

11-1-1999

Sticks, Stones, and Simple Teasing: The Jurisprudence of Non-Cognizable Harassing Conduct in the Context of Title VII Hostile Work Environment Claims

James C. Chow

Recommended Citation

James C. Chow, *Sticks, Stones, and Simple Teasing: The Jurisprudence of Non-Cognizable Harassing Conduct in the Context of Title VII Hostile Work Environment Claims*, 33 Loy. L.A. L. Rev. 133 (1999).

Available at: <https://digitalcommons.lmu.edu/llr/vol33/iss1/4>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

STICKS, STONES, AND SIMPLE TEASING: THE JURISPRUDENCE OF NON-COGNIZABLE HARASSING CONDUCT IN THE CONTEXT OF TITLE VII HOSTILE WORK ENVIRONMENT CLAIMS

*Sticks and stones will break my bones, but words will never hurt me.*¹

*Contrary to the children's rhyme, all insults, like sticks and stones, can hurt, but this does not mean that all insults are tortious.*²

I. INTRODUCTION

Approximately two-thirds of all Title VII sexual harassment claims in the United States circuit courts are dismissed when the claim involves stray remarks.³ The total number of sexual harassment charges filed with the Equal Employment Opportunity Commission (EEOC) and the Fair Employment Practices Agency has gradually increased from 10,532 in 1992 to 15,618 in 1998.⁴ With this escalation in filings, courts increasingly face the complex task of separating valid sexual harassment claims from conduct falling

1. THE CONCISE OXFORD DICTIONARY OF PROVERBS 212-13 (J. A. Simpson ed., 1983).

2. *Butler v. Ysleta Indep. Sch. Dist.*, 161 F.3d 263, 270 (5th Cir. 1998).

3. I discovered this statistic by searching the Westlaw database that includes all federal appeals cases after 1944, using the following search terms: "(stray w/1 remark) or (mere w/1 utterance!) or (simple w/1 teasing) and (sex! w/1 harass!)." I eliminated cases that did not deal with sexual harassment in the context of a hostile work environment. I conducted this search on June 20, 1999.

4. See The U.S. Equal Employment Opportunity Commission, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992 – FY 1998* (last modified Jan. 14, 1999) <<http://www.eeoc.gov/stats/harass.html>>.

outside the scope of Title VII. This task is particularly challenging in cases involving a claim of a hostile or abusive work environment where the court must wrestle with subtle distinctions in order to make a determination.

Courts recognize the existence of a hostile environment when the alleged violator subjects the claimant to severe or pervasive harassment.⁵ For example, one court found severe and pervasive conduct when over a period of years a male employer raped a female employee on several occasions, made repeated demands for sexual intercourse to which she complied with approximately forty to fifty times, fondled her, exposed himself to her, and followed her into the women's restroom.⁶ Such egregious behavior presented the court with an easy case of harassment.

However, cases more commonly involve less extreme forms of conduct. For example, in *Butler v. Ysleta Independent School District*,⁷ the claimants received letters with statements such as "You probably could use a man in your life to calm some of that frustration down," "You are still trying to control everyone's life [sic]," and "When you drive down the street you look like you're pissed off."⁸ Courts scrutinize facts like these in order to determine whether the claimant has established a hostile work environment. Was the behavior severe or pervasive? Or were the incidents isolated and more deserving of the labels "mere utterance"⁹ and "simple teasing"¹⁰?

On May 24, 1999, the United States Supreme Court decided *Davis v. Monroe County Board of Education*,¹¹ in which a fifth-grade student sued her school under Title IX for failure to remedy a classmate's sexual harassment.¹² The Court revisited the issue of severe and pervasive conduct, emphasizing that simple teasing is not actionable because this behavior is expected of children.¹³ Due to the

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

6. See *id.* at 60, 67.

7. 161 F.3d 263 (5th Cir. 1998).

8. *Id.* at 265. See discussion *infra* Part III.C.1.b.

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

10. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998).

11. 119 S. Ct. 1661 (1999).

12. See *id.* at 1664.

13. See *id.* at 1675. The reader should note that the Court was discussing

severity of the harassment and lack of response from school officials, the Court ultimately found for the claimant.¹⁴ Yet, implicit within the court's reasoning is the idea that members of society—whether at school or work—should tolerate a certain level of name-calling.¹⁵

This Comment examines sexual harassment relegated to the non-cognizable category of simple teasing. Part II provides background information by placing conduct labeled as stray remarks within the larger context of sexual harassment. Part III criticizes judicial downplaying of the harm caused by simple teasing. Part IV proposes the elimination of “play” as a factor for finding simple teasing non-cognizable. Part V concludes with a discussion of the potential impacts of implementing this proposal.

II. PLACING SIMPLE TEASING WITHIN THE LARGER CONTEXT OF SEXUAL HARASSMENT

In 1986, the United States Supreme Court affirmed the use of Title VII of the Civil Rights Act of 1964¹⁶ for sexual harassment claims in *Meritor Savings Bank, FSB v. Vinson*.¹⁷ Severe or pervasive sexual harassment that alters the conditions of the victim's employment and creates an abusive working environment violates Title VII.¹⁸ In affecting a term or condition of employment, the sexual harassment must be “sufficiently severe or pervasive” to be

simple teasing in the grade school setting, explicitly contrasting the adult workplace. *See id.* However, the discussion still reveals a wariness towards allowing less severe forms of harassment to become actionable.

14. *See id.* at 1676.

15. *See id.* at 1675. “Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it.” *Id.*

16. Title VII states:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

42 U.S.C. § 2000e-2(a)(1) (1994).

17. *See* 477 U.S. 57, 73 (1986).

18. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2283 (1998) (citing *Meritor*, 477 U.S. at 67).

actionable.¹⁹ The United States Supreme Court noted that the EEOC Guidelines on Discrimination Because of Sex²⁰ emphasize the consideration of the totality of the circumstances when assessing a sexual harassment claim.²¹

The conduct must be "(1) severe enough to alter the recipient's workplace experience even though the conduct occurred but once or but rarely, or (2) pervasive enough so as to be more than merely an accidental or isolated event and thus to become a defining condition of the workplace."²² There is an inverse evidentiary relationship between severity and pervasiveness.²³ If the harassment is very severe, the harasser does not need to repeat the activity for the conduct to be cognizable. On the other hand, if the harassment occurs regularly, the harasser need not to have acted in an extreme manner.

The sexual harassment in a hostile environment claim must be severe or pervasive under both an objective and a subjective standard.²⁴ In *Faragher v. City of Boca Raton*, the United States Supreme Court stated that "in order to be actionable under [Title VII], a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."²⁵

Under the objective standard, "[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."²⁶ Under the subjective standard, "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the

19. *Meritor*, 477 U.S. at 67.

20. 29 C.F.R. § 1604.11(b) (1998).

21. *See Meritor*, 477 U.S. at 69.

22. BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992) (citations omitted).

23. *See Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

24. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993). A number of commentators have also proposed a reasonable woman standard. *See LINDEMANN & KADUE*, *supra* note 22, at 181-84.

25. 118 S. Ct. at 2283 (citing *Harris*, 510 U.S. at 21-22).

26. *Harris*, 510 U.S. at 21.

conditions of the victim's employment, and there is no Title VII violation."²⁷

For example, in *Smith v. Northwest Financial Acceptance, Inc.*,²⁸ the claimant testified that she felt "humiliated and upset by the hostile nature of her supervisor's statements."²⁹ The court found that this testimony satisfied the subjective part of the test.³⁰ A claimant is not required to show a tangible job detriment resulting from abusive conduct.³¹ The court added that it was sufficient that the claimant testified that the abusive comments were "intolerable, publicly made, and caused humiliation and a loss of self-respect."³² The subjective element poses a minor hurdle for claimants.

In the Guidelines on Discrimination Because of Sex,³³ the EEOC recommends looking "at the record as a whole and at the totality of the circumstances."³⁴ In *Harris v. Forklift Systems, Inc.*,³⁵ the United States Supreme Court listed a number of factors for determining whether, under the totality of the circumstances, the sexual harassment is severe or pervasive.³⁶ These factors include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."³⁷ However, the Court emphasized that "no single factor is required."³⁸ In addition, "courts should not consider each incident of harassment in isolation. Rather, a court must evaluate the sum total of abuse over time."³⁹

27. *Id.* at 21-22.

28. 129 F.3d 1408 (10th Cir. 1997).

29. *Id.* at 1413.

30. *See id.*

31. *See id.*

32. *Id.*

33. 29 C.F.R. § 1604.11(b) (1998).

34. *Id.*

35. 510 U.S. 17 (1993).

36. *See id.* at 23; *see also Faragher*, 118 S. Ct. at 2283 (reaffirming these factors).

37. *Harris*, 510 U.S. at 23.

38. *Id.*

39. *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 155 (3d Cir. 1999) (citation omitted).

The analysis of harassing conduct involves policy considerations. The inquiry into severity and pervasiveness necessarily "requires a balance between the complainant's right to be free from sexual offense and the fact that the law does not address every discomfort and trivial offense."⁴⁰ Accordingly, the question is one of fact that depends on the totality of the circumstances.⁴¹

One of the factors examined is the frequency of the discriminatory conduct. For example, "[u]nless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct will not create an abusive environment."⁴² Thus, conduct that is not severe requires a showing of repeated activity.⁴³ In this way, incidents may be aggregated to establish pervasiveness.⁴⁴ "Although some dicta state that only repeated harassment is actionable, no case seems to have held that a single act of severe harassment will necessarily be too isolated to be actionable."⁴⁵

Another factor in the totality of the circumstances is the severity of the discriminatory conduct. "Some forms of unwelcome sexual conduct are so trivial that they are not actionable."⁴⁶ As the severity increases, the need for pervasiveness decreases.⁴⁷ "In determining whether the conduct has created a hostile environment, courts consider the cumulative effect of various incidents of sexual harassment."⁴⁸

An additional consideration is whether the harassing conduct interferes with an employee's ability to work. Interference, though, need not rise to the level of the harasser inflicting concrete

40. LINDEMANN & KADUE, *supra* note 22, at 185.

41. See BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 49 (Christine Godsil Cooper ed., Supp. 1997) (citations omitted).

42. LINDEMANN & KADUE, *supra* note 22, at 177.

43. *See id.*

44. See LINDEMANN & KADUE, *supra* note 41, at 42.

45. *Id.*

46. LINDEMANN & KADUE, *supra* note 22, at 178 (citation omitted).

47. *See id.* (citation omitted).

48. LINDEMANN & KADUE, *supra* note 41, at 44 (citation omitted).

psychological harm on the victim.⁴⁹ “[S]exual harassment is actionable whenever it unreasonably interferes with ‘work performance.’”⁵⁰ However, because unreasonable interference is only a factor “. . . Title VII does not require proof that the harassment actually interfered with work performance.”⁵¹

The United States Supreme Court has set the lower threshold of cognizability above a “mere utterance.”⁵² The Court stated that “‘simple teasing,’ offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”⁵³ Thus, stray remarks lay at one end of the spectrum with severe or pervasive sexual harassment at the other.

III. JUDICIAL DOWNPLAYING OF SIMPLE TEASING

Courts have been caught in a judicial quandary in deciding when to find a stray remark actionable. In part, this is due to the design of the Title VII statute. Other factors that contribute to the courts’ confusion may be understood through the lens of feminist legal theory. This section looks to the language of opinions to explain why courts tend to downplay the significance of stray remarks.

