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# Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action

HEATHER L. KLEINSCHMIDT*

## INTRODUCTION

When the United States Supreme Court first recognized sexual harassment as a form of employment discrimination in *Meritor Savings Bank v. Vinson*,[1] the Court employed lower court decisions regarding racial harassment in determining that a hostile work environment can provide the basis for a claim of sexual harassment.[2] Since this decision, lower courts have used the Supreme Court's analogy between racial harassment and sexual harassment to guide them when deciding open questions of law in *both* racial harassment and sexual harassment cases. But do the lower courts actually employ the same standards for racial harassment and sexual harassment claims? Should courts employ the same standards? Analyzing these comparisons is vital in determining what approach a court will take in the future when an open question of law in a case of one type of harassment, racial or sexual, has been answered by a case dealing with the other type of harassment. Although some courts claim that they are using the same legal standards, they often differ in how they apply these standards depending on whether they are confronted with a case of sexual harassment or racial harassment.

This Note focuses on courts' application of the "severe or pervasive" standard that is employed *both* in sexual harassment and racial harassment cases to determine whether a hostile work environment exists. Part I examines the legal origins of the analogy between racial harassment and sexual harassment in the context of the "severe or pervasive" standard. Part II argues that courts, particularly the Seventh Circuit, have applied the "severe or pervasive" standard differently depending on whether they are confronted with a case of sexual harassment or racial harassment. In practice, the Seventh Circuit has developed a "severe *and* pervasive" standard for sexual harassment cases, while using the "severe *or* pervasive" standard for racial harassment cases. The Court's approach, therefore, makes it more difficult for a sexual harassment plaintiff to establish a hostile work environment. A minority of courts have gone even further than the Seventh Circuit, moving towards a "severe *and* pervasive" standard for both sexual and racial harassment. Because courts rarely explain the reasons for the different treatment of racial harassment and sexual harassment cases, Part III explores some possible explanations for the discrepancy. Part IV argues that courts, such as the Seventh Circuit, should align sexual harassment standards with racial harassment

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* J.D. Candidate, 2005, Indiana University School of Law—Bloomington; B.A., 1999, Northwestern University. I would like to thank Professor Julia Lamber for her advice and comments when developing this Note. I would also like to thank Matt Singer for encouraging my pursuits with the *Indiana Law Journal*. I dedicate this Note to my mother, Sylvia Kleinschmidt, who always had confidence that even in the face of adversity I would achieve my goals, and to my father, Donald Kleinschmidt, who taught me that with hard work anything is possible.

1. 477 U.S. 57 (1986).
2. *See id.* at 65–68.

standards by employing the "severe *or* pervasive" standard mandated by the Supreme Court.

## I. LEGAL ORIGINS OF THE ANALOGY BETWEEN SEXUAL HARASSMENT AND RACIAL HARASSMENT

### *A. Legal Standards of Sexual Harassment and Racial Harassment*

Plaintiffs can sue employers for either racial harassment or sexual harassment under Title VII of the Civil Rights Act of 1964. Title VII provides that

> [i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[3]

Although Title VII does not explicitly mention either sexual harassment or racial harassment as a form of discrimination, the Supreme Court in *Meritor Savings Bank v. Vinson* ruled that sexual harassment was illegal sex discrimination under Title VII.[4]

Courts apply the following legal standards in determining whether actionable sexual harassment or racial harassment has occurred. Sexual harassment is harassing conduct that took place because of the victim's sex, while racial harassment is harassing conduct that took place because of the victim's race. For harassing conduct to be actionable, the conduct must be unwelcome.[5] "Unwelcome" does not mean "involuntary;" conduct can be unwelcome even if victims were not forced to join in the conduct against their will.[6]

In addition to the unwelcomeness requirement, the conduct must also affect a term or condition of employment.[7] Courts recognize two types of harassment that affect the terms or conditions of employment. The first type, quid pro quo harassment, is defined as a loss of economic or other tangible employment benefits that result when the victim rejects the employer's harassing demands.[8] The second type, hostile work environment harassment, is defined as harassment that is so severe *or* pervasive that it alters the terms or conditions of the victim's working environment.[9] The severe or pervasive standard has both subjective and objective components. Not only must the victim perceive that the work environment is abusive, but a reasonable person must also view

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3. 42 U.S.C. § 2000e-2(a)(1) (2000).

4. 477 U.S. 57, 64 (1986). Lower courts had previously determined that racial harassment was a form of racial discrimination. *See, e.g.*, Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1972); Calcote v. Texas Educ. Found., 458 F.Supp. 231, 237 (W.D. Tex. 1976).

5. *Meritor Sav. Bank*, 477 U.S. at 68.

6. *Id.*

7. *Id.* at 67.

8. *Id.* at 65. Examples of quid pro quo sexual harassment include firing, demoting, or refusing to promote the victim after the victim does not acquiesce to the harasser's demands for sexual intercourse.

9. *Id.* at 67.

the environment as abusive.[10] Determining whether a working environment is hostile requires an examination of the totality of the circumstances.[11]

When determining whether employers are liable for the conduct of their employees accused of harassment, courts look to who engaged in the harassing conduct. Employers are strictly liable for the harassing conduct of their supervisors.[12] If the supervisor took tangible employment action against the victim, the employer does not get an affirmative defense.[13] If there was no tangible employment action taken by the supervisor, the employer gets an affirmative defense if the employer proves: (1) that it took reasonable action to prevent the harm and to correct the harassment; and (2) that the victim "unreasonably failed to take advantage of preventive or corrective opportunities" or to avoid harm.[14] Employers are liable for harassing acts of their non-supervisory employees under a standard similar to that of negligence—employers will be liable if they knew or should have known about the harassing conduct.[15] Employers are also liable for the harassing behavior of non-employees if they knew or should have known about the harassing conduct and if they had control over the behavior of the non-employees.[16]

### *B. The Analogy between Racial Harassment and Sexual Harassment: Recognition of the "Severe or Pervasive" Standard in Cases of Hostile Work Environment*

The analogy between racial harassment and sexual harassment developed as courts began to recognize hostile work environment claims as actionable under Title VII of the Civil Rights Act of 1964. *Rogers v. Equal Employment Opportunity Commission*[17] was the first case to hold that a hostile work environment could create an actionable case of racial discrimination.[18] The plaintiff, a Hispanic woman working in an optometrist's office, filed a complaint after her employer segregated his Hispanic patients from his white patients.[19] Upon finding that the plaintiff's claim sufficiently established a Title VII violation, the court explained that "the phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."[20] Thus, the employer's segregation of patients constituted a hostile work environment because the employer created an environment permeated with racial discrimination.[21]

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

11. *Id.* at 23.

