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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.

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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.*

*Robert J. Gregory**

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an individual with respect to his or her "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[1] It has been clear, since at least 1986, 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 [hostile or abusive] working environment.'"[2] It has also been clear, since that time, that Title VII extends equally to claims of sexual and racial discrimination based on a hostile working environment.[3] Courts have accepted the view that claims of racial and sexual "harassment," to use the common parlance, are governed by the same legal standards.[4]

Despite the uniform standards applied to claims of racial and sexual harassment, there are strong indications that courts are not in practice

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1. 42 U.S.C. § 2000e-2(a)(1) (1994). I use the term "Title VII" throughout this Article in referring to the employment provisions of the Civil Rights Act of 1964.

2. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

3. *Id.* at 65-66. Title VII also prohibits conduct that creates a hostile working environment on the basis of religion or national origin. *See* 2 EEOC Compl. Man. (BNA) §§ 615.7(a)-(b) (Jan. 1982) ("[T]he EEOC has long recognized that harassment on the basis of race, color, religion, or national origin is an unlawful employment practice in violation of Title VII. . . . [T]he principles involved with regard to sexual harassment [also] apply to harassment on the basis of race, color, religion, or national origin."). This Article focuses on race- and sex-based claims of hostile environment discrimination.

4. *See infra* notes 18-24 and accompanying text (discussing the legal standards for claims of racial and sexual harassment).

assessing these claims on the same terms.[5] The critical inquiry in cases of hostile environment harassment is whether the harassing behavior is, first, race- or sex-based and, second, "sufficiently severe or pervasive to alter the conditions of the victim's employment."[6] In the race context, courts seem particularly receptive to claims that racially harassing behavior has affected the terms or conditions of an individual's employment, resolving any ambiguities in favor of the claimant and de-emphasizing the need for any specific number of instances of harassment.[7] In the sex context, the judicial reaction seems less solicitous, with courts more often stressing the ambiguities in the conduct at issue and the need for repeated instances of harassing conduct.[8]

This legal dichotomy is exposed by two recent decisions in the United States Court of Appeals for the Seventh Circuit.[9] In each of these cases, the court was confronted with the use of an epithet directed at the complaining party. In *Galloway v. General Motors Service Parts Operations*, the plaintiff had been "repeatedly" called a "sick bitch" by one of her co-workers over a period of four years.[10] In *Rodgers v. Western-Southern Life Insurance Co.*, the plaintiff's supervisor had referred to the plaintiff as a "nigger" on two occasions during the plaintiff's twelve years of employment.[11] The court in *Galloway* ruled that there was no "sexual innuendo or gender slur in 'sick bitch'" and that the harassing behavior was, in any event, "too tepid or intermittent or equivocal to make a reasonable person believe that she had been discriminated against on the basis of her sex."[12] The court in *Rodgers* ruled that the term "nigger" was "unambiguously" racist and its use, even on a few occasions, sufficiently severe to affect the terms and conditions of the plaintiff's employment.[13]

This Article explores the issues raised by the *Galloway* and *Rodgers* decisions. The Article focuses, in particular, on whether there are justifications for the disparate result in these two cases, which seem to raise similar claims of race- and sex-based discrimination. I conclude that while there may be some grounds for viewing the harassment in

5. This point is discussed at *infra* notes 25-54 and accompanying text.

6. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting *Vinson*, 477 U.S. at 67).

7. *See, e.g.*, Daniels v. Essex Group, Inc., 937 F.2d 1264, 1273-75 (7th Cir. 1991).

8. *See, e.g.*, Rennie v. Dalton, 3 F.3d 1100, 1107-08 (7th Cir. 1993).

9. *See* Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164 (7th Cir. 1996); Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668 (7th Cir. 1993).

10. 78 F.3d at 1165. The co-worker also made an obscene gesture at the plaintiff and urged her to "suck this, bitch." *Id.*

11. 12 F.3d at 671. The supervisor had also made the comment on one occasion, in the plaintiff's presence, that "'[y]ou black guys are too fucking dumb to be insurance agents.'" *Id.*

12. 78 F.3d at 1168.

13. 12 F.3d at 675.

Rodgers as more "severe," these grounds do not justify the tolerance shown to the sexual epithets at issue in *Galloway*. My aim here is not simply to isolate the court's decisions in these two cases but to use these cases to make a broader point about the disparate judicial response to claims of racial and sexual harassment. In my view, the case law reveals a judicial tolerance of sexual harassment that has no analog in the area of racial harassment and which leaves working women without the full protection of the law.

I. BACKGROUND: RACIAL AND SEXUAL HARASSMENT IN PRACTICE

As originally proposed, Title VII focused principally on the issue of race discrimination. The prohibition against sex discrimination "was added to Title VII at the last minute on the floor of the House of Representatives," with little legislative debate.[14] It is not surprising, given this history, that much of the early case law under Title VII focused on claims of race discrimination. Thus, one of the first decisions to address a claim of a hostile work environment, *Rogers v. EEOC*,[15] was a race/national origin case. In that case, the court ruled that a workplace "heavily charged with ethnic or racial discrimination" can affect the terms or conditions of an individual's employment and, thus, give rise to a Title VII violation.[16]

While the hostile environment theory had its origins in claims of a racially abusive working environment, the theory quickly spread to the area of sexual harassment. In 1980, the Equal Employment Opportunity Commission ("EEOC") issued guidelines on sexual harassment discrimination. The EEOC specified that unlawful sexual harassment consists of "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[17]

In *Meritor Savings Bank v. Vinson*,[18] the Supreme Court largely endorsed the EEOC's approach to the sexual harassment theory. The Court confirmed that Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and

14. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986).
15. 454 F.2d 234 (5th Cir. 1971).
16. *Id.* at 238.
17. 29 C.F.R. § 1604.11(a)(3) (1996).
18. 477 U.S. 57 (1986).

insult."[19] Noting that courts had applied this principle "to harassment based on race," the Court stressed that "[n]othing in Title VII suggests that a hostile working environment based on discriminatory *sexual* harassment should not be likewise prohibited."[20] The Court ruled that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[21]

Since *Vinson*, it has been clear that claims of racial and sexual harassment stand on the same legal footing. The EEOC has stated that the liability principles for hostile environment claims apply with "equal validity" to claims of racial and sexual harassment.[22] Courts have overwhelmingly applied the same legal standards in passing upon claims of racial and sexual harassment.[23] Courts have stressed that "Title VII 'on its face treats each of the enumerated categories [including race and sex] exactly the same.'"[24] Therefore, there is no reason to apply different "elements of proof . . . in a Title VII claim arising with a *racially* hostile work environment than in a case of *sexual* harassment within the workplace."[25]

While these judicial pronouncements suggest a level playing field for the assertion of claims of racial and sexual harassment, they do not

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19. *Id.* at 65.

20. *Id.* at 66.

21. *Id.*

22. 2 EEOC Compl. Man. (BNA) § 615.7(b) (Jan. 1982).

23. *See, e.g.*, Harrison v. Metropolitan Gov't of Nashville & Davidson County, 80 F.3d 1107, 1118 (6th Cir.) (stating that "the elements and burden of proof that a Title VII plaintiff must meet are the same for racially charged harassment as for sexually charged harassment"), *cert. denied*, 117 S. Ct. 169 (1996); West v. Philadelphia Elec. Co., 45 F.3d 744, 753 n.7 (3d Cir. 1995) ("The [Supreme] Court has recognized no difference in standards applicable to racially and sexually hostile work environments."); Daniels v. Essex Group, Inc., 937 F.2d 1264, 1270-72 (7th Cir. 1991) (viewing the standards applied to claims of racial and sexual harassment as interchangeable). In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Supreme Court ruled that Title VII is violated when "'discriminatory intimidation, ridicule, and insult'" is "'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Id.* at 21 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986)). The Court stressed that, in determining whether a work environment is sufficiently "hostile or abusive," a court must examine "all the circumstances," applying both an objective and subjective standard. *Id.* at 23 (stressing that the environment must be one that both the claimant herself and "a reasonable person" would find hostile or abusive). The Court indicated that the test for determining the existence of a hostile environment—which, the Court held, does not require a showing that the harassment caused psychological injury—applies equally to claims of harassment based on "race, gender, religion, or national origin." *Id.* at 22; *see also id.* at 26 (Ginsburg, J., concurring) (stressing that "Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful").

24. Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475, 485 (6th Cir. 1989) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 244 n.9 (1989) (plurality)).

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

answer the question of whether courts in practice accord the same treatment to such claims. Courts may agree that claims of racial and sexual harassment are to be judged under the same legal standards. Do they, however, apply these standards in the way that leads to equal levels of protection?

There are at least two ways of measuring a court's response to a claim of hostile environment discrimination. First, a hostile environment claim is viable only if the harassment is based on a prohibited factor, in this case, race or sex.[26] Title VII does not prohibit conduct, no matter how egregious, that is not tied to one or more of the statute's enumerated categories of discrimination.[27] Second, assuming that the harassment is race- or sex-based, the harassment must be "'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[28] An isolated instance of "non-severe misconduct" will not support a hostile environment claim.[29]

Turning to the first of these "measures," there are strong indications that courts are substantially inclined, in the race context, to resolve any ambiguities concerning the racial nature of the harassment in favor of the plaintiff. Thus, courts have inferred race discrimination from a noose hanging over the plaintiff's work station,[30] from the use of the term "Buckwheat,"[31] from the use of term "spooks,"[32] from the use of the term "tight eye" (in the case of a race claim based on Asian ancestry),[33] from the use of the word "boy,"[34] and from the statement

26. EEOC v. Flasher Co., Inc., 986 F2d. 1312, 1316 n.4 (10th Cir. 1992) (noting that discrimination directed at anyone other than a member of a suspect class is not prohibited by Title VII).

27. 42 U.S.C. § 2000e-2(a)(1) (1994) (stating that Title VII prohibits an employer from taking adverse employment action "with respect to" an individual's "race, color, religion, sex, or national origin"); *see also* Sanchez v. Philip Morris Inc., 992 F.2d 244, 247 (10th Cir. 1993) ("Title VII is not violated by the exercise of erroneous or even illogical business judgment."); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (stressing that "Title VII is not a clean language act").

28. *Harris*, 510 U.S. at 21 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)). It is significant that the Supreme Court has said that harassment must be sufficiently "severe *or* pervasive" to be actionable. *Id.* (emphasis added). This indicates that pervasiveness is "inversely related" to "severity," such that "the greater the severity of the individual incidents, the fewer there need to be actionable (and vice versa)." EEOC v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 35 (W.D.N.Y. 1994); *see also* EEOC Policy Guidance on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6681, at 6690 (Apr. 1990) (stating that "the more severe the harassment, the less need to show a repetitive series of incidents").

29. Saxton v. AT&T, 10 F.3d 526, 533 (7th Cir. 1993).

30. Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511 (11th Cir. 1989).

31. Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 (7th Cir. 1991).

32. Taylor v. Jones, 653 F.2d 1193, 1198-99 (8th Cir. 1981).

33. Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475, 480 (6th Cir. 1989).