A. *Walking the Title VII Tightrope*

With regard to the purpose of Title VII, there are two competing principles. On the one hand, the EEOC emphasizes that “Title VII does not proscribe all conduct of a sexual nature in the workplace.”⁵⁴ Within this consideration lies the idea that the statute should not be turned into a “general civility code.”⁵⁵ Thus, courts do not find

49. See *Harris*, 510 U.S. at 22.

50. LINDEMANN & KADUE, *supra* note 22, at 185-86.

51. LINDEMANN & KADUE, *supra* note 41, at 50 (citation omitted).

52. *Faragher*, 118 S. Ct. at 2283 (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

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

54. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), *reprinted in* LINDEMANN & KADUE, *supra* note 22, app.3, at 661.

55. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); see *Faragher*, 118 S. Ct. at 2283-84.

every stray remark or mere utterance as actionable sexual harassment.

On the other hand, Congress designed Title VII to sweep broadly. The language of the statute

evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unrestrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.⁵⁶

Title VII is stated broadly in order to promote "workplace equality."⁵⁷ As a result, the EEOC seeks to eliminate "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."⁵⁸

The idea that courts should not construe Title VII too broadly or too narrowly is linked to the aim of the statute. The primary objective of Title VII "is not to provide redress but to avoid harm."⁵⁹ Emphasizing this goal, the EEOC expressly states that "[p]revention is the best tool for the elimination of sexual harassment."⁶⁰

B. Harms of Simple Teasing

In their treatise *Sexual Harassment in Employment Law*, Barbara Lindemann and David Kadue reveal some facts about sexual harassment:

56. *Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234, 238 (5th Cir. 1971) (discussing harassment in the context of ethnic discrimination).

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

58. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (1998).

59. *Faragher*, 118 S. Ct. at 2292 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

60. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(f).

(1) A majority of working women believe that they have been sexually harassed in the workplace. Women's advocates have characterized harassment as the most widespread problem faced by women in the work force.

....

(4) Sexual harassment in its severest forms (physical conduct, retaliatory discharges) tends almost exclusively to be practiced by men against women.

....

(8) Women often remain silent when confronted with sexual harassment even while suffering physically, economically, and psychologically [sic].⁶¹

Feminist legal theorists have developed models that attempt to explain these facts. Catharine MacKinnon, Kathryn Abrams, and Vicki Schultz provide a sampling of some of these insights.

1. Dominance over women

One model examined to determine the harm caused by stray remarks focuses on power. Catharine MacKinnon explains her dominance approach as follows: "In this approach, an equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination."⁶²

Under this theory, stray remarks reinforce the power imbalance in the workplace. The court in *Bundy v. Jackson*⁶³ acknowledged this problem by noting that "so long as the sexual situation is constructed with enough coerciveness, subtlety, suddenness, or one-sidedness to negate the effectiveness of the woman's refusal . . . she is not considered to have been sexually harassed."⁶⁴ In the context of rape, MacKinnon proposed that "sexuality [can be understood] as a

61. LINDEMANN & KADUE, *supra* note 22, at 4-7 (citations omitted).

62. Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987), reprinted in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 87 (Katharine T. Bartlett et al. eds., 1991).

63. 641 F.2d 934 (D.C. Cir. 1981).

64. *Id.* at 945-46 (referring to CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 46-47 (1979)).

social sphere of male power of which forced sex is paradigmatic."⁶⁵ Her description equally applies in workplaces infested with stray remarks.

Thus, the harm is the continued domination of men over women through the use of simple teasing. A barb about a co-worker's sexual proclivities, for example, undoubtedly bruises the individual on the receiving end. However, the damage extends beyond one person's hurt feelings by rippling into the larger societal construct of unequal power.⁶⁶

2. Failing to recognize women's difference in experience

Another useful framework for analyzing the impact of stray remarks is to examine women's difference in experience. Kathryn Abrams explains that "[o]ne principal reason for the pervasiveness of sexual harassment in the workplace is that men regard conduct, ranging from sexual demands to sexual innuendo, differently than women do."⁶⁷ As a result, what may be normal sexual conduct for some men is highly offensive to some women.⁶⁸

Anita Bernstein found that "men are relatively likely to feel flattered or amused, whereas women are relatively likely to feel frightened or insulted, by sex-related behavior or displays at work."⁶⁹

65. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 635 (1983), reprinted in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 181, 187 (Katharine T. Bartlett et al. eds., 1991).

66. As MacKinnon puts it,

[feminism's] project is to uncover and claim as valid the experience of women, the major content of which is the devaluation of women's experience.

This defines our task not only because male dominance is perhaps the most pervasive and tenacious system of power in history, but because it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality.

Id. at 182 (footnote omitted).

67. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202 (1989).

68. See LINDEMANN & KADUE, *supra* note 22, at 5 (citations omitted).

69. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 465-66 (1997) (footnotes omitted).

Abrams describes this as a difference in experience.⁷⁰ Men tend to undervalue uncomfortable feelings created by aggressive or sexual behavior.⁷¹ As they are usually the aggressor, they often may not empathize with victims of aggression.⁷² In addition, men generally exercise greater control over workplaces than women.⁷³ Consequently, male "views of sexual behavior in the workplace remain the norm, the measure of 'business as usual.'"⁷⁴

As for women, their experiences as a group give them a different perspective.⁷⁵ Abrams discusses the "distinctive feelings women have about their role in the workplace,"⁷⁶ which stem from various factors such as being "comparative newcomers to many kinds of work"⁷⁷ to usually occupying the "lower rungs of most professional hierarchies."⁷⁸ Abrams also points to women's differing attitudes about sex as a reason that women have a different perspective about sexual conduct in the workplace.⁷⁹ The prevalence of rape and pornography, women's vulnerability to sexual coercion and greater sensitivity to sexual conduct, Abrams argues, all contribute to these differing attitudes.⁸⁰

Since women as a group regard sexual conduct differently than their male counterparts, stray remarks can cause particularized harm. "Sexual inquiries, jokes, remarks, or innuendoes . . . have the effect of reminding a woman that she is viewed as an object of sexual

70. See Abrams, *supra* note 67, at 1203.

71. See *id.*

72. See *id.* at 1202-03.

73. See *id.* at 1203.

74. *Id.*

75. The court in *Ellison v. Brady* recognized this difference in perspective and incorporated in its opinion Abrams's argument for the adoption of a reasonable woman standard. See *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991). Abrams, though, was wary of what the adoption of a reasonable woman standard would represent. She noted that "[e]ven a reasonable woman standard, when it is not carefully elaborated by a discussion of the differences between men and women, may reflect less an effort to see beyond the male perspective, than an attempt to evoke a woman who is, in Henry Higgins's words, 'more like a man.'" Abrams, *supra* note 67, at 1202.

