to outline this theory in five parts. Part I has sought to explain the issue and to imply its attendant problems. Part II will provide a basic case history of both hostile environment sexual harassment and the equal opportunity harassment exception and will begin to highlight how these cases can allow for closing the exception. Part III will discuss previous scholarly arguments regarding the appropriateness of and potential for closing the exception. Finally, Part IV outlines a new disparate impact theory for prohibiting equal opportunity sexual harassment.

instance, a uniform hiring exam that women consistently outperform men on would have a disparate impact on the men.

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

II. LEGAL BACKGROUND

A. History of Hostile Environment Sexual Harassment as Title VII Sex Discrimination

1. Title VII Generally

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁷ As it relates to sexual harassment, this prohibition can be usefully broken down into four elements: (1) discrimination in (2) the conditions of employment (3) because of (4) sex. An employer "discriminates" when he either treats members of a class of employees differently from members of another class (disparate treatment) or when an employment practice has a different effect on members of one class of employees than on members of other classes (disparate impact).⁸ Harassment adversely affects the "conditions" of employment when a reasonable person of the victim's gender would find the harassment hostile or abusive.⁹ "Because" means that "but for" the protected characteristic, the victim would not have suffered the complained-of injury.¹⁰ "Sex" means gender, not sexual conduct.¹¹

7. 42 U.S.C. § 2000e-2(a)(1) (1964).

8. Civil Rights Act of 1991, Pub. L. No. 102-166, § 703(m) (1991) (codified as amended at 42 U.S.C. § 2000e-2(k) (1991)).

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

10. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring) ("[A] substantive violation [of Title VII] only occurs where consideration of an illegitimate criteria is the 'but for' cause of an adverse employment action."). The Court explained the "but for" test: "In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that the factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way." *Id.* at 240.

11. *Oncale*, 523 U.S. at 80 ("We have never held that workplace harassment is automatically discrimination because of sex merely because the words used have sexual content or connotations. 'The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'") (quoting *Harris*, 510 U.S. at 25) (Ginsburg, J., concurring). In the past there was confusion over this, largely because of the minimal legislative history regarding the word "sex" in Title VII. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986); *Ellison v. Brady*, 924 F.2d 872, 875-76 (1991). This lack of guidance was largely because "sex" was added to the list of protected characteristics in Title VII in a last-ditch effort to stop passage of the Civil Rights Act in 1964. See *Meritor*, 477 U.S. at 63-64; see also 110 CONG. REC. 2577 (1964); WILLIAM N. ESKRIDGE, JR. AND PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 15 (1995); Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment under Title*

2. Legal History of Hostile Environment Sexual Harassment

Hostile environment sexual harassment was not firmly established as a Title VII violation until the Supreme Court's 1986 decision in *Meritor Savings Bank v. Vinson*.¹² In *Meritor*, Ms. Vinson sued former employer Meritor Savings Bank and her supervisor for sexual harassment, alleging a violation of Title VII.¹³ She contended that during her four-year term of employment, her supervisor, Mr. Taylor, had constantly subjected her to sexual harassment.¹⁴ According to Vinson, the harassment began during her initial training when Taylor invited her to dinner and then suggested during the meal that they have sex.¹⁵ She initially refused, but eventually succumbed for fear of being fired.¹⁶ Thereafter, Taylor repeatedly demanded sex from her, usually at the bank, and ultimately had sex with her forty to fifty times.¹⁷ Some of these sexual episodes were rapes.¹⁸ Taylor also fondled her in front of other employees, followed her into the women's restroom when she went in there alone, and exposed himself to her.¹⁹

At trial, the district court found no Title VII liability on the theory that the relationship was voluntary and had nothing to do with her continued employment, advancement, or promotions at the bank.²⁰ On appeal, however, the U.S. Court of Appeals for the District of Columbia reversed on a hostile environment theory of sexual harassment.²¹ The Supreme Court granted certiorari to resolve confusion over whether hostile environment sexual harassment was actionable under Title VII.²² The Court held that unwelcome sexual

VII, 20 VT. L. REV. 55, 56-57 (1995); Sandra Levitsky, Note, *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1014 (1996).

12. 477 U.S. 57 (1986). Previously, only "quid pro quo" sexual harassment was uniformly recognized as a sexual harassment cause of action. Quid pro quo sexual harassment occurs when a supervisor/employer makes decisions on raises, promotions, demotions, hiring, firing, etc. based on an employees' submission to, rejection of, or participation in sex. 29 C.F.R. § 1604.11(a)(1) (1995); *Henson v. Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).

13. *Meritor Sav. Bank*, 477 U.S. at 59.

14. *Id.* at 60.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 61.

21. *Id.* at 62-63.

22. *Id.* at 63.

advances, requests, and other verbal or physical sexual conduct constitute prohibited sexual harassment where such conduct has the purpose or effect of creating an intimidating, hostile, or offensive work environment.²³ The Court further clarified that not all conduct characterizable as harassment affects a term, condition, or privilege of employment within the meaning of Title VII; actionable conduct must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."²⁴

Subsequent interpretation of the Court's holding in *Meritor* crystallized the elements of the hostile environment cause of action. A plaintiff must prove: (1) that she was subjected to unwelcome sexual harassment, (2) that the harassment was based on sex, and (3) that the harassment was sufficiently severe or pervasive to create an abusive work environment, altering the terms or conditions of employment.²⁵

Seven years later, the Court defined when harassment is sufficiently severe or pervasive to abusively alter the victim's conditions of employment in *Harris v. Forklift Systems*, holding that harassing conduct disadvantageously alters the victim's conditions of employment if a *reasonable person* subjected to the harassment would perceive it as hostile or abusive.²⁶ Before *Harris* there was some confusion as to how much abuse was required to affect a victim's conditions of employment; the Court adopted the reasonable person standard to resolve the following facts.²⁷ Ms. Harris worked as a manager at Forklift Systems, Inc.²⁸ She alleged that Forklift's President, Mr. Hardy, harassed her by calling her a "dumb ass woman" and telling her several times in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager."²⁹ He publicly suggested that they go to the

23. *Id.* at 65 (quoting 29 CFR §§ 1604.11(a), (a)(3) (1985)).

24. *Id.* at 67.

25. *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557 (11th Cir. 1987). Technically, the plaintiff must also prove membership in a protected class, but since both the male and female genders are now protected classes, there is effectively nothing to prove in that context. *Id.* See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

26. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). The Court also held that a victim must *subjectively* perceive the harassment as hostile or abusive. *Id.* at 21-22. Practically speaking, however, it seems very unlikely that such a requirement would ever affect a plaintiff who makes the effort to sue.

27. *Id.* at 20.

28. *Id.* at 19.

29. *Id.*

Holiday Inn “to negotiate [her] raise.”³⁰ He also forced Harris and other female employees to pull coins from his pants pockets, threw objects on the ground and made them pick them up, and made sexual innuendos about their clothing.³¹ In one instance, when Harris was dealing with a customer, Hardy publicly asked her, “What did you do, promise the guy . . . some [sex] Saturday night?”³² Harris sued, alleging that the sexual harassment violated her Title VII rights. At trial, the district court found that although this array of harassment would offend the reasonable woman and that it was a “close case,” it was not sufficiently abusive to violate Title VII because Hardy had not seriously damaged Harris’ psychological well-being.³³ The Sixth Circuit affirmed in a brief unpublished opinion.³⁴ The Supreme Court reversed, however, finding that tangible psychological harm is not necessary for Title VII liability and that the appropriate standard is whether a reasonable person would consider the harassment hostile or abusive.³⁵ The Court emphasized that the “mere utterance of an . . . epithet which engenders offensive feelings in an employee” would not suffice.³⁶ The Court further characterized its decision as taking a middle path between making “merely offensive” conduct actionable and requiring a tangible psychological injury.³⁷

The *Harris* Court’s “reasonable person” is a *gender-specific* reasonable person who evaluates the offensiveness of conduct from the perspective of a reasonable member of the plaintiff’s gender. For example, this means that when a female victim alleges sexual harassment, a court asks, “Would a reasonable woman experience the complained-of conduct as hostile or abusive?” While *Harris* itself did not specifically address whether the reasonable person is gender-specific,³⁸ a number of factors indicate that this is implicit. First, many circuits added gender-specific meaning to the reasonable person standard before *Harris* was decided. In *Ellison v. Brady*, the Ninth Circuit adopted the “reasonable woman” standard because of concerns that a gender-neutral reasonable person standard tends to be male-

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 20.

34. *Id.*

35. *Id.* at 22 (“[T]itle VII comes into play before the harassing conduct leads to a nervous breakdown.”).

36. *Id.* at 20-21.