34. Ruffin v. Great Dane Trailers, 60 Fair Empl. Prac. Cas. (BNA) 684, 688 (N.D. Ala. 1991), *rev'd on other grounds*, 969 F.2d 989 (11th Cir. 1992).

that "you must think you're back in Arkansas chasing jackrabbits."[35] The use of the term "nigger," in particular, has been viewed as inherently racist and offensive. As one court stated: "The use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination *per se*."[36]

In the context of sexual harassment, courts have also been willing to infer discrimination from a wide variety of sexual comments and conduct.[37] Still, there are indications that courts are less willing to resolve ambiguities in favor of the plaintiff. Courts, for example, have held that even the most coarse sexual discourse or behavior does not result in conduct that is "sex-based."[38] Courts, in particular, have insisted upon specific proof that the conduct stems from an anti-male or -female animus.[39] Courts have also stressed that instances of sexual con-

35. Rodgers v. Western-Southern Life Ins. Co., 792 F. Supp. 628, 631 (E.D. Wis. 1992), *aff'd*, 12 F.3d 668 (7th Cir. 1993); *see also* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996) (dealing with a racial harassment claim that was supported by such "inherently racist remarks" as "another one," "one of them," "that one in there," and "all of you," made in reference to African-American employees).

36. Bailey v. Binyon, 583 F. Supp. 923, 927 (N.D. Ill. 1984); *see also* Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982) (holding that the use of the word "nigger-rigged" was race-based despite contention that the term was not "intended to carry racial overtones").

37. *See, e.g.*, Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (viewing the terms "dumb fucking broads" and "fucking cunts" as sex-based); EEOC v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 35 (W.D.N.Y. 1994) (ruling that "a man calling a woman a whore" is sex-based, since it "reduce[s] her to an illicit sexual being").

38. *See, e.g.*, Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1542 (10th Cir. 1995) (holding that the statement "sometimes don't you just want to smash a woman in the face" was a result of the supervisor's "frustration" with a female employee, not "gender discrimination"); Murray v. Wal-Mart Stores, 61 Fair Empl. Prac. Cas. (BNA) 850, 853-54 (D. Kan. 1993) (ruling that the alleged harassment, which included a reference to the plaintiff as a "cow" and comments on her breasts, was not "motivated by sex"); Fox v. Ravinia Club, Inc., 761 F. Supp. 797, 800 (N.D. Ga.) (ruling that a male co-worker's statement, "You cold northern bitch. Why don't you give us southern boys a break and say yes once in a while?" was not sexual harassment because it "was not necessarily meant in a sexual way"), *aff'd*, 948 F.3d 731 (11th Cir. 1991); Ebert v. Lamar Truck Plaza, 715 F. Supp. 1496, 1498-99 (D. Colo. 1987) (holding the female plaintiffs failed to establish that harassment "was based on their sex," despite evidence of "foul language" and "unwelcome touching" by male employees), *aff'd*, 878 F.3d 338 (10th Cir. 1989).

39. *See, e.g.*, Annis v. County of Westchester, 36 F.3d 251, 254 (2d Cir. 1994) (stating that sexual harassment is "tantamount" to "sex discrimination" when the harassment "includes conduct evidently calculated to drive someone out of the workplace" because of her gender); Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1181 n.2 (N.D. Ind. 1995) (refusing to find that harassment was sex-based absent proof that "abuse was based on the 'harasser's' disdain for the victim's gender"); Hinton v. Methodist Hosps., 779 F. Supp. 956, 960-61 (N.D. Ind. 1991) (finding that a reference to the plaintiff's pubic hair was not actionable "sexual" harassment absent proof that the comment was made with an intent of denying plaintiff, as a woman, "an equal footing in the workplace"); Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (stating that it is not enough that the harassment had "sexual overtones" or that the plaintiff was harassed "because of" his sex; rather, there must be proof of an "anti-male" environment, as evidenced by conduct that "fosters a sense of degradation in the victim by attacking their [sic] sexuality"); *cf.* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996) (stressing

duct "that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge,"[40] a principle that appears to have no analog in the race context.[41] Courts have suggested that even the most "gendered" conduct is not discriminatory if the harasser is motivated by a personal dislike, rather than a sexual animus.[42] In contrast to race cases, where animus is typically inferred from the statement or conduct itself, courts in sex cases seem far more willing to probe the context of the statement or conduct and the underlying motivation of the individual engaging in the harassing behavior.[43]

A similar discrepancy is evident with respect to the requirement that the harassing behavior be sufficiently severe or pervasive. As an initial matter, courts in the race context show a marked intolerance to the notion that the impact of a racist slur can be diminished by its common usage in the workplace or society at large. Courts have stressed that "while Title VII does not require an employer to fire all 'Archie Bunkers' in its employ, the law does require that an employer

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that an "intent to discriminate" might be found to be implicit in the use of racially suggestive "'code words'").

40. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986); *accord A. Sam & Sons Produce Co., Inc.*, 872 F. Supp. at 36 & n.14.

41. No court has suggested that the use of a racial epithet, like "nigger," would not be "race-based" if a Caucasian employee in the workplace was equally offended by the term. Courts, in fact, have recognized that even a seemingly race-neutral term can evoke pejorative meanings for African-American employees that it does not for Caucasian employees. *See* Ruffin v. Great Dane Trailers, 60 Fair Empl. Prac. Cas. 1 (BNA) 684, 688 (N.D. Ala. 1991) (stating that the use of the word "Rondo" in reference to the plaintiff could be viewed as racially tinged "given the historical basis of black people frequently being referred to . . . by first names when others were not"), *rev'd on other grounds*, 969 F.2d 989 (11th Cir. 1992); *cf.* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) (stating that the supervisor's use of the word "tilly" in reference to a woman did not create a hostile working environment); Paape v. Wall Data, Inc., 934 F. Supp. 969, 977 (N.D. Ill. 1996) (ruling that a male manager's repeated reference to female employees as "dumb blonds" could not support a reasonable inference that the alleged harassment was sex-based).

42. *See, e.g.*, Huebschen v. Department of Health & Human Servs., 716 F.2d 1167, 1169, 1171-72 (7th Cir. 1983) (holding that gender "was merely coincidental" to a manager's "sexually insulting" behavior and spiteful conduct, perpetrated in response to an employee's refusal to accede to the manager's sexual advances, where the manager was upset at the employee personally for having "jilted her"); Murray v. Wal-Mart Stores, 61 Fair Empl. Prac. Cas. (BNA) 850, 854 (D. Kan. 1993) (stating that the fact that the plaintiff was replaced by another woman suggests that references to the plaintiff's breasts were "motivated by a bias against plaintiff personally, not against plaintiff as a woman"); Morley v. New England Tel. Co., 47 Fair Empl. Prac. Cas. (BNA) 917, 924 (D. Mass. 1987) (ruling that statements, while carrying "sexual overtones," were based on a "personality conflict" rather than the plaintiff's sex); *cf.* Reed v. Shepard, 939 F.2d 484, 491-92 (7th Cir. 1991) (finding that because the plaintiff "welcomed" the harassment, the "language and sexually explicit jokes were used around plaintiff because of her personality rather than her sex") (citations omitted).

43. *See infra* notes 123-40 and accompanying text.

take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers."[44] Courts have stated that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[45] Courts have viewed racist epithets as beyond the pale, regardless of the prevalence of these epithets in the workplace.[46]

In the sex context, on the other hand, courts seem much more willing to acquiesce in the common mores of the workplace or society. Courts have stressed that Title VII was not "designed to bring about a magical transformation in the social mores of American workers."[47] Courts have stated that a court must consider "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs,"[48] meaning that the more prevalent the sexism, the more difficult to prove that the sexual conduct is sufficiently severe to affect the terms or conditions of an individual's employment. Courts have cautioned that employers "cannot be saddled with the insurmountable task of conforming all employee conduct at all times to the dictates of Title VII."[49] As one court has intoned: "The [workplace] . . . is a complex and diversified community in which employees work closely and continuously in each other's presence over long hours, during which, experience has shown, inappropriate conduct appears from time to time."[50]

There is also a pronounced tendency, in the area of racial harassment, to de-emphasize the number of incidents of harassment necessary to sustain a hostile environment claim. Thus, courts have stressed that the Title VII plaintiff does not prove "the existence of a hostile working environment by alleging some 'magic' threshold number of incidents," nor may an employer "rebut a claim simply by saying that

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44. Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988).

45. *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

46. *See* Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982) (showing that the term "nigger-rigged" was "a common term in the car business" did not defeat the plaintiff's claim of racial harassment).

47. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986) (quoting Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

48. *Id.* at 620; *see also* Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1538 (10th Cir. 1995) (stating that the plaintiff's claim of gender discrimination must be evaluated "in the context of a blue[-]collar environment where crude language is commonly used"); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) (discussing whether workplace harassment can be considered "distressing" must be examined in light of "contemporary American popular culture in all its sex-saturated vulgarity").

49. Spicer v. Commonwealth of Virginia, 66 F.3d 705, 711 (4th Cir. 1995).

50. *Id.*

the number of incidents alleged is too few."[51] Courts have admonished that "[d]rawing a distinction between 'isolated incidents' and a 'pattern of harassment' does not advance the analysis; the plaintiff need not prove that the instances of alleged harassment were related in either time or type."[52] Courts have stressed that because racial epithets are not "mere insults, . . . petty oppressions, or other trivialities," their use, on even a few occasions, is actionable.[53]

In sex cases, courts rarely employ this generous language. Courts have suggested, on occasion, that a single incident of sexual harassment can be sufficient to sustain a hostile environment claim, particularly where the conduct is of a physical nature.[54] Yet, courts have been willing to flunk the plaintiff's case, on the severity issue, even in cases involving multiple incidents of physical harassment.[55] More typically, courts emphasize the need for repetition of the objectionable conduct.[56] Courts have stated that "'[i]solated and/or trivial remarks

51. Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 (7th Cir. 1991); *see also* West v. Philadelphia Elec. Co., 45 F.3d 744, 757 (3d Cir. 1995) (stressing with respect to "racially harassing comments" that "frequency is a factor to be considered, but it is to be considered in context, including the severity of the incidents").

52. Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988).

53. Bailey v. Binyon, 583 F. Supp. 923, 932-34 (N.D. Ill. 1984) (citations omitted); *see also* Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510-11 (11th Cir. 1989) (finding a hostile working environment was supported by a few incidents of race-based harassment, including two incidents in which a noose was hung over the plaintiff's work station); BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (5-yr. cum. supp. 1989) (stating that "[e]vidence of a single egregious racial slur [may be] sufficent to present a triable issue of fact").

54. *See* King v. Board of Regents of the Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990); Barrett v. Omaha Nat'l Bank, 584 F. Supp. 22, 25 (D. Neb. 1983), *aff'd*, 726 F.2d 424 (8th Cir. 1984).

55. *See, e.g.*, Saxton v. AT&T, 10 F.3d 526, 534 (7th Cir. 1993); Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 337 (7th Cir. 1993); Ebert v. Lamar Truck Plaza, 715 F. Supp. 1496, 1499 (D. Colo. 1987).

