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BITCH v. WHORE: THE CURRENT TREND TO DEFINE THE REQUIREMENTS OF AN ACTIONABLE HOSTILE ENVIRONMENT CLAIM IN VERBAL SEXUAL HARASSMENT CASES

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INTRODUCTION

If you want to avoid liability for sexual harassment under Title VII,[1] use the term "bitch" when referring to female employees. At least, that is what the Seventh Circuit leads one to believe with its holding that a male co-worker's repeated usage of "sick bitch" in reference to a female employee was not gender-based for the purposes of Title VII.[2] However, the court stated, as an example, that the terms "fucking broads" and "fucking cunts" would be more gender-based than the term "bitch," and, therefore, would be actionable.[3]

One of the problems with sexual harassment law is the courts' inability to establish a bright-line test that would determine what type of conduct is and is not actionable.[4] With considerable gray areas in the law, one of the biggest problems arises when the alleged harassing conduct is verbal, with little or no physical touching involved.[5] The federal courts have traditionally dealt

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1. Title VII is the common name of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2000e-17 (1964).

2. Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996).

3. *Id.* at 1168. (citing Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994)). In *Steiner*, the Ninth Circuit held that a supervisor's repeated use of "dumb fucking broad," "cunt," and "fucking cunt" in reference to a female employee established a prima facie case of hostile work environment sexual harassment. *Id.* at 1462.

4. Rachel Mead Zweighaft, Comment, *What's the Harm? The Legal Accommodations of Hostile Environment Sexual Harassment*, 18 COMP. LAB. L.J. 434, 435 (1997).

5. *See* Joshua F. Thorpe, Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1377-78 (1990) (discussing the need for courts to recognize gender-based harassment as separate from sexual

with this problem by creating limits on the hostile environment claim.[6] In keeping with the tradition of placing limits on hostile environment claims, the federal courts currently use three different tests to determine whether verbal sexual harassment creates a hostile environment: the gender relation test,[7] the sexual nature test,[8] and the personal animosity test.[9]

This Comment examines the attempt by the federal courts to further define what is required to establish a prima facie case for verbal sexual harassment cases. Part I.A discusses the historical beginnings of the hostile environment claim by looking at the enactment of Title VII by Congress, its beginnings as it was applied to race discrimination claims, and its interpretation by the Equal Employment Opportunity Commission. Part I.B discusses how the hostile environment sexual harassment claim has been

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harassment, particularly when the alleged behavior is non-sexual in nature). "Courts have yet to hold clearly and uniformly that a pattern of gender-based harassment alone constitutes a sufficient predicate for a hostile work environment action." *Id.* at 1377.

6. Hostile environment discrimination does not affect economic aspects of the plaintiff's employment, such as promotion, discharge, or salary, but rather deprives an employee of "the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986). In quid pro quo harassment, on the other hand, a plaintiff must prove that (1) the employee is a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment complained of was based on sex; (4) the employee's submission to the unwelcome advances was an express or implied condition for receiving job benefits, or that the employee's refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment; and (5) the existence of employer liability. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982). *See, e.g.*, Nichols v. Frank, 42 F.3d 503, 513 (9th Cir. 1994) (holding that evidence presented by a deaf-mute employee that her employer conditioned employment benefits on sexual favors established a claim of quid pro quo harassment); Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205, 1208-09, 1212 (D.R.I. 1991) (holding that evidence that employees were required to participate in sexual liaisons with supervisor's secretary as a condition of continued employment established a claim of quid pro quo harassment).

7. Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537 (10th Cir. 1995). Discussing the gender relation test, the court stated that "[a]ny harassment of an employee 'that would not occur but for the sex of the employee . . . may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.'" *Id.*

8. Turley v. Union Carbide Corp., 618 F. Supp. 1438, 1441-42 (S.D. W. Va. 1985). The sexual nature test states that an employee is not sexually harassed where the alleged harassment is non-sexual in nature. *Id.* at 1442.

9. Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1168 (7th Cir. 1996). The personal animosity test states that when a male co-worker's comments to a female employee are based on a personal animosity rather than a belief that "women did not belong in the work force," a hostile working environment is not created under Title VII. *Id.*

interpreted by the courts from its creation in 1981 to the present. Part II discusses the development of the verbal sexual harassment claim and the current tests used by federal courts to define the requirements of a prima facie case. Part III analyzes Supreme Court cases and concludes that there is a need for the Court to further define a prima facie case of verbal sexual harassment. Finally, Part IV proposes that the Supreme Court should adopt the approach of some of the lower federal courts with regard to verbal sexual harassment cases and place the emphasis on disparate treatment rather than sex in order to be consistent with the purpose of Title VII.

I. ORIGINS OF THE HOSTILE ENVIRONMENT CLAIM

A. The Evolution of the Unexpected

Senator Howard W. Smith of Virginia had no idea that his proposal to add sex as a classification to the pending Title VII bill would result in expanding employment discrimination law into realms never imagined.[10] Senator Smith's proposal was added at the last minute in an attempt to defeat the bill.[11] His ploy, proposing the addition of the word "sex" with the expectation that the bill would not be approved, was thwarted when Title VII was passed as amended with sex as a classification.[12] Title VII of the Civil Rights Act of 1964 made it "an unlawful employment practice for an employer . . . 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."[13] The courts, however, were left with a limited

10. Jeff Bleich & Kelly Klaus, *Sexual Harassment: The Supreme Court May Yet Have Its Biggest Say on the Subject*, 58 OR. ST. B. BULL. 15, 15 (1998).

11. *Id.* *Meritor*, 477 U.S. at 64. The amendment the Senator proposed surprisingly received support from women's rights groups and from his opponents, who viewed the addition of sex as a classification as "a great trick." Bleich & Klaus, *supra* note 10, at 15.

12. *Meritor*, 477 U.S. at 64. Curiously enough, most of the votes against the act were by the same people who voted for the amendment. Bleich & Klaus, *supra* note 10, at 15.

13. 42 U.S.C. § 2000e-2(a)(1) (1994). Congress expected that Title VII would result in the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). *See* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (stating that by "forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women") (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (1971)). *But see* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986) (stating that while Title VII was created to provide women with equal employment opportunities, it was not "designed to bring about a magical transformation in

legislative history to guide them in interpreting the words of the Act prohibiting employment discrimination "based on sex."[14]

The concept of "hostile environment claims" under Title VII initially developed in the context of race-based discrimination claims.[15] In *Rogers v. EEOC*, the Fifth Circuit held that a workplace "heavily charged with ethnic or racial discrimination" gave rise to a Title VII claim.[16] The *Rogers* court recognized the definition of hostile environment claims by ruling that an employee's work atmosphere constituted a protected "term" or "condition" of employment under Title VII.[17]

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the social mores of American workers").

14. Bleich & Klaus, *supra* note 10, at 15. The Supreme Court acknowledged this in *Meritor*. 477 U.S. at 64.

15. Robert J. Gregory, *You Can Call Me A "Bitch" Just Don't Use the "N-Word": Some Thoughts On Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741, 743 (1997). The courts at this time also recognized hostile environment actions based on ethnic and religious discrimination. Thorpe, *supra* note 5, at 1367. *See* Friend v. Leidinger, 588 F.2d 61, 68-69 (4th Cir. 1978) (Buzner, J., concurring) (disagreeing with majority that discrimination of black firefighters did not amount to violation of Title VII); Firefighters Inst. For Racial Equal. v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir. 1977) (determining that the city fire department's practice of excluding blacks from informal "supper clubs" violates its duty under Title VII "to provide a nondiscriminatory working environment"); Lucero v. Beth Israel Hosp. & Geriatric Ctr., 479 F. Supp. 452, 454 (D. Colo. 1979) (holding that a black supervisor's continual harassment of non-black employees violated Title VII); United States v. City of Buffalo, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (determining that widespread and egregious racial harassment of blacks in city's police and fire departments violated Title VII); Gray v. Greyhound Lines, 545 F.2d 169, 176 (D.C. Cir. 1976) (holding that discriminatory hiring practices concerning black bus drivers violated Title VII).

16. 454 F.2d 234, 238 (5th Cir. 1971). In *Rogers*, a Hispanic employee alleged that her employers, who were optometrists, discriminated against her by dividing patients by national origin. *Id.* at 236. The court stated in dicta that "the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection." *Id.* at 237-38. Furthermore, the court determined that the intent of Congress in enacting Section 2000e-2(a)(1) was to "eradicate" the type of employment practices demonstrated in the case. *Id.* at 238.

17. *Id.* Before *Rogers*, Title VII claims dealt mainly with "terms" of employment such as hiring, firing, and promotion. *Id.* *Rogers*, however, limited the availability of hostile environment claims by stating that a "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not effect the terms, conditions, or privileges of employment. *Id.* *See* Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) (deciding that derogatory comments made by a supervisor did not rise to the level necessary to constitute a violation of Title VII); Smith v. Amoco Chems. Corp., No. 76-G-106, 1979 WL 276, at *2 (S.D. Tex. July 20, 1979) (holding that verbal passes made at female operator trainee did not rise to level necessary to constitute violation of Title VII); Dickerson v. United States Steel Corp., 439 F. Supp. 55, 74-75 (E.D. Pa. 1977) (concluding that a claim by black production and maintenance employees

The Equal Employment Opportunity Commission (EEOC) was created by Congress in a provision of Title VII to further enforce the Act.[18] The EEOC's primary responsibility is to investigate private and public employment complaints of discrimination, including sexual harassment.[19] In 1980, the EEOC published a set of guidelines regarding sexual harassment.[20]

The Supreme Court has used the EEOC guidelines, stating "these Guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[21] The EEOC has issued other guidelines such as "Guidance on Current Issues of Sexual Harassment."[22] In these guidelines, the EEOC provided guidance set forth in recently

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concerning racially discriminatory atmosphere "by no means was shown to be pervasive" as required by Title VII).