76. Abrams, *supra* note 67, at 1204.

77. *Id.* (footnotes omitted).

78. *Id.* (footnotes omitted).

79. See *id.* at 1205.

80. See *id.*

derision rather than as a credible coworker."⁸¹ Another harm resulting from their attitudes toward sex is that women can feel sexually coerced by a suggestive comment.⁸²

3. Undermining the competence of women

A third approach for understanding why stray remarks cause injury examines how these statements undermine the competence of women. Vicki Schultz argues that "[h]arassment has the form and function of denigrating women's competence for the purpose of keeping them away from male-dominated jobs or incorporating them as inferior, less capable workers."⁸³ Men categorically harass others more often than women do. Abusive comments by men are an expression of "idealized masculinity" in response to perceived threats from female and less masculine male workers.⁸⁴

Schultz proposes that the courts look beyond stray remarks as merely sexual advances.⁸⁵ Rather than "appeal[ing] to judges to protect women's sexual virtue or sensibilities," harassment law should be used "to promote women's empowerment and equality as workers."⁸⁶ The workplace represents one of the most important battlefronts because of its "pivotal role in producing gender inequality between men and women."⁸⁷

Undermining the competence of women works harm in specific ways. Miranda Oshige, a student commentator, enumerated a few of these methods.⁸⁸ For example, flirting can be seen as demeaning in effect and an unnecessary interference with work.⁸⁹ Sexual conduct can also "decrease[] women's productivity and their job satisfaction

81. *Id.* at 1208.

82. *See id.* at 1207.

83. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1755 (1998).

84. *Id.* at 1762.

85. *See id.* at 1729.

86. *Id.*

87. *Id.* at 1756. Schultz does not limit the victims of this workplace dynamic to women, but includes men who may not fit into the traditionally masculine role. *See id.* at 1757.

88. *See* Miranda Oshige, Note, *What's Sex Got to Do with It?*, 47 STAN. L. REV. 565 (1995).

89. *See id.* at 573.

and impose[] barriers on their ability to excel as workers.”⁹⁰ The fact that men as a group tend to occupy higher positions in the management structure further increases the harm. Oshige notes that “being asked for a date may put a subordinate in a very uncomfortable situation, and being complimented on physical appearance may make a woman feel that her appearance garners more attention than her work.”⁹¹

C. Shortcomings of the Current Jurisprudence for Simple Teasing

Courts undervalue the harm of stray remarks in two ways. First, courts have created an unspoken requirement that stray remarks be linked to an actual injury. Second, courts excuse playful stray remarks from their scope of inquiry. In *Indest v. Freeman Decorating, Inc.*,⁹² Judge Jones acknowledged that “there is a continuum of sexually-categorized behavior ranging from the use of diminutives like ‘sweetie-pie’ on one extreme to physical assault on the other, and the commingling of particular conduct, words and working environments may form a complex stew.”⁹³

Beyond this acknowledgement, however, courts provide little guidance for determining where in the spectrum diminutives end and assault begins. In attempting to separate the ingredients of the “complex stew,” this subsection dissects sexual harassment cases according to the type of harm involved—physical or emotional.

1. Simple teasing coupled with physical harm

a. actual physical contact

Stray remarks accompanied by actual physical contact provide the easiest case for courts to find actionable sexual harassment. Examples of physical contact that raise stray remarks to the level of cognizability range from aggressive conduct to sexual groping.

*Lockard v. Pizza Hut, Inc.*⁹⁴ provides an illustration of aggressive conduct in the form of a customer grabbing the hair of Lockard,

90. *Id.* at 575 (footnotes omitted).

91. *Id.* at 585.

92. 164 F.3d 258 (5th Cir. 1999).

93. *Id.* at 264 n.8.

94. 162 F.3d 1062 (10th Cir. 1998).

a waitress at Pizza Hut.⁹⁵ Prior to this incident, the customer and his friend had come into the restaurant on several occasions.⁹⁶ Lockard testified that they had often “made ‘filthy’ comments to her such as ‘I would like to get into your pants.’”⁹⁷ On the evening of the incident, Lockard seated the customers and then “. . . one of the customers commented that she smelled good and asked what kind of cologne she was wearing. Ms. Lockard responded that it was none of his business, and the customer grabbed her by the hair.”⁹⁸ This aggressive behavior contributed to the court’s finding of severe conduct.⁹⁹

Lockard also presents an example of sexual groping.¹⁰⁰ After being ordered by her manager to continue serving the two customers, Lockard returned to their table with their beer.¹⁰¹ “As she reached to put the beer on the table, the customer pulled her to him by the hair, grabbed her breast, and put his mouth on her breast.”¹⁰² The hair grabbing and the breast groping allowed the court to conclude that the customers’ conduct was “more than a mere offensive utterance.”¹⁰³ Although the incidents were relatively isolated, the conduct was “severe enough to create an actionable hostile work environment.”¹⁰⁴

Another example of sexual contact combined with a remark is found in *Durham Life Insurance Co. v. Evans*.¹⁰⁵ A male office manager “grabbed [his insurance agent’s] buttocks from behind while she was bending over her files and told her that she smelled good.”¹⁰⁶ This incident factored heavily into the court’s finding of an abusive work environment.¹⁰⁷ Although arriving at the correct

95. *See id.* at 1067.