56. *See* Kotcher v. Rosa & Sullivan Applicance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992) (stating that "[t]he [harassing] incidents must be repeated and continuous"); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622 n.7 (6th Cir. 1986) (suggesting that harassment must be "systematically directed to the plaintiff over a protracted period of time"); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 214 (7th Cir. 1986) (ruling that offensive comments and conduct of co-workers were "too isolated and lacking the repetitive and debilitating effect necessary to maintain a hostile environment claim"); Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986) (holding that isolated incidents of harassment are not sufficient to establish a violation; the harassment must be sustained and nontrivial); Downes v. FAA, 775 F.2d 288, 293 (Fed. Cir. 1985) (stating "a *pattern* of offensive conduct must be proved"); Miller v. Aluminum Co. of Am., 679 F. Supp. 495, 501-02 (W.D. Pa. 1988) (stressing that the incidents of sexual conduct "must be persistent, not isolated" and that "generally the case law requires a sexual discrimination plaintiff to have been subjected to continued explicit propositions of sexual epithets or persistent offensive touchings to make out a hostile work environment claim").

of a sexual nature' do not satisfy the definition of sexual harassment: 'the offensive conduct must be persistent.'"[57]

As this discussion makes clear, the fact that courts apply the same legal standards in assessing claims of racial and sexual harassment does not mean that these claims are treated in the same fashion in practice. There are indications that courts respond more favorably to claims of racial, as opposed to sexual, harassment, shading the issues of discriminatory animus and severity in the plaintiff's favor. The result of this approach is to provide different levels of protection against conduct that is, at least arguably, of a similar nature.[58]

II. THE DECISIONS: *RODGERS* AND *GALLOWAY*

The above discussion provides the backdrop for the consideration of the *Rodgers* and *Galloway* decisions. In this section, I briefly discuss the facts and holdings of these cases.

A. Rodgers*: Striking down the Racial Epithet*

Rodgers v. Western-Southern Life Insurance Co.[59] involved a claim of a racially hostile work environment. The plaintiff, James Rodgers, worked for the defendant, as an insurance agent and associate sales manager, for twelve years.[60] During much of his tenure, Rodgers toiled under the supervision of William Mann.[61] The evidence showed that Mann was an oppressive supervisor, who repeatedly used insulting language, referring to Rodgers and other sales agents, Caucasian and African-American alike, as "knobheads," "knuckleheads," "dunderheads," and "goons."[62]

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57. Rennie v. Dalton, 3 F.3d 1100, 1107 (7th Cir. 1993) (quoting *Downes*, 775 F.2d at 293); *see also* McKenzie v. Illinois Dep't of Transp., 92 F.3d 473, 480 (7th Cir. 1996) (ruling that the harassment was not actionable because it involved only "three sexually suggestive comments over a three-month period").

58. I do not mean to imply by this recitation that the disparity between the judiciary's reaction to claims of racial and sexual harassment is absolute. There are race cases where courts have rejected the plaintiff's claim, notwithstanding the use of overtly racist language. *See* Bolden v. PRC Inc., 43 F.3d 545, 551 (10th Cir. 1995) (stressing that there must be "a steady barrage of opprobrious racial comments") (citations omitted). There are also sex cases where courts have responded with great sensitivity to evidence that might appear less than compelling. *See* Bennett v. Corroon & Black Corp., 845 F.2d 104, 105-06 (5th Cir. 1988) (holding that a one-time posting of cartoons depicting the plaintiff in an obscene fashion could support a claim of hostile environment discrimination). My point is that, in the aggregate, the cases reveal disparities on the issues of "animus" and "severity" based on the type of harassment (race or sex) at issue.

59. 12 F.3d 668 (7th Cir. 1993).

60. *Id.* at 671.

61. *Id.* at 670-71.

62. *Id.* at 671.

Rodgers based his claim on a relatively small number of incidents of racial harassment. There was evidence that Mann had twice used the word "nigger" in Rodgers' presence.[63] The evidence also showed that on another occasion Mann had made the comment that "'[y]ou black guys are too fucking dumb to be insurance agents,'" while speaking derisively about the employment prospects of African-American applicants.[64] Rodgers maintained that he quit his employment because of Mann's abusive behavior, citing specifically to the racially derogatory comments.[65] Rodgers asserted a claim for constructive discharge based on the racial harassment.[66]

The case was tried in the district court, which ruled in Rodgers' favor.[67] The court stated that in ruling upon Rodgers' hostile environment claim, it was required to take into account "the likely effect of a defendant's conduct upon a reasonable person's ability to perform his or her work and upon his or her well-being, as well as the actual effect upon the particular plaintiff bringing the claim."[68] The court emphasized that in making this determination, a court "must avoid placing undue weight on the simple number of harassing incidents inflicted upon the plaintiff" since "[t]he number of instances of harassment is but one factor to be considered in the examination of the totality of the circumstances."[69] While noting that "much of Mann's verbal abuse was race-neutral," the court found "that Mann's racist comments to Rodgers were so racially derogatory that they impaired his ability to do his job and would have similarly affected any reasonable employee."[70] The court also sustained Rodgers' constructive discharge claim, finding that "Mann's racist comments and taunts contributed significantly to the stress condition that prevented Rodgers from continuing to perform his job."[71] The court awarded Rodgers over $100,000 in monetary damages.[72]

On appeal, the defendant argued that the evidence was insufficient to sustain a finding of either a hostile work environment or a construc-

63. *Id.*

64. *Id.*

65. Rodgers v. Western-Southern Life Ins. Co., 792 F. Supp. 628, 630 (E.D. Wis. 1992).

66. *Rodgers*, 12 F.2d at 672.

67. *Rodgers*, 792 F. Supp. at 628.

68. *Id.* at 633 (quoting Brooms v. Regal Tube Co., 881 F.2d 412, 419 (7th Cir. 1989)).

69. *Id.* at 633-34 (quoting Daniels v. Essex Group, Inc., 937 F.2d 1264, 1273 (7th Cir. 1991)).

70. *Id.* at 634-35.

71. *Id.* at 635.

72. *See* Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 670 (7th Cir. 1993).

tive discharge.[73] The court of appeals rejected both contentions, affirming the district court's decision in all respects.[74]

In ruling in Rodgers' favor, the Seventh Circuit stressed that the critical inquiry was whether the objectionable statements were sufficiently severe or pervasive to "alter the conditions of employment and create an abusive working environment."[75] The court agreed with the district court that "[w]ithin the totality of circumstances, there is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim."[76] The court acknowledged that there was not a "pervasive pattern" of harassment but held that the isolated nature of the incidents did not, as a matter of law, defeat the claim.[77]

Significantly, the court of appeals rejected the defendant's argument that the district court erred "in finding that Mann's use of the word 'nigger' contributed to a hostile work environment."[78] The defendant urged the court "to consider the context in which that word was used," noting that "Rodgers could not recall the precise context in which [Mann used the word]" and that "black employees, including Thomas and Rodgers himself, also used this word in the workplace."[79] The court rejected the defendant's argument, stating that "no single act can more quickly 'alter the conditions of employment and create an abusive working environment' than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates."[80] Referring to the use of the word "nigger" as "discrimination *per se*," the court observed that "[t]he fact that black employees also may have spoken the term 'nigger' does not mitigate the harm caused by Mann's use of that epithet; a supervisor's use of the term impacts the work environment far more severely than use by coequals."[81]

The court also rejected the defendant's contention that the district court committed error in "finding that Mann's statement '[y]ou black guys are too fucking dumb to be insurance agents' contributed to a

73. *Id.*
74. *Id.*
75. *Id.* at 675 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).
76. *Id.* at 674.
77. *Id.*
78. *Id.* at 675.
79. *Id.*
80. *Id.* (quoting *Vinson*, 477 U.S. at 67 (citation omitted)).
81. *Id.*

racially hostile work environment."[82] Again, the defendant asked the court "to place the statement in context: it was an isolated statement used as a motivational technique at least six months prior to Rodgers' resignation."[83] The court was unmoved by this argument, stating that "Title VII does not permit supervisors to use this type of blanket criticism of the intelligence of a racially-defined class of employees as a motivational technique."[84] Noting that "the six[-]month lapse between Mann's utterance of the statement and Rodgers' resignation does not sever the causal connection between the statement and the resignation," the court concluded that the district court properly considered "the cumulative weight" of the "'isolated' racial comments" in "examining the 'totality of the circumstances' giving rise to Rodgers' action."[85]

Finally, the court of appeals upheld the district court's finding of a constructive discharge.[86] The court ruled that the racially hostile environment created by Mann constituted the type of "aggravated" discrimination that justified a finding that Rodgers was compelled to quit his employment.[87] The court rejected the defendant's contention that the severity of Mann's racial comments was diminished by the fact that Mann was generally abusive, in a race-neutral manner, toward Rodgers and others. The court was persuaded "that Mann's racist comments and taunts, though perhaps not the sole factor, contributed significantly to the stress condition that compelled Rodgers to resign."[88]

B. Galloway*: Marginalizing the Sexual Epithet*

Galloway v. General Motors Service Parts Operations[89] involved a claim of a sexually hostile work environment. The plaintiff, Rochelle Galloway, worked as a packer in the defendant's parts department.[90] During the last four years of her employment, from 1987 to 1991, Galloway suffered verbal harassment at the hands of a co-worker, Bullock, with whom she had previously been romantically involved.[91] The evidence showed that "Bullock repeatedly called [Galloway] a

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 677.
87. *Id.*
88. *Id.*
89. 78 F.3d 1164 (7th Cir. 1996).
90. *Id.* at 1165.
91. *Id.*

'sick bitch,' the 'sick' apparently a reference to the fact that in 1986 and 1987 Galloway was hospitalized for a psychiatric disorder."[92] Bullock once remarked to Galloway, in 1988, "If you don't want me bitch, you won't have a damn thing," and once, in 1990, "made an obscene gesture at her and said 'suck this, bitch.'"[93]

Galloway contended that the defendant violated Title VII by failing to take prompt steps to remedy Bullock's harassment.[94] The defendant moved for summary judgment, arguing, in part, that the conduct alleged by Galloway was not sufficient to sustain a finding of a hostile work environment.[95] The district court granted summary judgment in favor of the defendant, ruling, in part, that the "repetitions of 'sick bitch' . . . were not enough to make Galloway's working environment objectively hostile to her as a woman."[96] The court opined:

> The term "sick bitch" was "not overtly sexual in nature" and that Galloway's own coarse remarks to Bullock and others, such as her statement to him to "take that nasty dick and stick it in [your] momma's mouth," indicated that she probably wasn't much upset by his allegedly harassing behavior.[97]

The court of appeals affirmed the district court's grant of summary judgment.[98] The court, per Chief Judge Posner, rejected the "district judge's decision to cut off . . . the evidence [of harassment] in 1991," based on when Galloway filed her charge.[99] The court also disagreed with the district court's "suggestion that the plaintiff's use of dirty lan-

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92. *Id.*

93. *Id.*

94. *Id.* In cases of co-worker harassment, an employer is liable only if, knowing or having reason to know of the harassment, it fails to take adequate steps to redress it. *See* Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990) (applying a negligence standard resembling the "fellow servant" rule and distinguishing the chosen standard from earlier cases which relied on *respondeat superior*); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1512 (11th Cir. 1989) (using *respondeat superior* as a basis for liability); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) (requiring a showing of the employer's responsibility for the acts of an employee under the theory of *respondeat superior*); 29 C.F.R. § 1604.11(d) (1995).