12. Faragher v. Boca Raton, 524 U.S. 775, 804–05 (1998).

13. *Id.* at 808. For example, the employer does not get an affirmative defense if the supervisor fired or demoted the victim.

14. *Id.* at 807.

15. 29 C.F.R. § 1604.11(d) (2004).

16. 29 C.F.R. § 1604.11(e) (20004).

17. 454 F.2d 234 (5th Cir. 1972).

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

19. *Rogers*, 454 F.2d at 236.

20. *Id.* at 238.

21. *See id.* at 238–39.

Lower courts followed the lead of the *Rogers* court in cases involving race. For example, in *Calcote v. Texas Educational Foundation*,[22] a white plaintiff alleged that his African-American supervisor harassed him by talking down to the plaintiff, writing a deficiency report on the plaintiff, and generally frustrating the plaintiff because of his race.[23] Although the court ultimately decided the case on alternative grounds, it recognized that racial harassment can form the basis of a Title VII claim when the harassing conduct creates an environment charged with discrimination.[24]

Claims of racial harassment and sexual harassment were first analogized in *Henson v. Dundee*.[25] The plaintiff, a female dispatcher for a police department, claimed that the chief of police uttered demeaning sexual vulgarities and requested that she engage in sexual relations with him.[26] Finding that a hostile work environment could provide the basis of a sexual harassment claim just as it could provide the basis of a racial harassment claim, the court wrote:

> [s]exual harassment which creates a hostile or offensive environment for members of one sex *is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality*. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[27]

The court then remanded the case for a determination of whether the police chief's conduct created a hostile work environment.[28]

The Supreme Court, in *Meritor Savings Bank v. Vinson*,[29] cited with approval the analogy between racial harassment and sexual harassment employed in *Henson*. The plaintiff brought an action against her former employer, claiming that while she was employed at the bank, her supervisor sexually harassed her when he made repeated requests for sexual favors, fondled her, exposed himself, and raped her.[30] The Court found that the district court erred in dismissing the plaintiff's claim.[31] In reaching this decision, the Court recognized that a hostile work environment is actionable discrimination under Title VII.[32] The Court cited *Rogers* as the first case that identified hostile work environment as actionable.[33] The Court also observed that, following *Rogers*, lower courts acknowledged hostile work environment as actionable in cases of racial harassment.[34] The court concluded that "[n]othing in Title VII suggests that a hostile work environment based on discriminatory *sexual* harassment should not be

22. 458 F.Supp. 231 (W.D. Tex. 1976).
23. *Id.* at 237.
24. *Id.*
25. 682 F.2d 897 (11th Cir. 1982).
26. *Id.* at 902.
27. *Id.* (emphasis added).
28. *Id.* at 901.
29. 477 U.S. 57, 66 (1986).
30. *Id.* at 60.
31. *Id.* at 73.
32. *Id.*
33. *Id.* at 65–66.
34. *Id.* at 66.

likewise prohibited."[35] The Court then used the *Henson* standard, explaining that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[36] The Court remanded the case so that the lower court could decide whether the employer's conduct was severe or pervasive enough to create a hostile work environment.[37]

More than fifteen years later, the Supreme Court reaffirmed that the analogy between racial harassment and sexual harassment was proper. In *National Railroad Passenger Corp. v. Morgan*,[38] the Court decided its first case of racial harassment. The African-American plaintiff alleged that since the time of his hiring, he had been subject to consistent harassment, which included utterances of racial epithets by managers, refusals to allow him to participate in an apprenticeship program, and numerous "written counselings" for absenteeism.[39] The Court resolved the case using the continuing violation theory for Title VII claims.[40] When making its decision, the Court stated that hostile work environment racial harassment and sexual harassment claims are reviewed under the same standard.[41] The Court applied the "severe or pervasive" standard it developed for sexual harassment cases involving hostile work environments to this racial harassment case.[42]

## II. SEVERE OR PERVASIVE CONDUCT IN THE SEVENTH CIRCUIT: SAME LEGAL STANDARD, DIFFERENT APPLICATION

After *Meritor* and *National Railroad*, one might think that the Supreme Court requires lower courts to treat cases of racial harassment and sexual harassment the same using the "severe or pervasive" standard. Indeed, courts say that they are using the same legal standards when deciding whether racially or sexually harassing conduct rises to the level of an actionable hostile work environment claim. Although courts claim to use the same "severe or pervasive" standard, they often differ when applying it. These differences are revealed when analyzing courts' definitions of the severe or pervasive conduct that gives rise to a hostile work environment claim.

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35. *Id.*

36. *Id.* at 67 (alteration in original) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

37. *See id.* at 73.

38. 536 U.S. 101 (2002).

39. *Id.* at 106 n.1.

40. *See id.* at 122. The Court held that claims of hostile work environment are not time barred if at least one of the harassing acts is within the time period for filing a claim and if all the harassing conduct is part of the same employment practice. *Id.* at 122. It acknowledged that hostile work environment claims often involve harassing conduct that is repeated over a period of time. *See id.* at 115. Because these claims are based on the collective effect of these acts, the acts together form a single, unlawful employment practice; the acts constitute one continuing violation of Title VII. *See id.* at 117.

41. *Id.* at 116 n.10.

42. *See id.*

### *A. Origins of the Severe or Pervasive Standard*

In *Meritor*, the Court found that for conduct to create a hostile work environment, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment.'"[43] The Court clarified the severe or pervasive standard in *Harris v. Forklift Systems*.[44] The plaintiff claimed that the president of Forklift Systems made sexual innuendos towards her and insulted her due to her gender.[45] The Court remanded the case because the district court erred when applying the severe or pervasive standard in deciding that the alleged conduct did not create a hostile work environment.[46] The Supreme Court held that the severe or pervasive standard has both subjective and objective components.[47] Not only must the victim perceive that the work environment is abusive, but a reasonable person must also view the environment as abusive.[48] The Court further explained that to determine whether an environment is hostile it must examine the totality of the circumstances.[49] Factors which can be considered include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[50] Thus, the victim does not have to suffer psychological injury or any other tangible injury to be successful on a claim of hostile work environment harassment.[51]

### *B. Same Standards, Different Application: An Examination of the Seventh Circuit's Sexual Harassment and Racial Harassment Decisions*

Lower courts now use the severe or pervasive standard defined in *Meritor* and explained in *Harris* when deciding cases of both sexual harassment and racial harassment. Following *Harris*, lower courts began to apply the severe or pervasive standard when deciding cases of sexual harassment, citing *Harris* when reaching their decisions.[52] Lower courts deciding cases of racial harassment also cited the Supreme

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43. Meritor Sav. Bank v. Vincent, 477 U.S. 57, 67 (1986) (alteration in original) (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

44. 510 U.S. 17, 21–23 (1993).