96. *See id.*

97. *Id.* at 1072.

98. *Id.* at 1067.

99. *See id.* at 1072.

100. *See id.* at 1067.

101. *See id.*

102. *Id.*

103. *Id.* at 1072.

104. *Id.*

105. 166 F.3d 139 (3d Cir. 1999).

106. *Id.* at 146.

107. *See id.* at 155.

result, the *Lockard* and *Durham* courts have set the bar very high for finding a stray remark cognizable.

On the other hand, non-cognizable stray remarks accompanied by actual physical contact sometimes lack pervasiveness and severity. In the context of same-gender harassment, the United States Supreme Court has characterized this sort of behavior as "roughhousing."¹⁰⁸ In the opposite-gender context, the physical contact is usually isolated and brief. For example, in *Adusumilli v. City of Chicago*,¹⁰⁹ the court found that "the most serious misconduct, the unwanted touching of Adusumilli's buttocks, took the relatively mild form of a poke and occurred only once."¹¹⁰

The *Adusumilli* court misses the mark on two points. First, by placing emphasis on the frequency of the harassment, the court trivializes an incident that only occurred once. Second, the court implies that playful behavior cannot constitute sexual harassment. When contrasted with the findings of harassment in *Lockard*¹¹¹ and *Durham*,¹¹² the unspoken rule becomes clear. The courts prohibit physical or sexual assault, but allow flirtatious contact. Moreover, an utterance needs to be accompanied by conduct rising to the level of physical or sexual assault before the courts will recognize the comment as harassment. Only unusually extreme circumstances will get the courts' attention.

b. threat of physical contact

The threat of physical contact or intimidation does not involve actual physical contact. For example, in *Harris v. Forklift Systems, Inc.*,¹¹³ the court considers as a factor for finding an abusive environment whether the conduct is "physically threatening" as opposed to merely being offensive.¹¹⁴ This factor places emphasis on the subjective element of the severe or pervasive analysis.

108. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

109. 164 F.3d 353 (7th Cir. 1998).

110. *Id.* at 362.

111. 162 F.3d at 1072.

112. 166 F.3d at 155.

113. 510 U.S. 17 (1993).

114. *Id.* at 23.

In *Hathaway v. Runyon*,¹¹⁵ Hathaway was an employee of the postal service and Norris was her coworker.¹¹⁶ During work, Norris placed himself physically close to Hathaway and told her that other workers believed they were romantically involved.¹¹⁷ On two occasions, Norris sexually touched her.¹¹⁸ After Hathaway told him to stop, Norris and another coworker, Wynn, began to laugh, snicker, and make suggestive noises at her.¹¹⁹ This activity continued for eight months.¹²⁰

The court found that Norris and Wynn's conduct toward the claimant caused her to be "frightened and intimidated."¹²¹ The claimant "testified that she was terrified to pass within grabbing range of [both of her coworkers] and that she felt trapped when they blocked her exit from the narrow label room."¹²² In part, the court based its finding of abusive working conditions on the claimant's feelings toward her coworkers' intimidating presence.¹²³

Although the two touching incidents no doubt contributed to her claim, the court spent a large part of its analysis focusing on Norris's and Wynn's non-physical conduct and its effect on Hathaway. The court may have feared that conduct like Norris's initial touching of Hathaway's buttocks¹²⁴ would escalate into more physically or sexually aggressive behavior. Hence, the court emphasized that Hathaway was "frightened and intimidated,"¹²⁵ "terrified,"¹²⁶ "that she felt trapped,"¹²⁷ and "was the victim of menacing sex-based

115. 132 F.3d 1214 (8th Cir. 1997).

116. *See id.* at 1217.

117. *See id.*

118. *See id.* at 1222. On one occasion, Norris "hit her on the buttocks with a clipboard while they were together in an enclosed stairwell." *Id.* at 1217. The other incident involved Norris "approach[ing] her from behind and squeez[ing] her buttocks while she was waiting for an elevator." *Id.*

119. *See id.*

120. *See id.*

121. *Id.* at 1222.

122. *Id.*

123. *See id.*

124. *See id.* at 1217.

125. *Id.* at 1222.

126. *Id.*

127. *Id.*

treatment.”¹²⁸ Similar to the context of actual physical contact, the threat of physical harm must rise to a very high level before the court can find sexual harassment.

Courts have refused to recognize stray remarks when the physical threat is not sufficiently severe or pervasive. An example of this bias can be seen in *Shepherd v. Comptroller of Public Accounts*.¹²⁹ Shepherd, the claimant, was employed by the Comptroller of Public Accounts of the State of Texas.¹³⁰ Moore, the alleged harasser, was one of Shepherd’s coworkers.¹³¹

According to Shepherd’s deposition, on one occasion Moore stood in front of Shepherd’s desk and remarked “your elbows are the same color as your nipples.” Shepherd testified that Moore remarked once “you have big thighs” while he simulated looking under her dress. Shepherd claimed Moore stood over her desk on several occasions and attempted to look down her clothing. According to Shepherd, Moore touched her arm on several occasions, rubbing one of his hands from her shoulder down to her wrist while standing beside her. Shepherd alleged additionally that on two occasions, when Shepherd looked for a seat . . . Moore patted his lap and remarked “here’s your seat.”¹³²

The court failed to find an abusive work environment because the incidents lacked severity.¹³³ The court reasoned that “the comments made by Moore were boorish and offensive,” but not severe.¹³⁴ The remarks were mere utterances, which did not rise to the level of sexual harassment.¹³⁵

In part of its analysis, the court agreed with the lower court’s assessment that the conduct was “too tepid to amount to actionable harassment.”¹³⁶ The court explained that “[n]one of Moore’s actions

128. *Id.*

129. 168 F.3d 871 (5th Cir. 1999).

130. *See id.* at 872.