95. Galloway v. General Motors Serv. Parts Operations, No. 92 C 5987, 1994 U.S. Dist. LEXIS 16902 (N.D. Ill. Nov. 23, 1994).

96. *Galloway*, 78 F.3d at 1165.

97. *Id.*

98. *Id.* at 1168.

99. *Id.* at 1167. The district court had "ruled that any acts of harassment committed prior to . . . the three hundredth day before Galloway filed her charge . . . were time-barred." *Id.* at 1165. The court of appeals ruled that a plaintiff may base her suit "on conduct that occurred outside the statute of limitations" if

> it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in light of events that occurred later, within the period of the statute of limitations.

Id.

guage shows that she was not harmed by her co[-]worker's use of such language."[100] The court, however, agreed with the district court that the harassment identified by Galloway was not sufficient to sustain her claim.[101]

The court first ruled that the term "'sick bitch—and, we add, the other verbal abuse, and the obscene gesture, that Bullock directed toward Galloway—was, in context, not a sex- or gender-related term."[102] The court acknowledged that "'bitch' is rarely used of heterosexual males (though some heterosexual male teenagers have taken recently to calling each other 'bitch')" but stated that "it does not necessarily connote some specific female characteristic, whether true, false, or stereotypical."[103] Specifically, "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."[104] In the court's view, "[i]n its normal usage, [bitch] is simply a pejorative term for 'woman.'"[105] The court conjectured that if "Bullock had called Galloway a 'sick woman,' and a similarly situated male co[-]worker a 'sick man,' there would be no ground for an inference of sex discrimination."[106] Likewise, "were there a similarly situated male worker to Galloway whom Bullock called a 'sick bastard' while calling her a 'sick bitch,' we do not think it would be rational for a trier of fact to infer that Bullock was making the workplace more uncongenial for women than for men."[107] While noting that the term "'bitch' is sometimes used as a label for women who possess such 'woman faults' as 'ill-temper, selfishness, malice, cruelty, and spite,' and latterly as a label for women considered by some men to be too aggressive or careerist," the court stated that "[w]hen a word is ambiguous, context is everything."[108] The court determined that because "there would not be an automatic inference from [Bullock's] use of the word 'bitch' that his abuse of a woman was motivated by her gender rather than by a personal dislike unrelated to gender," Galloway could not sustain her

100. *Id.* The court stated "that there is no principle of law, or for that matter of psychology, that decrees that the use of bad language automatically demonstrates the user's insensitivity to like language directed against himself or herself." *Id.*

101. *Id.* at 1168.

102. *Id.* at 1167.

103. *Id.* at 1168.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* (quoting Beverly Gross, *Bitch*, SALMAGUNDI, Summer 1994, at 146, 150).

claim in the absence of specific proof that Bullock used the term with one of its "gendered" connotations.[109]

The court also concluded that Galloway's claim failed even if there was "some sexual innuendo or gender slur in 'sick bitch.'"[110] The court stated that Title VII does not reach harassing conduct that is "too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex."[111] Noting that "Bullock repeated 'sick bitch' to Galloway some indefinite number of times over a period of four years in the context of a failed sexual relationship," the court found:

> The repetition of the term together with the other verbal conduct that is alleged reflected and exacerbated a personal animosity arising out of the failed relationship rather than anything to do with a belief by Bullock, of which there is no evidence, that women do not belong in the work force or are not entitled to equal treatment with male employees.[112]

The court ruled that "[i]n these circumstances no inference could be drawn by a reasonable trier of fact that Bullock's behavior, undignified and unfriendly as it was, created a working environment in which Galloway could rationally consider herself at a disadvantage in relation to her male co-workers by virtue of being a woman."[113]

III. *RODGERS* AND *GALLOWAY*: A COMPARATIVE ANALYSIS

It should be apparent from the above recitation why I have chosen the *Rodgers* and *Galloway* decisions for testing the thesis that courts respond differently to seemingly similar claims of hostile environment discrimination when the alleged harassment is the product of race, as opposed to sex, discrimination. Both cases, of course, are decisions of the same court, the Seventh Circuit. In each case, the court was confronted with an epithet coupled with other statements or conduct of a derogatory nature. In *Rodgers*, the epithet was "nigger," with the additional comment that blacks are "too fucking dumb to be insurance agents."[114] In *Galloway*, the epithet was "bitch" or "sick bitch," with the additional act of an obscene gesture coupled with the comment "suck this, bitch."[115] Each case, moreover, arose in a similar proce-

109. *Galloway*, 78 F.3d at 1168.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993).
115. 78 F.3d at 1165.

dural posture, *Galloway* on summary judgment[116] and *Rodgers* on review of the district court's factual findings in favor of the plaintiff.[117] The question in each case was not whether the evidence compelled a finding of unlawful discrimination but whether it could reasonably support such a finding.

The cases do involve one distinction that might be viewed as significant. In *Rodgers*, but not *Galloway*, the harasser was the plaintiff's supervisor. The court emphasized that this added to the severity of the harassment.[118] On the other hand, *Galloway* involved the "repeated" use of the word "bitch."[119] *Rodgers*, by contrast, involved a handful of racial comments over a twelve-year period of employment.[120] The repeated use of the epithet in *Galloway* could well offset the added sting that might have been present in *Rodgers* by virtue of the managerial status of the harasser.[121] This is a point to which I return later,[122] but, for now, it can be fairly said that, the nature of the discrimination aside, the conduct at issue in these cases is, at the very least, similar.

While the cases would appear to present parallel claims of racial and sexual harassment, the reactions of the Seventh Circuit, in the respective cases, could not have been more different. In *Rodgers*, the defendant made a number of arguments designed to diminish the impact of the racial invective by reference to the "context" in which the comment was made.[123] These attempts met with a chilly response in the court of appeals.[124] The court ruled that because the word "nigger" "'automatically separates the the person addressed from every

116. *Id.* at 1168.

117. 12 F.3d at 670.

118. *Id.* at 675.

119. 78 F.3d at 1165.

120. 12 F.3d at 670-71.

121. It is also noteworthy that the abusive language in *Galloway* was directed at the plaintiff. 78 F.3d at 1165. In *Rodgers*, by contrast, the word "nigger," while used in the plaintiff's presence, was not used in reference to the plaintiff. 12 F.3d at 671. That the unwelcome conduct is directed at the plaintiff may tend to increase the severity of the harassment. *See* EEOC Policy Guidance on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6681, at 6691; *cf.* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) (explaining that remarks might acquire a more "sinister cast" when "delivered from so short a distance from the listener's face as to invade the listener's private space").

122. *See infra* notes 186-92 and accompanying text (arguing that harassment by a co-worker can be as severe as harassment by a supervisor where the co-worker's harassment is coupled with a failure on the employer's part to redress the harassment).

123. 12 F.3d at 675-76.

124. *Id.*

non-black person,'" the contextual factors invoked by the defendant were of no force.[125]

In *Galloway*, by contrast, the court stressed that context was "everything."[126] The court acknowledged that "'bitch' is rarely used of heterosexual males" and that the term is a "pejorative term for 'woman.'"[127] The court also noted that there was no evidence that the perpetrator had been similarly abusive in his dealings with his male co-workers.[128] Nonetheless, the court ruled that, "in context," the term could not be reasonably viewed as a "sex- or gender-related term."[129]

Notably, in rejecting the plaintiff's claim, the court in *Galloway* embraced many of the same arguments that had been considered and rejected in *Rodgers*. Indeed, the Seventh Circuit in these cases offered divergent views on at least three critical issues.

First, the Seventh Circuit took different views of the relevance of the perpetrator's underlying motivation for the harassing behavior. In *Rodgers*, the defendant argued that the statements were not the product of a racial animus, in part, because the supervisor had used the racist language as a "motivational technique."[130] The court rejected the argument that the subjective motivation of the harasser would detract in any way from the racial connotation apparent in the words themselves. To the contrary, in the court's view, "Title VII does not permit supervisors to use" racially derogatory language as a "motivational technique."[131]

In *Galloway*, the harasser's subjective motivation was not only deemed relevant but central to the existence of a sexually discriminatory work environment. The court stressed that the "verbal conduct . . . reflected and exacerbated a personal animosity arising out of the failed relationship."[132] The court opined that one could not "automatic[ally]" infer from the harasser's use of the word "bitch" that he was "motivated by [the plaintiff's] gender rather than by a personal dislike unrelated to gender."[133] In the court's view, a reasonable jury could not infer a "sexual innuendo" from a male co-worker's use of the word "bitch," even when coupled with an obscene gesture and the

125. *Id.* (quoting Bailey v. Binyon, 583 F. Supp. 923, 927 (N.D. Ill. 1984)).
126. 78 F.3d at 1168.
127. *Id.*
128. *Id.*
129. *Id.* at 1167.
130. 12 F.3d at 675.
131. *Id.*
132. 78 F.3d at 1168.
133. *Id.*

comment "suck this, bitch," absent proof that the term had been used with the specific intent of signaling that "women do not belong in the work force or are not entitled to equal treatment with male employees."[134]

The Seventh Circuit also took different views of how the context of the particular workplace might affect the meaning and impact of the epithet. In *Rodgers*, the defendant argued that the supervisor's use of the term "nigger" was not inherently racist since the word was used with frequency by other African-American employees in the workplace, including Rodgers himself.[135] The defendant also maintained that the severity of the epithet was diminished by the fact that the supervisor was generally abusive to employees on a race-neutral basis.[136] The court was unimpressed with either argument, stressing that these factors affected neither the racial character nor the severity of the epithets.[137]

The court in *Galloway* again took a different path. The evidence showed that the harasser had not abused "any men."[138] Yet, the court imagined a scenario in which the harasser had called a male worker a "'sick bastard' while calling [*Galloway*] a 'sick bitch,'" stating that, in such a case, no rational trier of fact could infer that the harasser "was making the workplace more uncongenial for women than for men."[139] The court also suggested that the term "bitch" might have meanings other than those associated with "some specific female characteristic" and, thus, could not be considered an inherently "gendered" term.[140] In the court's view, the relevant "context" could strip the epithet of both its sexual character and severity.

Finally, the Seventh Circuit reached contrary conclusions in applying the "severity" requirement. In *Rodgers*, the evidence showed that the racial epithets had been used on a few occasions over a period of twelve years.[141] The defendant argued that the epithets were too isolated to support a finding of a hostile or abusive work environment.[142] The court found that the "cumulative weight" of the "'isolated' racial comments" was sufficient to sustain a finding of unlawful harassment, ruling that Rodgers' claim was not "diminished by the lapse of time

134. *Id.*
135. 12 F.3d at 675-77.
136. *Id.*
137. *Id.*
138. 78 F.3d at 1168.
139. *Id.*
140. *Id.*
141. 12 F.3d at 670-72.
142. *Id.* at 675.

between the utterance of the racially offensive remarks and his resignation."[143]

In *Galloway*, the evidence showed that the harasser had repeatedly used the word "bitch" over a period of four years.[144] Nonetheless, the court concluded that the harassing conduct was "too tepid or intermittent or equivocal" to be sufficiently severe to support a claim of a hostile work environment.[145] The co-worker's behavior was "undignified and unfriendly" but nothing more.[146]

In sum, *Rodgers* and *Galloway* present what appear to be comparable claims of racial and sexual harassment. The cases, nonetheless, elicited fundamentally different responses from the two Seventh Circuit panels. The court in *Galloway* viewed the sexual epithet in a completely different light, embracing some of the same arguments of "context" that had been dismissed in *Rodgers*.