37. *Id.*

38. *Id.* at 20-23.

biased and could reinforce current male-biased notions of acceptable conduct.³⁹ Prior to the Ninth Circuit, the First,⁴⁰ Third,⁴¹ Sixth,⁴² and Seventh Circuits,⁴³ in addition to the Equal Employment Opportunity Commission ("EEOC"),⁴⁴ had already adopted the gender-specific reasonable person standard. Moreover, courts continued to use a gender-specific reasonable person standard after *Harris*.⁴⁵ Further, the *Harris* Court was directly confronted with the gender-specific reasonable person standard and did not deny its validity.⁴⁶ The district court in *Harris* applied the gender-specific reasonable person standard, finding that Harris' supervisor's conduct would offend the reasonable woman, but that he was not liable because she did not suffer tangible psychological harm.⁴⁷ In analyzing the district court's reasoning, the Supreme Court only found error regarding the district court's requirement of tangible psychological injury in order to find a Title VII violation.⁴⁸ The Court did not find error in the district court's application of the "reasonable woman" test, nor did the Court discuss any difference between "reasonable person" and "reasonable woman."⁴⁹ The Court's silence on this issue when faced with it as part of the district court's opinion, in the wake of widespread adoption by many circuit courts and the EEOC, suggests assent to the use of the reasonable woman standard. Finally, regardless of how one interprets

39. 924 F.2d 872, 878-81 (9th Cir. 1991):

In evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the reasonable victim. If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy . . . [w]e believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.

40. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) ("A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive.").

41. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3rd Cir. 1990) (sexual harassment must detrimentally affect a reasonable person of the same sex as the victim).

42. *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (adopting the "reasonable woman" standard).

43. *King v. Bd. of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990).

44. EEOC Compliance Manual § 615, ¶ 3112, C at 3242 (1988) (noting that courts "should consider the victim's perspective and not stereotyped notions of acceptable behavior").

45. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994).

46. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993).

47. *Id.*

48. *Id.* at 22.

49. *Id.*

Harris, when the Supreme Court recently ruled on same-sex sexual harassment in *Oncale v. Sundowner Offshore Services*, it characterized the reasonable person as having the plaintiff's perspective in light of "all the circumstances."⁵⁰ Because the plaintiff's gender is one of the circumstances to be considered, *Oncale* seems to require that the reasonable person share the plaintiff's gender.

The Supreme Court resolved a major aspect of sexual harassment jurisprudence in *Oncale*, holding that same-sex sexual harassment can constitute Title VII sex discrimination.⁵¹ Joseph Oncale worked as a roustabout for Sundowner Offshore Services, Inc., on an oil platform as a member of an eight-man crew.⁵² Three members of the crew, John Lyons, Danny Pippen, and Brandon Johnson, forcibly subjected Oncale to sex-related, humiliating actions in the presence of the rest of the crew.⁵³ In one instance, Pippen and Johnson restrained Oncale while Lyons placed his penis on Oncale's neck, and on another occasion, Lyons placed his penis on Oncale's arm.⁵⁴ Pippen and Lyons physically assaulted Oncale in a sexual manner and Lyons threatened him with rape.⁵⁵ When Oncale complained to Sundowner's Safety Compliance Clerk, Valent Hohen, Hohen told Oncale that Lyons and Pippen "picked [on] [Hohen] all the time too, and called him a [faggot]."⁵⁶

The district court granted summary judgment to Sundowner, reasoning that under Fifth Circuit precedent, Title VII was not considered to prohibit same-sex harassment.⁵⁷ The circuit court affirmed the district court's decision.⁵⁸ The Supreme Court reversed, holding that same-sex harassment can violate Title VII.⁵⁹ Finding that Oncale had a legitimate claim against Sundowner, Justice Scalia's majority opinion stated, "[W]e hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely

50. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

51. *Id.* at 82.

52. *Id.* at 77.

53. *Id.*

54. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118 (5th Cir. 1996).

55. *Oncale*, 523 U.S. at 77.

56. *Id.* It is ambiguous from the Court's recitation of the facts whether Hohen was called this name suggesting homosexuality or whether he called Oncale a name suggesting homosexuality. It seems, however, that in this context it is more likely that Hohen was called the "name." In either case, it is clear that the aggressors were probably homophobes.

57. *Id.* at 77.

58. *Id.*

59. *Id.* at 79 ("We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.").

because the plaintiff and the defendant . . . are of the same sex."⁶⁰ Justice Scalia went on to clarify that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."⁶¹

B. History of the Equal Opportunity Harasser Exception

1. Pre-*Meritor* Cases Indicating that Equal Opportunity Harassment Does Not Violate Title VII

The equal opportunity harasser's exemption from Title VII liability has early origins in Title VII jurisprudence. The issue came up repeatedly, though entirely in dicta, during the formative period of sexual harassment jurisprudence.⁶² First, in *Barnes v. Costle*, Judge Robinson distinguished the situation of an employer who sexually harasses members of one gender, which that court found to be actionable, from that of the bisexual employer making "egalitarian" sexual demands.⁶³ In pure dicta, the U.S. Court of Appeals for the District of Columbia stated, "In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."⁶⁴ It should be noted that the *Barnes* court did not involve bisexual harassment at all. Rather, Ms. Barnes alleged that her supervisor, Mr. Costle, repeatedly asked her out, repeatedly made sexual remarks to her, and repeatedly suggested to her that if she had a sexual affair with him her employment status would be enhanced.⁶⁵ Thus, Judge Robinson's dicta regarding the legality of bisexual harassment was pure speculation with little relevance to the resolution of the case before the court.

The D.C. Circuit reiterated Judge Robinson's bisexual harassment exception in *Bundy v. Jackson* when the court articulated the following but-for test for sexual discrimination: "[W]ould the complaining employee have suffered the harassment had he or she

60. *Id.* at 79.

61. *Id.* at 80.

62. *Vinson v. Taylor*, 760 F.2d 1330, 1332-33 (D.C. Cir. 1985) (Bork, J., dissenting); *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

63. 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

64. *Id.*

65. *Id.* at 985.

been of a different gender?"⁶⁶ The court indicated, in dicta, that sexual harassment would be sex discrimination except in the case of a "*reductio ad absurdum* . . . where a bisexual supervisor harasses men and women alike."⁶⁷ In that case, the plaintiff, Ms. Bundy claimed that supervisors Burton, Gainey, and Swain had all made repeated sexual overtures to her; Swain even told her, "[A]ny man in his right mind would want to rape you."⁶⁸ The *Bundy* court found that this male-on-female sexual harassment constituted sex discrimination in violation of Title VII. Because there was no bisexual harassment at issue in the case, the court's dicta excepting bisexual harassment from liability should be treated as mere theoretical speculation.

A few years later in *Vinson v. Taylor*, Judge Bork took *reductio ad absurdum*⁶⁹ literally, arguing in his dissent that because the bisexual harasser would escape Title VII liability, Congress must have intended no prohibition on sexual harassment whatsoever under Title VII.⁷⁰ Bork argued that if Title VII bars sexual harassment, then it is absurd for the statute to not apply in the case of the equal opportunity harasser—because the harasser would escape liability simply by virtue of harassing *more*—and that, therefore, because it results in this absurd corollary, the proposition that sexual harassment violates Title VII must be false.⁷¹

In *Henson v. Dundee*, the Eleventh Circuit joined the D.C. Circuit in finding that hostile environment sexual harassment can

66. 641 F.2d 934, 942 n.7 (D.C. Cir. 1981).

67. *Id.*

68. *Id.* at 940.

69. A *reductio ad absurdum*, in the strict sense, is a logical tool used to prove the invalidity of a proposition. To use it, one assumes the *truth* of the proposition that one believes to be false. Then, through interaction with the established premises and conclusions, one shows that such an assumption results in absurdity, and thus, that the proposition in question must be false. For example, if one begins with the premises "A does not equal C" and "B equals C," then one method of proving that "A does not equal B" would be to first *assume* that "A equals B"; then, because "B equals C," so does "A equal C," except that the beginning premise was "A does not equal C." Thus, "A equals C" and "A does not equal C," which is absurd because A cannot both equal and not equal C. Hence, "A does not equal B." Judge Bork's use is not entirely proper. He found that including sexual harassment in sex discrimination results in absurdity because sexual harassment is not prohibited if conducted bisexually. *Vinson v. Taylor*, 760 F.2d 1330, 1332-33 (D.C. Cir. 1985) (Bork, J., dissenting) While this may feel absurd, however, it is not logically absurd; it makes good sense if one believes that Title VII is about discrimination (which all do) and that bisexual harassment is not discrimination (which most, erroneously, do). Thus, his conclusion that sex discrimination must not include sex harassment by virtue of *reductio ad absurdum* is based on fuzzy reasoning.

70. *Id.* at 1333 n.7 ("That bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender.").