18. 42 U.S.C. § 2000e-4 (1994).

19. LYNNE EISAGUIRRE, SEXUAL HARASSMENT: A REFERENCE HANDBOOK 82 (1997). One of the EEOC's responsibilities is to gather evidence from employers. *Id.* However, the EEOC's primary purpose is to negotiate with the employer to protect the employee's rights granted under Title VII. *Id.* If the negotiation fails, the EEOC can file suit or issue the employee a "right to sue" letter. *Id.* Because some 15,500 sexual harassment claims are currently filed each year with the EEOC, the EEOC most often issues a "right to sue" letter. John Cloud, *Sex and the Law: Sexual Harassment Can Mean Firing Victims Who Don't Give In or Merely Telling A Dirty Joke; Clinton's Fate Rests On Laws That Tie Even Lawyers Into Knots*, TIME, Mar. 23, 1998, at 48, 49. Out of these filings, juries have returned over 500 verdicts for plaintiffs since 1991. *Id.*

20. 29 C.F.R. § 1604.11 (1999). The Guidelines define sexual harassment as:

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) 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.

Id.

21. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)). *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that under the Act, the administrator's decisions are not governing upon the courts; however, they are to be regarded by courts and litigants as a source of guidance); *see also* Walter v. KFGO Radio, 518 F. Supp. 1309, 1315 (D.N.D. 1981) (stating that the guidelines are entitled to "great deference"); Caldwell v. Hodgeman, 25 Fair Empl. Prac. Cas. (BNA) 1647, 1649 (Mass. Dist. Ct. 1981) (stating that the guidelines were created to aid in courts' determinations of what types of conduct are violations of Title VII); Continental Can Co. v. State, 297 N.W.2d 241, 248 (Minn. 1980) (applying the interim EEOC guidelines).

22. EEOC, PUB. NO. N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990).

developed cases in sexual harassment law.[23] The courts continue to rely on these guidelines to make and transform the area of sexual harassment law.

B. Sexual Harassment in the Judicial Arena

Courts did not apply the hostile environment theory developed in *Rogers* to sexual harassment cases until 1976, when the District Court for the District of Columbia recognized sexual harassment as a form of sex discrimination in *Williams v. Saxbe*.[24] In 1979, Professor Catharine A. MacKinnon published her influential book, Sexual Harassment of Working Women.[25] Professor MacKinnon advocated expansion of Title VII not only to "quid pro quo"[26] claims, but also to "hostile workplace"[27] sexual

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23. *Id.* at 1. This new set of guidelines was created to aid in determining the development of sexual harassment law after *Meritor*, dealing with issues such as: (1) whether sexual conduct is "unwelcome"; (2) whether a work environment is sexually "hostile"; (3) when employers are liable for sexual harassment by supervisors; and (4) how to evaluate preventative and remedial action taken in response to claims of sexual harassment. *Id.* at 4.

24. 413 F. Supp. 654, 657-58 (D.C. Cir. 1976). Williams alleged she was subjected to a sexual advance from her supervisor. *Id.* at 655. When she declined his advances, her supervisor engaged in a pattern of harassing and humiliating her. *Id.* A year later in *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977), quid pro quo sexual harassment was held to be actionable under Title VII. *Id.* The federal courts' initial resistance was "quite strong" and sexual harassment was explained as "resulting from biological forces, physical attraction, and the learned role of men as initiators of sexual activity." Zweighaft, *supra* note 4, at 446. One of the theories that supports this type of analysis is the "socio-biological theory of behavior." STEPHEN J. MOREWITZ, SEXUAL HARASSMENT AND SOCIAL CHANGE IN AMERICA 182 (1996). Under this theory, men are assumed to naturally have stronger sexual urges than women. *Id.* Thus, men should be given a wide range in expressing their sexual urges. *Id.*

25. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 32-40 (1979).

26. See *supra* note 6 for a definition and discussion of quid pro quo harassment. *See also Barnes*, 561 F.2d at 984-85 (reversing summary judgment for employer who attempted to abolish female employee's position after she refused demands for sexual favors); Miller v. Bank of Am., 600 F.2d 211, 212-13 (9th Cir. 1979) (holding that Title VII was violated where plaintiff was discharged when she refused to cooperate with her supervisor's sexual advances). The harms of sexual requests and behavior in quid pro quo harassment are easier to calculate than the harms of hostile environment harassment. Zweighaft, *supra* note 4, at 436-37. Employer liability is also easier to calculate in quid pro quo cases now that the Supreme Court has decided two cases dealing with the subject. In both, the Court ruled that employers are vicariously liable for a supervisor's sexual harassment when the worker's immediate supervisor takes a tangible employment action against the worker, such as firing, failing to promote, or changing benefits. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 764-65 (1998).

27. See definition *supra* note 6 for a discussion of hostile environment

harassment claims, which the Supreme Court later recognized as being entitled to protection.[28]

Quid pro quo claims, which allege that an employee must choose between suffering adverse employment actions or submitting to sexual demands, were the first to be recognized under Title VII.[29] The second type of sexual harassment, hostile environment, as proposed by Professor MacKinnon, was not recognized until 1981, when the Court of Appeals for the District of Columbia explicitly adopted her definition when it held that the creation of a hostile work environment violated Title VII.[30] In *Bundy v. Jackson*,[31] a female employee was sexually propositioned by a fellow employee as well as by her two supervisors at the District of Columbia Department of Corrections.[32] By looking at "numerous [racial discrimination] cases finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits," the court found that sex discrimination could be found to violate Title VII.[33]

A year later, the Eleventh Circuit handed down a similar holding in *Henson v. City of Dundee*.[34] In *Henson*, a female police dispatcher alleged that she and other female dispatchers were subjected to sexual harassment by the chief of the Dundee Police Department.[35] Citing *Rogers*,[36] the Court found that sexual

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discrimination. In evaluating a hostile environment claim, a case-by-case analysis must be used to weigh the "reasonableness" of the claim against the behavior alleged and the environment of the claimant's workplace. Zweighaft, *supra* note 4, at 441.

28. MACKINNON, *supra* note 25, at 40-47.

29. *See Williams*, 413 F. Supp. at 662 (finding a connection between the plaintiff's rejection of her supervisor's sexual advances and his subsequent harassment of her).

30. Bundy v. Jackson, 641 F.2d 934, 946 (D.C. Cir. 1981).

31. *Id.*

32. *Id.* at 939. Bundy's co-worker, Delbert Jackson, sexually propositioned her. *Id.* One of her supervisors, Arthur Burton, continually called her into his office and requested that she spend the afternoon with him at his apartment. *Id.* at 940. He also asked her about her own sexual "proclivities." *Id.* Another supervisor, James Gainey, asked her to join him at a motel and on a trip to the Bahamas. *Id.* Upon reporting the harassment to Burton and to Gainey's supervisor, Bundy said he told her that "any man in his right mind would want to rape you." *Id.*

33. *Id.* at 943-44 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

34. 682 F.2d 897 (11th Cir. 1982).

35. *Id.* at 899. This case dealt with three different types of harassment claims. *Id.* The first was a claim that the chief created a hostile and offensive working environment by subjecting Henson to sexual inquiries and vulgarities. *Id.* The second was a quid pro quo claim claiming that the chief requested that she have sexual relations with him. *Id.* The third claim was for constructive discharge, based upon plaintiff's resignation after the chief's conduct. *Id.* This Comment focuses only on the hostile environment claim.

36. *Rogers*, 454 F.2d at 234.

harassment was sex discrimination and noted that "[s]urely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."[37] Reinforcing its strong language, the *Henson* court went further than the *Bundy* Court and outlined the elements needed to establish a hostile environment claim: (1) the employee must belong to a protected group; (2) the employee must have been subjected to unwelcome sexual harassment; (3) the harassment must have been based upon sex; (4) the employee must have suffered an adverse employment action as a result of her refusal of the advances; and (5) the employer must be responsible.[38]

It was on this basis that the Supreme Court finally approved the hostile environment cause of action under Title VII in its landmark decision *Meritor Savings Bank v. Vinson*.[39] In *Meritor*, the Supreme Court held that a plaintiff may establish a Title VII violation by proving that discrimination based on sex created a hostile or abusive work environment.[40] Explicitly adopting the reasoning in *Henson*, the Court went on to note that Title VII was

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37. *Henson*, 682 F.2d at 902. The court mentioned the *Bundy* case as support for its holding. *Id.* Furthermore, the court also noted and gave deference to the EEOC Guidelines on Sexual Harassment. *Id.* at 903. *See also* Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983) (noting analysis of quid pro quo and hostile environment sexual harassment in the EEOC guidelines); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984) (citing EEOC guidelines as authority for elements of an actionable hostile environment sexual harassment claim).

38. *Henson*, 682 F.2d at 903-05. After the plaintiff presents a prima facie case of discrimination, a defendant must produce adequate evidence that the defendant acted for a "legitimate, nondiscriminatory reason." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973). *See also* Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 336 (7th Cir. 1993) (concluding that Coca-Cola discharged Weiss for failure to meet company expectations with regard to responsibilities in inventory counts); Hinton v. Methodist Hosp., 779 F. Supp. 956, 961 (N.D. Ind. 1991) (finding that Methodist Hospital fired Hinton only after she was caught stealing drugs and carrying a weapon while on duty); Neville v. Taft Broad. Co., 42 Fair Empl. Prac. Cas. (BNA) 1314, 1317-24 (W.D.N.Y. 1987) (concluding that account executive was discharged after she made errors in accounts, did not inform clients of preempted spots, failed to properly service her accounts, failed to meet budgets, accumulated excessive charges, and received complaints from clients); Bohen v. City of E. Chicago, 622 F. Supp. 1234, 1237 (N.D. Ind. 1985) (concluding that the plaintiff's behavior made her counterproductive to the "good order, discipline, and security" at the fire department).