131. *See id.*

132. *Id.*

133. *See id.* at 874.

134. *Id.*

135. *See id.*

136. *Id.*

physically threatened Shepherd."¹³⁷ This statement mirrors the language found in *Hathaway*, in which the court focused on the fear and intimidation felt by the claimant.¹³⁸ The potential for physical or sexual assault was not present in *Shepherd*, and thus the environment was not hostile.

Furthermore, in labeling Moore's conduct as "boorish,"¹³⁹ the court seemed to indicate that the alleged harasser was merely uncouth in his attempts at flirtation. At the end of the facts describing the alleged harassment, the court added that Shepherd "engaged in friendly discussions with Moore on almost a daily basis and had a friendly relation with him at work and outside of work."¹⁴⁰ Under these circumstances, Moore appears to have been only teasing Shepherd. Again, the notion of playfulness surfaces. Conduct that can be characterized as play cannot constitute sexual harassment.

*Butler v. Ysleta Independent School District*¹⁴¹ presents another case where the court made similar findings. Gracia and Butler, who were teachers in an elementary school, received anonymous mailings.¹⁴² The content of the mailings varied from notes with statements such as "You probably could use a man in your life to calm some of that frustration down"¹⁴³ and "When you drive down the street you look like you're pissed off,"¹⁴⁴ to a greeting card containing a picture of the naked buttocks of four women with a caption stating that "the winner is you (for being the perfect asshole)."¹⁴⁵ The local authorities subsequently discovered that the school principal sent the mailings.

The court found that the work environment was not hostile.¹⁴⁶ One of the reasons that led to the court's conclusion was that the letters arrived infrequently.¹⁴⁷ The court explained as follows: "Even

137. *Id.*

138. *See* 132 F.3d at 1222.

139. *Shepherd*, 168 F.3d at 874.

140. *Id.* at 872.

141. 161 F.3d 263 (5th Cir. 1998).

142. *See id.* at 265.

143. *Id.*

144. *Id.*

145. *Id.*

146. *See id.* at 269.

147. *See id.*

occasional anonymous letters can be frightening, and irregular receipt of such letters may be even more disarming than letters that arrive like clockwork and become an expected nuisance for which the victim may be prepared Nonetheless, the frequency factor affords plaintiffs little or no support."¹⁴⁸ The court seemed to imply that the timing of the mailings failed to instill a sufficient degree of fear in the recipients. Because the letters were spaced out over a period of a school year, their intimidating effect was *de minimis*.¹⁴⁹

Another reason the court gave for not finding an abusive work environment was that the statements in the letters were not threatening.¹⁵⁰ The court linked its analysis to the previous reason in supposing the following:

The anonymity of a letter may itself make it threatening, even if the content is innocuous. A threatening statement, such as "I am watching you," is more threatening still when the author is unknown. But here, the anonymous notes had no threatening content whatsoever. At worst, a reasonable person receiving such messages could be afraid that someone dislikes her and objectifies her. We do not diminish the hurt that comes with such knowledge, but we do not find that it supports a finding that a workplace environment is hostile.¹⁵¹

Although sympathetic to the teachers' plight, the court was only able to gauge the impact of the letters in terms of whether they suggest pending physical harm. Without a threat, the letters were "innocuous,"¹⁵² like the "tepid" advances of the alleged harasser in *Shepherd*.¹⁵³ Standing alone, the stray remarks in both *Shepherd* and *Butler* were unable to sustain sexual harassment claims.¹⁵⁴

148. *Id.*

149. *See id.*

150. *See id.* In addition, the court found that the conduct was not severe and did not interfere with the teachers' work performances. *See id.* at 270. The reasons for these findings will be discussed in more detail below. *See infra* Part III.C.2.b.

151. *Butler*, 161 F.3d at 269-70.

152. *Id.* at 269.

153. 168 F.3d at 874.

154. *See id.* at 874; *Butler*, 161 F.3d at 269.

2. Simple teasing coupled with emotional harm

a. psychological injury

Courts have also recognized stray remarks as creating an abusive work environment when psychological injury is present. This type of non-physical conduct may involve both psychological or emotional damage. Actual psychological damage forms the far end of the spectrum, exemplified by a claimant suffering a "nervous breakdown."¹⁵⁵ The United States Supreme Court has made it clear that a "tangible psychological injury" is not required.¹⁵⁶ Nevertheless, similar to the cases involving actual physical contact, actual psychological damage eases the level of severity and pervasiveness needed for courts to find a hostile work environment.

In *Lockard*, in which two customers made sexual comments and grabbed the waitress's hair, and one of them put her breast in his mouth,¹⁵⁷ the court found relevant that Ms. Lockard suffered psychological harm.¹⁵⁸ At trial,

Ms. Lockard testified she was frightened to be near men, even her father and her husband, and that her condition prevented her from working. Several family members testified to changes in Ms. Lockard's behavior as a result of the incident, including her fear of going out in public. Ms. Lockard sought psychological counseling from Dr. Karen Rasile, who appeared as an expert witness at trial and stated that Ms. Lockard exhibited classic symptoms of post-traumatic stress disorder and major depression.¹⁵⁹

The combination of the customers' conduct and the resulting harm led the court to conclude that there was "more than a mere offensive utterance."¹⁶⁰ Lockard was thus able to establish an abusive work environment.¹⁶¹

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

156. *Id.* at 21.

157. *See* 162 F.3d at 1067.

158. *See id.* at 1072.

159. *Id.* at 1068.

160. *Id.* at 1072.

161. *See id.*

The United States Supreme Court in *Harris* declared that the standard for an abusive working environment “takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.”¹⁶² At the same time, the Court acknowledged that “[t]he effect on the employee’s psychological well-being is . . . relevant to determining whether the plaintiff actually found the environment abusive.”¹⁶³ Thus, although psychological harm is only considered to be one relevant factor in the determination,¹⁶⁴ the actual showing of psychological harm helps boost a claim of harassment to a necessary level of offensiveness.