71. *Id.* at 1331-33.

constitute sex discrimination, and, as did the D.C. Circuit, arguing in corresponding dicta that bisexual harassment is excluded from liability.⁷² Ms. Henson alleged that while she was employed as a dispatcher for the Dundee Police Department, Chief of Police Sellgren sexually harassed her by subjecting her and the only other female employee to "numerous harangues of demeaning sexual inquiries and vulgarities," by repeatedly requesting sex from her, and by preventing her from attending the police academy because of her refusals to have sex with him.⁷³ The Eleventh Circuit held that Henson properly stated a valid Title VII claim.⁷⁴ In resolving the question of whether hostile environment sexual harassment could violate Title VII, the court analyzed the issue at length. In so doing, the court indicated that bisexual harassment would not violate Title VII:⁷⁵ "[Where] a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers . . . the [victims] would have no remedy under Title VII."⁷⁶

2. Cases Confronting the Equal Opportunity Harassment Defense Using Analyses that Restrict its Scope

The Title VII exemption for equal opportunity harassment, to the extent that it has ever been established as "law," has survived into the twenty-first century.⁷⁷ The Ninth and Eighth Circuits, however, addressed the first cases that actually involved equal opportunity harassment, and each analyzed the issue in ways that drastically restricted the exception's scope.⁷⁸ In *Steiner v. Showboat Operating Company*, the Ninth Circuit Court of Appeals denied applicability of the defense.⁷⁹ In *Steiner*, Ms. Steiner, a floor person for a Showboat casino, sued Showboat alleging that her supervisor, Trenkle, had

72. 682 F.2d 897, 901-02, 904 (11th Cir. 1982).

73. *Id.* at 899-900.

74. *Id.* at 901-02.

75. *Id.* at 901-904.

76. *Id.* at 904.

77. *Holman v. Indiana*, 211 F.3d 399, 402-07 (7th Cir. 2000) (holding that as a matter of law neither of the plaintiffs has a claim for discrimination under Title VII where the complaint states that their supervisor sexually harassed both female and male plaintiffs in the same sexual manner); *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996) ("Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex.").

78. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994); *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264 (8th Cir. 1993); *Cbiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993).

79. *Steiner*, 25 F.3d at 1464.

abusively harassed her.⁸⁰ According to Steiner, Trenkle frequently called her offensive names such as “dumb fucking broad,” “cunt,” and “fucking cunt.”⁸¹ On one occasion, when he disagreed with her choice to “comp” a breakfast for two blackjack players, he publicly asked, “Why don’t you go in the restaurant and suck their dicks while you are at it if you want to comp them so bad?”⁸²

Showboat defended itself by showing that Trenkle abused both male and female employees, arguing that this proved that he had not discriminated because of sex.⁸³ The district court agreed and granted summary judgment in favor of Showboat.⁸⁴ The Ninth Circuit reversed, however, finding that Trenkle discriminated by abusing women in a gender-based way, while he abused men in a gender-neutral way.⁸⁵ For instance, while he called men “assholes,” he called women “dumb fucking broads.”⁸⁶ By harassing female employees differently from male employees, he had discriminated by sex and was therefore liable.⁸⁷

Perhaps the boldest disparate treatment analysis of an equal opportunity harassment defense was in the U.S. District Court for the District of Wyoming in the case of *Chiapuzio v. BLT Operating Corp.*⁸⁸ The facts of *Chiapuzio* are as follows: Dale and Carla Chiapuzio (“Dale” and “Carla”), Clint Bean (“Bean”), and Christina Vironet (“Vironet”) were employees of the Wyoming Technical Institute (“WTI”).⁸⁹ Eddie Bell (“Bell”) supervised them.⁹⁰ Bell repeatedly asserted to both Dale and Carla that he could make love to Carla better than Dale could.⁹¹ Bell also publicly subjected Bean and his wife

80. *Id.* at 1461.

81. *Id.*

82. *Id.*

83. *Id.* at 1463.

84. *Id.*

85. *Id.* at 1463-64.

86. *Id.* at 1464.

87. *Id.* The court further opined that “although words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that both men and women working at Showboat have viable claims against [defendant] for sexual harassment.” *Id.* One can infer that if the court had actually been presented with both male and female plaintiffs, it would have reasoned that treating women differently from men necessarily implies that men are treated differently from women, and therefore, that Trenkle had discriminated in his treatment of men as well. *See id.*

88. 826 F. Supp. 1334, 1336-38 (D. Wyo. 1993).

89. *Id.* at 1335. WTI is a trade school that was owned and operated by the defendant BLT Operating Corp. (“BLT”). *Id.*

90. *Id.*

91. *Id.*

to constant sexually abusive remarks, once offering Bean's wife \$100 to sit on his lap.⁹² Finally, Bell made repeated sexual advances on Vironet, a receptionist at WTI.⁹³

The Chiapuzios, Bean, and Vironet all sued BLT for sexual harassment under Title VII. At trial, BLT argued that because Bell harassed both male and female employees he did not discriminate based on sex.⁹⁴ The court, unimpressed with the general argument that equal harassment is not gender-based,⁹⁵ rejected this equal opportunity harassment defense,⁹⁶ finding that in this case, Bell's remarks were gender-driven.⁹⁷ His harassment demeaned Dale and Bean as not being "man enough" for their wives.⁹⁸ In contrast, when Bell harassed Vironet, Carla, and Bean's wife he typically described graphic sexual acts that he would like to perform with them.⁹⁹ Though Bell was an equal opportunity harasser, "[t]he nature of [his] remarks indicate[d] that he harassed the plaintiffs because of their gender."¹⁰⁰ The court found discrimination by analyzing *how* Bell had harassed each plaintiff and determined that he had harassed males and females differently.¹⁰¹

In *Kopp v. Samaritan Health System, Inc.*, the Eighth Circuit Court of Appeals narrowed the equal harassment defense by analyzing whether one gender was harassed more severely than the other.¹⁰² In that case, Ms. Kopp, a hospital employee, alleged that Dr. Albaghdadi had abused her because she was a woman.¹⁰³ On two occasions, he shouted at her, once throwing his stethoscope at her because another doctor had transferred a patient before Albaghdadi could collect his

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1337. The court argued that "[w]here a harasser violates both men and women, 'it is not unthinkable to argue that each individual who is harassed is being treated badly because of gender.'" *Id.* (quoting John J. Donahue, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1610-11 (1992)).

96. *Chiapuzio*, 826 F. Supp. at 1336-38.

97. *Id.* at 1337.

98. *Id.*

99. *Id.* at 1338.

100. *Id.* at 1337-38 (emphasis added).

101. *Id.* The court offered a further argument in favor of this finding: efficiency. *Id.* at 1338. Reasoning that the plaintiffs could succeed if they brought their suits individually by showing that the general work atmosphere was sexually hostile, it found that barring a group lawsuit would create an inefficient and pointless result. *Id.*

102. 13 F.3d 264, 269-70 (8th Cir. 1993).

103. *Id.* at 266.

fee.¹⁰⁴ On another occasion, an echocardiogram report was missing and Albaghdadi telephoned Kopp to demand that she tell him where the report was.¹⁰⁵ When she did not know, he said that the female head of Samaritan's medical records department was a "stupid bitch."¹⁰⁶ When he encountered Kopp in the hallway fifteen minutes later, and she still could not provide him with a firm answer, he grabbed her, gripping her bra straps and skin, pulled her close and shouted, "I want to know who to come after when this happens again."¹⁰⁷ Albaghdadi also abused other female Samaritan employees.¹⁰⁸ He threatened one, attacked another with charged defibrillator paddles, called one a "fat bitch," told another to get her "tits" out of the way while attending to patients, threw a patient chart at another, and told another that she was "a piece of shit" and that he wanted to "beat the shit out of [her]."¹⁰⁹

Samaritan asserted an affirmative defense that Albaghdadi had also abused male employees.¹¹⁰ Specifically, he swore at one for being too slow, raised his voice at another when he met to discuss the Kopp incident, swore at another for canceling a test Albaghdadi had ordered, and called another a "goddamn bastard" during the Kopp incident.¹¹¹ The district court agreed that this proved that Albaghdadi had not discriminated based on sex.¹¹² On appeal, however, the Eighth Circuit reversed, finding that Albaghdadi harassed female employees more frequently and with more severity than he harassed their male counterparts.¹¹³ The record showed that Albaghdadi had harassed females on ten occasions whereas he had harassed males on only four occasions.¹¹⁴ Also, several times he abused women with actual physical contact and harm, whereas he abused men only with a raised voice or a verbal insult.¹¹⁵ Thus, the court reasoned that even though the environment may have been abusive for all employees, it was *more*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 267-68.

109. *Id.*

110. *Id.* at 268.

111. *Id.*

112. *Id.* at 265.

113. *Id.* at 269.

114. *Id.*

115. *Id.*

abusive for female employees, and so, Albaghdadi had discriminated on the basis of gender.¹¹⁶

More recent cases have indicated a policy concern with allowing an equal opportunity harasser to escape liability.¹¹⁷ Essentially, it seems counter-intuitive that an employer is liable for sexually harassing some employees, but not liable for sexually harassing *all* employees.¹¹⁸ As is clear in light of *Oncale*, however, this policy concern is insufficient to support extending liability to equal opportunity harassers under a statute designed to combat discrimination.¹¹⁹ Without articulating how equal opportunity harassment discriminates by sex, it appears quite clear that no Title VII liability exists for the bona fide equal opportunity harasser.¹²⁰

3. The Most Recent Case: *Holman v. Indiana* and its Flaws

The Seventh Circuit recently reached this same conclusion in *Holman v. Indiana*, the first and only case to actually *hold* that the equal opportunity harasser is not liable for sexual discrimination under Title VII.¹²¹ The alleged facts are as follows. Steven and Karen Holman ("Steven" and "Karen"), a married couple, both worked at the Indiana Department of Transportation ("IDOT").¹²² They alleged that Karen's foreman, Gale Uhrich ("Uhrich"), began sexually harassing her in 1995 by "touching her body, standing too closely to her, asking her to go to bed with him and making sexist comments."¹²³ They also

116. *See id.*

117. *See McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996). "It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female." *Id.* at 260; *see also Doe v. Belleville*, 119 F.3d 563, 590 (7th Cir. 1997) (citing similar concerns).