39. 477 U.S. 57, 57 (1986). In *Meritor*, a female bank employee brought a sexual harassment suit against the bank and her supervisor. *Id.* at 60. She alleged that the supervisor repeatedly asked her for sexual favors, fondled her in front of her co-workers, followed her into the women's restroom, exposed himself, and forcibly raped her. *Id.*

40. *Id.* at 66.

not limited to "economic and tangible injury," which meant that cases resulting in non-economic injury were also cognizable.[41]

The Court then proceeded to adopt what is perhaps the most important and the most confusing standard for evaluating a hostile environment claim. Justice Rehnquist, writing for the majority, stated that in order to be actionable, the alleged conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[42] The Court also addressed the issue of "voluntariness," holding that the "unwelcomeness" of the sexual conduct was the most important factor in assessing whether it constituted sexual harassment, rather than whether the victim participated willingly.[43] The Court concluded, however, that evidence of the employee's "provocative dress and sexual fantasies" could be considered as a defense to the sexual harassment claim.[44]

Shortly after the Supreme Court rendered its decision in *Meritor*, the Sixth Circuit decided *Rabidue v. Osceola Refining Co.*[45] Instead of applying the broad language contained in *Meritor*, the court created a new standard.[46] The plaintiff, Vivian Rabidue, alleged that her supervisor's obscene comments to her and his display of nude photographs of women created an offensive working environment.[47] Using a "reasonable person" standard,[48]

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41. *Id.* at 64-65. The Supreme Court reasoned that making a hostile environment claim stand on whether or not the injury was economic was contrary to congressional intent and the EEOC guidelines. *Id.*

42. *Id.* at 67 (quoting *Henson*, 682 F.2d at 904).

43. *Id.* at 68.

44. *Meritor*, 477 U.S. at 69. In 1994, however, President Clinton signed the Violence Against Women Act, which restricts the kinds of evidence concerning a plaintiff's past that defendants can present in sexual harassment cases. 42 U.S.C. § 13942(c) (1994). This is especially applicable to instances in which the harasser is accused of assault. *Id.* The restriction of evidence in sex offense cases was later adopted as Federal Rule of Evidence 412. FED. R. EVID. 412.

45. 805 F.2d 611 (6th Cir. 1986).

46. Zweighaft, *supra* note 4, at 450.

47. *Rabidue*, 805 F.2d at 615. The supervisor was also found to have generally referred to women as "whores," "cunt," "pussy," and "tits." *Id.* at 624. The language that Rabidue claims the supervisor directed at her specifically was "[a]ll that bitch needs is a good lay." *Id.*

48. There is a considerable split between the federal courts regarding whether to apply a "reasonable person" standard or a "reasonable woman" standard when deciding hostile environment sexual harassment cases. *Compare* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991), *and* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990), *and* Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987), *and* Burns v. McGregor Elec. Indus., 989 F.2d 959, 962 (8th Cir. 1993), *and* Canada v. Boyd Group, Inc., 809 F. Supp. 771, 776 (D. Nev. 1992), *and* Mills v. Amoco Performance Prod., Inc., 872 F. Supp. 975, 988 (S.D. Ga. 1994), *and* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991), *and* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 875-76 (D. Minn. 1993) (applying the

the court required the plaintiff to show that the harassment "unreasonably interfered with her work performance and created an intimidating, hostile, or offensive working environment that affected seriously her psychological well-being."[49]

Application of the stringent "serious psychological harm" test was prevalent in the circuits until the Supreme Court decided *Harris v. Forklift Systems, Inc.*[50] The Supreme Court rejected the stringent standard in *Henson*, and instead took the "middle path" by holding that the conduct need not "'seriously affect[ ] [an employee's] psychological well-being' or [lead the employee] to 'suffer injury'" for the plaintiff to succeed in a hostile environment claim.[51] The Court also adopted a test that requires a court to look at all the circumstances in determining whether an environment is "hostile" or "abusive."[52]

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reasonable woman standard), *with* Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 580 (10th Cir. 1990), *and* Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 193 (1st Cir. 1990), *and* Bennett v. New York City Dep't of Corrections, 705 F. Supp. 979, 984 (S.D.N.Y. 1989), *and* Hollis v. Fleetguard, Inc., 668 F. Supp. 631, 636-37 (M.D. Tenn. 1987) (applying the reasonable person standard).

49. *Rabidue*, 805 F.2d at 622. This test became commonly known as the "serious psychological harm test." *See also* Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989) (determining that a prima facie case of hostile environment sexual harassment requires the plaintiff to show that the harassment was severe enough to affect her "psychological stability"); Downes v. Federal Aviation Admin., 775 F.2d 288, 292 (Fed. Cir. 1985) (requiring that the plaintiff show that the misconduct was "sufficiently severe and persistent to affect seriously [his or her] psychological well-being").

50. 510 U.S. 17 (1993).

51. *Id.* at 22. Justice O'Connor stated that Title VII was applicable "before the harassing conduct leads to a nervous breakdown." *Id.* She reasoned that an abusive work environment and a negative affect on an employee's job performance can be created short of "seriously affect[ing] [one's] psychological well-being." *Id.* "Middle path" is the term she gave the Court's standard, stating that it is in between making actionable any conduct that is "merely offensive" and going as far as demanding proof of "psychological injury." *Id.* at 21. The holding did not suggest that sexual harassment could not have a severe psychological impact on a victim. *Id.* at 22. Surveys have shown that mild impacts on victims of sexual harassment can include nervousness, irritability, uncontrollable anger, and disgust. MOREWITZ, *supra* note 24, at 157. Physical health problems, however, have ranged from insomnia, gastrointestinal problems, and loss of weight to heart diseases, arthritis, diabetes, gastrointestinal disorders, skin diseases, chest and back pains, headaches, fatigue, and loss of sexual interest. *Id.* at 157-58.

52. *Harris*, 510 U.S. at 23. These circumstances include: "the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id. See also Vance*, 863 F.2d at 1510 (stating that a jury "does not necessarily examine each alleged incident of harassment in a vacuum. What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents."); Andrews v. City of Philadelphia,

This attempt by the Court to further define the hostile environment cause of action has left the federal courts with little guidance as to exactly what constitutes actionable harassment.[53] When a case involves verbal harassment with little or no touching, the analysis becomes even more unclear. It is this lack of guidance and broad language that has allowed lower courts to continually define the hostile environment sexual harassment claim narrowly.[54]

II. CURRENT TESTS USED TO ESTABLISH A PRIMA FACIE CASE OF VERBAL SEXUAL HARASSMENT

This Part discusses the creation of the gender relation, sexual nature, and personal animosity tests by the lower federal courts to determine which claims of verbal sexual harassment are actionable and which are not.[55]

A. The Gender Relation Test

The exact language of Title VII clearly prohibits discrimination "because of sex." However, as precise as that language might seem, its application is ambiguous, and courts

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895 F.2d 1469, 1484 (3d Cir. 1990) ("A play cannot be understood on the basis of some of its scenes, but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."). It is worthwhile to note that the Supreme Court in dictum hinted that it favors the application of a "reasonable person" standard. *Harris*, 510 U.S. at 21.

53. Bleich & Klaus, *supra* note 10, at 16. Even though there is still a dispute in the courts over the definition of an actionable hostile environment claim, the next controversial legal topic will involve the First Amendment. Cloud, *supra* note 19, at 55. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1819-43 (1992) (arguing that some hostile environment claims violate the First Amendment); Kingsley R. Brown, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 501-11 (1991) (arguing that federal enforcement of some hostile environment claims violates the First Amendment); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 242 (1992) (noting that the law may limit the intrusions one must endure at work to those that relate to work).

54. Vicki Schultz, a professor at Yale Law School, has argued that:

> [T]he popular view of harassment is both too narrow and too broad. Too narrow, because the focus on rooting out unwanted sexual activity has allowed us to feel good about protecting women from sexual abuse while leading us to overlook equally pernicious forms of gender-based mistreatment. Too broad, because the emphasis on sexual conduct has encouraged some companies to ban all forms of sexual interaction, even when these do not threaten women's equality on the job.

Vicki Schultz, *Sex Is The Least Of It: Let's Focus Harassment Law On Work, Not Sex*, THE NATION, May 25, 1998, at 12.

55. See *supra* notes 7-9 and accompanying text for a definition of the gender relation, sexual nature, and personal animosity tests.

continually grapple with what type of conduct is and is not actionable under the statute.[56]

In order to succeed with a claim under Title VII, the federal courts require that a plaintiff must show that the defendant's conduct would not have occurred "but for" the victim's sex.[57] This test has evolved to mean that a female plaintiff must prove that she was "exposed to disadvantageous terms or conditions of employment to which members of the other sex were not exposed."[58]

In verbal sexual harassment cases, the court's determination of whether the verbal conduct alleged was based on gender is rooted in whether the defendant's comments were gender-related or gender-neutral.[59] For example, in *Volk v. Coler*,[60] the Seventh

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56. One of the main problems with determining actionable conduct is that typically in sexual harassment cases, the conduct alleged is often "lewd or shocking," whereas gender-based conduct is typically non-sexual in nature. Frank S. Ravitch, *Contextualizing Gender Harassment: Providing An Analytical Framework for an Emerging Concept in Discrimination Law*, 3 DET. C.L. REV. 853, 861-63 (1995).