V. *RODGERS* AND *GALLOWAY*: CAN THE DECISIONS BE RECONCILED?

Having set the scene with a discussion of the *Rodgers* and *Galloway* decisions, I now turn to the critical issue raised by these cases: Is there a justification for such a disparate response to the use of racial and sexual epithets? Or, stated differently, can these decisions be reconciled?

At the outset, I should make clear that I fully support the result in *Rodgers*. I agree that the word "nigger," certainly when employed by a white supervisor, is inherently discriminatory.[147] I agree as well that even the isolated use of that term, in such a case, can be sufficient to sustain a finding of a hostile work environment. From my perspective, then, the issue is not whether *Rodgers* went too far in imposing liability. The issue is whether *Galloway* fell short of the mark in dismissing the plaintiff's seemingly comparable claim of sexual harassment. As I discuss below, I believe that *Galloway* was wrongly decided and can-

143. *Id.* at 675, 677.

144. 78 F.3d at 1165.

145. *Id.* at 1168.

146. *Id.*

147. *Rodgers*, 12 F.3d at 675. I do not mean to imply that the use of such an epithet is, in every case, a violation of Title VII. By "inherently discriminatory," I mean that the term is one that, on its face, differentiates along racial lines. Whether the use of such a discriminatory term is sufficiently "pervasive or severe" to affect the terms or conditions of an individual's employment is largely a question of fact to be resolved on a case-by-case basis. The point is not that the isolated use of a racial epithet compels a finding of a hostile working environment but that such use can support a fact finder's determination in the plaintiff's favor.

not be reconciled with the court's treatment of the race-based claim of harassment in *Rodgers*.

A. The Issue of Discrimination

The first issue is whether the "verbal conduct" in *Galloway* can be viewed as supporting an inference of sex-based discrimination in the same way that the epithets in *Rodgers* supported a finding of race-based discrimination. In ruling that the term "bitch," in particular, did not carry with it a "sexual innuendo," *Galloway* did not mention the court's previous decision in *Rodgers*. The court, however, did suggest some bases for distinguishing *Rodgers*. Specifically, two grounds for distinguishing the cases emerge from the *Galloway* decision: (1) that the term "bitch," in contrast to "nigger," is not unambiguously discriminatory, thus justifying an examination of the context in which it was used; and (2) that the term "bitch" was used in a failed sexual relationship, a factor arguably unique to the gender context.

In assessing the first of these points, it is important to recall the procedural posture of the *Galloway* case. *Galloway* came before the court of appeals upon the district court's grant of summary judgment in favor of the defendant.[148] The plaintiff was not arguing that the use of the term "bitch" was discriminatory per se. The issue was whether the term could support an inference of sex-based discrimination.

Given this standard, the court's holding that the term "bitch" was "not a sex- or gender-related term"[149] is, to be generous, mystifying. "Bitch" is a term derived from its use in describing "the female of the dog or some other carnivorous mammals."[150] In human terms, it is used to describe a "lewd or immoral woman" or a "malicious, spiteful, and domineering woman."[151] The court, in *Galloway*, acknowledged that "bitch" is "a pejorative term for 'woman.'"[152] It seems beyond dispute that "bitch" can be reasonably viewed as a "gender-related" term.

The *Galloway* court suggested that the use of the word "bitch" was not actionable because "it does not necessarily connote some specific female characteristic, whether true, false, or stereotypical."[153] This misses the point. First, the issue in *Galloway* was not whether the term was "necessarily" discriminatory but whether it might be. Sec-

148. 78 F.3d at 1168.
149. *Id.* at 1167.
150. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 154 (1988).
151. *Id.*
152. 78 F.3d at 1168.
153. *Id.*

ond, Title VII prohibits an employer from taking adverse employment action "because of" race or sex.[154] It does not require that the action be specifically tied to a particular characteristic of the protected group. In *Rodgers*, for example, the court did not ask whether the term "nigger" was used in reference to a particular racial characteristic. The court recognized the term for what it was: a pejorative reference to blacks, as such. "Bitch" is, in a similar way, a pejorative reference to women.

Further, with all due respect to the court, it is hard to see how the term "bitch" does not connote a sense that women are "unworthy of equal dignity and respect."[155] "Bitch" may sometimes be used to reference specific "'woman faults,' "[156] but its meaning transcends the transcription of specific female faults. It is a generally pejorative term and, certainly, when spoken by a man to a woman, almost inherently gender-laden and offensive.

This is not to say that a word, no matter how inherently offensive, can be divorced entirely from its "context." Even "nigger," for example, can be used in certain contexts (for example, among African-American acquaintances) that do not as directly invoke an offensive, racial connotation. In *Rodgers*, the court did not look at contextual factors beyond noting that the epithets were used by a supervisor, who was Caucasian and who had also made the comment that the African-Americans were "too fucking dumb" to be insurance agents.[157]

The context in *Galloway* was of a comparable nature. The objectionable comments were made by a male who had been romantically involved with the plaintiff.[158] The male not only used the term "sick bitch," repeatedly, but told the plaintiff to "suck this, bitch," presumably while gesturing toward his crotch.[159] The latter act seems, quite clearly, to anchor the verbal barrage in a sexually abusive context. Given this context, it is hard to view the word "bitch" as anything other than a gender-laden term. If the term "nigger," as used in *Rodgers*, "automatically separate[d]" the plaintiff by race, the term

154. 42 U.S.C. § 2000e-2(a) (1994).

155. *Galloway*, 78 F.3d at 1168.

156. *Id.* (quoting Beverly Gross, *Bitch*, SALMAGUNDI, Summer 1994, at 146, 150).

157. The EEOC filed a brief as *amicus curiae* in support of the plaintiff's position in *Rodgers*. The EEOC argued that the district court could permissibly find that the supervisor's use of racist taunts and epithets unreasonably interfered with the plaintiff's work performance. Brief of the EEOC as *Amicus Curiae*, Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668 (7th Cir. 1993), at 11 (Nos. 93-1125 and 93-1266). The EEOC stressed, in particular, that "the use of the word 'nigger' by a white supervisor is patently offensive," rendering even the isolated use of the term actionable. *Id.* at 13.

158. *Galloway*, 78 F.3d at 1665.

159. *Id.*

"bitch," as used in *Galloway*, automatically separated the plaintiff by gender.[160]

In *Galloway*, the court suggested that there would be no discrimination if the harasser had used the term "sick bastard" in referring to a male co-worker.[161] The short answer is that there was no evidence that the harasser had done so. However, let us go with the court's suggestion. Let us say that the harasser did use the term "sick bastard" or was otherwise abusive in his dealings with male co-workers. Would this not defeat a claim of a sexually hostile work environment? The answer, in a word, is "no".

The sexual harassment theory is premised on the assumption that sexual comments almost invariably connote gender.[162] This is true for

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160. In *Galloway*, the court suggested that the term "fucking cunts" was a more "gendered" term than "bitch," although even the term "cunt," the court suggested, was not inherently sex-based. *See* 78 F.3d at 1168 (citing Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (7th Cir. 1974) as suggesting that a term would not be actionable if "the harasser abuses men in terms that also are gendered" and suggesting that whether a term is one of sexual harassment may turn on whether there is anything "else in the case to establish the sexual character of the harassment"). One could make the case that the term "cunt," more so than "bitch," is the gender parallel for "nigger"; however, in my view, both terms are objectionable and both have an obvious connection to gender.

161. 78 F.3d at 1168.

162. There is no doubt that the term "sex," as used in Title VII, is a reference to gender. *See, e.g.*, Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 538 (10th Cir. 1994) (explaining that if a hostile work environment "is not due to [an employee's] gender, [the employee] has not been the victim of sex discrimination"); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (explaining that the language of the Title VII "implies that it is unlawful to discriminate against women because they are women and against men because they are men"); Quick v. Donaldson Co., 895 F. Supp. 1288, 1293 n.5 (S.D. Iowa 1995) (quoting EEOC Dec. No. 76-75 (1976), Empl. Prac. Guide (CCH) ¶ 6495, at 4266); Joshua F. Thorpe, Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1362. The sexual harassment theory, however, proceeds from the assumption that, in the absence of evidence to the contrary, unwelcome conduct of a sexual nature implicates gender. *See* Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("Only by reduction *ad absurdum* could we imagine a case of [sexual] harassment that is not sex discrimination—where a bisexual supervisor harasses men and women alike.") (citing Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977)); Brief of the EEOC as *Amicus Curiae*, Robinson v. Jacksonville Shipyards, Inc., No. 91-3655 (11th Cir.), at 24 (stating that the EEOC's sexual harassment guidelines "presume . . . that one's gender is typically implicated by "unwelcome" conduct "of a sexual nature;" it "would be the rarest of cases in which the proliferation of sexual comments and materials in a workplace did not differentiate along gender lines"). Of course, there can be unlawful harassment based on gender, even when the harassment does not take a sexual form, if women are subjected to harsher working conditions than their male counterparts. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) ("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."); Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993) ("The predicate acts which support a hostile-environment sexual-harassment claim need not be explicitly sexual in nature."); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (stressing that hostile work environment claims are "in no way limited . . . to intimidation or ridicule of an explicitly sexual nature"); Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation:*

an obvious reason: In a society that has singled out women, in particular, as sexual objects, the use of pejorative, sex-based terms almost invariably differentiates along gender lines.[163] The court's reference, in *Galloway*, to "bastard" as a parallel term of harassment merely illustrates the point. "Bastard" has a number of primary meanings that have nothing to do with gender.[164] Even if gender-based, its use between men hardly conjures up the same history of sexual abuse as can the word "bitch" when used by a man in reference to a woman.[165]

A Claim of Sex Discrimination Under Title VII, 81 GEO. L.J. 1, 13 n.55 (1992) ("Most courts have recognized that harassment that is visited upon someone because of her gender, regardless of the sexual content, is sex discrimination.").