The *Lockard* court no doubt understood the standard. However, the court calling attention to Lockard’s mental suffering in the statement of facts and in the analysis of the sexual harassment suggests that less weight may have been given to the sexual comments themselves. Consequently, a court attempting to follow the *Lockard* holding would interpret the relevant facts as only those relating to the physical assault and the psychological harm. The stray remarks are diminished to a point where they do not form part of the inquiry. Thus, the United States Supreme Court’s proclamation that “Title VII comes into play before the harassing conduct leads to a nervous breakdown”¹⁶⁵ holds little meaning.

b. emotional injury

Even without the need for psychological counseling, courts have recognized that stray remarks may result in an abusive work environment. The United States Supreme Court in *Meritor Savings Bank, FSB v. Vinson*¹⁶⁶ indicated that “Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”¹⁶⁷ Humiliation is a key element. In *Harris*, the Court pointed to whether conduct is “humiliating, or a

162. *Harris*, 510 U.S. at 21.

163. *Id.* at 23.

164. *See id.*; *see also Hathaway*, 132 F.3d at 1223 (noting that psychological harm is relevant to the inquiry).

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

166. 477 U.S. 57 (1986).

167. *Id.* at 65.

mere offensive utterance" as relevant to finding a hostile environment.¹⁶⁸

*Steiner v. Showboat Operating Co.*¹⁶⁹ is a case involving offensive utterances. Steiner was a blackjack dealer in a casino supervised by Trenkle, the vice-president.¹⁷⁰ Trenkle called Steiner names, such as "dumb fucking broad," and "cunt."¹⁷¹ After Steiner had given complimentary restaurant passes to some customers, Trenkle yelled, "Why don't you go in the restaurant and suck their dicks while you are at it . . . ?"¹⁷² To another employee, Trenkle said, "I wouldn't want you to lose your job . . . because you have got big boobs."¹⁷³

These facts presented a simple case for the court to find sexual harassment.¹⁷⁴ Besides being sexually explicit and highly derogatory, the court noted that the comments were "publicly made."¹⁷⁵ The court found this fact significant because, in quoting the language of *Harris*, "while a 'mere offensive utterance' might not create a hostile environment, conduct which is 'humiliating' is more likely to do so."¹⁷⁶

Because the feeling of humiliation is often dependent on the presence of others,¹⁷⁷ courts take notice of the setting in which the harassing conduct occurs. In *Smith v. Northwest Financial Acceptance, Inc.*,¹⁷⁸ Mangus, the supervisor, told the employee "(1) to 'get a little this weekend' so she would 'come back in a better mood,' . . . (2) that Plaintiff 'would be the worst piece of ass that I ever had,' . . . and (3) that Plaintiff 'must be a sad piece of ass' who 'can't keep a man,' . . ."¹⁷⁹

168. 510 U.S. at 23.

169. 25 F.3d 1459 (9th Cir. 1994).

170. *See id.* at 1461.

171. *Id.*

172. *Id.*

173. *Id.* at 1462.

174. *See id.* at 1464.

175. *Id.* at 1463.

176. *Id.*

177. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 552 (1979) (defining "humiliate" as "to reduce to a lower position in one's own eyes or others' eyes").

178. 129 F.3d 1408 (10th Cir. 1997).

179. *Id.* at 1414 (citations omitted).

The court found this to be a hostile work environment.¹⁸⁰ The setting played a pivotal role in the analysis:

Plaintiff was subjected to Mr. Mangus' comments in the intimate setting of her Casper, Wyoming, office. Because the office was a relatively small, open space without partitions or walls, Plaintiff's co-workers could hear Mr. Mangus' remarks and occasionally witness his treatment of Plaintiff. This public setting only increased the humiliation, and, therefore, the severity of the discriminatory conduct.¹⁸¹

Additionally, in *Durham*, where the court also found sexual harassment, one of the relevant facts was the failure of the management to honor the insurance agent at an awards dinner, even though she was the top-producer.¹⁸² The agent "felt that she had been humiliated in front of her colleagues and her son, who was also present."¹⁸³ Similarly, in *Butler*, the court noted that anonymous letters to teachers would have been more severe had they been publicly circulated.¹⁸⁴

The degree of humiliation necessary before a stray remark is elevated to sexual harassment picks up where psychological harm leaves off. Courts fear that Title VII would be turned into a "general civility code."¹⁸⁵ Courts have reacted by making it clear that "[d]iscourtesy or rudeness" do not count as sexual harassment.¹⁸⁶ Actual degradation, like actual psychological injury, provides a touchstone, lessening the burden of analysis. This approach, however, leaves claimants injured by non-humiliating stray remarks with non-cognizable claims.

Which forms of humiliation fall short of the mark? In *Oncale*, the United States Supreme Court indicated that "ordinary socializing in the workplace"¹⁸⁷ and "intersexual flirtation"¹⁸⁸ fall outside the

180. *See id.*

181. *Id.*

182. *See* 166 F.3d 139, 145 (3d Cir. 1999).

183. *Id.*

184. *See* 161 F.3d at 269.

185. *Oncale*, 523 U.S. at 80; *see* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2283-84 (1998).

186. *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999).

187. 523 U.S. at 81. *See supra* Part III.A discussing the broad principles and policies of Title VII.