57. *See* McKinney v. Dole, 765 F.2d 1129, 1139 (D.C. Cir. 1985) (concluding that a supervisor's use of physical force towards an employee "because of that employee's sex" was a violation of Title VII); EEOC v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 35-36 (W.D.N.Y. 1994) (concluding that a supervisor's repeated use of the word "whore" to refer to female employees and his statement that the female employees should "go fuck themselves" would not have occurred "but for" the plaintiff's gender); Bennett v. Corroon & Black Corp., 517 So. 2d 1245, 1247 (La. Ct. App. 1987) (holding that sexually explicit cartoons of the plaintiff in the men's restroom were not labeled with her name merely because she was female). Some recent cases have heightened the "but for" requirement and demand a showing that the harassment was motivated by "gender animus." *See* Lipsett v. University of Puerto Rico, 864 F.2d 881, 905 (1st Cir. 1988) (stating that "this attack, although not explicitly sexual, was nonetheless charged with anti-female animus"); Penry v. Federal Home Loan Bank of Topeka, 970 F. Supp. 833, 838 (D. Kan. 1997) (stating that "this conduct, though offensive, cannot be construed as being motivated by sexual animus or gender bias"); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (explaining that causation may be proven by evidence of "harassing behavior lacking a sexually explicit content but directed at women and motivated by animus against women").

58. Justice Scalia, in one of the Supreme Court's most recent opinions dealing with sexual harassment, placed emphasis on the "because of sex" provision set out in Title VII and stated that the critical issue is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Sys., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). This case was not only important because the majority adopted Justice Ginsburg's concurring opinion in *Harris*, but rather because the Court extended Title VII protection to same-sex harassment cases. *Id.* at 1003. However, the Court once again did not provide any further analysis to aid lower courts in determining what type of conduct would be actionable.

59. *Compare* Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996) (holding that a co-worker's repeated usage of "sick

Circuit found substantial evidence to support a sexual harassment claim where a female plaintiff's supervisor frequently referred to the plaintiff as "hon," "honey," "babe," and "tiger."[61] Because the supervisor's words were words that are frequently used to refer to women and not men, the court considered them to be gender-related for the purposes of Title VII.[62]

Another clear case of hostile environment sexual harassment based on gender was demonstrated in *Huddleston v. Roger Dean Chevrolet, Inc.*[63] In *Huddleston*, the female plaintiff was the first woman to work as a sales representative at a car dealership.[64] Male sales representatives interfered with her sales efforts by blocking every door to the showroom floor to keep her from meeting new customers and by calling her a "bitch" and a "whore" in front of customers.[65] Furthermore, on one occasion the sales manager grabbed the plaintiff by the arm and physically moved her a few feet while criticizing her job performance.[66]

The Eleventh Circuit held that the male sales representatives' conduct created a hostile environment.[67] However, in applying the gender relation test, the court concentrated on the sales manager's physical act of moving the plaintiff, instead of the male sales representatives' attempts to interfere with the plaintiff's work.[68] Further, in making its

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bitch" in reference to female employee was not gender related), *and* Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1543 (10th Cir. 1995) (finding that a supervisor's directive to female plaintiff that she get her "ass back in the truck" was gender-neutral), *and* Gillum v. Federal Home Loan Bank of Topeka, 970 F. Supp. 833, 851 (D. Kan. 1997) (holding that a supervisor's advice to female subordinate that she walk to lose weight off her hips and yelling to another female employee to "get your buns over here" did not demonstrate gender discrimination), *and* Young v. Finish Line, Inc., 68 Fair Empl. Prac. Cas. (BNA) 975, 978 (D. Kan. 1995) (holding that employer's reference to female employee as "dumb" was not gender-based), *with* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (holding that supervisor's reference to female employee as "dumb fucking broads" and "fucking cunts" established a prima facie case of hostile environment sexual harassment), *and* EEOC v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 35 (W.D.N.Y. 1994) (holding that vice president's references to a female employee as a "whore" constituted hostile environment sexual harassment), *and* Kulp v. Dick Horrigan VW, Inc., 1994 WL 3393, at *2 (E.D. Pa. 1994) (holding that female plaintiff who was called a "slut" by a co-worker had stated a hostile environment claim).

60. 845 F.2d 1422 (7th Cir. 1988).

61. *Id.* at 1426.

62. *Id.* at 1432-34.

63. 845 F.2d 900 (11th Cir. 1988).

64. *Id.* at 902.

65. *Id.* The sales representatives referred to this type of conduct as "boxing." *Id.*

66. *Id.* at 904.

67. *Id.* at 905.

68. *Huddleston*, 845 F.2d at 904.

conclusion, the court found that the comments made by the male sales representatives carried "sexual connotations," and therefore, were based on gender.[69]

In *Huddleston*, the court created the standard that a violation of the gender relation test is clear when physical harassment is involved, and the comments made to the female employee are sexual in nature.[70] However, most verbal hostile environment cases do not consist of comments grounded in sexual epithets or offensive and explicit references to women's bodies or their sexual conduct.[71]

The determination of whether the alleged verbal conduct was based on gender is only the first step in the hostile environment analysis.[72] The second step, most often used to determine the

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69. *Id.*

70. *Id.* See *infra* Part II.B. for a discussion of the sexual nature test. It is interesting to note that the federal courts created another obstacle to gender-based sexual harassment by continually holding that conduct offensive to both men and women employees does not constitute a violation of Title VII based on sex. *See* Walk v. Rubbermaid, Inc., No. 94-4306, 1996 WL 56203, at *2 (6th Cir. Feb. 8, 1996) (stating that the plaintiff failed to show that her supervisor used abusive language towards her "based on her sex" since the supervisor used the abusive language with both male and female employees); Johnson v. Tower Air, Inc., 149 F.R.D. 461, 469 (E.D.N.Y. 1993) (holding that an international flight manager's abusive language and obscene gestures to both male and female members of an airline crew did not constitute actionable sexual harassment); Linebaugh v. Sheraton Mich. Corp., 497 N.W.2d 585, 588 (Mich. 1993) (concluding that the plaintiff did not demonstrate that a sexually explicit cartoon was "gender-oriented" because it depicted both plaintiff and a male co-worker engaging in a sexual act). Only a few cases have held to the contrary. *See, e.g.*, Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 (D. Wyo. 1993) (finding that a Title VII claim for sexual harassment was not foreclosed by the fact that a supervisor's verbal harassment was directed toward both male and female employees).

71. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998) (arguing that frequently sexual harassment does not consist of conduct dealing with sexuality, but rather conduct dealing with gender). See also *infra* Part II.B for a discussion of the lower court's recognition of sexual conduct in order to create an actionable verbal sexual harassment case. For example, in *Walk*, a female plaintiff alleged that her supervisor's conduct created a hostile environment. 76 F.3d at 381. The conduct consisted of the plaintiff's supervisor leaving plaintiff a voice mail message stating that she was "fucking stupid" and inquiring "what kind of fucking manager are you?" *Id.* Also, on two or three occasions as the plaintiff was walking by the supervisor's office, he raised his hand and said "I have no time for you or your fucking menopausal bitches." *Id.* The Sixth Circuit Court of Appeals held that the statements made on voice mail were not gender-based for purposes of Title VII. *Id.* at 382. However, the court did find that the statement using the term "bitch" was in fact sex-based, which demonstrates the federal courts' continuing failure to recognize gender-based comments that do not have explicitly derogatory connotations to women. *Id.*

72. 29 C.F.R. § 1604.11 (1980). In the EEOC Guidelines, it is noted that harassment not involving sexual activity or language may also give rise to Title VII liability. *See* E.E.O.C. Proposed Guidelines on Harassment Based on

"severity" or "pervasiveness" of the conduct, is to determine whether or not the conduct was sexual in nature.[73]

B. The Sexual Nature Test

The lower federal courts have also created the sexual nature test to determine whether the harassment is deemed sexual or "non-sexual."[74] The first case to dismiss a plaintiff's claim because the alleged harassment was "non-sexual" in nature was *Turley v. Union Carbide Corp.*[75] In *Turley*, the plaintiff claimed that her foreman "pick[ed] on [her] all the time" and treated her differently than male employees.[76] The Southern District of West Virginia held that non-sexual conduct, where there was no evidence that the foreman demanded sex from the plaintiff, touched her, or told her sexual jokes, did not constitute sexual harassment.[77] The court based its reasoning on the sexual harassment theory developed by Catharine MacKinnon[78] and also on the EEOC Guidelines.[79] The court determined that "sex" does not mean gender; rather "it is used pursuant to its more popular meaning."[80] This led to the conclusion that "while . . . harassment may be directed at a

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Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51266, 51266 (1993) (noting that verbal or physical harassment based on gender that creates a hostile environment is actionable). The EEOC recognized that non-sexual harassment that is based on gender can constitute sexual harassment. *Id.* at 51267. The Proposed Guidelines were later withdrawn for reasons unrelated to the provisions defining actionable gender harassment. L. Camille Hebert, *Sexual Harassment Is Gender Harassment*, 43 U. KAN. L. REV. 565, 565-66 (1995).

73. The EEOC defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a) (1980). This section of the EEOC Guidelines has been read to limit harassment to sexual conduct. *Id.* § 1604.11. *See* Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (citing the EEOC Guidelines as support that only evidence of unwelcomed sexual advances will establish liability under Title VII); Turley v. Union Carbide Corp., 618 F. Supp. 1438, 1441-42 (S.D. W. Va. 1985) (citing the EEOC Guidelines to support the court's statement that harassment must "play[ ] upon the stereotypical role of the female as a sexual object" in order to be actionable); Reynolds v. Atlantic City Convention Ctr., 53 Fair Empl. Prac. Cas. (BNA) 1852, 1867 (D.N.J. 1990) (using the EEOC Guidelines to conclude that only harassment of a "sexual nature" would be actionable). See also Schultz, *supra* note 71, at 1716 discussing the necessity for the lower federal courts to move away from requiring sexual conduct in order to create a hostile environment.