118. *McDonnell*, 84 F.3d at 260.

119. *Holman v. Indiana*, 211 F.3d 399, 404 (7th Cir. 2000). "We do not think . . . that it is anomalous for a Title VII remedy to be precluded when both sexes are treated badly. Title VII is predicated on discrimination . . . requiring disparate treatment is consistent with the statute's purpose of preventing such treatment." *Id.*; *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (noting that Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.").

120. For the purposes of this Note, the "bona fide" equal opportunity harasser is one that harasses on a purely even-handed basis, not differentiating by gender in his treatment of targets at all.

121. *Holman*, 211 F.3d at 404.

122. *Id.* at 401.

123. *Id.*

alleged that Uhrich had sexually harassed Steven by "grabbing his head while asking for sexual favors."¹²⁴

At trial, IDOT moved to dismiss the Holman's claim under Rule 12(b)(6) of the *Federal Rules of Civil Procedure*¹²⁵ for failure to state a claim.¹²⁶ The district court granted the motion and dismissed the Holmans' complaint,¹²⁷ finding that "because both plaintiffs were alleging sexual harassment by the same supervisor, they both, as a matter of law, could not prove that the harassment occurred 'because of sex.'"¹²⁸ The Holmans appealed, but the Seventh Circuit affirmed the district court's dismissal.¹²⁹ The Seventh Circuit reasoned that Title VII liability required *discrimination*, which in turn required a showing that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹³⁰ Hence, the court found, because the Holmans alleged that each had been sexually harassed, as a matter of law, neither of them had been subjected to "disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹³¹

Ironically, the *Holman* court's failure was in straying from Title VII's text, which prohibits sex discrimination, and focusing too much on the joint allegation of "sexual harassment." To analyze the court's reasoning, this Note will refer to the offensive conduct allegedly suffered by Steven as "X," and the offensive conduct allegedly suffered by Karen as "Y." As discussed previously, X is foreman Uhrich asking Steven for sexual favors while grabbing his head.¹³² Y is foreman Uhrich touching Karen's body, standing too closely to her, asking her to go to bed with him, and making sexist

124. *Id.*

125. *Id.*

126. Essentially, this means that if all facts alleged by the plaintiffs are taken to be true, and such facts do not constitute a valid cause of action, then the complaint is dismissed. *See id.* at 402. A complaint will be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

127. *Holman*, 211 F.3d at 401.

128. *Holman v. State*, 24 F. Supp. 2d 909, 910 (N.D. Ind. 1998).

129. *Holman*, 211 F.3d at 407.

130. *Id.* at 403 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

131. *Id.* "Title VII does not cover the 'equal opportunity' or 'bisexual' harasser, then, because such a person is not discriminating on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly)." *Id.*

132. *Id.* at 401.

comments.¹³³ X and Y are clearly different in certain respects: Uhrich did not grab Karen's head,¹³⁴ Uhrich did not make sexist remarks to Steven.¹³⁵ The Seventh Circuit, however, unconsciously and inductively converted these distinct sets of alleged facts X and Y into "Z," i.e. "sexual harassment." Hence, the court reasoned that because Karen alleged Z, and because Steven alleged Z, then they had not been treated differently; thus, there was no discrimination because of sex.¹³⁶ By inductively converting X and Y into Z and Z, however, the court obfuscated the differences between X and Y and failed to adhere to Title VII's clear mandate that an employer may not discriminate, or treat employees differently, on the basis of sex.¹³⁷ Karen and Steven *were* treated differently, and the nature of the differences suggests that they were treated differently "because of . . . sex." The 1991 Civil Rights Act, which amended the 1964 Civil Rights Act, specifically provides that disparate treatment is discrimination by sex if the plaintiff(s) can show that sex was a "motivating factor" for the difference.¹³⁸ Thus, as long as the Holmans could prove that Uhrich's choice to headlock Steve was motivated in part by Steve's maleness and that his choice to make misogynist comments to Karen was motivated in part by her femaleness, then they would have sufficiently shown discrimination by sex.

One might object that this concrete analysis seizes on minutiae to show discrimination when few would normally recognize its existence. But, while it may be true that on first glance few would see discrimination in Uhrich's treatment of the Holman's, the fact remains that he disparately treated Steve and Karen Holman. Title VII is intended "to strike at the *entire spectrum* of disparate treatment of men and women in employment."¹³⁹ Moreover, there is no danger that close attention to concrete differences in treatment would lead to an absurd "flood" of Title VII suits because a plaintiff must always prove

133. *Id.* While the complaint also alleged that Uhrich had "sexually harassed" both Karen and Steve, such an allegation is not so much a fact as a legal conclusion, and thus, a more proper point of analysis is to consider the actual facts alleged.

134. *Id.*

135. *Id.*

136. *See id.* at 402-04.

137. 42 U.S.C. § 2000e-2(a)(1) (1964).

138. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(m) (2001). "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.*

139. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)) (emphasis added).

that the disparate treatment was motivated in part by sex, and, even more importantly, that the disparate treatment was sufficiently abusive to alter his or her conditions of employment. Under this reasoning, the Holmans still may have lost on the ground that, taken alone, neither headlocks nor misogynist comments are objectively offensive enough to render Steven's or Karen's employment conditions "hostile." The other aspects of Uhrich's harassment would not be considered in this abusiveness analysis because he did not treat Steven and Karen differently with regard to those other aspects. If Uhrich's headlocks and sexist comments were sufficiently severe or pervasive, however, then one or both of the Holmans still might have won; in any event, this would be a question of fact for the jury. The *Holman* court should have accounted for the real differences in the way that Uhrich treated Karen and Steven, and thus, it should have decided the case based on whether the disparate treatment was sufficiently hostile, rather than on a supposed lack of discrimination.¹⁴⁰

The courts' reasoning in *Showboat*, *Chiapuzio*, and *Kopp* is more faithful to the dictates of Title VII than is that of the *Holman* court. Title VII forbids employers from treating members of one sex differently from members of the other sex when such disparate treatment is motivated, in part, by sex.¹⁴¹ Again, this is intended to strike at the entire spectrum of disparate treatment.¹⁴² Because "sexual harassment" is essentially a mere label for a certain category of Title VII violations, the fact that both male and female employees allege facts that can be characterized as "sexual harassment" should not obfuscate gender-based differences in the actual alleged harassing conduct. Therefore, victims of an employer who abuses men and women in different ways generally should be able to sue, as long as they can show that the difference in treatment amounted to a disadvantageous condition of employment and was motivated by the victims' genders.

While this analysis effectively eliminates the equal opportunity harasser exception for situations in which an employer abuses men and women differently, it does not resolve the situation where an employer subjects men and women to exactly the same abuse. Thus,

140. This Note's analysis of *Holman* is essentially an application of *Chiapuzio's* reasoning. The author can ascertain no inconsistencies with Title VII in this method of closely analyzing harassment to determine whether there has been disparate treatment.

141. Civil Rights Act of 1991, Pub. L. No. 102-166, § 703(m) (1991).

142. *Oncale*, 523 U.S. at 78 (quoting *Meritor Sav. Bank*, 477 U.S. at 64) (emphasis added).

this Note's introductory hypothetical, in which Supervisor Fred repeatedly asked both Ken and Carol "How about some sex today?" would not be resolved by disparate treatment analysis. This Note's central thesis, presented in Part IV, will endeavor to show Fred's liability.

III. SCHOLARLY PERSPECTIVES ON EQUAL OPPORTUNITY HARASSMENT

Professor Charles Calleros addressed equal opportunity harassment in "The Meaning of 'Sex': Homosexual and Bisexual Harassment Under Title VII", in which he expressed agreement with those courts that deny Title VII liability for equal opportunity harassers.¹⁴³ He did, however, acknowledge that one could logically consider the same conduct directed at members of both genders to be sex discrimination by "taking compartmentalization to an extreme."¹⁴⁴ Compartmentalization of qualitatively different burdens for separate analysis is a routine practice in Title VII cases.¹⁴⁵ For instance, if a female employee sues for sexual harassment sex discrimination, an employer could not defend himself by showing that he requires male employees to work more physically strenuous jobs.¹⁴⁶ This compartmentalization principle was implicitly recognized in *Oncale*: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹⁴⁷ In the *Oncale* Court's evaluation of "the critical issue," there is no mention of whether there are different disadvantageous "offsetting" terms or conditions of employment that "equalize" the overall working conditions. The only issue in the text is whether, in the context of a particular disadvantageous term or condition, members of one sex are exposed and members of the other are not. Therefore, by clear implication, if an employer's treatment inflicts *different* disadvantageous conditions of employment on men than on women, both male and female victims have a right to sue for the injury that they sustained from the particular disadvantageous condition of employment affecting them personally. Thus, in the example described

143. Calleros, *supra* note 11, at 79.

144. *Id.* at 77.