45. *Id.* at 19.

46. *Id.* at 22. The district court erroneously held that in order to be severe or pervasive, the conduct had to seriously alter the plaintiff's psychological well-being or cause her to suffer injury. *See id.* at 20.

47. *Id.* at 21.

48. *Id.*

49. *Id.* at 23.

50. *Id.*

51. *See id.* at 22.

52. *E.g.*, Beardsley v. Webb, 30 F.3d 524, 529 (4th Cir. 1994); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1462–63 (9th Cir. 1994); Nash v. Electropace Sys., Inc., 9 F.3d 401, 403–04 (5th Cir. 1993); Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526, 533 (7th Cir. 1993); Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1042 (2d Cir. 1993).

Court's sexual harassment decisions regarding the severe or pervasive standard, stating that the same standard applies to both.[53]

Although lower courts use the severe or pervasive standard that was developed in *Meritor* and *Harris* in both sexual harassment and racial harassment cases, courts often differ in applying the standard. Conduct that has been deemed severe or pervasive in cases of racial harassment has not been found to be severe or pervasive in the context of sexual harassment. The plaintiff must suffer from more egregious conduct to win on a sexual harassment claim than for a plaintiff to win on a racial harassment claim. This Note suggests that these courts, particularly the Seventh Circuit, have moved towards a standard of severe *and* pervasive conduct for actionable sexual harassment claims, while staying true to the Supreme Court's severe *or* pervasive standard for actionable racial harassment claims.[54]

The different treatment of racial harassment cases and sexual harassment cases by many courts is apparent when examining decisions of the Court of Appeals for the Seventh Circuit.[55] Following the *Harris* decision in 1993, the Seventh Circuit was one of the first circuits to apply the Supreme Court's severe or pervasive standard. Immediately following *Harris*, the Seventh Circuit decided two cases of sexual harassment and one case of racial harassment. These decisions provide a stark contrast in the way courts treat racial harassment and sexual harassment. In the case of racial harassment, one utterance of a racial epithet was deemed sufficiently severe for an actionable hostile work environment claim. However, in the cases of sexual harassment, multiple physical advances coupled with sexual comments were neither severe nor pervasive enough for an actionable hostile work environment claim.

In *Rodgers v. Western-Southern Life Insurance Co.*,[56] the Seventh Circuit found that even one utterance of a racial epithet was sufficient to give rise to a claim of hostile work environment racial harassment. The plaintiff, an African-American insurance sales manager, claimed that his white supervisor called him a "nigger" twice and said that "[y]ou black guys are too fucking dumb to be insurance agents."[57] The court held that this conduct was sufficient to establish a claim of hostile work

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53. *E.g.*, Hawkins v. Pepsi Co., Inc., 203 F.3d 274, 281 (4th Cir. 2000); Jackson v. Quanex Corp., 191 F.3d 647, 658-59 (6th Cir. 1999); Barbour v. Browner, 181 F.3d 1342, 1347–48 (D.C. Cir. 1999); Gipson v. KAS Snacktime Co., 171 F.3d 574, 578 (8th Cir. 1999).

54. Judith J. Johnson has also suggested that courts are moving towards a severe and pervasive standard for sexual harassment cases. Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 111–19 (2003). She also argues that courts merely "give lip service to the requirement that racial harassment be severe or pervasive." *Id.* at 122. This Note, however, proposes that most courts have stayed true to the Supreme Court's "severe or pervasive" standard. A minority of courts have even applied the more stringent "severe and pervasive" standard to racial harassment cases. *See infra* Part II.C.

55. For an in-depth discussion of two of the Seventh Circuit's differing decisions, see Robert J. Gregory, *You Can Call Me a "Bitch" Just Don't Use the "N-word": Some Thoughts on* Galloway v. General Motors Service Parts Operations *and* Rodgers v. Western-Southern Life Insurance Co., 46 DEPAUL L. REV. 741 (1997). This Note suggests that the differing approaches that Gregory discusses are due to the Seventh Circuit's use of a severe and pervasive standard for sexual harassment cases.

56. 12 F.3d 668, 671 (7th Cir. 1993).

57. *Id.* at 671.

environment. In reaching this conclusion, the court wrote: "Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment' than the use of an unambiguous racial epithet such as 'nigger' by a supervisor in the presence of his subordinate."[58] The court, therefore, indicated its belief that the use of one racial epithet was severe enough to be actionable.[59]

In contrast, the Seventh Circuit has held that even physical contact with the plaintiff was not severe. In *Saxton v. American Telephone Telegraph Co.*,[60] the plaintiff stated she went out one evening with her supervisor to discuss her dissatisfaction with her job assignment.[61] During that meeting, the supervisor rubbed his hand on the plaintiff's upper thigh, placed his hand on the plaintiff's knee several times, and kissed her.[62] On a separate occasion, the supervisor leapt out from behind some bushes and attempted to grab the plaintiff.[63] The court found that the supervisor's behavior was "relatively limited" as there were only two instances of offensive conduct; the harassment, therefore, was not pervasive.[64] Regarding the severity prong, the court acknowledged that "[c]ertainly any employee in Saxton's position might have experienced significant discomfort and distress as the result of her superior's uninvited and unwelcome advances."[65] While that supervisor's conduct could have made the plaintiff's job "subjectively unpleasant," his behavior was "merely offensive."[66] The court found, therefore, that the supervisor's conduct was not severe. Thus, the court held that although the supervisor's conduct was "undoubtedly inappropriate," it was neither severe nor pervasive enough to create a hostile work environment.[67]

Likewise, in *Weiss v. Coca-Cola Bottling Co.*,[68] the court found multiple occurrences of sexually harassing conduct insufficient to be actionable.[69] Here, the plaintiff claimed that her supervisor called her a dumb blond, asked her out on dates, placed "I love you" signs in her work station, placed his hand on her shoulder on several occasions, and tried to kiss her three times.[70] The court found that these incidents were "relatively isolated" and not serious.[71] The supervisor's conduct, therefore, did not produce a hostile work environment.[72]

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58. *Id.* (citation omitted) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

59. *See id.*

60. 10 F.3d 526 (7th Cir. 1993).

61. *Id.* at 528.

62. *Id.* The plaintiff and supervisor met at a nightclub. Later that evening, they drove to a jazz club where the harassing conduct took place. *Id.*

63. *Id.* After the two of them met for lunch, the supervisor took a walk. The plaintiff decided to take a walk by herself. While she was walking the supervisor "lurched" behind the bushes. *Id.*

64. *Id.* at 534.