74. *Turley*, 618 F. Supp. at 1442.

75. *Id.* at 1438.

76. *Id.* at 1442.

77. *Id.*

78. MACKINNON, *supra* note 25, at 1. Professor MacKinnon defined sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." *Id.*

79. *Turley*, 618 F. Supp. at 1441.

80. *Id.* at 1441-42.

member of the female sex, it is harassment which plays upon the stereotypical role of the female as a sexual object" that is actionable.[81]

After *Turley*, many other courts similarly dismissed hostile environment sexual harassment cases on the basis that the alleged conduct was non-sexual in nature.[82] However, a few courts took an opposite course. In *McKinney v. Dole*,[83] the Court of Appeals for the District of Columbia held that harassment need not "take the form of sexual advances or of other incidents with clearly sexual overtones."[84]

Delgado v. Lehman[85] followed in *McKinney's* footsteps.[86] The Eastern District of Virginia held that the plaintiff had established a prima facie case of hostile environment sexual harassment because "[s]exual harassment need not take the form of overt sexual advances or suggestions, but may consist of such things as verbal abuse of women if it is sufficiently patterned to comprise a condition and is apparently caused by the sex of the harassed employee."[87]

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81. *Id.* at 1442.

82. *See, e.g.*, Hosemann v. Technical Materials, Inc., 554 F. Supp. 659, 663 (D.R.I. 1982) (finding plaintiff's allegations that a co-worker "always . . . tried to make her do her work poorly" and that another had "embarrassed [her] every work day . . . by not talking very good about females" were non-sexual and therefore unactionable); Walker v. Sullair Corp., 736 F. Supp. 94, 100 (W.D.N.C. 1990) (concluding that "[s]exual harassment based on a hostile work environment exists where there are sexual advances, fondling or a sexually suggestive workplace atmosphere that the claimant finds unwelcome"); Wimberly v. Shoney's, Inc., 39 Fair Empl. Prac. Cas. (BNA) 444, 453 (S.D. Ga. 1985) (concluding that "only shocking and pervasive sexually oriented misconduct amount[s] to a Title VII violation").

83. 765 F.2d 1129 (D.C. Cir. 1985).

84. *Id.* at 1138. In *McKinney*, the plaintiff, a government employee, was sexually harassed by her male supervisor at the Federal Aviation Administration (FAA). *Id.* at 1143. The supervisor exposed himself to McKinney, rubbed up against her and asked for sexual favors, and assaulted her by grabbing her arm and twisting it in an attempt to prevent her from leaving her office. *Id.* at 1132. The supervisor contended that he was not liable because McKinney did not suggest that there were any sexual connotations involved in the physical assault incident. *Id.* at 1136. The court disagreed and stated that the "[court had] never held that sexual harassment or other unequal treatment of an employee . . . must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones." *Id.* at 1138. The court even went as far as stating that "any disparate treatment, even if not facially objectionable, may violate Title VII." *Id.* at 1139.

85. 665 F. Supp. 460 (E.D. Va. 1987).

86. In *Delgado*, a male supervisor repeatedly referred to the plaintiff as a "babe" and frequently responded to her statements by saying "[l]isten here woman." *Id.* at 463. He also blew cigar smoke in her face and repeatedly referred to other women in the office in a derogatory manner. *Id.*

87. *Id.* at 468 (citing *McKinney*, 765 F.2d at 1138). The court reasoned that because the evidence had shown that the plaintiff's supervisor treated women

McKinney and *Delgado* opened the door to a series of cases holding that hostile environment sexual harassment need not be sexual in nature.[88] Even though many courts now state that non-sexual conduct is actionable, verbal sexual harassment claims still seem to require proof of sexually degrading comments before a claim will be actionable.[89] Thus, courts often disallow claims in verbal sexual harassment cases if the defendant's language can be characterized as non-sexual.

This trend is clearly shown in the Seventh Circuit's decision in *Baskerville v. Culligan International Co.*[90] In *Baskerville*, the plaintiff was a secretary in the marketing department of

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worse than he treated men, the plaintiff had proven that she was a victim of sexual harassment. *Id.* at 469.

88. *See also* Smith v. St. Louis Univ., 109 F.3d 1261, 1265 (8th Cir. 1997) (reversing summary judgment for defendant in a hostile environment sexual harassment claim where a chairman repeatedly spoke in a derogatory manner towards a resident even though the harassment was not sexual in nature); Kopp v. Samaritan Health Sys., 13 F.3d 264, 269 (8th Cir. 1993) (reversing summary judgment for defendant where a doctor was abusive and threatening to his staff even though the abuse was rarely sexual); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014-15 (8th Cir. 1988) (holding the defendant employer liable where women traffic controllers were verbally and physically harassed although various incidents were not sexual); Luttjohann v. Goodyear Tire & Rubber Co., 927 F. Supp. 403, 407-08 (D. Kan. 1996) (holding that a supervisor's daily profane, gender-neutral, yelling at female area manager was sufficient to state a claim of hostile work environment absent an allegation of sexual advance as long as there was proof that profane ranting occurred because of manager's gender).

89. *Compare Hall*, 842 F.2d at 1012 (concluding that construction worker's references to female co-workers as "fucking flag girls," "[b]londe bitch[es]," and "[h]erpes" were sufficiently pervasive and severe to constitute a violation of Title VII), *and* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 883 (D. Minn. 1993) (concluding that co-worker's references to women as "bitch," "whore," and "cunt" violated Title VII), *and* Cline v. General Elec. Capital Auto Lease, Inc., 757 F. Supp. 923, 926-27 (N.D. Ill. 1991) (concluding that harasser's reference to female employee as "dyke," "dragon lady," and "syphilis" constituted a hostile work environment in violation of Title VII), *with* Scott v. Sears Roebuck & Co., 605 F. Supp. 1047, 1055 (N.D. Ill. 1985) (concluding that plaintiff's claims that co-worker's repeatedly asked her out, came over to talk to her, and flirted with her lacked severity because "[she] was not subjected to vulgarity, demeaning comments, improper inquiries about her private behavior or explicit propositions"), *and* Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996) (concluding that male co-worker's repeated usage of "sick bitch" in reference to a female employee was not sufficiently severe or pervasive to create a hostile work environment because "sick bitch" was not overtly sexual in nature), *and* Howard v. Beech Aircraft Corp., No. 94-3259, 1995 WL 355252, at *2 (10th Cir. June 14, 1995) (concluding that supervisor's comments to female plaintiff that she had "Martha Lattamore syndrome" in reference to the size of the plaintiff's breasts and that "the smartest woman at Beech was not as smart as the dumbest man," were "not overtly sexual enough . . . to support her sexual harassment claim").

90. 50 F.3d 428 (7th Cir. 1995).

Culligan.[91] She was subjected to a series of harassing incidents by her supervisor, which consisted of him calling her "pretty girl," making an "um, um, um" sound when she wore a leather skirt, and commenting on how hot his office became when she "stepped [her] foot" into it.[92] He also referred to the plaintiff as "Ms. Anita Hill," and when she once asked him why he left a company Christmas party, he replied, "[I] didn't want to lose control, so I thought I'd better leave."[93]

The court dismissed the plaintiff's sexual harassment claim, labeling the supervisor's harassment as "merely unpleasant" as opposed to hostile.[94] Writing for the majority, Judge Posner explicitly stated that because the supervisor never touched the plaintiff, made threats to her, exposed himself, showed her dirty pictures, or invited her to have sex with him or go out on a date with him, the plaintiff had not established a cause of action under Title VII.[95]

All of the examples that the Seventh Circuit gave in *Baskerville* to show actionable causes of hostile environment sexual harassment were sexual in nature. Thus, the court indirectly held that comments that are non-sexual in nature would not be actionable.[96] This case, and others mentioned above, show a trend by the lower courts to disregard the *McKinney* holding in cases of verbal sexual harassment. In addition to the gender relation and the sexual nature tests, some lower courts require a third hurdle that a plaintiff must overcome to establish a valid hostile environment sexual harassment claim. This third step, the personal animosity test, is discussed below.

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91. *Id.* at 430.

92. *Id.*

93. *Id.*

94. *Id.* at 431. The court went even further by attacking the plaintiff personally stating that "only a woman of Victorian delicacy – a woman mysteriously aloof from contemporary American popular culture" would find the comments made by her supervisor to be harassing. *Id.*

95. *Baskerville*, 50 F.3d at 431.

96. *Id.* at 430. Posner eliminated non-sexual conduct from liability by dividing sexual harassment into two categories:

> On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.

Id. (citations omitted). By mentioning these classifications of sexual harassment, Judge Posner was able to reason that the supervisor's harassing conduct did not constitute hostile environment sexual harassment because it did not fall into one of the categories. *Id.* As a result, unwelcomed non-sexual harassment is not actionable because it is not mentioned on either "side" of the actionable sexual harassment fence.

C. The Personal Animosity Test

The first case to dismiss a plaintiff's claim on the basis that the harassing behavior was due to personal animosity and not gender was brought by a male. In *Huebschen v. Department of Health and Social Services*,[97] a male plaintiff brought an action under the Equal Protection Clause alleging that his female supervisor conditioned employment on granting sexual favors.[98] It was established at trial, through testimony, that the two had engaged in a consensual sexual relationship.[99] The Seventh Circuit concluded that when the consensual relationship ended, the supervisor became spiteful toward the plaintiff and that her motivation to harass was not based on his gender, but on the fact that "he was a former lover who had jilted her."[100]

The holding in this case has been applied to Title VII claims, thus creating another way in which lower courts could dismiss a plaintiff's hostile environment sexual harassment claim.[101] As now applied to Title VII cases, courts could dismiss a plaintiff's claim for failing the "because of sex" provision or the gender relation test by asserting that the harassing conduct was not based on gender, but rather personal animosity between the victim and the defendant.[102] For example, in *McCollum v. Bolger*,[103] the Eleventh

97. 716 F.2d 1167 (7th Cir. 1983).