163. When the harasser is a man and a particular woman is the target of the harassment, it is easy to see how the harassment is sex- or gender-based. *See* Vandeventer v. Wabash Nat'l Corp., 887 F. Supp. 1178, 1180 (N.D. Ind. 1995) ("The concept of sexual harassment is an acknowledgement that when a male employer requires a woman to submit to him sexually for a promotion, or creates a sexually hostile environment, he is discriminating against her on the basis of her gender."). Even when the sexual conduct is not directed at a particular woman (or women), there are still reasons to assume that the conduct will affect the working conditions of women more so than of men. *See* Ellison v. Brady, 924 F.2d 872, 879 & n.10 (9th Cir. 1991) (stating "women are disproportionately victims of rape and sexual assault, [and thus] have a stronger incentive to be concerned with sexual behavior"); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1507 (M.D. Fla. 1991) ("Men and women perceive the existence of sexual harassment differently."); CAROL GILLIGAN, IN A DIFFERENT VOICE 7-8 (1982); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989) ("Hostile environment doctrine must begin from an understanding of the way in which [certain] practices challenged as sexual harassment are likely to be experienced differently by women than by men."); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 829-30 & nn.62-63 (1991); Marcosson, *supra* note 162, at 18-19 ("The justification for finding sex discrimination in the sexual nature of the harassment is found, in part, in the wealth of data, discussed in sociological and legal literature, which demonstrates profound differences in attitudes and perceptions (particularly regarding sexual conduct), and in economic empowerment, between men and women in society.") (citing Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207-08 (1990)); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984)).

164. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 34 (1988) (defining "bastard" as "an illegitimate child"; "something that is spurious, irregular, inferior, or of questionable origin"; "an offensive or disagreeable person—used as a generalized term of abuse").

165. By emphasizing the male-on-female nature of the harassment, I do not mean to endorse the view that Title VII does not cover harassment when the harasser is of the same gender as the victim, an issue that has divided the courts. *Compare* Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (holding Title VII does not recognize a claim for same-gender harassment), *and* Goluszek v. Smith, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (same), *with* Quick v. Donaldson Co., 90 F.3d 1372, 1376-79 (8th Cir. 1996) (holding claim for same-gender harassment was cognizable under Title VII), Williams v. District of Columbia, 916 F. Supp. 1, 8 (D.C. Cir. 1996) (same), King v. M.R. Brown, Inc., 911 F. Supp. 161, 167 (E.D. Pa. 1995) (same), Nogueras v. University of P. R., 890 F. Supp. 60, 62-63 (D.P.R. 1995) (same), Griffith v. Keystone Steel & Wire, 887 F. Supp. 1133, 1135-37 (C.D. Ill. 1995) (same), *and* EEOC v. Walden Book Co., 885 F. Supp. 1100, 1101-04 (M.D. Tenn. 1995) (same). Other courts have addressed related issues. *See* McWilliams v. Fairfax County of Bd. of Supervisors, 72 F.3d 1191, 1195-96 n.4 (4th Cir. 1996) (holding that harassment among heterosexuals of the same gender is not actionable under Title

It is revealing, in this regard, that the court in *Rodgers* saw no significance in the fact that the isolated racial comments had been mixed in with a barrage of race-neutral abuse. The court stressed that even in the midst of the generally abusive environment, the racial slurs retained their sting. Would the result have been different if the supervisor, in addressing white employees, had added the term "honkie" to the mix? Not likely. The word "nigger" "conjure[s] up the entire history of racial discrimination in this country."[166] The racist nature of that term would not be diminished, to any significant degree, by the use of the relatively benign "honkie."

The differing approaches of the courts, on this issue, confirm the point made earlier in this Article.[167] In the race context, courts typically resolve ambiguities concerning the racial nature of the harassment in favor of the plaintiff. Courts, in the sexual context, are much more inclined to give close scrutiny to the underlying motivation of the individual engaging in the harassing behavior. Such additional scrutiny is unjustified. Terms of an explicitly sexual nature are sufficient, at the very least, to support an inference of sex discrimination.

This leads to the second possible distinction between the two cases: that the harassment stemmed from a failed "personal relationship."[168] It should be noted, at the outset, that courts have often expressed a concern that the sexual harassment theory not intrude upon the per-

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VII, while leaving open the possibility that "same-sex discrimination" may be covered "where either victim or oppressor, or both, are homosexual or bisexual"); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (noting in passing that "[s]exual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not be actionable"). Title VII is violated whenever "'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,'" Kopp v. Samaritan Health Sys., Inc., 13 F.3d at 269 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)), which can include cases in which the harasser is of the same gender as the victim. On the other hand, the fact that the harasser and the victim are of the same gender might make the harassment's connection to gender less apparent, in a particular case, although not impossible to show. *Cf.* Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981) (stating that while Title VII covers discrimination against Caucasian employees, the requisite factual proof differs for the Caucasian employee, since one cannot as readily draw an inference of discrimination from the elements of the prima facie case). It might also render the effect of the harassment less severe unless, in the case at hand, the harassment conjures up some other history of gender-related subjugation. *See* Marcosson, *supra* note 162, at 24-25 & n.94 (arguing that workplace harassment of gays and lesbians "reinforces stereotypes about appropriate gender roles," thus adding to "'society's pressure to conform to heterosexuality'") (quoting SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 17 (1988)).

166. Bailey v. Binyon, 583 F. Supp. 923, 934 (N.D. Ill. 1984).

167. *See supra* notes 30-36 and accompanying text (discussing the degree to which courts, in the context of racial harassment claims, take a more lenient view of the type of comment or statement that is sufficient without more to support an inference of discrimination).

168. Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1168 (7th Cir. 1996).

sonal, consensual relations of co-workers.[169] Courts have stressed that Title VII applies only to sexual conduct of a coercive nature.[170] Courts have warned that if the sexual harassment theory is not confined to carefully defined limits, the statute will become a device for policing the normal give-and-take of interpersonal relations in the workplace.[171]

While these concerns may have merit, they do not justify the court's rationale in *Galloway*. First, the law already contains a bulwark against unwarranted intrusions upon personal relationships: the requirement that the harassing behavior be "unwelcome."[172] In the race context, the "unwelcomeness" requirement, although present, is almost never at issue.[173] In the sex context, however, plaintiffs occasionally find their cases defeated on the threshold issue of the "unwelcomeness" of the sexual conduct.[174] Evidence that the plaintiff has invited the conduct, by her own actions, or that the conduct is part

169. *See, e.g.*, DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 308 (2d Cir. 1986) (stating that "sexual relationships between co-workers should not be subject to Title VII scrutiny, so long as they are personal, social relationships") (citing *Preamble to Interim Guidelines on Sex Discrimination*, 45 Fed. Reg. 25024 (1980)).

170. *See id.* at 307-08; *see also* EEOC Policy Guidance No. N-915-048, EEOC Compl. Man. (BNA) N:5051, at 5052-53 (Jan. 1990) (stressing that Title VII "does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships" but does prohibit favoritism "based upon coerced sexual conduct").

171. *See, e.g.*, Vinson v. Taylor, 760 F.2d 1330, 1331 n.3 (D.C. Cir. 1985) (dissenting) (expressing concern that an employer should not be forced into "monitoring or policing his employees' voluntary sexual relationships"), *aff'd sub nom.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

172. *See* 29 C.F.R. § 1604.11(a) (1995) (defining sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature").

173. In race cases, courts have formulated the standard to include a requirement that the harassment be "unwelcome." Daniels v. Essex Group, Inc., 937 F.2d 1264, 1271 (7th Cir. 1991) (quoting the standards enunciated in Daniels v. Essex Group, 740 F. Supp. 553, 560-61 (N.D. Ind. 1990)). Rarely, however, does the "unwelcomeness" issue come into play. This may be one area where there are grounds for distinguishing, to some degree, between claims of racial and sexual harassment. While one can imagine a workplace where a small level of racial teasing is tolerated by African-Americans and Caucasians alike, the use of a racial epithet, particularly by a white worker, is unlikely to be welcomed. On the other hand, a certain amount of ribald repartee (not to mention overt flirtation) is a part of the sexual dynamic for at least some individuals, male and female alike. It seems likely that if the unwelcomeness requirement is to have much application at all, it will be in the sexual context.

174. Reed v. Shepard, 939 F.2d 484, 491-92 (7th Cir. 1991); Ukarish v. Magnesium Electron, 33 Empl. Prac. Dec. (CCH) ¶ 34,087, at 32, 118 (D.N.J. 1983); Gan v. Kepro Circuit Sys., 27 Empl. Prac. Dec. (CCH) ¶ 32,379, at 23,648 (E.D. Mo. 1982); Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149, 1177 (M.D. Pa. 1982); *see also Vinson*, 477 U.S. at 68 (stressing that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'"); Ellison v. Brady, 924 F.2d 872, 880 n.13 (9th Cir. 1991) ("If sexual comments or sexual advances are in fact welcomed by the recipient, they, of course, do not constitute sexual harassment. Title VII's prohibition of sex discrimination in employment does not require a totally desexualized work place.").

of the normal give and take of a sexual tryst, encouraged by the plaintiff's own behavior, can support a finding that the alleged harassment is not "unwelcome" and, thus, not actionable.

In *Galloway*, the court considered the issue of whether the plaintiff's claim was defeated by "her own coarse remarks" to the harasser "and others."[175] The court ruled, correctly in my view, that the plaintiff had not "welcomed" the conduct by her own "defensive" reactions to the alleged harassment.[176] Having ruled in the plaintiff's favor on this point, the court should have been satisfied that the harassing conduct was not the uncoerced product of a soured personal relationship.

Further, the notion that Galloway's claim could be defeated by evidence that the harasser was acting out of "personal animosity" rather than a "belief" that "women do not belong in the work force"[177] presupposes that the proper focus, in a hostile environment case, is on the subjective motivation of the harasser. However, in cases of this nature, the law assumes the point of view of the victim, not of the harasser.[178] In *Rodgers*, the court recognized this principle, flatly rejecting the defendant's argument that the racial epithets could be dismissed because of the "nonracist" motivations of the harasser. In contrast to this view, the court in *Galloway* shifted the focus to the putative motivations of the harasser, thereby ignoring the obvious sexual connotation in the epithet itself.

Indeed, the *Galloway* court's distinction between "abuse of a woman" that is "motivated by her gender rather than by a personal dislike unrelated to gender"[179] splits too fine a hair. Harassment is often the product of some personal animus. Where the harassment does not take the form of a racist or sexual statement or act, it is not actionable under Title VII, absent proof that the harasser selectively targeted members of one race or sex.[180] Where, however, the harasser employs racial or sexual means, in carrying out his vendetta, Title VII comes into play, since the harassment, by its very nature, differentiates along racial or gender lines. In such a case, the plaintiff's claim is

175. 78 F.3d 1164, 1165 (7th Cir. 1996).

176. *Id.* at 1167.

177. *Id.* at 1168.

178. *See* Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 965 (8th Cir. 1993); Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991); King v. Board of Regents of the Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990); Yates v. Avco Corp., 819 F.2d 630, 637 & n.2 (6th Cir. 1987).

179. 78 F.3d at 1168.

180. *See* Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 676 (7th Cir. 1993) (noting that "Rodgers would not have an action under Title VII if Mann had not mixed racist comments into his daily routine of race-neutral verbal abuse").

viable regardless of whether the harasser acted out of racial or sexual hatred or a personal animus.

Again, let us accept the court's invitation. Let us assume that the fact that the co-worker in *Galloway* acted from "personal dislike," following a "soured" romantic relationship, is critical to the inquiry. Does this deprive the abuse of any "gender" content?