145. *Id.* at 71 ("[Courts] routinely compartmentalize allegedly discriminatory practices, isolating a particular kind of objectionable policy or practice for analysis.").

146. *See id.*

147. *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

above, wherein females are sexually harassed and males are made to perform more strenuous labor, *both* males *and* females could sue (rather than *neither* being able to sue) for their respective injuries.¹⁴⁸

Professor Calleros acknowledged that extreme compartmentalization shows that equal harassment subjects men and women to different kinds of harassment.¹⁴⁹ He noted that male victims are subjected to unwelcome demands for homosexual sex, a form of harassment "that might be unsettling to homophobic men in a way that is psychologically different, though not necessarily more intense, [than] the pain and stress visited upon the women as a result of the supervisor's heterosexual advances toward them."¹⁵⁰ He concluded, however, that such analysis extends compartmentalization too far, suggesting that a similar claim could be made of generalized layoffs because men, socialized as "breadwinners," suffer more from losing their jobs than women do.¹⁵¹

Professor Calleros may be correct that analyzing the disparate impacts of a layoff from the employees' perspectives could show that men suffer disadvantageously in a different way than women do when laid off. Even so, this argument fails to rebut the propriety of using disparate impact analysis in equal opportunity harassment cases because Calleros's hypothetical amounts to the (potential) imposition of disadvantageous conditions of *unemployment* not suffered by the other sex. Title VII clearly does not obligate employers to concern themselves with former employees' conditions of unemployment.¹⁵² Moreover, one may presume that such layoffs would usually be "consistent with business necessity."¹⁵³ Thus, his example fails as a *reductio ad absurdum* for the role that compartmentalized disparate impact analysis might usefully play in sexual harassment cases. Indeed, sexual harassment seems to be a particularly apt example in which compartmentalized disparate impact analysis would be applicable because, unlike generalized wage reductions, layoffs, etc., sexual harassment is presumably never "consistent with business necessity."

148. The Supreme Court recognized the concept of simultaneous discrimination in *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 142 (1980) (finding that a single policy can simultaneously discriminate against both men and women).

149. Calleros, *supra* note 11, at 77.

150. *Id.*

151. *Id.*

152. 42 U.S.C. § 2000e-2(a)(1) (1964).

153. Civil Rights Act of 1991, 42 U.S.C. § 2000(e) et seq. (1991).

In a recently published student article, Dawn Macready argued that the equal opportunity harassment exception is an example of judges using restrictive statutory construction in an effort to restrain the size and influence of government and not because it accords with statutory purposes.¹⁵⁴ She argued that the equal opportunity harassment exception frustrates Title VII's purpose of protecting equality in the workplace and that the statutory language, "because of . . . sex," is ambiguous enough to be interpreted to prohibit equal opportunity harassment.¹⁵⁵ For instance, while "sex" has been interpreted to refer only to the male-female distinction, it could be interpreted more broadly also to refer to sexuality, sexual conduct, or sexual impulses.¹⁵⁶ Under that interpretation, the fact that a supervisor harasses members of both genders would be irrelevant to his liability because he would be singling out employees for harassment "because of" his sexual desire for them. Macready also suggested that this expanded interpretation of "sex" is unnecessary since courts could simply follow the reasoning developed in *Chiapuzio*¹⁵⁷ to argue that when harassers harass men in a different way than they harass women, they are discriminating based on sex.¹⁵⁸ Thus, Macready found that the equal opportunity harassment exception could be eliminated via either of these routes, that the exception is "absurd on its face," that Title VII's purpose of providing an egalitarian workplace mandates its elimination, and therefore, that the issue is an example of recalcitrant courts using their statutory construction power to rein in the federal government's influence.¹⁵⁹

While this Note joins in Macready's support for the *Chiapuzio* reasoning,¹⁶⁰ her argument that courts ought to interpret "sex" as meaning both gender and sexual conduct rings a little hollow. She is not without support,¹⁶¹ but not only has this interpretation been definitively denied¹⁶² it is also a little silly. True, "sex" *can* mean sexual conduct. But "race" can mean racing conduct, perhaps running or swimming. "Age" can mean aging conduct, perhaps smoking or

154. Dawn Macready, Note, *Statutory Construction as a Means of Judicial Restraint on Government: A Case Study in Bisexual Harassment under Title VII*, 27 OHIO N.U. L. REV. 659, 676 (2001).

155. *Id.* at 675.

156. *Id.*

157. Discussed *infra* at Part II.B.2.

158. Macready, *supra* note 154, at 672-74.

159. *Id.* at 675-76.

160. *Id.* at 672-74.

161. *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991).

162. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998).

tanning. The Author can not imagine Macready seriously arguing that Title VII prohibits employers from discriminating against running marathons. It seems fairly obvious that the protected characteristics listed in Title VII are just that; protected *characteristics*, not activities. Thus, this Note concurs with the Supreme Court's determination that harassing workplace sexual conduct does not automatically satisfy Title VII's "because of . . . sex" requirement.¹⁶³

In *The Sexual Harassment of Men: Evidence for a Broader Theory of Sexual Harassment and Sex Discrimination*, psychologists Margaret Stockdale, Michelle Visio, and Leena Batra built on Katherine Franke's 1997 *Stanford Law Review* Article,¹⁶⁴ which criticized existing theory on sexual harassment's relationship to sex discrimination and created a new theory that adequately accounts for atypical forms of harassment, such as same sex and equal opportunity harassment.¹⁶⁵

The psychologists argued that sexual harassment constitutes sex discrimination when "the conduct is being used to enforce or perpetuate 'hypergender' norms and stereotypes."¹⁶⁶ The authors further explained, "Hypergender norms are composed of both hypermasculinity (a rigid male sex-role stereotyped identity composed of calloused sex attitudes toward women, a conception of violence as manly, and a view of danger as exciting) and hyperfemininity (a rigid female sex-role stereotype identity that women are viewed as sexual objects)."¹⁶⁷ They found that this understanding of sexual harassment's discriminatory effects would:

Recogn[ize] that (a) sexual harassment reinforces rigid sex-role norms and stereotypes that subjugate all women and those men who do not conform to heterosexual norms of masculinity; (b) the harassment of men by other heterosexual men constitutes sex discrimination because it has the effect of perpetuating hypermasculine and heterosexist standards¹⁶⁸ . . . (c) bisexual or equal-opportunity harassment constitutes sex discrimination even though members of both genders are harassed because such an

163. *Id.*

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

165. Margaret S. Stockdale et al., *The Sexual Harassment of Men Evidence for a Broader Theory of Sexual Harassment and Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 630, 659-61 (1999).

166. *Id.* at 636.

167. *Id.* at 636-37.

168. By "heterosexist standards," the authors mean "an ideological system that denies, denigrates, and stigmatizes any non-heterosexual form of behavior, identity, relationship, or community." *Id.* at 637 (quoting G. M. Herek, *Heterosexism, Hate Crimes, and the Law*, in VIOLENCE AND THE LAW 89-112 (M. Costanzo & S. Oskamp eds., 1994).

act can directly subordinate women by conditioning employment benefits on sexual cooperation or creating a hostile work environment for women, and it can indirectly subordinate women by harassing men in order to maintain male dominance through hypermasculine ideology.¹⁶⁹

Through empirical psychological research, the psychologists determined that men harass men in significantly different ways from how they harass women.¹⁷⁰ Their primary finding was that male-male harassment typically takes the form of enforcing a hypermasculine heterosexual gender-role on those men who expose "weakness" or seem "effeminate."¹⁷¹ "[M]ale on male sexual harassment] often involves enforcing masculine gender role expectations of strength and dominance . . . [and is usually inflicted on slightly younger, [less senior, lower paid, non-supervisory personnel]."¹⁷² Thus, their research implies that the hypothetical "bona fide" equal opportunity harasser¹⁷³ may be nothing more than a fictional character. Indeed, all of the equal opportunity harassment cases thus far conform to these psychologists' finding that the male harasser will harass men in a male-hierarchy-imposing manner, while he harasses women in a sexually-derogatory and sex-extracting manner.¹⁷⁴ These findings suggest that the so-called equal opportunity harasser is driven by different goals when he harasses men than when he harasses women, and that he imposes different "disadvantageous conditions of employment"¹⁷⁵ on men than on women. Therefore, the psychologists' finding directly supports this Note's thesis that equal opportunity harassment can constitute sex discrimination in violation of Title VII.¹⁷⁶

In April of 2001, *Washington Law Review* published student Shylah Miles's piece in which she argued that the equal opportunity harassment defense should be eliminated by analyzing the "because

169. *Id.*

170. *Id.* at 647-56.

171. *Id.*

172. *Id.* at 655, 658.

173. The "bona fide" equal opportunity harasser harasses men and women in exactly the same manner.

174. *Holman v. Indiana*, 211 F.3d 399, 404 (7th Cir. 2000); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9th Cir. 1994); *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269-70 (8th Cir. 1993); *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337-38 (D. Wyo. 1993).

175. *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)).