98. *Id.* at 1171-72.

99. *Id.* at 1169.

100. *Id.* at 1172.

101. *See* Morley v. New England Tel. Co., No. 82-1051-Z, 1987 U.S. Dist. LEXIS 3107, at *24 (D. Mass. April 14, 1987) (concluding that while it was clear from the evidence that a personality conflict existed between harasser and victim, it was not clear that the conflict was based on sex); Bradshaw v. Golden Rd. Motor Inn, 885 F. Supp. 1370, 1380 (D. Nev. 1995) ("Personal animosity is not the equivalent of sex discrimination and is not proscribed by Title VII. The plaintiff cannot turn a personal feud into a sex discrimination case by accusation.") (quoting McCullom v. Bolger, 794 F.2d 602, 610 (11th Cir. 1986)); Reyes v. McDonald Pontiac-GMC Truck, Inc., 997 F. Supp. 614, 617 (D.N.J. 1998) ("Plaintiff had a severe personality conflict with [harasser], but this did not arise because of the sex of either party."). Courts have dismissed hostile environment sexual harassment complaints despite noting the inappropriateness of the harassing conduct. *See, e.g.*, Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) (stating that the alleged harasser "whatever his qualities as a sales manager, is not a man of refinement; but neither is he a sexual harasser"); Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1013 (7th Cir. 1994) (Coffey, J., dissenting) (disagreeing that the conduct constituted sexual harassment, but noting that the conduct was "appalling, disgusting and has no place in the work environment"); Penry v. Federal Home Loan Bank of Topeka, 970 F. Supp. 833, 838 (D. Kan. 1997) (dismissing plaintiff's claim because the "conduct, though offensive, cannot be construed as being motivated by sexual animus or gender bias").

102. See *infra* Part II.C (giving examples of cases in which a plaintiff's claim was dismissed on the basis that the discrimination was not "based on sex" but rather personal animosity).

103. 794 F.2d 602 (11th Cir. 1986).

Circuit dismissed a plaintiff's Title VII claim for reasons similar to those in *Huebschen*. In *McCollum*, the plaintiff, a female mail carrier, alleged that her postmaster discriminated against her by reducing her mail route and classifying her at a lower pay level than other mail carriers.[104] The court concluded that the plaintiff was not discriminated against because of her sex, but because she had a bad relationship with her postmaster.[105] The court held that "[p]ersonal animosity is not the equivalent of sex discrimination and is not proscribed by Title VII. The plaintiff cannot turn a personal feud into a sex discrimination case by accusation."[106]

The Seventh Circuit, which created the personal animosity test in *Huebschen*, later applied it to a verbal sexual harassment case in *Galloway v. General Motors Service Parts Operations*.[107] In *Galloway*, as in *Huebschen*, the plaintiff and her co-worker had a romantic relationship that eventually deteriorated.[108] From the time that the relationship ended until the plaintiff quit her job, the co-worker repeatedly called the plaintiff a "sick bitch."[109] The co-worker also told the plaintiff "[i]f you don't want me, bitch, you won't have a damn thing" and made an obscene gesture at her, remarking "suck this, bitch."[110]

After the court determined that the term "bitch" was not a gender-specific or sexual term, it applied the holding from *Huebschen*.[111] By using the personal animosity test, the court concluded that the statements made by the co-worker were, therefore, not based on the fact that the plaintiff was a woman.[112] The court found that "[t]he repetition of the term together with the other verbal conduct . . . reflected and exacerbated personal animosity arising out of the failed relationship."[113]

In direct opposition to the cases mentioned above, the Eighth Circuit concluded in *Burns v. McGregor* that personal dislike is irrelevant for purposes of Title VII.[114] The plaintiff in *Burns* resigned after a co-worker called her a "bitch," "slut," "asshole,"

104. *Id.* at 605.
105. *Id.* at 610.
106. *Id.*
107. 78 F.3d 1164 (7th Cir. 1996).
108. *Id.* at 1165.
109. *Id.*
110. *Id.*
111. *Id.* at 1168.
112. *Galloway*, 78 F.3d at 1168.
113. *Id.*
114. 989 F.2d 959, 964-65 (8th Cir. 1993). *See also* Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1001 (10th Cir. 1996) (holding that the gender-neutral verbal abuse of a female automobile sales employee based on reasons such as jealousy, dislike of her, and anger at her perceived preferential treatment based on her special relationship with the sales manager was irrelevant to her Title VII sexual harassment claim).

and "cunt" during a heated exchange.[115] The court refused to accept the defense's explanation that the heated exchange was a result of personal dislike and not because of the plaintiff's gender.[116]

The court held that "[t]here is no excuse in any work environment for subjecting a female worker to such verbal abuse even if the harasser and the plaintiff did not like each other."[117] The *Burns* case, therefore, disregarded the personal animosity test created by the Seventh Circuit and preserved the plaintiff's verbal sexual harassment claim.

III. THE SUPREME COURT'S LACK OF GUIDANCE IN HOSTILE ENVIRONMENT SEXUAL HARASSMENT CASES HAS ALLOWED LOWER FEDERAL COURTS TO NARROWLY INTERPRET VERBAL SEXUAL HARASSMENT CASES

The Supreme Court has provided little guidance to the lower federal courts in regard to what constitutes a prima facie case of hostile environment sexual harassment.[118] This lack of guidance has led the lower courts to interpret verbal sexual harassment claims narrowly.[119] The creation of the gender relation, sexual nature, and personal animosity tests has allowed the lower courts to dismiss many meritorious claims of verbal sexual harassment which clearly would have been actionable under the plain meaning and purpose of Title VII.[120]

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115. *Burns*, 989 F.2d at 964.

116. *Id.* at 965.

117. *Id.*

118. Thus far, the Supreme Court has decided only three hostile environment sexual harassment cases in which the elements of a prima facie case were discussed. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (stating that in order to establish a hostile environment the conduct must be unwelcome and "sufficiently severe or pervasive to alter conditions of victim's employment and create an abusive working environment"); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (clarifying the hostile environment claim by stating that the conduct need not seriously affect an employee's psychological well-being or lead the employee to suffer injury); Oncale v. Sundowner Offshore Serv. Inc., 523 U.S. 75, 79-80 (1998) (expanding Title VII protection to same-sex harassment cases and further defining sexual harassment as the exposure of one sex to "disadvantageous terms or conditions" of employment to which members of the other sex are not exposed).

119. See *supra* Parts II.A, II.B, and II.C for a discussion and examples of the gender relation, sexual nature, and personal animosity tests that the lower federal courts currently use to decide hostile environment sexual harassment cases.

120. See *supra* Parts II.A, II.B, and II.C for examples of cases in which the lower federal courts dismissed a plaintiff's verbal hostile environment sexual harassment claim after applying the gender relation, sexual nature, and personal animosity tests.

A. The Supreme Court's Decisions in Meritor, Harris, and Oncale: A Failure to Clarify What Type of Conduct Would Constitute a Hostile Environment in Verbal Sexual Harassment Cases

Subsequent to the Supreme Court's decisions in *Meritor* and *Harris*, the lower federal courts were left with only two clarifications of the hostile environment analysis: the conduct must be "severe or pervasive"[121] and it need not affect the "psychological well-being" of the plaintiff in order to be actionable.[122] As a result, these decisions gave a tremendous amount of discretion to the federal courts as to what constitutes actionable sexual harassment.

The problem with *Meritor* is that the range of conduct that the Court held to create a hostile environment was extreme, ranging from demands for sexual favors to rape.[123] This type of extreme conduct was what the Supreme Court used to create the "severe or pervasive" requirement in hostile environment cases.[124]

As a result, there is currently a consensus among federal courts that hostile environment sexual harassment claims should be recognized when the alleged conduct consists of unwelcome, pervasive, and offensive physical touching of a sexual nature.[125] However, the courts fail to distinguish verbal sexual harassment cases from claims such as the one in *Meritor*, in which the conduct complained of was physical and therefore considered more

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

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

123. 477 U.S. at 60. The plaintiff's supervisor subjected her to repeated demands for sexual favors, and she had intercourse with him numerous times. *Id.* The supervisor also fondled her in front of other employees, followed her into the women's restroom where he exposed himself, and forcibly raped her several times. *Id.*

124. *Id.* at 67.

125. *See* Schultz, *supra* note 71, at 1692-96 (discussing that in the current state of sexual harassment law, most courts focus on harassment consisting of sexual conduct). However, even extreme cases of sexual harassment can be found to be non-actionable if the plaintiff does not establish the unwelcomeness of the harassing conduct. *See, e.g.*, Reed v. Shepard, 939 F.2d 484, 487 (7th Cir. 1991) (holding that the plaintiff welcomed the sexual harassment because she used offensive language, showed co-workers her abdominal scar, gave gifts of a sexual nature to co-workers, and occasionally did not wear a bra); Gan v. Kepro Circuit Sys., No. 81-268 C(5), 1982 WL 166, at *1 (E.D. Mo. Jan. 7, 1982) (holding that a female plaintiff failed to allege a hostile work environment on the basis that she continuously used vulgar language, initiated sexually-oriented conversations with her co-workers, asked male employees about their marital sex lives and whether they engaged in extramarital affairs, and discussed her own sexual encounters); Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1563-64 (M.D. Fla. 1990) (holding that a female employee failed to show hostile environment sexual harassment because she frequently and actively participated in general sexual banter and innuendo).