The answer is an emphatic "no" for reasons that, once again, expose the gap between the *Rodgers* and *Galloway* decisions. The *Galloway* court assumed that if the abuse stemmed from a failed personal relationship, it could not be seen as disadvantaging the plaintiff "in relation to her male co[-]workers by virtue of being a woman."[181] This, however, ignores the unfortunate history of male-female relations. Men have a history of abusing women and are prone to do so, most often, in the context of failed (or failing) personal relationships.[182] In that context, the use of the derogatory word "bitch" or the phrase "suck this, bitch," can, in the mind of a reasonable woman, conjure up the entire history of male-on-female abuse. Indeed, if such language is repeated, as it was in *Galloway*, a woman may reasonably feel that the verbal abuse is a prelude to physical violence.[183] The fact that the abuse flows out of a failed personal relationship, rather than diminishing the sexual character or severity of the abuse, may actually serve to heighten it.

In *Rodgers*, the court understood the history that was conjured up by the term "nigger." The court recognized that the use of the word in the workplace could erode the "self-esteem" of a black employee.[184] The *Galloway* court was unable to see the parallel history of subjugation conjured up by the co-worker's sexually abusive conduct. The result was that the *Galloway* court, under the rubric of "context," turned on its head what should have been a simple issue: whether the term "bitch" can reasonably be perceived as a term that carries "some sexual innuendo."[185]

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181. 78 F.3d at 1168.

182. *See* Don Colburn, *Domestic Violence; AMA President Decries 'A Major Public Health Problem'*, WASH. POST, June 28, 1994, at Z10.

183. *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (noting that "because women are disproportionately victims of rape and sexual assault," women "who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault").

184. 12 F.3d at 677.

185. 78 F.3d at 1168.

B. The Issue of Severity

If *Galloway* cannot be defended on the threshold issue of discrimination, what about the court's ruling that the repeated use of the word "bitch" was not sufficiently severe to implicate the protections of Title VII? Again, the court did not distinguish the prior decision in *Rodgers*, wherein the court considered the much more isolated racial epithets sufficiently severe to have altered the terms and conditions of the plaintiff's employment. Two possible distinctions, however, emerge from the *Galloway* decision: (1) that the harasser in *Galloway* was a co-worker, rather than a supervisor, thus diminishing the impact of the harassment; and (2) that the term "bitch" is not as offensive as the term "nigger," particularly when used in the context of a failed personal relationship.

At first glance, the first of these distinctions would appear to have some merit. In *Rodgers*, the court reasoned that a supervisor's use of the word "nigger" "impacts the work environment far more severely than use by co-equals."[186] The court stressed that the insults "flowed from the mouth of a supervisor—indeed, the highest ranking employee in the [plaintiff's] office."[187] In *Galloway*, the court suggested that the "verbal conduct," coming from a co-worker, did not enforce a view that "women do not belong in the work force or are not entitled to equal treatment with male employees."[188]

While there is no denying the injury inflicted by a management official's use of a racist epithet, the fact that the harassment in *Galloway* emanated from a co-worker is less significant than it first appears. Under Title VII, an employer is liable for co-worker harassment only if the employer itself has reason to be aware of the harassment and fails to take adequate steps to redress it.[189] The plaintiff in *Galloway* was not arguing that the co-worker's use of abusive language, by itself, violated Title VII. The plaintiff was arguing that the employer violated Title VII by "failing to protect her" from the harassment.[190] The plaintiff could prevail on that claim only by proving that a hostile envi-

186. 12 F.3d at 675.

187. *Id.* at 677.

188. 78 F.3d at 1168.

189. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431-32 (7th Cir. 1995); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 966 (8th Cir. 1993); Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991); 29 C.F.R. § 1604.11(d) (1995).

190. 78 F.3d at 1165.

ronment existed[191] and that the employer, fairly charged with knowledge of the harassment, failed to take action to remedy it.[192]

The *Galloway* court dismissed the plaintiff's claim without addressing the adequacy of the employer's response to the alleged harassment. Assuming, however, that the evidence showed that the employer failed to take action in response to the plaintiff's complaints, the effect on the plaintiff could be substantial. To be subjected to an offensive epithet by a supervisor is no doubt harmful. To be told effectively by your employer, however, that the use of an offensive epithet by a co-worker is tolerated can be equally humiliating. In fact, in some respects, the impact may be worse since the supervisor's conduct might be viewed as unique to the supervisor, while the employer's failure to respond can be seen as part of an institutional insensitivity to the kind of workplace harassment at issue.[193] A co-worker's repeated use of offensive language, coupled with the employer's failure to redress the harassment, can have as severe an impact on an individual as the use of offensive language directly by a supervisor or manager.

The second distinction suggested above has, in some respects, already been addressed. The court in *Galloway* placed substantial reliance on the fact that the abuse flowed from a failed personal relationship both in ruling that the abuse did not have any "sexual innuendo" and in finding that the abuse was too "tepid or intermittent or equivocal" to be actionable.[194] Yet, as noted above, the fact that the abuse stems from a failed sexual relationship, if anything, heightens both the sexual character and severity of the harassment by evoking the history of male-on-female abuse prevalent in the very context of a failed relationship.[195] If context is, indeed, "everything," as stated in *Galloway*,[196] the "context" in that case enhanced, rather than diminished, the severity of the co-worker's harassment.

What about the general issue of whether the term "bitch" is as inherently offensive as the term "nigger"? "Nigger" is a patently offen-

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

192. *Baskerville*, 50 F.3d at 431-32; *Burns*, 989 F.2d at 966; *Ellison*, 924 F.2d at 881; 29 C.F.R. § 1604.11(d).

193. In *Rodgers*, there was no evidence that the plaintiff had ever reported the harassment to a company official. Liability was imposed on the employer on the theory that "racial harassment by a [company official] at a decision-making level in the corporate hierarchy" is directly attributable to the employer. Rodgers v. Western-Southern Life Ins. Co., 792 F. Supp. 628, 635 (E.D. Wis. 1992) (citing Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986) (dicta)).

194. 78 F.3d at 1168.

195. *See supra* notes 182-83 and accompanying text.

196. 78 F.3d at 1168.

sively term. It is uniquely tied to the history of racial oppression in this country, a history that may be unparalleled in its degree of abuse and degradation. It is difficult to quarrel with the statement in *Rodgers* that "[perhaps] no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates."[197]

On the other hand, the fact that "nigger" is an offensive term does not diminish the impact of a term such as "bitch." The term "nigger" might be viewed as more inherently objectionable than the term "bitch." In that sense, there may be a small range of cases where the isolated use of the word "nigger" is sufficiently "severe" to create a hostile working environment, while the isolated use of the word "bitch" is not. This minor concession, however, in no way justifies the tolerance of the type of repeated abuse at issue in *Galloway*, nor does it support the view that racial harassment claims are of a fundamentally different stripe. No two words have precisely the same meaning. No two groups have suffered precisely the same discrimination. The differences between racial and sexual discrimination, whatever they may be, do not justify the gaping disparities in approach revealed by the *Rodgers* and *Galloway* decisions.[198]

In truth, the *Galloway* court's reference to "failed personal relationships" may say something much more fundamental than is readily apparent at first glance about the disparate responses of courts to claims of racial and sexual harassment. Racist epithets have been an unfortunate part of this country's history. The use of such epithets, however, is increasingly on the wane, even in private discourse.[199] The use of sexually abusive language, by contrast, appears to be as prevalent as ever, at least in private conversation and particularly in reference to women who are at the other end of a "failed personal relationship."[200]

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197. Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

198. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 25-26 (1993) (Ginsburg, J., concurring) (stressing that the law should treat claims of sex discrimination in the same fashion as it does claims of race discrimination "except in the rare case in which a bona fide occupational qualification is shown").

199. My support for this statement comes from my own experience. I rarely hear a racial epithet even in my interactions with individuals who signal hostility toward minority group members. On the other hand, some of the same individuals who would never use a racial epithet in referring to a member of a minority group have no qualms about using sexually derogatory language in reference to particular women.

200. The prevalence of sexually derogatory language may be illustrated, most dramatically, by the frequent use of such language by male "rappers" and "hip-hop" artists. *See* William Bennett et al., *Rap Rubbish*, USA TODAY, June 6, 1996, at 13A.

One might argue that the very prevalence of terms like "bitch," in common usage, diminishes the impact of these terms when transported to the workplace.

The problem with this, of course, is that it fossilizes the current levels of societal acceptance into a legal standard. It is not so long ago that racist epithets were not out of bounds, even in public discourse.[201] This has changed, in part, because the law has transformed people's attitudes or at least affected the perception of what is acceptable discourse. The law could have a similarly transforming effect with respect to sexually derogatory language if courts were to insist upon the same "no tolerance" policy that has been the hallmark of the judiciary's response to claims of racial harassment.[202]

This, then, is the final contrast between the *Rodgers* and *Galloway* decisions. In *Rodgers*, the court showed no tolerance for a racist epithet, even when used a handful of times over a twelve-year period. In *Galloway*, the court tolerated a sexist epithet used repeatedly over a much shorter time frame. Rather than using Title VII to transform workplace behavior, as did the court in *Rodgers*, the court in *Galloway* acquiesced in the toleration of the harasser's sexually abusive language.

V. SEXUAL HARASSMENT AND THE TRANSFORMATIVE POWER OF TITLE VII: SOME FINAL THOUGHTS

As I noted above, my aim in this Article is not merely to contrast the results in the *Rodgers* and *Galloway* cases. I also seek to use these cases to make a broader point about the disparate responses of courts to claims of racial and sexual harassment. The above discussion suggests a number of broader issues raised by the *Rodgers* and *Galloway* decisions.

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201. In one of the most notorious examples, Senator Theodore Bilbo of Mississippi, who served well into the twentieth century, peppered his public statements with the word "nigger" and other racial and ethnic slurs. *See* DAVID BRINKLEY, WASHINGTON GOES TO WAR 77-78 (1988).

202. *See supra* notes 44-46 and accompanying text (discussing the judiciary's "no tolerance" policy with respect to the use of racial epithets). Notably, the judiciary's aversion to racial epithets extends to other evidentiary issues arising in Title VII cases. Courts, for example, have been quick to infer from a manager's use of the word "nigger" that the manager's subsequent decision to take adverse employment action against an African-American employee was racially based. *See, e.g.*, Brown v. East Miss. Elec. Power Ass'n, 989 F.2d 858, 861-62 & n.8 (5th Cir. 1993). Courts have also sustained findings of constructive discharge, based on the use of racial epithets, even where the few incidents of harassment recalled by the plaintiff occurred several years before his resignation. *See* Taylor v. Western & Southern Life Ins. Co., 966 F.2d 1188, 1190-94, 1189, 1206 (7th Cir. 1992). Decisions like these provide employers with a strong incentive to purge the workplace of racially abusive language.

The first point that emerges from these decisions, and others,[203] is that courts have a discomfort with the sexual harassment theory that does not seem to surface in the context of race-based claims of hostile environment discrimination. This discomfort may stem from the very fact that the harassment is of a sexual nature. Courts may have concerns that they not be forced into policing the sexual give and take that is a normal part of the courting ritual. Courts may feel that sexual conduct is more prone to ambiguity precisely because of the subtleties of the sexual dynamic. The very pervasiveness of sexually derogatory speech may lead courts to conclude that a certain degree of even unwanted sexual conduct is inevitable. Courts may feel, in particular, that employers cannot be fairly "saddled with the insurmountable task" of conforming employee conduct to some legal norm of permissible sexual conduct,[204] at least to the same degree that they are required to purge the workplace of racist behavior.