65. *Id.*

66. *Id.* at 535.

67. *Id.* at 534.

68. 990 F.2d 333 (7th Cir. 1993).

69. *Id.* at 337.

70. *Id.* at 334–35.

71. *Id.* at 337.

72. *See id.*

After its three initial decisions following *Harris* in 1993, the Seventh Circuit continued to hold sexual harassment plaintiffs to a higher standard than racial harassment plaintiffs. For example, *Galloway v. General Motors Service Parts Operations*[73] provides a stark contrast to the court's earlier holding that a single utterance of "nigger" is severe enough to be actionable under Title VII. In *Galloway*, the plaintiff claimed that a co-worker repeatedly called her a "sick bitch."[74] He also told her, "If you don't want me, bitch, you won't have a damn thing," and on a separate occasion he said, "Suck this, bitch," while making an obscene gesture towards her.[75] The court held that the term "bitch" is not gender or sex related because although

> [i]t is true that "bitch" is rarely used of heterosexual males . . . . [I]t does not necessarily connote some specific female characteristic, whether true, false, or stereotypical; it does not draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect. In its normal usage, it is simply a pejorative term for "woman."[76]

The court found that the co-worker's use of "bitch" was motivated by personal animosity towards the plaintiff and not by her gender.[77] Because the court found that the utterances were not made because of the plaintiff's gender, the court did not even reach the issue of whether they were severe or pervasive.[78] The court suggested, however, that even if the utterances were gender motivated, they still would not constitute a hostile work environment because they were "too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex."[79]

When the Seventh Circuit finally arrived at the question of whether utterances that are sexual in nature are severe or pervasive, the court held that claims based on sexual utterances are not actionable under Title VII. The court reached this conclusion in *Baskersville v. Culligan International Co.*[80] and in *Gleason v. Mesirow Financial, Inc.*[81] In *Baskerville*, the plaintiff alleged numerous incidents of harassing conduct by her supervisor that occurred over a period of seven months: when she commented on how hot her supervisor's office was, he replied, "[n]ot until you stepped your foot in here;" he said that an announcement over the public address meant that "pretty girls run around naked" and he left an office party early because "he didn't want to lose control" with all the attractive girls there.[82] He also called her a "pretty girl" and a "tilly," grunted when she wore a leather skirt, and made a masturbatory gesture towards her.[83] The court determined that "vulgar banter, tinged with sexual innuendo"

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73. 78 F.3d 1164 (7th Cir. 1996).
74. *Id.* at 1165.
75. *Id.*
76. *Id.* at 1168.
77. *Id.*
78. *See id.*
79. *Id.*
80. 50 F.3d 428, 430–31 (7th Cir. 1995).
81. 118 F.3d 1134, 1143–46 (7th Cir. 1997).
82. *Baskerville*, 50 F.3d at 430.
83. *Id.*

is inescapable in the workplace and that Title VII was not meant to eliminate such vulgarity.[84] The court held that the plaintiff did not have an actionable claim for sexual harassment because the supervisor's utterances merely created a mildly offensive and unpleasant working environment and were not, therefore, severe enough to be actionable.[85]

Similarly, the *Gleason* court held that sexual utterances, by themselves, were not enough to form an actionable hostile work environment claim. In this case, the plaintiff claimed that her manager said that female customers were "bitchy," "dumb," and "suffering from PMS," made comments to female employees regarding breast sizes and wearing tight skirts, flirted with the plaintiff's female relatives, ogled women as they walked by his desk, and told the plaintiff he dreamt about holding her hand.[86] The court found that these comments were less egregious than the supervisor's comments in *Baskerville* because they were directed at other women and did not involve the plaintiff personally.[87] The court recognized that the supervisor's many comments were juvenile and inappropriate.[88] It held, however, that this "low-level harassment" was not severe enough to constitute a hostile work environment.[89] The plaintiff's claim, therefore, was not actionable.[90]

In contrast to the Seventh Circuit's decisions regarding the severity of sexual utterances, the court held that racial comments continued to be severe or pervasive enough to be actionable. In *Cerros v. Steel Technologies, Inc.*,[91] the Latino plaintiff alleged that his white supervisor called him "spic," "wetback," "brown boy," "Javier," and "Julio."[92] He also alleged that racist graffiti, including "White power," "Tony Cerros is a spic," and "go back to Mexico," was written on bathroom walls.[93] The court held that the lower court erred in granting summary judgment to the employer.[94] It found that unambiguous racial epithets fell on the more severe end of the hostile work environment spectrum.[95] It concluded that these comments were highly offensive; therefore, it was possible that this conduct was severe or pervasive.[96] Thus, the defendant sufficiently made an actionable hostile work environment claim.[97]

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84. *Id.* at 430–31.

85. *Id.* When reaching its decision, the court took its focus away from what the supervisor did do and placed it on what the supervisor did not do: he did not touch the plaintiff; he did not invite her to have sexual relations with him; he did not threaten her; and he did not expose himself to her. Because he did none of these things, the plaintiff did not have an actionable claim. *Id.*

86. *Gleason*, 118 F.3d at 1137.

87. *Id.* at 1144.

88. *Id.* at 1145.

89. *Id.* at 1144, 1146.

90. *Id.* at 1146.

91. 288 F.3d 1040 (7th Cir. 2002).

92. *Id.* at 1042.

93. *Id.*

94. *Id.* at 1048.

95. *Id.* at 1047.

96. *Id.* at 1046–47.

97. *Id.* at 1048.

98. 218 F.3d 798 (7th Cir. 2000).

It is possible for a plaintiff in the Seventh Circuit to win on a hostile work environment sexual harassment claim, but the plaintiff must show forceful physical contact coupled with sexual utterances in order for the conduct to be deemed severe or pervasive. *Hostetler v. Quality Dining, Inc.*[98] provides an example of conduct deemed to be actionable. The plaintiff claimed that a supervisory employee grabbed her face and kissed her, sticking his tongue down her throat.[99] The next day, he came up behind the plaintiff, took her face in his hand, tried to kiss her, and began to unfasten her brassiere; when she resisted he laughed and said he would "undo it all the way."[100] On a separate occasion, the employee told the plaintiff that his ability to perform oral sex was so excellent that she "would do cartwheels" if he performed this sex act on her.[101] When deciding this case, the court described the line between actionable conduct and non-actionable conduct as a continuum—at one end lies sexual assault and at the other end lies the occasional sexual utterance.[102] It held that whether the conduct in the case at bar was objectively severe or pervasive was a close question, but that the claim fell on the actionable side of the line.[103] The court saw the conduct in question as "forcible physical contact of a rather intimate nature" and the utterance as more than a casual obscenity.[104] Furthermore, the employee's actions were more severe than the attempts to kiss in *Saxton* and *Weiss*.[105] The court held, therefore, that a fact finder could have found that the conduct was severe or pervasive, and it reversed the district court's grant of summary judgment for the employer.[106]