"severe."[126]

Consequently, under the type of standard created in *Meritor*, verbal sexual harassment cases are more difficult to prove than physical harassment cases or cases where the harassment is sexual in nature.[127] The Supreme Court had the perfect opportunity to apply the "severe or pervasive" test to a case of verbal sexual harassment in *Harris*.[128] The plaintiff in *Harris* was subjected to repeated gender-specific statements and sexually oriented conduct by her supervisor.[129] The Court could have clarified how to apply the "severe or pervasive" standard to verbal sexual harassment cases. Instead, the Court's opinion only focused on eliminating the lower court's requirement of "serious psychological harm" in order for a plaintiff to have an actionable hostile environment claim.[130]

The latest Supreme Court decision further confuses the Court's previous analysis of what constitutes a prima facie hostile environment sexual harassment claim. The Supreme Court's holding in *Oncale v. Sundowner Offshore Serv. Inc.* was narrowly focused and only consisted of applying Title VII protection to same-sex harassment cases.[131] In dicta, however, Justice Scalia further confuses hostile environment analysis by quoting Justice Ginsberg's concurring opinion in *Harris*. Justice Scalia states that the proper analysis for sexual harassment cases should be "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[132] With the Supreme Court focusing on the "because of sex" provision of Title VII in *Oncale*,[133] it now seems that the Court has adopted the language frequently used by the

126. See discussion *supra* Parts II.A and II.B for citations of verbal sexual harassment cases dismissed by the lower federal courts on the basis of lack of severity.

127. Barbara L. Zalucki, *Discrimination Law: Defining the Hostile Work Environment Claim of Sexual Harassment Under Title VII*, 11 W. NEW ENG. L. REV. 143, 162 (1989).

128. *See* Schultz, *supra* note 71, at 1710-14 (noting that the Supreme Court's decision in *Harris* failed to expand the concept of hostile work environment harassment to include all types of gender-based discrimination).

129. Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993). The plaintiff's supervisor told her on several occasions, "You're a woman, what do you know" and "We need a man as the rental manager." *Id.* At least once he called her "a dumb ass woman" and suggested that the two of them "go to the Holiday Inn to negotiate [her] raise." *Id.* He further suggested that she get coins from his front pants pocket, threw objects in front of her and asked her to pick them up, and made sexual innuendoes about her clothing. *Id.*

130. *Id.* at 22.

131. 523 U. S. 75, 81-82 (1998).

132. *Id.* at 1002 (quoting *Harris*, 510 U.S. at 25).

133. *Id.*

lower federal courts when applying the gender relation test.[134]

On its face, this language seems to be hinting that the Supreme Court believes that non-sexual conduct can be the basis for an actionable claim. If so, this adoption of Justice Ginsberg's analysis would be more conducive to verbal sexual harassment claims. However, it is not clear whether this language is to be applied only to same-sex harassment cases or if it should be applied to all types of hostile environment claims. It also is not clear how this newly adopted analysis affects the "severe or pervasive" test the Court created long ago in *Meritor*.

Furthermore, without more clarification by the Supreme Court, this adoption of Justice Ginsberg's analysis seems to mirror the application of the gender relation test that is currently being used by the lower courts.[135] Therefore, the Supreme Court's dicta in *Oncale* will only continue to support the denial of verbal sexual harassment claims that are based on non-sexual conduct, until the focus of sexual harassment law shifts from sex to disparate treatment.

B. The Sexual / Non-Sexual Distinction

The lack of Supreme Court guidance with regard to hostile environment sexual harassment claims has left the lower federal courts to create their own standards for analyzing verbal sexual harassment claims.[136] Due to the creation of the gender relation and sexual nature tests and the lower courts' continuous denial of claims in which the conduct was non-sexual in nature, many victims of verbal sexual harassment have been denied protection from disparate treatment in the workplace.[137]

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134. See *supra* Part II.A for a discussion of the gender relation test and the "because of sex" provision applied by lower federal courts.

135. *Oncale*, 523 U.S. at 80-81 (adopting Justice Ginsburg's "disparate treatment" analysis and emphasizing that the harassing conduct does not have to be sexual in nature to be actionable, but must be on the "basis of sex"). *See also* Gross v. Burggraf Constr. Co., 153 F.3d 1531, 1537 (10th Cir. 1995) (finding that Justice Scalia's emphasis that the harassment must be on the "basis of sex" is merely an acceptance by the Court of the "because of sex" language that the lower courts use when applying the gender relation test). See also *supra* Part II.A for examples of the lower courts' use of the gender relation test.

136. See *supra* Parts II.A, II.B, and II.C for a discussion of the gender relation, sexual nature, and personal animosity tests, respectively. See also *supra* notes 7-9 for the definitions of these tests.

137. See *supra* notes 59, 89 and discussion *supra* Parts II.A and II.B for case examples illustrating the dismissal of verbal sexual harassment cases after applying the gender relation and sexual nature tests.

1. The Use of the Gender Relation Test as a Tool to Dismiss Non-Sexual Verbal Sexual Harassment Claims

The lower courts' application of the gender relation test turns on whether the verbal conduct alleged is gender-related or gender-neutral.[138] This focus on gender-related conduct undermines the purpose of Title VII by denying all verbal sexual harassment claims where the alleged conduct is devoid of sexually-charged epithets traditionally used to degrade women.[139]

The lower federal courts almost always find for a female plaintiff when it is shown that she was repeatedly referred to by comments grounded in sexual epithets or explicit references to women's bodies, such as "whore," "slut," and "cunt."[140] These type of situations are held to fall under the "because of sex" provision of Title VII because this type of sexually-degrading conduct is most often used in reference only to women and not to men.[141] Thus, the courts find no problem holding that the verbal conduct was "based on sex" for the purposes of Title VII.[142]

However, when a female is subject to verbal harassment that can be directed at both men and women, the gender relation test logically fails as a standard of analysis for determining whether the conduct is actionable under Title VII.[143] Verbal conduct that

138. See *supra* notes 59 & 89 for cases illustrating the lower court's categorization of the harassing language of those words used only towards women and those used in reference to either men or women.

139. See *infra* Part IV and *supra* note 59 for examples and a discussion of the type of language used to determine and dismiss cases where the gender relation test was applied.

140. *See* Walk v. Rubbermaid, Inc., No. 94-4306, 1996 WL 56203, at *2 (6th Cir. Feb. 8, 1996) (finding that the term "bitch" was sex-based); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (holding that the use of the term "cunt" in reference to a female employee established a prima facie case of hostile environment sexual harassment); EEOC v. A. Sam & Sons Produce Co., Inc., 872 F. Supp. 29, 35 (W.D.N.Y 1994) (holding that the reference to a female employee as a "whore" created a hostile environment); Kulp v. Dick Horrigan VW, Inc., No. 93-5335, 1994 WL 3393, at *2 (E.D. Pa. Jan. 3, 1994) (holding that the defendant's use of the term "slut" to refer to a female employee, along with depriving her of certain privileges and assigning her extra tasks, created a hostile environment).

141. *See, e.g.*, Volk v. Coler, 845 F.2d 1422, 1432-34 (7th Cir. 1988) (holding that a supervisor's comments were frequently used to refer to women and not men and therefore were gender-related).

142. See discussion *supra* Part II.A for an exception to this rule. *But see* Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996) (demonstrating that even the repeated use of the term "bitch" can be found to be non-gender related); Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988) (finding for the plaintiff on the basis of a physical act and ignoring the repeated references to the plaintiff as a "bitch" and "whore").

143. *See* Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1543 (10th Cir. 1995) (deciding that the terms "ass" and "dumb" are expressions typically used to refer to both sexes, and therefore are gender-neutral).

has failed the gender relation test has consisted of terms such as "dumb" and "asshole," in reference to female employees, or phrases such as "get your buns over here," and "get [your] ass back in the truck."[144] These examples show how the gender relation test allows verbal conduct that should be actionable to fall between the cracks.

Even though these terms and phrases were directed at only women employees, the lower courts denied the plaintiffs' claims solely on the basis that the terms used by the harassers could also have been directed at men and were, therefore, gender-neutral.[145] This analysis of the "because of sex" provision of Title VII denies victims of verbal sexual harassment protection from inequality in the workplace. Certainly the determination whether conduct is actionable under Title VII should not be placed in the hands of the harassers who can avoid liability by simply choosing their harassing terms and phrases wisely.

2. *The Sexual Nature Test is Merely the Gender Relation Analysis in Disguise*

Even though the *McKinney* case explicitly rejected *Turley's* requirement that a sexual harassment claim include sexually based conduct, this trend has not caught on with verbal sexual harassment cases.[146] Currently, a defendant's comments in a verbal sexual harassment case must be sexually degrading in order to survive the "severe or pervasive" prong of the *Meritor* test.[147]

It is true that a majority of the lower federal courts cite *McKinney* in stating that sexual harassment does not have to consist of sexual conduct.[148] In verbal sexual harassment cases, however, this analysis seems to be easily forgotten.[149] In the

144. See cases cited *supra* note 59 for an illustration of the gender-related/gender-neutral distinction.

145. See cases cited *supra* note 59 for an illustration of the gender-related/gender-neutral distinction.

146. See discussion *supra* Part II.B for examples of cases denying non-sexual verbal sexual harassment claims.

147. See discussion *supra* Part II.B for examples of cases associating "severe" conduct with sexual conduct.

148. *See* Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (holding that sexual harassment does not always require sexual conduct); Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1564-65 (M.D. Fla. 1990) (stating that non-salacious conduct can constitute sexual harassment); EEOC v. A. Sam & Sons Produce Co., 872 F. Supp. 29, 34 (W.D.N.Y. 1994) (citing McKinney v. Dole, 765 F.2d 1129, 1140 (D.C. Cir. 1985)) (rejecting defendant's argument that comments that were not "overtly sexual" were insufficient to establish a hostile environment claim).