Throughout this Article, I have sought to show that these concerns are misplaced. The concern that courts will be forced into policing every sexual exchange in the workplace is met by, among other things, the requirement that the harassment be "unwelcome."[205] While pundits often talk of the dangers of converting every sexual misunderstanding into a federal case,[206] the reported cases rarely involve the ambiguous sexual advance or comment. More typical is what occurred in *Galloway*. The repeated use of the word "bitch," the grabbing of the genital area, and the crude demand for sexual submission hardly seem the product of a simple "misunderstanding" between the sexes. The law should not be so demanding that it leaves no room for the mixed signal or the occasional "off-color" joke or remark. Nor should it permit, under the rubric of "context" or "ambiguity," the type of crude, offensive, and pervasive abuse tolerated in *Galloway*.

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203. *See supra* notes 31-58 and accompanying text (discussing the courts' general approach to claims of racial and sexual harassment).

204. Spicer v. Virginia Dep't of Corrections, 66 F.3d 705, 711 (4th Cir. 1995).

205. *See supra* notes 172-74 and accompanying text (discussing the "unwelcomeness" requirement). No doubt, an overly aggressive application of the "unwelcomeness" requirement has its own pitfalls. Implying that a woman has "welcomed" the harassment by her dress or sexual demeanor conjures up the ugly history of the law's treatment of rape complainants. *See generally* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977) (discussing the treatment of rape victims during trial and the legislature's effort to shield them). In my view, the "unwelcomeness" requirement, while it has meaning, should be reserved for a relatively small number of cases where the record clearly shows that the plaintiff, by her own interactions (not her dress or general sexual demeanor) has welcomed the specific sexual conduct at issue. *Cf. supra* note 173 (stating "that if the unwelcomeness requirement is to have much application at all, it will be in the sexual context").

206. *See* Nat Hentoff, *A 'Pinup' of His Wife*, WASH. POST, June 5, 1993, at A21.

The concern that sexual misconduct is too pervasive in society at large to be regulated effectively in the workplace is equally unavailing. The very purpose of Title VII is to restrict in the workplace what might be viewed as acceptable (or at least permissible) in other, more personal settings. That employers may have to bear the brunt of enforcing workplace norms is inherent in Title VII's liability standards. Title VII does not make an employer strictly liable for co-worker harassment, no matter how egregious.[207] What Title VII requires is that the employer, once it is charged with knowledge of the harassment, take adequate steps to redress such harassment. Within these constraints, it is fair to require employers to play the same private "enforcement" role in the sexual context as they have in the racial context and fair to hold them responsible for failing to carry out that role.

Of course, saying that the employer can be made to enforce the standards of Title VII presupposes that courts are willing themselves to impose the standards. For courts to impose the level of protection that I believe Title VII requires, however, they must be able to see the history of abuse and subjugation that is evoked by objectionable sexual language and conduct. In the race context, courts have been able to see how even a single word can prove injurious to an African-American employee. In the sex context, grasping the meaning of derogatory conduct has proven more elusive. This, if nothing else, is the lesson of *Rodgers* and *Galloway*.

Why is it that courts cannot perceive the history of sexual abuse with the same clarity that characterizes their response to racially harassing behavior? One might argue that the problem is the small number of female judges on the federal bench.[208] Yet, most federal judges are also Caucasian[209] and still seem able to understand, often

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207. *See supra* note 94 (discussing the standard of liability for cases of co-worker harassment). Even in cases where the harasser is a supervisor, employer liability is not absolute; *see also* Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994) (stating that an employer is directly liable for harassment where the supervisor creates "a discriminatorily abusive work environment through the use of his delegated authority").

208. While as of 1994, only fourteen percent of federal judges were women, President Clinton has nominated far more females than any of his predecessors, including forty percent during the first year of his administration. Michael E. Solimine & Susan E. Wheatly, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 920 nn.1-2 (1995); *see also* Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. REV. 309, 309-16 (1996) (comparing President Clinton's record on nominating women for federal judgeships with those of Presidents Reagan, Bush, and Carter). The argument that sexual harassment doctrine has been influenced by a "gender bias in the courts" is made in David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 147 (1995) (noting that "[m]ost federal court judges are men").

209. James E. Coleman, Jr. et al., *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 202

with great sensitivity, the harm inflicted by the racial epithet. Perhaps this is simply a case where the story of racial oppression has been more effectively told and the lessons more deeply embedded in our common understandings.[210] Whatever the case, the relative inability of courts to understand the nature of the harm inflicted by sexually demeaning conduct leaves working women vulnerable to conduct that is as offensive to women as the most severe racial epithet is to African-Americans.

Another case from the Seventh Circuit, *Saxton v. American Telephone and Telegraph Co.*,[211] illustrates the point. In *Saxton*, the plaintiff had been hired to work for the defendant's Design Engineering Staff.[212] One of the defendant's managers began making unwelcome sexual advances.[213] On one occasion, the manager, having invited Saxton for drinks to discuss work-related matters, "placed his hand on Saxton's leg above the knee several times," "rubbed his hand along her upper thigh," "kissed her for two to three seconds," and "put his hand on [her] leg once or twice more during the ride home," all over Saxton's objection.[214] A few weeks later, the manager invited Saxton to lunch to discuss work-related matters but then detoured to an arboretum, leaving the car to take a walk.[215] When Saxton removed herself from the car and began walking, the manager "'lurched' at her from behind some bushes, as if to grab her," prompting Saxton to "dash[ ] several feet away in order to avoid him."[216] After Saxton complained about these incidents, the manager became "sullen," changing his behavior toward her at work.[217] The manager "refused to speak with her, treated her in a condescending manner, and teased her about her romantic interest in a co[-]worker."[218]

(1996) (noting that as of July, 1994, ninety percent of the 164 federal appellate court judges were Caucasian, and approximately eighty-five percent of the 573 federal district court judges were Caucasian).

210. For a discussion of this general point, see CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 127-41 (1979).

> The primary point of reference for antidiscrimination law has not been the social situation and experience of women, but that of black Americans, or at least black men. . . . Judges have become conscious of many attitudes and practices as unquestionably racist which are allowed to persist in their corresponding sexist forms.

Id. at 127-28.

211. 10 F.3d 526 (7th Cir. 1993).

212. *Id.* at 528.

213. *Id.*

214. *Id.* at 528 & n.3.

215. *Id.* at 528.

216. *Id.*

217. *Id.* at 528-29.

218. *Id.* at 529.

On this record, the court of appeals concluded that Saxton's proof was insufficient even to survive a motion for summary judgment.[219] The court noted that "'[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.'"[220] The court ruled that even assuming "that the conduct at issue had a sufficiently adverse effect on Saxton, her claim must still fail, as the objective prong of the inquiry is not satisfied."[221] The court stressed that the manager's offensive behavior was "relatively limited, presumably because Saxton was forthright and persistent in making clear that the advances were unwelcome," and not "severe" enough, in its own right, to "create an objectively hostile work environment."[222]

In some ways, *Saxton* may be a more troubling decision than *Galloway*. One can debate whether a term like "bitch" is, in isolation, as offensive as the word "nigger." Surely acts of unwelcome physical contact are, however, on par with even the most offensive racial epithet. The unwelcome physical groping of a woman's body, particularly in a remote setting of a male's choice, as in *Saxton*,[223] can conjure up the entire history of violence against women. At the very least, it can be insulting and demeaning, reducing the woman to a sexual object and stripping her of her professional dignity. In *Saxton*, the court seemed unable to grasp these meanings, stating only that the conduct was "inappropriate and unprofessional."[224] This is clearly inconsistent with the condemnation of the isolated racial epithets at issue in *Rodgers*.[225]

How, then, can decisions like *Saxton* and *Galloway* be avoided? First, courts must lose their misplaced discomfort with the sexual harassment theory. Second, courts must make an effort to understand

219. *Id.* at 537. It is worth noting that the author of the *Saxton* opinion, Judge Ilana Diamond Rovner, is a woman. *Id.* at 528; *see supra* notes 208-09 and accompanying text (questioning whether the small number of female judges is the primary cause of the relative insensitivity of courts to claims of sexual harassment).

220. 10 F.3d at 534 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

221. *Id.*

222. *Id.*

223. *Id.* at 528 & n.3.

224. *Id.* at 537.

225. This is not to say that there was not another way to view the evidence in *Saxton*. The court insinuated, without saying, that the plaintiff may have welcomed the sexual advances by her own flirtatious behavior with the supervisor. *Id.* at 528 (suggesting that before the incidents at issue, the plaintiff had received a job that seemed beyond her level of qualification after having had lunch with the supervisor "several times"). The court, however, did not rule on this point and never gave the fact finder the opportunity to assess whether the plaintiff's objections to the physical harassment were, under the circumstances, reasonable. *Id.* at 534, 537.

the meanings inherent in sexually derogatory comments or conduct.[226] It is tempting to say that judges must look beyond their own life experiences, to "walk a mile" in the shoes of those who have suffered sexual indignities. The answer, however, may lie closer to home.

How many judges, as employers, would repeatedly use the type of language at issue in *Galloway*? How many judges, as employers, would engage in the type of behavior at issue in *Saxton*? How many judges, as employers, would tolerate such conduct, by others, in their own workplaces? The answer, I hope (and think), is very few. Yet, these same judges, as judges, seem willing to tolerate such behavior to a degree not replicated in the race context, based apparently on the perception that in the "rough and tumble" world of many workplaces, a certain degree of sexually abusive behavior is inevitable.[227] If there are workplaces where sexually crude behavior persists, it is the judges, armed with Title VII, who have the power to make a change.

Title VII has the power to transform workplace behavior. Until courts transform their own thinking and place sexual harassment on the same plane as racial harassment, however, the statute will not live up to its full potential as a device for "eliminating prejudices and biases in our society."[228]

CONCLUSION

Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[229] On paper, this right extends equally to claims of racial and sexual harassment. In practice, the judicial response to claims of sexual harassment falls short of the mark set by the race cases. The decisions in *Rodgers* and *Galloway* illustrate this disparity. The law should strive for a more unified approach, in practice, to comparable claims of race- and sex-based harassment.

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226. I do not mean to raise the debate over whether the impact of harassment should be assessed from the perspective of a "reasonable woman," as opposed to "reasonable person." *Compare* Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991) (adopting the perspective of a "reasonable woman"), *with id.* at 884-85 (Stephens, J., dissenting) (arguing against a "reasonable woman" standard because "[w]hether a man or woman has sensibilities peculiar to the person and what they are is not necessarily known"). Courts can apprehend the effect that sexually derogatory conduct may have on a female complainant without assuming the stance of a hypothetical "reasonable woman."

227. *See, e.g.*, Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1538 (10th Cir. 1995) (stressing that "[s]peech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments").

228. Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988).

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