176. Discussed *infra* at Part IV.

of . . . sex" element in sexual harassment claims on an individual rather than a gender-comparative basis.¹⁷⁷ She claims that:

Analyzing each claim individually will enable courts to deny the equal-opportunity-harasser defense. Where a perpetrator harasses both men and women, the traditional interpretation of the 'because of sex' element prevents plaintiffs from making the required showing of disparate treatment. Evidence of disparate treatment, however, does not exhaust the evidence of discrimination because of sex; individual analysis of the plaintiff's claim may also expose harassment based on an individual's sex. This analysis separates plaintiffs' claims and analyzes conduct directed at each plaintiff individually. If that conduct is motivated by the plaintiff's gender, then the plaintiff has satisfied the 'because of sex' element. By utilizing an individual analysis, courts can deny the equal-opportunity-harasser defense, enable sexual harassment law to fulfill its purpose, and avoid absurd results that occur with the traditional disparate-treatment requirement.¹⁷⁸

Miles's "individual analysis" would require courts to essentially focus only on each individual plaintiff's claim, ignoring other plaintiffs from the same workplace or other noncomplaining victims, and look for evidence that the harassing conduct related to the plaintiff's gender.¹⁷⁹ Miles stated further, "Because such a nexus may exist regardless of the [defendant's] conduct toward other employees, a fact-finder should be permitted to draw a similar conclusion whenever a plaintiff presents evidence of conduct related to his or her gender, notwithstanding conduct related to other employees' genders. . . . [E]vidence of equal-opportunity harassment should not be dispositive."¹⁸⁰ For instance, when a supervisor harasses a female employee with terms such as "cunt" or "broad," the requisite showing of discrimination can be made because such terms are traditionally used to denigrate women.¹⁸¹

Additionally, Miles finds support in *Oncale* for the use of individualized analysis, arguing that "the Court stated in dicta that a plaintiff could show discrimination 'because of sex' with three different types of evidence: (1) comparative evidence, (2) evidence of gender-specific conduct or actions, or (3) evidence of explicit or implicit proposals of sexual activity."¹⁸² Miles argues that the second and third evidentiary routes "opened the door to an individual analysis of the 'because of sex' element because such evidence concerns conduct directed toward the individual plaintiff."¹⁸³

177. Shylah Miles, Note, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity Harasser Defense*, 76 WASH. L. REV. 603, 621 (2001).

178. *Id.*

179. *Id.* at 623-24.

180. *Id.*

181. *Id.* at 624-25.

182. *Id.* at 628.

183. *Id.*

While interesting, Miles's proposal is ultimately unpersuasive. She has completely lost sight of Title VII's purpose as an anti-discrimination statute. It is simply nonsensical to make an "individualized" showing of discrimination because discrimination fundamentally relates to inequalities between employees; one cannot show that an employee has experienced inequality if one is unwilling to relate her experience to that of others. The *Oncale* Court reiterated the requirement that members of one gender suffer "disadvantageous terms or conditions of employment to which members of the other gender are not exposed."¹⁸⁴ Miles's approach entirely evades this requirement. Thus, Miles' attempt to resolve the equal opportunity harassment conundrum fails.

In *The Epistemic Contract of Bisexual Erasure*, Kenji Yoshino discussed the bisexual harassment exception and found a number of potential limits on its scope.¹⁸⁵ First, he noted that, by and large, courts do not grant the exemption when a harasser who has harassed only one gender defends against a suit simply by claiming to "be" bisexual.¹⁸⁶ Second, he discussed the "sequential bisexual," one who alternates between periods of harassing men and periods of harassing women, and he noted the possible argument that "[e]ven if he harassed the same numbers of men and women, one could still argue that at the time he was harassing any individual man, no woman was in danger, and vice versa."¹⁸⁷ Finally, he cited *Chiapuzio* for the theory that where bisexual harassment occurs in gender-differentiated ways, there has been discrimination "because of sex."¹⁸⁸ He noted that in *Chiapuzio* the harasser harassed women in sexual ways and he harassed men in non-sexual ways, thus providing a difference in the harassment based on sex. He contends that the logic of this case can be extended to those cases of sexual harassment of both men and women where the harassment's sexual content manifested itself in systematically sex-differentiated ways.¹⁸⁹

Yoshino leaves the bisexual harassment defense intact for those employers who are "genuinely 'sex-blind' such that the sex of the

184. *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))

185. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 436-61 (2000).

186. *Id.* at 444.

187. *Id.* (citing *Tietgen v. Brown's Westminster Motors, Inc.*, 921 F. Supp. 1495 (E.D. Va. 1996)).

188. *Id.* at 445-46 (citing *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1336-38 (D. Wyo. 1993)).

189. *Id.* at 446.

victim [has] no salience for him.”¹⁹⁰ He seems to be stuck with this conclusion because of his general approach to this issue, which is, perhaps, overly focused on the subjective motivations of the harasser and lacking in regard for the impact on the victims’ “conditions of employment.”¹⁹¹ Title VII’s text, and the *Oncale* court’s interpretation of it, indicate that the critical issue is whether members of one sex suffer disadvantageous conditions of employment that members of the other sex do not. Rather than looking exclusively to whether sex has salience for the harasser, Yoshino ought to have considered the victims’ conditions of employment.¹⁹²

In *The “Undifferentiating Libido”: A Need For Federal Legislation to Prohibit Sexual Harassment by a Bisexual Sexual Harasser*, Robin Applebaum argued that:

Technically, Title VII should not provide a remedy to victims of bisexual harassment because the harasser is treating both sexes alike and therefore, the requisite “but for” standard can never be satisfied. However, the male supervisor may only sexually harass one woman, despite working among several. Similarly, in a same-sex sexual harassment situation, not everyone of the harasser’s gender will be harassed. The “but for” standard is not necessarily “but for” the victim’s sex, rather “but for” the employer’s sexual attraction to the employee, the employee would not have been harassed.¹⁹³

Applebaum goes on to conclude, however, that including equal opportunity harassment in Title VII would stretch Title VII “even further” beyond its original intent. Furthermore, she found that while sexual harassment, in general, is a bad fit with Title VII’s anti-discrimination purpose, it should be generally prohibited nevertheless.¹⁹⁴ Thus, she proposes that the only viable solution to resolving the theoretical weaknesses of including sexual harassment in Title VII, and the troubling gaps in protection flowing from those weaknesses, such as the lack of prohibition against bisexual harassment, is new federal legislation that specifically targets sexual harassment in the workplace.¹⁹⁵ In thus arguing, she follows in

190. *Id.*

191. 42 U.S.C. § 2000e-2(a)(1) (1964).

192. It should be noted that Yoshino’s article only tangentially touches on this topic and does not go to a great effort to make radical analytical moves with it, basically being content to summarize already proposed limits and discuss their implications. His article’s primary focus is on the visibility of bisexuality in the law, a far broader topic than this statutory construction issue. Yoshino, *supra* note 185, at 353.

193. Robin Applebaum, Note, *The “Undifferentiating Libido”: A Need for Federal Legislation to Prohibit Sexual Harassment by a Bisexual Sexual Harasser*, 14 HOFSTRA LAB. & EMP. L.J. 601, 616 (1997) (citing Michelle Ridgeway Pierce, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1090 (1989)).

194. *Id.* at 616.

195. *Id.* at 621-22.

Michelle Ridgeway Pierce's footsteps, taking the essential position that using analytical contortions to fit sexual harassment into sex discrimination simply rings false and that the better solution is to pressure Congress to deal with sexual harassment on its face.¹⁹⁶

Applebaum's view is unfounded. Her main argument, that sexual harassment is "but for" the harasser's sexual attraction rather than being "but for" the victim's sex, displays a fundamental misunderstanding of "but for" analysis. True, the harasser's sexual attraction is generally a sine qua non in sexual harassment cases, but victim's sex is *also* a sine qua non. If the victim were of the opposite sex, the disadvantageous conditions of employment imposed by the harassment would not have been imposed. Applebaum seems far too ready to submit to the Borks of the world in this respect. Moreover, while an anti-harassment statute certainly has its appeal,¹⁹⁷ Congress does not seem to be terribly anxious to make one. Scholars would probably do better to work their influence on the existing doctrine rather than throwing up their hands and asking Congress to get involved.

In *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*,¹⁹⁸ Sandra Levitsky uses a Catharine MacKinnon-style gender dominance approach to argue that bisexual harassment is sex discrimination because it reinforces traditional gender norms of male dominance and female submission.¹⁹⁹ She argues that "[s]exual harassment acts . . . both as a penalty for departing from scripted gender norms and as a method of maintaining the gender hierarchy."²⁰⁰ She states further:

In opposite-sex, equal opportunity, and sexual harassment cases in which a homosexual supervisor harasses an employee of the same sex, the harasser makes the victim feel like a sex object. Sex objects are usually women. For a woman, feeling like a sex object

196. *Id.* at 621 (citing Pierce, *supra* note 193, at 1100). Pierce's argument was very similar:

The new law would have three beneficial effects. First, it would alleviate the theoretical and analytical problems associated with defining sexual harassment as 'gender discrimination' under Title VII. Second, it would provide a claim for plaintiffs where Title VII is presently inapplicable. More specifically, it would provide a cause of action for plaintiffs not presently included under Title VII, such as victims of bisexual harassment and victims in a single-sex environment. Finally, the proposed legislation would end the distortion of Title VII, thereby returning Title VII's emphasis to legitimate gender issues.