Some courts, particularly the Seventh Circuit, have different approaches as to what constitutes severe or pervasive conduct depending on whether it is hearing a racial harassment case or a sexual harassment case.[107] The court's decision in *Cerros* demonstrates that utterances of racial epithets, by themselves, are severe or pervasive enough to create an actionable hostile work environment. In fact, the court held in *Rodgers* that a single utterance of the world "nigger" was severe enough to be actionable. In contrast, the court held in *Baskersville* and *Gleason* that even multiple utterances that were sexual in nature were not actionable because they were not severe. When the sexual utterances were coupled with physical contact in *Saxton* and *Weiss*, the court decided that this still was not severe enough to be actionable. Only in *Hostetler*, when the utterance was combined with forceful physical contact (a forceful kiss and unfastening a brassier) did the court find the conduct severe or pervasive. In practice, therefore, successful sexual harassment plaintiffs are held to a high "severe *and* pervasive" standard—the conduct must be both physically forceful and occur multiple times.[108] In contrast, a successful racial harassment plaintiff is still held to the severe or pervasive standard.

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98. 218 F.3d 798 (7th Cir. 2000).
99. *Id.* at 802.
100. *Id.*
101. *Id.*
102. *Id.* at 807.
103. *Id.*
104. *Id.* at 807–08.
105. *Id.* at 808–09.
106. *Id.* at 811.
107. Gregory, *supra* note 55, at 740–41; Johnson, *supra* note 54, at 111–23.
108. Johnson, *supra* note 54, at 111.

### C. *Is Severe* and *Pervasive Here to Stay? Implications for Racial Harassment Cases*

While the case law examined thus far reveals that some courts treat cases of racial harassment and sexual harassment differently, there is an indication that other courts are treating racial harassment and sexual harassment the same. However, these courts are not using the severe *or* pervasive standard defined in *Meritor* and *Harris*. Courts, in practice, are moving towards a severe *and* pervasive standard in sexual harassment cases and are then importing this standard to cases of racial harassment. Some fear that by using an analogy between racial harassment and sexual harassment, courts will find that no matter how severe, a single instance of harassment will not constitute an actionable claim for hostile work environment.[109] Employees, therefore, would be forced to tolerate even the most severe harassment as long as it is an isolated occurrence.[110] The new severe and pervasive standard could trivialize the damage created by a single incident of harassment by finding the incident not actionable.[111]

Case law indicates that there is substance to the argument that racial harassment cases are being held to the higher severe and pervasive standards of sexual harassment cases. In *Motley v. Parker-Hannifan Corp.*, the African-American plaintiff alleged three incidents of harassing conduct by his employer: first, an African-American doll was hung in effigy; second, graffiti directed at the plaintiff was written on a wall; third, a flier was altered by darkening the face and labeling it with the plaintiff's name.[112] The court quoted *Rabidue v. Osceola Refining Co.*, a hostile work environment sexual harassment opinion, stating that claims

> are characterized by multiple and varied combinations and frequencies of offensive exposures, which characteristics would dictate an order of proof that placed the burden upon the plaintiff to demonstrate that injury resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency.[113]

Using *Rabidue* as its standard, the court held that the isolated incident of the doll hung in effigy was not severe enough to establish a claim for a hostile work environment.[114] When this incident was coupled with the graffiti and the flier, the court found that the conduct was still not severe or pervasive enough to constitute a hostile work environment.[115]

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109. L. Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 865 (1997). Although Hébert argues that some racial harassment cases are being held to a higher standard, she does not argue that this is a severe and pervasive standard.

110. *Id.*

111. *Id.* at 866.

112. Motley v. Parker-Hannifan Corp., No. 1:94-CV-639, 1995 U.S. Dist. LEXIS 7420, at *1–3 (W.D. Mich. May 10, 1995).

113. *Id.* at *7 (quoting Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986)).

114. *Id.*

115. *Id.*

Although the Seventh Circuit held in *Rodgers* that one utterance of the word "nigger" is severe enough to be actionable, other circuits have found that utterances of racial epithets are not severe enough to be actionable. One example is *Hibbler v. Regional Medical Center.*[116] The plaintiff alleged a single use of a racial epithet by her supervisor.[117] The court wrote that unless the conduct was extreme, a single incident was not severe or pervasive enough to be actionable.[118] Although it found the use of the epithet to be inexcusable, the court held that the remark did not create a hostile work environment.[119]

Even when utterances of racial epithets are combined with other harassing conduct, some courts are now likely to find that the behavior is not severe or pervasive. In *Woodland v. Joseph T. Ryerson & Son, Inc.*,[120] the court held that racial epithets joined with other behavior were not actionable. The plaintiff claimed that on multiple occasions, employees used racial epithets directed at the plaintiff and other African-American employees.[121] In addition, copies of a racist poem were distributed among employees, and racist graffiti was written on the walls.[122] The court remarked that the conduct was offensive and inexcusable.[123] However, the behavior was too sporadic to be severe or pervasive.[124]

Similarly, the court in *Gipson v. KAS Snacktime Co.*[125] held that use of the word "nigger" combined with other conduct was not severe or pervasive enough to be actionable. The African-American plaintiff alleged that at their first meeting, his white supervisor refused to shake his hand and told the plaintiff to "[f]ire that fat black guy that wears glasses, because he just doesn't fit in around here."[126] The supervisor also called the plaintiff a "dumb nigger" and made other trivializing comments, which included demanding that the plaintiff quit because the company did not need "his kind."[127] The supervisor even threatened to fire the plaintiff if he ever walked ahead of the supervisor.[128] On several occasions, the supervisor said that if the plaintiff had worked for him ten years ago, the supervisor would have "ripped his head off."[129] In reaching its decision that the plaintiff did not make an actionable hostile work environment claim, the court explicitly stated that it was using the same standard that it used in sexual harassment cases.[130] The court acknowledged that the supervisor's behavior was offensive and rude, but it was not severe or pervasive.[131]

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116. No. 00-6205, 2001 WL 700829 (6th Cir. June 12, 2001).
117. *Id.* at *2. The opinion did not provide the racial epithet that the supervisor used.
118. *Id.*
119. *Id.*
120. 302 F.3d 839 (8th Cir. 2002).
121. *Id.* at 843–44.
122. *Id.* at 844.
123. *Id.*
124. *Id.*
125. 171 F.3d 574 (8th Cir. 1999).
126. *Id.* at 577.
127. *Id.* at 577–78.
128. *Id.* at 577.
129. *Id.*
130. *Id.* at 578.
131. *Id.* at 580.