188. *Oncale*, 523 U.S. at 81.

scope of Title VII. The recurring language in this context is "simple teasing."¹⁸⁹

In *Adusumilli v. City of Chicago*,¹⁹⁰ Adusumilli worked as an administrative assistant in a police station.¹⁹¹ Various co-workers were responsible for the allegedly harassing behavior.¹⁹² Her supervisor advised her that "to avoid being laughed at, she should break her banana in the middle rather than eating it whole."¹⁹³ A police officer told her to "wash a banana before she ate it."¹⁹⁴ Another officer suggested that she not wave at squad cars "because people would think she was a prostitute."¹⁹⁵ Three officers also stared at her breasts on separate occasions.¹⁹⁶ Additionally, Adusumilli overheard a conversation where a male officer asked a female officer "if [she] had worn a low-neck top the night before."¹⁹⁷

In this instance, the court found that Adusumilli did not suffer sexual harassment.¹⁹⁸ In reviewing the remarks made by those around her, the court decided that Adusumilli "complains of no more than teasing."¹⁹⁹ The kidding and flirtatious nature of the comments reduced their stature to harmless stray remarks, similar to the stature given to "poor taste and a lack of professionalism."²⁰⁰

*Indest v. Freeman Decorating, Inc.*²⁰¹ elaborates on the idea of fun in the workplace: "Incidental, occasional or merely playful sexual utterances will rarely poison the employee's working conditions to the extent demanded for liability."²⁰² The court echoes the Supreme Court's tone and takes the idea one step further. In setting a novel standard for acceptable behavior at work, the court commented

189. *Id.* at 82.

190. 164 F.3d 353 (7th Cir. 1998).

191. *See id.* at 357.

192. *See id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *See id.*

197. *Id.*

198. *See id.* at 362.

199. *Id.* at 361.

200. *Penry v. Federal Home Loan Bank*, 155 F.3d 1257, 1263 (10th Cir. 1998).

201. 164 F.3d 258 (5th Cir. 1999).

202. *Id.* at 264.

that the alleged harasser's "vulgar remarks and innuendos (about his own anatomy) were no more offensive than sexual jokes regularly told on major network television programs."²⁰³

Title VII does not reach "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."²⁰⁴ In much simpler language, the courts seem to be saying, "All work and no play makes Jack a dull boy."²⁰⁵

IV. ELIMINATING PLAY AS AN EXCUSE

Stray remarks may cause harm, yet courts have trouble delineating which remarks should be actionable absent physical or psychological injury. The line can be drawn around "play." Courts should eliminate play as a factor for finding stray remarks non-cognizable. In other words, in analyzing the conduct of the harasser, a finding of merely playful behavior should not serve as an excuse because of lack in severity. Rather, play resulting in an unreasonable interference with an employee's work performance adds to an abusive work environment. This would reserve the "workplace" as a place intended for work.

The previous cases discussed would reach different results if play were not considered as a factor for finding a stray remark non-cognizable. In *Adusumilli v. City of Chicago*,²⁰⁶ the court found that the harassing conduct lacked severity because "Adusumilli complains of no more than teasing about waving at squad cars, ambiguous comments about bananas, rubber bands, and low-neck tops, staring and attempts to make eye contact, and four isolated incidents in which a co-worker briefly touched her arm, fingers, or buttocks."²⁰⁷

203. *Id.* The comments themselves are strangely absent from the court's opinion.

204. *Oncale*, 523 U.S. at 81.

205. JOHN BARTLETT, *FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE* 246 (Justin Kaplan ed., 16th ed. 1992).

206. 164 F.3d 353 (7th Cir. 1998).

207. *Id.* at 361.

Instead of discounting the incidents as too insubstantial because of their playful nature, the court should have determined the appropriateness of the conduct given the nature of the setting. All of the incidents occurred in the police station in which Adusumilli worked.²⁰⁸ The alleged harassers, which consisted of police officers and Adusumilli's supervisor,²⁰⁹ were men in positions of authority. By considering the totality of the circumstances, the alleged violators' playful behavior was inappropriate and constituted an unreasonable interference with Adusumilli's work performance.

Similarly, in *Shepherd v. Comptroller of Public Accounts*, the court addressed the playful nature of the conduct.²¹⁰ Shepherd's co-worker commented on her nipples and thighs, attempted to look under her dress and down her shirt, referred to his lap as her seat, and rubbed her arms from her shoulders down to her wrist on several occasions.²¹¹ During this time, Shepherd received "an unfavorable evaluation of her work product."²¹² In refusing to find an abusive work environment, the court characterized the comments as "boorish and offensive."²¹³ Rather than end the analysis on that note, the court ought to have continued. The court should have concluded that boorish and offensive conduct was inappropriate in the workplace and caused actual harm to Shepherd's work performance. Therefore, the teasing created an abusive work environment.

V. CONCLUSION

The problem is that playful stray remarks cause harm but are not actionable as a violation of Title VII. The solution is to discard the excuse that the alleged harasser was simply teasing.

This proposal solves the problem both by furthering the policy goals of Title VII and by accommodating the concerns of Title VII claimants. Congress designed Title VII to promote workplace equality without sweeping too broadly or too narrowly. In other

208. *See id.* at 357.

209. *See id.*

210. 168 F.3d 871 (5th Cir. 1999).

211. *See id.* at 872.

212. *Id.* at 873.

213. *Id.* at 874.

words, Congress wanted to rid the workplace of harassment, but at the same time, not turn the statute into a general civility code.

Disallowing as an excuse the playfulness of a remark does not open the floodgates to litigation by punishing every incivility. Rather, the proposal helps courts distinguish between impolite behavior and sexual harassment. In weeding out harassing behavior, Title VII focuses on prevention rather than punishment. Violators will learn that subtle forms of harassment can no longer slip through undetected. Victims will be reassured that the workplace is indeed a safe place to work.

Thus, re-characterizing playful stray remarks as a factor for finding sexual harassment will provide additional comfort to claimants. At the same time, the impact of the proposal on existing law would be minimal. The proposal does not change the law, but rather adds precision to the analysis of harassing conduct. If courts fear that this proposal would put too much of a damper on socializing, an alternative might be to institute recess at work.

*James C. Chow**

* I wish to thank Professor Yxta Maya Murray and Professor Catherine L. Fisk for their help in making this piece possible. My gratitude also goes to the members of the *Loyola of Los Angeles Law Review* for their skills in fine-tuning. I dedicate this Comment to my parents and my wife, Hongtao Liu.