Id.

197. Particularly if one believes that Congress ought to define sexual harassment rather than leaving that job to courts and the E.E.O.C.

198. Levitsky *supra* note 11, at 1045.

199. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 107 (1987) (arguing that sexual harassment both expresses and reinforces the social inequality of women to men).

200. Levitsky, *supra* note 11, at 1040.

reminds her that she is a woman trespassing in a man's world; sexual harassment subordinates women by penalizing them for crossing gender boundaries. Male victims of sexual harassment in these cases are victims of a 'system of gender domination whose principle effect is to subordinate women.' When a person sexually harasses a man, the harasser both feminizes him and reinforces the idea that those qualities associated with women are subordinate to the qualities associated with men.²⁰¹

For instance, often male-on-male sexual harassment is inflicted on men perceived to be "effeminate."²⁰²

Levitsky argues that the traditional comparative Title VII analysis should be replaced with the dominance analysis.²⁰³ Where the comparative analysis asks whether the victim would have suffered the disadvantageous terms or conditions if she were a member of the opposite gender, the dominance analysis asks whether the egregious conduct reinforced sex stereotypes that operate to preserve gender hierarchy within the workplace.²⁰⁴ She goes on to argue that the "equal opportunity harasser, like all . . . who harass, reinforces the sexual hierarchy by taking advantage of the sex object stereotype. The dominance analysis holds individuals liable for any harassment based on gender or gender stereotypes that reinforces this sexual hierarchy, regardless of the sex or sexual orientation of the victims."²⁰⁵

While Levitsky's approach is analytically sound and well-founded in MacKinnon's work, it may be too ambitious in that it demands a fundamental overhaul of the theoretical basis of sexual harassment law. Moreover, MacKinnon developed the fundamentals of this perspective over twenty years ago and it has yet to take hold in the majority of courts. Indeed, MacKinnon's amicus brief for *Oncale* argued along these lines in favor of liability for same-sex harassment.²⁰⁶ While the Court did allow liability in that case, Justice Scalia's majority opinion bears little resemblance to MacKinnon's dominance theory.²⁰⁷ Instead, the opinion stayed squarely in line with the comparative approach.²⁰⁸ Since it is unlikely that the Supreme Court will adopt a radical feminist approach like MacKinnon's in the

201. *Id.* (citing PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 69 (1990); BARBARA A. GUTEK, *SEX AND THE WORKPLACE* 10 (1985)).

202. *Id.* at 1041.

203. *Id.* at 1038-44.

204. *See id.*

205. *Id.* at 1044.

206. Catharine A. MacKinnon, *Oncale v. Sundowner Offshore Servs., Inc.*, 96-568, *Amici Curiae Brief in Support of Petitioner*, 8 *UCLA WOMEN'S L.J.* 9, 30-32 (1997).

207. Compare *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-82 (1998), with MacKinnon, *supra* note 206, at 17-22.

208. *Oncale*, 523 U.S. at 80-82.

near future, it would appear that equal opportunity harassers will remain free from liability unless a theory of liability is devised that is reconcilable with the comparative approach.

IV. WHY EVEN BONA FIDE EQUAL OPPORTUNITY HARASSMENT IS DISCRIMINATION "BECAUSE OF . . . SEX"

Using *Oncale* and the text of Title VII as a basis, it is clear that "harassment" is nothing more than a proxy for acts that create "hostile or abusive conditions of employment," and if those acts impose hostile conditions on one sex, but not on the other, those acts constitute sex discrimination.²⁰⁹ Therefore, if equal opportunity harassment imposes different disadvantageous conditions of employment on both male and female victims, it follows that equal opportunity harassment discriminates on the basis of sex. If the conditions of employment are viewed from the perspective of the gender-specific reasonable victim, as the *Harris-Oncale* synthesis seems to dictate,²¹⁰ it should be clear that equal opportunity harassment may well impose differently disadvantageous conditions of employment on women than men, and perhaps vice-versa. Thus, equal opportunity harassment may violate Title VII under a *disparate impact* analysis, even if it does not violate it under the more traditional *disparate treatment* analysis.²¹¹

A. *Disparate Impact Under Title VII*

The 1991 Civil Rights Act amended Title VII to statutorily codify employees' rights to be free from disparate impact discrimination.²¹² Essentially, an employment practice violates Title VII's disparate impact prohibition if: (1) it causes a disparate impact on the basis of race, sex, etc., and (2) the employer cannot demonstrate that the practice in question is job-related for the plaintiff's position and consistent with business necessity.²¹³ Of course, in the sexual

209. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

210. Discussed *supra* at notes 26-38, and accompanying text.

211. Discussed *supra* at notes 121-142, and accompanying text.

212. Civil Rights Act of 1991, 42 U.S.C. § 2000(e) et seq. (1991).

213. *Id.* at § 2000(e)-2(k).

An unlawful employment practice based on disparate impact is established under [Title VII] only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color religion, sex, or national origin and the respondent fails to demonstrate that the

harassment context an additional element would be that the employment practice is so objectively abusive that it constitutes a condition of employment²¹⁴ –or, perhaps more appropriately, an employment practice.²¹⁵ Clearly, sexual harassment is not job-related or consistent with business necessity. Therefore, objectively abusive equal opportunity harassment should constitute sex discrimination violating Title VII if the plaintiffs can show a disparate impact based on sex.

1. Use of the Reasonable Victim Standard to Determine Disparate Impact

The *Harris* Court commands that analysis of the “conditions of employment” take the victim’s perspective into account.²¹⁶ In defining the standard for when harassment has altered the conditions of employment, the Court indicated that “all the circumstances” must be taken into account, including whether the conduct is threatening, offensive, or humiliating, whether it unreasonably interferes with the employee’s work performance, and what the effect is on the employee’s psychological well-being.²¹⁷ These circumstances cannot be meaningfully analyzed without consideration of the employee’s perspective. Thus, because the employee’s perspective is used to determine the conditions of employment, whether the conditions of employment vary from one employee to another depends in part on the employees’ perspectives. As discussed earlier, this perspective includes the employee’s gender.²¹⁸

2. The Method of Compartmentalizing Qualitatively Different Impacts

Recall that “compartmentalization” is the analytical practice of isolating a particular kind of objectionable policy or practice for analysis.²¹⁹ For instance, an employer who subjects only female employees to unwelcome sexual advances and who assigns only men to the least desirable work stations would undoubtedly expose his

challenged practice is job related for the position in question and consistent with business necessity.

Id.

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

215. Civil Rights Act of 1991, 42 U.S.C. § 2000(e) et seq. (1991).

216. *Id.* at 21-22.

217. *Id.* at 23.

218. Discussed *supra* at notes 26-38, and accompanying text.

219. Calleros, *supra* note 11, at 72.

employer to liability under Title VII for either or both practices.²²⁰ Professor Calleros indicated that a court would find that women had been discriminated against with respect to one element of working conditions, unwelcome sexual advances, and that men had been discriminated against with respect to another, undesirable work stations.²²¹ He further noted that some degree of judicial compartmentalization is necessary because, as in the above hypothetical, it would be "unseemly, if not impossible, [to inquire] into the degree of undesirability of a male-only work station [as opposed] to the qualitatively distinct burden suffered by women exposed to unwelcome sexual advances."²²²

By combining this compartmentalization principle with a disparate impact analysis, the resulting new model looks to whether there are compartmentalizable, qualitatively different disparate impacts imposed on women than on men when both genders are subjected to sexual harassment.

B. Equal Opportunity Harassment Will Often Violate Female Victims' Title VII Rights

Under this model of applying Title VII, one must therefore consider whether Supervisor Fred, though harassing Ken and Carol in *exactly the same manner*, will nonetheless impose *differently disadvantageous* conditions of employment on each, because of their sexes, when he repeatedly asks them "How about some sex today?" Or, to make it absolutely clear that he is demanding the same thing from each of them, if he repeatedly asks, "How about some sodomy today?" Will such unwanted sexual attention result in qualitatively different disparate impacts?

Psychological evidence suggests that the reasonable woman is far more offended by unwanted sexual attention than is the reasonable man.²²³ Unwanted workplace sexual advances from a man have been found to be only "slightly upsetting" to most men, but

220. *Id.*

221. *Id.* at 72-73.

222. *Id.* at 73.

223. C. Waldo, J. L. Berdahl & L. F. Fitzgerald, *Are Men Sexually Harassed? If So, by Whom?* 22 LAW & HUM. BEHAV., 59-79 (1998) (hereinafter "*Are Men Sexually Harassed?*"); C. Waldo, J. L. Berdahl & L. F. Fitzgerald, *Sexual Harassment of Men?* 20 PSYCHOL. OF WOMEN Q. 527-47 (1996) (hereinafter "*Sexual Harassment of Men?*"). "Much of what women call sexual harassment is not unwelcome or threatening when experienced by men, and . . . the consequences are not as damaging for men as they are for women." *Sexual Harassment of Men?*, *supra* at 543.