Case law indicates that once some courts hold sexual harassment plaintiffs to what is, in practice, a severe and pervasive standard, they import this tougher standard to racial harassment plaintiffs. It is neither enough to allege a single, severe incident, nor is it enough to allege repeated occurrences of harassing conduct. Hanging an African American in effigy or using the word "nigger" is not actionable. Even when there are multiple occurrences of racially harassing conduct, such as in *Motley*, *Woodland*, and *Gipson*, some courts will not find the conduct pervasive. Thus, the conduct must be both severe *and* pervasive to be actionable. These courts have imported the severe and pervasive standard to racial harassment cases.

Although a minority of courts have begun to use this severe *and* pervasive standard in both sexual harassment and racial harassment claims, the Supreme Court, in *Meritor* and *National Railroad*, has required that both sexual harassment claims and racial harassment claims be subject to the same severe *or* pervasive standard. Courts, in practice, have not followed the Supreme Court's mandate to treat the two according to the same severe *or* pervasive standard. For example, the Seventh Circuit has held sexual harassment plaintiffs to a more stringent severe *and* pervasive standard, making it tougher for sexual harassment plaintiffs to be successful than for racial harassment plaintiffs. Part III will examine some explanations for why some courts treat sexual harassment and racial harassment differently.

## III. APPROPRIATENESS OF USING DIFFERENT STANDARDS FOR RACIAL HARASSMENT AND SEXUAL HARASSMENT CLAIMS

When reaching decisions regarding cases of racial and sexual harassment, courts rarely give satisfying explanations for why treatment of racial harassment cases and sexual harassment cases differs. When deciding claims of hostile work environment harassment, courts generally cite to *Harris* and federal appellate court opinions, and then they simply reason that the conduct either is or is not severe or pervasive.[132] Commentators, therefore, are left to hypothesize why courts hold sexual harassment plaintiffs to a higher standard than racial harassment plaintiffs. Several explanations can be given for the different treatment of sexual harassment and racial harassment cases.[133] First, sexual discrimination and racial discrimination are historically different; this historical difference translates into different treatment in the legal system. Second, despite the Supreme Court's recognition in *Meritor* that sexual harassment is a form of sex discrimination, lower courts only grudgingly accepted sexual harassment as actionable. Third, the term "race" as used in the harassment context has only one denotation, while the term "sex" has two denotations. "Sex" can be used to denote gender differences (male or female), and it can be used to describe sexuality (the

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132. *See supra* Part II.B.

133. For other discussions of the reasons for differences between race and sex in harassment cases, see Hébert, *supra* note 109, at 836–44; Gregory, *supra* note 55, at 772–75. Hébert suggests the differences in the cases are a result of differences in historical context, the victim's experience of harassment, and the harasser's motivation behind the harassing conduct. Hébert, *supra* note 109, at 836–44. Gregory examines such factors as court's discomfort in policing the "sexual give and take" that is part of the workplace courting ritual, the prevalence of sexual misconduct in society, the ambiguities inherent in harassing utterances, and the number of female and minority judges on the bench. Gregory, *supra* note 55, at 772–75.

expression of sexual desires). The courts often view sexual harassment as an expression of sexuality for which employers should not be held liable.

### *A. Historical Differences Between Race and Sex*

One possible explanation for the different legal treatment of racial harassment and sexual harassment cases is that race and sex are historically different; therefore, any analogy between the two is not justified. In some ways, women and racial minorities share a common history of deprivation of legal and political rights.[134] Until the late nineteenth century, neither group could vote, hold office, bring a lawsuit, or serve on juries.[135] Both groups have also historically been denied equal treatment in the workplace.[136] For example, traditionally there have been "women's jobs" and "African American's jobs" that are lower paying than those jobs traditionally held by white men.[137] However, some have argued that sexual discrimination has not left the same legacy as racial discrimination and that subordination of women to men cannot compare to slavery, segregation, and racially motivated hate crimes.[138] When Frederick Douglas called upon women to support suffrage for African Americans despite the absence of suffrage for women, he pled:

> When women, because they are women, are dragged from their homes and hung upon lamp-posts; when their children are torn from their arms and their brains dashed upon the pavement; when they are objects of insult and outrage at every turn; when they are in danger of having their homes burnt down over their heads; when their children are not allowed to enter schools; then they will have [the same] urgency to obtain the ballot.[139]

Those who argue that race and sex should not be analogized often point out these differences, claiming that analogizing race and sex threatens to trivialize the historical violence against racial minorities.[140] For example, when early feminists described marriage as slavery, some argue this analogy of race and sex implied that slavery was no worse than marriage.[141]

These historical differences have also translated into differences in the way that women and racial minorities are treated in the legal system outside of Title VII. For example, in Equal Protection Clause cases, classifications based on race are considered suspect and are subject to strict scrutiny.[142] Classifications based on gender, however,

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134. For an in-depth discussion of these historical differences, see Hébert, *supra* note 109, at 836–38.

135. Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

136. Hébert, *supra* note 109, at 837–38.

137. *Id.* at 838.

138. *See id.* at 837.

139. *Id.* (alteration in original) (quoting 2 HISTORY OF WOMEN'S SUFFRAGE 383 (Elizabeth Cady Stanton et al. eds., Susan Anthony 1976) (1881)).

140. Hébert, *supra* note 109, at 879–80.

141. *Id.* at 879 (citing ANGELA Y. DAVIS, WOMEN, RACE & CLASS 33–34 (1983)).

142. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

are thought of as "quasi-suspect" classifications that are subject to a higher degree of scrutiny than rational basis review but are not subject to strict scrutiny.[143]

*B. Reluctance to Accept Sexual Harassment as Actionable Under Title VII*

The different treatment of racial harassment and sexual harassment cases might also be due to the reluctance of the federal government to accept sex discrimination as a form of actionable discrimination. The disinclination of Congress to accept sex discrimination as actionable is apparent in the limited legislative history of Title VII of the Civil Rights Act of 1964.[144] There is some indication that sex discrimination was added at the last minute in order to defeat the bill's passage—the congressman who introduced the sex discrimination provision into the bill believed that others in Congress would think that extending protection to sex discrimination was absurd because treating men and women in the workplace differently was acceptable.[145] However, the bill passed.[146]

After Congress passed the Civil Rights Act of 1964, federal courts hesitantly accepted sexual harassment as an actionable claim under Title VII.[147] Prior to 1977, only five sexual harassment cases had been litigated under Title VII.[148] Of these cases, only one held that sexual harassment was actionable under Title VII.[149] It was not until

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143. *See* United States v. Virginia, 518 U.S. 515 (1996); Frontiero v. Richardson, 411 U.S. 677 (1973).