“extremely upsetting” to most women.²²⁴ Of course, if unwanted sexual advances are severe and pervasive enough, the reasonable man will eventually experience severe distress. But, one can logically infer from the above findings that as the pervasiveness and severity of unwanted sexual advances increases, the reasonable woman would continue to be more severely distressed than the reasonable man. Therefore, because bona fide equal opportunity harassment imposes a significantly disparate impact on the reasonable woman, it discriminates against female victims in the conditions of employment.²²⁵ Returning to the ongoing hypothetical, Carol therefore should be able to sue Supervisor Fred for imposing a sex-based disparate impact in her conditions of employment.

C. Equal Opportunity Harassment May also Violate Male Victims’ Title VII Rights

Because the reasonable man generally suffers less from unwanted sexual advances than does the reasonable woman,²²⁶ to show a disparate impact violation Ken must prove that Fred’s advances imposed a qualitatively different impact on him; an impact that the reasonable man, but not the reasonable woman, would view as a disadvantageous condition of employment. This Note asserts that Ken’s best option is to argue that male-male sexual harassment threatens the reasonable man’s cultural gender-status, while male-female harassment does not threaten the reasonable woman’s gender-status. According to Catharine MacKinnon, male-male harassment makes the target “inferior as a man by social standards . . . for a man to be attacked, placing him in a woman’s role, demeans his masculinity; he loses it, so to speak. *This cannot be done to a woman.*”²²⁷ Thus because our society assigns the role of sexual dominator to males and sexual dominatee to females, unwanted sexual advances attack the reasonable man’s hold on his gender-role, while they simply reinforce the reasonable woman’s gender role. This may lead to a further burden for the reasonable male victim in that he must perform dominating acts in order to consolidate his hold on

224. *Are Men Sexually Harassed?*, *supra* note 223, at 71, 74; *Sexual Harassment of Men?*, *supra* note 223, at 537.

225. 42 U.S.C. § 2000e-2(k) (2001).

226. Discussed *infra* at Part IV.B.

227. MacKinnon, *supra* note 206, at 19-20.

masculinity. Additionally, some heterosexual men subjected to male-male sexual advances may experience confusion as to their sexual orientation and additional shame as a result.²²⁸ The reasonable woman, however would not experience these burdens when harassed by a man.

Having shown that Fred's advances burden Ken in a way that they do not burden Carol, the remaining question is whether this disparate burden is sufficiently severe to constitute a disadvantageous condition of employment. While jurors must ultimately determine this on a case-by-case basis, interpretation of psychological literature suggests an affirmative answer to this question.²²⁹ The studies indicate that harassment of the kind that enforces men's traditional heterosexual gender role, such as ridiculing men for acting effeminately or pressuring men to engage in stereotypical forms of masculine behavior, is "upsetting" to most men.²³⁰ In a situation in which unwanted sexual advances are sufficiently severe and pervasive to call the reasonable man's traditional gender-role into question in the manner that MacKinnon describes, he would therefore likely experience gender-role anxiety, as at least "upsetting," and potentially "extremely upsetting," such that gender-role anxiety would constitute a disadvantageous condition of employment.²³¹

Thus, under disparate impact analysis, Fred's conduct, if sufficiently severe, should result in liability for actions directed towards both Ken and Carol. One might argue that because Fred's demands were not really motivated by Ken's or Carol's gender, he should not be liable for discrimination.²³² This argument fails, however, because Fred's motivation is irrelevant to disparate impact analysis. Title VII is not a fault-based tort scheme, but rather focuses

228. While it is uncertain as to whether male sexual harassment of men can bring on such a reaction, male rape of males has been shown to do so. See MICHAEL SCARCE, *MALE ON MALE RAPE* 57-65 (1st ed. 1997). For instance, heterosexual males raped by other males often experience erections and sometimes even ejaculate; such experiences then lead them to doubt their sexuality afterward. See *id.*

229. *Are Men Sexually Harassed?*, *supra* note 223, at 59-79; *Sexual Harassment of Men?*, *supra* note 223, at 527-47 "Much of what women call sexual harassment is not unwelcome or threatening when experienced by men, and . . . the consequences are not as damaging for men as they are for women." *Id.* at 543.

230. *Are Men Sexually Harassed?*, *supra* note 223, at 61.

231. Of course, other psychological effects suffered by males at the hands of male harassers may come to light with further study. This Note does not mean to imply that it has exhausted the possibilities, simply that it has ascertained a potential discriminatory effect that is based on the maleness of the victim in an equal opportunity harassment context.

232. See *infra* Part II.B.2.

on the consequences of employment practices.²³³ Neither the 1991 Civil Rights Act nor the *Oncale* Court's recent interpretation of Title VII requires a discriminatory motive in disparate impact cases.²³⁴ *Oncale* reiterated that "the critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."²³⁵ Hence, the harasser's motivation is simply irrelevant to a Title VII disparate impact claim.

Thus, under this view of Title VII, one finds that equal opportunity harassment of sufficient severity would often result in finding liability against those who harass females and, perhaps, sometimes result in finding liability against those who harass males.

D. The "Empathetic White Male" Expanded Standing Theory in the Service of Combating Equal Opportunity Harassment

Many courts have held that members outside the discriminated-against class may sue discriminating employers even though the discrimination was not directed toward them personally.²³⁶ The basic theory behind this expansion of standing is that the congressional intent of Title VII may have been to eliminate prudential standing requirements for such causes of action and to allow any person sufficiently aggrieved to meet the Article III "case or controversy" requirement to be able to sue.²³⁷ For instance, if an employer creates a work environment that is hostile to women, male employees may sue under Title VII by alleging that they are injured by the loss of their right to an environment free from gender discrimination.²³⁸ Some circuits have denied such standing, but one of the main rationales supporting that decision was the now-defunct rule

233. *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *Rogers v. E.E.O.C.*, 454 F.2d 234, 239 (5th Cir. 1971)).

234. Civil Rights Act of 1991, 42 U.S.C. § 2000(e) et seq. (1991); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-82 (1998).

235. *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

236. N. Morrison Torrey, *Indirect Discrimination Under Title VII: Expanding Male Standing To Sue For Injuries Received As A Result Of Employer Discrimination Against Females*, 64 WASH. L. REV. 365, 383-84 (1989); Laura M. Jordan, Note, *The Empathetic, White Male: An Aggrieved Person Under Title VII?*, 55 WASH. U. J. URB. & CONTEMP. L. 135, 145-50 (1999).

237. U.S. CONST. art. III. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States." *Id.*

238. Torrey, *supra* note 236, at 378. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

against same-sex sexual harassment suits.²³⁹ Federal circuit courts of appeal that have denied direct liability for same-sex harassment have reasoned that males should not be able to "end run" the standing barrier by suing based on harassment against their female colleagues.²⁴⁰ Because *Oncale* has overruled those federal circuits that rejected same-sex sexual harassment suits, the rationale for denying third-party standing has disappeared.²⁴¹

Hence, it would seem that in many federal circuits, at a minimum the Third, Fifth, Sixth, Seventh, and the District of Columbia,²⁴² male victims of equal opportunity harassment may be able to sue because of the already-established psychologically disparate impact that such harassment has on their female colleagues. By focusing both male and female plaintiffs' efforts on proving the discriminatory effect on women, plaintiffs should be able to overcome the argument that neither sex is discriminated against. Having established the misogynist work environment, the male victims would simply allege the loss of a gender-equal work environment, and both they and their female colleagues should have viable Title VII claims. Thus, in federal circuits with liberal standing requirements, male victims of harassment can choose between the earlier explored disparate impact theory of qualitatively different psychological effects being suffered by both men and women and this somewhat simpler, though perhaps not as controversial, theory of focusing exclusively on the more severe general psychological damage inflicted on female victims through equal opportunity harassment.

V. CONCLUSION

This Note has endeavored to prove that equal opportunity sexual harassment can and does result in members of one sex being exposed to disadvantageous conditions of employment to which members of the other sex are not. When there is differentiation in the mode of harassment based on the victim's gender, plaintiffs should have a disparate treatment cause of action; when there is bona fide

239. *Jordan*, *supra* note 236, at 150.

240. *Id.*

241. *Oncale*, 523 U.S. at 79-80.

242. *Clayton v. White Hall School Dist.*, 778 F.2d 457 (8th Cir. 1985); *Stewart v. Hannon*, 675 F.2d 846 (7th Cir. 1982); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981); *EEOC v. Bailey Co.*, 563 F.2d 439 (6th Cir. 1977), cert. denied, 435 U.S. 915 (1978); *Gray v. Greyhound Lines, E.*, 545 F.2d 169 (D.C. Cir. 1977); *Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977); *Torrey*, *supra* note 236, at 378-80.

equal harassment, plaintiffs should often have a disparate impact and/or third-party standing cause of action. Implementing this analysis in future Title VII cases should effectively eliminate the categorical equal opportunity harassment exception without deviating from the text or basic anti-discrimination purpose of Title VII.

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