144. *See* 110 CONG. REC. 2577–84 (1964).

145. *See, e.g.*, CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–18 (1985); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 23–25 (1995); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441–43 (1966).

146. *See* 110 CONG. REC. 2584 (1964).

147. *See* LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 46.02 (2d ed. 2003); L. Camille Hébert, *The Economic Implications of Sexual Harassment for Women*, 3 KAN. J.L. & PUB. POL'Y 41, 42–44 (1994).

148. *See* Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) (holding that Title VII was not meant to provide a remedy for "what amounts to a physical attack motivated by sexual desire on the part of a supervisor and which happens to occur in a corporate corridor rather than a back alley"); Williams v. Saxbe, 413 F. Supp. 654, 657–60 (D.D.C. 1976) (finding that sexual harassment is actionable as sex discrimination under Title VII and rejecting employer's argument that firing plaintiff for refusing the sexual advances of her supervisor resulted from "an isolated personal incident which should not be the concern of the courts and was not the concern of Congress in enacting Title VII"); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 162–65 (D. Ariz. 1975) (holding that the supervisor's sexual advances were not actionable under Title VII because the supervisor was merely satisfying a personal desire and because his behavior was not conducted pursuant to a company policy); Miller v. Bank of America, 418 F. Supp. 233, 236 (D. Nev. 1974) (holding that Title VII could not be used to hold an employer liable for the "natural sex phenomenon" of men's attraction to women); Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974) (holding that sexual harassment was not actionable because the case was "a controversy underpinned by the subtleties of an inharmonious personal relationship").

149. *Williams*, 413 F. Supp. at 657–60.

the late 1970's that the tide began to turn for sexual harassment plaintiffs.[150] Sexual harassment as a cause of action did not gain judicial recognition until 1976.[151] In contrast, racial harassment was recognized as actionable under Title VII as early as 1971.[152]

### *C. Merely Misplaced Affection? "Sex" Versus "Sexual"*

Courts might also treat cases of sexual harassment and racial harassment differently because the term "race" as used in the harassment context has only one denotation, while the term "sex" has two denotations. "Sex" can be used to denote gender differences (male or female), and it can be used to describe sexuality (the expression of sexual desires).[153] Courts have not had any trouble recognizing harassment based on gender distinctions as actionable.[154] However, the courts have struggled with acknowledging harassment based on sexuality as actionable.[155]

Courts are sometimes reluctant to accept harassment based on sexuality as actionable because they perceive sexual activity in the workplace as unrelated to the job. Harassers whose conduct is based on sexuality might have different motivations for their behavior than harassers whose conduct is based on race or gender.[156] Conduct based on sexuality could be a misguided attempt to initiate romance or show affection; courts do not want to interfere in failed "personal relationships" of employees.[157] Courts view this harassing behavior as merely natural and normal activity between co-workers that should not expose the employer to liability.[158] While some women are not receptive to these sexual advances, some women welcome this behavior—courts do not want to police office flirtations motivated by personal affection. These personal motivations are lacking in cases of racial and gender harassment.

The courts' struggle to recognize harassment based on sexuality is apparent when examining early sexual harassment decisions. In *Barnes v. Train*,[159] the plaintiff was fired when she refused to have sexual intercourse with her supervisor.[160] Holding that the plaintiff did not have a cause of action, the court wrote that this was "a controversy underpinned by the subtleties of an inharmonious personal relationship" and was not discrimination based on gender.[161] Similarly, in *Corne v. Bausch & Lomb, Inc.*,[162] the

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150. *See* LARSON, *supra* note 147, § 46.02(1).

151. *See Williams*, 413 F. Supp. at 657; Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1449 (1984).

152. Sarah McLean, Comment, *Harassment in the Workplace: When Will the Reactions of Ethnic Minorities and Women Be Considered Reasonable?*, 40 WASHBURN L.J. 593, 598 (2001).

153. LARSON, *supra* note 147, § 46.02(1).

154. *See id.*

155. *Id.*

156. *See* Hébert, *supra* note 109, at 842–43.

157. *Id.* at 843; Gregory, *supra* note 55, at 765–66.

158. Gregory, *supra* note 55, at 766; *see also* cases cited *supra* note 148.

159. 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974).

160. *Id.* at 124.

161. *Id.*

162. 390 F. Supp. 161, 163 (D. Ariz. 1975).

court described the supervisor's sexual advances as "nothing more than a personal proclivity, peculiarity or mannerism . . . satisfying a personal urge."[163] The court also explained, "It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act . . . . [A]n outgrowth of [such a holding] would be a potential federal lawsuit every time any employer made amorous or sexually oriented advances toward another."[164] Again, the court held that the plaintiff did not have a cause of action.[165] These decisions indicate that courts believed that harassment based on sexuality was not motivated by hostility towards women but was instead motivated by personal affection having nothing to do with the employer.

This struggle to recognize harassment based on sexuality is not limited to cases decided before *Meritor*. When the court in *Saxton* upheld summary judgment for the defendant, it wrote:

> Certainly any employee in Saxton's position might have experienced significant discomfort and distress at the result of her superior's uninvited and unwelcome advances. . . . Thus, although it might be reasonable for us to assume that [the supervisor's] inaccessibility, condescension, impatience, and teasing made Saxton's life at work subjectively unpleasant, the evidence fails to demonstrate that his behavior was not "merely offensive."[166]

Thus, although the plaintiff experienced discomfort and unpleasantness, the conduct was not severe or pervasive enough to establish a hostile work environment.[167] Courts have deemed this unpleasantness as a part of the working environment that victims of harassing behavior must tolerate. For example, in *Baskerville*, the court determined that "vulgar banter, tinged with sexual innuendo" is inescapable in the workplace and that Title VII was not meant to eliminate such vulgarity.[168] The court held that the plaintiff did not have an actionable claim for sexual harassment because the supervisor's sexual utterances merely created a mildly offensive and unpleasant working environment.[169]

When courts view sexual harassment as merely misplaced affection that plaintiffs must deal with as part of a normal working environment, they fail to recognize that sexual harassment is motivated by power, just as racial harassment is motivated by power.[170] Sexual harassment is caused by the frustration men feel over their loss of

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163. *Id.*

164. *Id.*

165. *Id.* at 165.

166. Saxton v. AT&T, 10 F.3d 526, 534–35 (7th Cir. 1993).

167. *Id.*

168. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430–31 (7th Cir. 1995).

169. *Id.*

170. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 174 (1979) ("Sexual harassment perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market. Two forces of American society converge: men's control over women's sexuality and capital's control over employees' work lives."); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997) ("[T]he sexual harassment of a woman by a man is an instance of sexism precisely because the act embodies fundamental gender

power over women in the workplace.[171] The majority of management positions are held by men, and traditionally men have held higher paying jobs.[172] However, women are gradually being employed in jobs traditionally held by men.[173] Some men feel threatened by this change in position and therefore act with hostility towards women as a result of their loss in power.[174] Such hostility often takes the form of sexual harassment, including behavior based on sexuality.[175] Men express their hostility in a sexual way due to biological and social factors that cause men to believe they can still have power over women in the context of a sexual relationship.[176]

The view that sexually harassing behavior is motivated by power and hostility towards women rather than sexual desire is similar to the argument made for criminalizing rape. In the 1970s, feminists began to emphasize that rape was a crime of violence motivated by men's desire to exert power over women.[177] They portrayed the rapist as a man motivated by sexism, not the passions of sex.[178] Feminists emphasized power over desire in order to combat the traditional tendency to blame the victims for the rape based on their sexual conduct or appeal.[179] The approach to rape as motivated by power transformed the focus of rape litigation from the sexual character of the victim to the violent conduct of the perpetrator.[180]

This Part has discussed three reasons for the reluctance of courts to treat sexual harassment and racial harassment in the same way. Historically, racial minorities have been subject to more severe forms of discrimination than women. Courts have only reluctantly accepted sexual harassment as a form of sex discrimination; recognition of racial harassment as a form of racial discrimination came earlier. Finally, courts view sexual harassment as being motivated by personal affection towards the employee. This Part, however, has suggested that sexual harassment, like racial harassment, is motivated by power. This motivation is just one reason for aligning the standards for racial harassment and sexual harassment.

## IV. ALIGNING THE STANDARDS FOR RACIAL HARASSMENT AND SEXUAL HARASSMENT

Despite the prevalence of the differing treatment of racial harassment and sexual harassment claims, courts should align the treatment of these claims. There are several arguments in support of aligning the standards. First, the Supreme Court in both *Meritor* and *National Railroad* required that racial and sexual harassment cases be

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stereotypes: men as sexual conquerors and women as sexually conquered, men as masculine sexual subjects and women as feminine sexual objects.").

171. *See* MACKINNON, *supra* note 170, at 199.

172. Hébert, *supra* note 147.

173. *Id.*

174. MACKINNON, *supra* note 171, at 199 ("[M]ale sexual advances may often derive as much from fear and hatred of women and a desire to keep them in an inferior place as from a genuine positive attraction or affection . . . ."); Hébert, *supra* note 147.

175. Hébert, *supra* note 147.

176. *Id.*

177. Samual H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 878, 882 (2002).

178. *Id.* at 882.

179. *Id.* at 879.

180. *Id.* at 883.

treated equally according to the severe or pervasive standard.[181] Second, the analogy is appropriate because both racial and sexual minorities share a common history of deprivation of rights.[182] Third, the motivations behind sexually harassing conduct and racially harassing conduct are the same—harassers engage in this behavior to exert power over a subordinate group.[183]

Aligning the standards, however, should not include the approach that some courts have taken by importing the tougher severe *and* pervasive standard of sexual harassment claims to racial harassment claims.[184] Instead, the sexual harassment standard should align with the less stringent standard of racial harassment cases. Because one severe incident of conduct is not actionable, holding racial harassment plaintiffs to the more stringent severe and pervasive standard of sexual harassment cases could leave employees exposed to extremely damaging behavior with no legal recourse.

Interests of minority group women who have been victimized by harassment will benefit from aligning the standards. The interests of minority group women are harmed when racial harassment and sexual harassment are treated as two separate types of discrimination that are subject to two different standards.[185] In the case of these women, race and sex intersect.[186] For them, racial harassment and sexual harassment walk hand-in-hand; it is impossible for minority group women to separate their experiences according to race and sex.[187] By having the same legal standard for both types of harassment, it will become easier for minority group women to be successful on their harassment claims.[188]

## CONCLUSION

Although it appears that the Supreme Court, in *Meritor* and *National Railroad*, has required that both sexual harassment claims and racial harassment claims be subject to the severe or pervasive standard, in practice, courts have not followed the Supreme Court's mandate. The Seventh Circuit has clearly made it tougher for sexual harassment plaintiffs to be successful than racial harassment plaintiffs by holding sexual harassment plaintiffs to a more stringent severe *and* pervasive standard. A minority of courts have begun to import this stricter standard to cases of racial harassment. Neither of these approaches is consistent with the severe *or* pervasive standard prescribed in *Meritor*.

There are reasons for the reluctance of courts such as the Seventh Circuit to treat sexual harassment and racial harassment the same. Historically, racial minorities have

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181. *See supra* Part I.B.

182. *See supra* Part II.C

183. *See supra* note 170 and accompanying text.

184. *See supra* Part II.C.

185. Debra Dominick, Comment, *Title VII: How Recent Developments in the Law of Sexual Harassment Apply with Equal Force to Claims of Racial Harassment*, 103 DICK. L. REV. 765, 791 (1999); Hébert, *supra* note 109, at 881.

186. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 604 (1990).

187. *Id.*; Dominick, *supra* note 185, at 791.

188. Hébert, *supra* note 109, at 881.

been subject to more severe forms of discrimination than women. Courts have only reluctantly accepted sexual harassment as a form of sex discrimination; recognition of racial harassment as a form of racial discrimination came earlier. Finally, courts view sexual harassment as being motivated by personal affection towards the employee instead of being motivated by power.

Courts should change their ways and return to the severe *or* pervasive standard for both racial harassment and sexual harassment cases. Both groups have historically been deprived of rights. Also, harassing conduct is motivated by power in both sexual and racial harassment cases. By aligning the standards of sexual harassment to the less stringent standards of racial harassment, the courts would be aligning themselves with the intentions of the Supreme Court in *Meritor* and *National Railroad*. In addition, the consistency found with aligning the standards will make it easier for minority women to bring harassment claims.

The direction that the courts take in deciding what standards to use could have implications for open questions of law in future harassment cases. If courts continue to treat sexual and racial harassment differently when deciding whether conduct creates a hostile working environment, courts might move away from the analogy between sexual and racial harassment when deciding open questions of law. Courts might be less likely to import standards of one type of harassment to the other type of harassment, making decisions less predictable. However, if courts align the severe or pervasive standard, they might also be likely to continue the analogy to open issues of law. This would lead to consistency and predictability for all involved in Title VII litigation.