149. *See* Schultz, *supra* note 71, at 1732-38 (discussing the holding in *McKinney* and its lack of influence on hostile environment sexual harassment law).

majority of these cases, the lower courts state that the alleged conduct does not have to be sexual in nature. The court then, however, requires that the victim prove that the harassment occurred "because of the victim's sex" in order to establish a prima facie case.[150] Thus, when the lower courts apply the sexual nature test, they merely return to the first step of analysis under the gender relation test.

This is evident by a series of lower court decisions that were based upon the sexual nature test.[151] Once again, as with the gender relation test, terms such as "fucking flag girls," "blonde bitch," "herpes," "dyke," and "syphilis" when analyzed under the sexual nature test, were severe and pervasive enough to constitute a hostile environment in violation of Title VII, but harassment lacking sexually demeaning comments was not.[152] Thus, when applying the sexual nature test to verbal sexual harassment cases, women are once again denied protection from inequality in the workplace under Title VII.

3. The Personal Animosity Test is Another Basis on which to Deny a Meritorious Hostile Environment Sexual Harassment Claim

The Seventh Circuit's holding in *Huebschen* unleashed yet another way in which the lower courts could dismiss valid hostile environment sexual harassment claims.[153] The problem with the personal animosity test is that it allows defendants to easily avoid liability under Title VII. Defendants can admit to their harassing behavior, but then escape liability simply by explaining that their motive was not "based on sex" as required by Title VII,[154] but rather was based on personal dislike.[155]

At first, this test was only applied to cases in which it was

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150. *See Hall*, 842 F.2d at 1014 (holding that unequal treatment of an employee or group must be based on the sex of that individual to be actionable under Title VII); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (stating that a claim for sexual discrimination requires that the harassing conduct be "based upon sex"). *See also* Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 602 (1993) (stating that in an action for hostile work environment sexual harassment, harassing conduct need not be sexual in nature because its defining characteristic is that harassment occurs "because of [victim's] sex").

151. See discussion *supra* Part II.B for examples of cases in which the lower federal courts applied the sexual nature test.

152. *See* cases cited *supra* note 88 (demonstrating the requirement that the harassing conduct be sexual in nature).

153. *See* Huebschen v. Department of Health & Soc. Serv., 716 F.2d 1167, 1170-71 (7th Cir. 1983) (holding that violations of Title VII require an employee-employer relationship).

154. See *supra* Part I.A for the precise language of the statute.

155. *See* McCollum v. Bolger, 794 F.2d 602, 610 (11th Cir. 1986) (holding that a plaintiff cannot base her sex discrimination claim on "personal animosity").

proven that the plaintiff and the accused co-worker had a romantic relationship in the past.[156] Currently, however, the test is being applied liberally to cases involving all types of situations.[157] This was demonstrated by the Eleventh Circuit's decision in *McCullom*[158] where no previous romantic relationship existed. However, the court still dismissed the plaintiff's sexual harassment claim because there was evidence that the postmaster and the plaintiff had an acrimonious relationship in the past.[159]

Even though Title VII was enacted to protect women from disparate treatment in the workplace, the lower courts fail to uphold this purpose when they apply the personal animosity test.[160] The application of this test gives the impression that courts allow sexual harassment in the workplace as long as the motive behind it is personal dislike. This negative impression destroys the very basis upon which Title VII was enacted – to eradicate discriminatory treatment in the workplace.[161]

IV. THE SUPREME COURT SHOULD RETURN THE FOCUS OF HOSTILE ENVIRONMENT SEXUAL HARASSMENT LAW TO ELIMINATING INEQUALITY IN THE WORKPLACE

The gender-specific/gender-neutral component of the gender relation test is perhaps the greatest obstacle to enforcement of Title VII's prohibition of sex discrimination. The use of these two categories in verbal sexual harassment claims places the focus on the specific words used and their context, instead of on the harassment itself. This misplaced focus by the lower courts obscures the big picture and results in rulings which run contrary to the very purpose of Title VII.

A remedy to this problem has been proposed by some of the lower courts only to be subsequently ignored by others.[162] The proper test to analyze a verbal sexual harassment case should be "whether members of one sex are [subjected] to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[163] A correct application of this test would shift the focus from sexuality and return it to disparate treatment

156. *See Huebschen*, 716 F.2d at 1169 (noting that the plaintiff and his supervisor had engaged in a consensual sexual relationship).

157. *See* cases cited *supra* note 101 and discussion *supra* Part II.C for an illustration of cases in which the personal animosity test was applied.

158. 794 F.2d at 610.

159. *Id.*

160. See discussion *supra* Part II.C for citations of cases in which courts have applied the personal animosity test.

161. See *supra* note 13 for a discussion of the congressional intent of Title VII.

162. See *supra* Part II.A for a discussion of courts that use the disparate treatment test and those that do not.

163. *Harris*, 510 U.S. at 25.

in the workplace.

The application of this test would also bolster the lower courts' thus-far empty statement that sexual harassment need not be sexual in nature. For example, if the Seventh Circuit had applied this disparate treatment test to the facts from the *Galloway* case, the case would have had a much different result. It was not disputed that the male co-worker repeatedly referred only to a female employee as a "sick bitch."[164] In applying the disparate treatment test, it is obvious that the male co-worker subjected the woman co-worker to disadvantageous terms or conditions of employment to which other males in the office were not exposed. Viewing the case this way takes the focus off of the term "sick bitch" and places it back onto inequality in the workplace. This analysis would thus eliminate the Seventh Circuit's need to compare "bitch" with "cunt" in order to determine the level of severity required under the *Meritor* test.[165]

This analysis can further be applied to many of the previously mentioned cases. Take, for example, the *Baskerville* case. In *Baskerville*, the Seventh Circuit dismissed a plaintiff's claim because the court indirectly labeled it as non-sexual.[166] The facts demonstrated that a male supervisor subjected only a female employee to a series of comments ranging from calling her "pretty girl" to commenting on how hot his office became when she "stepped [her] foot" into it.[167] Once again, if the Seventh Circuit had used the disparate treatment test, the case would have been analyzed differently. Since the male supervisor only made harassing comments to a female employee, it would have been easier under the disparate treatment test for the court to determine that the female employee was subjected to sexual harassment in the workplace.

Whether *Baskerville* would have survived the "severe or pervasive" analysis created in *Meritor* is a different story. Simply changing the focus of the verbal sexual harassment cases from the specific words used to disparate treatment will not undermine the Supreme Court's tests set forth in *Meritor* and *Harris*. A female plaintiff still must establish that she is a member of a protected class, that the harassment was unwelcome, that an injury was suffered, and that the conduct was "severe or pervasive."[168]

In fact, the shift in focus may aid the lower courts in refining the ambiguous "severe or pervasive" prong of the *Meritor* test with

164. Galloway v. General Motor Serv. Parts Operations, 78 F.3d 1164, 1165 (7th Cir. 1996).

165. *Id.* at 1168.

166. *See* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) (holding that the defendant was not a sexual harasser).

167. *Id.* at 430.

168. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-69 (1986).

regard to verbal sexual harassment cases. No longer will the courts have to use the sexual/non-sexual distinction to determine the "sever[ity] or pervasive[ness]" of the verbal harassment.[169] Instead, the courts can focus on whether the harassment "altered the conditions of the victim's employment" and whether it "created an abusive environment."[170] The answer to these two questions will be easily determined when the harassing comments are repeatedly made and subject one sex to "disadvantageous terms or conditions of employment to which the other sex [is] not exposed."[171]

Furthermore, the disparate treatment analysis would eliminate the current illogical use of the personal animosity test by the lower courts. For example, in *McCollum*, the plaintiff alleged that her postmaster discriminated against her by reducing her mail route and classifying her at a lower pay level than other mail carriers.[172] Under the disparate treatment analysis, the female plaintiff would only have to prove that she was subjected to harassment from her postmaster that males employees in the post office were not. The courts could discontinue using the personal animosity test as a means of dismissing sexual harassment cases. Instead, the court could adopt the reasoning of the Eighth Circuit's holding in *Burns* that a defendant cannot use personal dislike as an excuse to subject a female plaintiff to verbal abuse in the workplace.[173]

Moreover, the shifting of the focus in verbal sexual harassment cases from sex to inequality will not create an easier way for plaintiffs to bring sexual harassment cases. The current checks that have been put in place by the Supreme Court will remain unaffected. Therefore, the same amount of protection will exist against frivolous or meritless lawsuits.

If, however, as a result of the shift in focus, more plaintiffs win their verbal sexual harassment claims, this would not suggest that the new standard is too lenient. It would simply reflect and remind us that sexual harassment is still a real problem in the workplace and that the courts can no longer aid or ignore it by splitting hairs and creating ways in which to distinguish and ultimately dismiss meritorious claims.

CONCLUSION

The lack of guidance by the Supreme Court in regard to what constitutes a prima facie case of hostile environment sexual

169. *Id.* at 67.
170. *Id.*
171. Harris v. Forklift Sys., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring). *See* cases cited *supra* note 162 (discussing the "disparate treatment" test).
172. 794 F.2d 602, 605 (11th Cir. 1986).
173. 989 F.2d 959, 965 (8th Cir. 1993).

harassment has led the lower federal courts to narrowly define verbal sexual harassment cases. The current use of the gender relation, sexual nature, and personal animosity tests has allowed the lower federal courts to dismiss many meritorious verbal sexual harassment claims.

The latest dicta by the Supreme Court suggests that the Court believes that so-called "non-sexual" conduct can be the basis for an actionable claim. Now is the time for the Supreme Court to go one step further and adopt the disparate treatment analysis as utilized in individual disparate treatment claims that allege gender discrimination as the test for establishing a prima facie hostile environment case. This shift in focus from a requirement that the allegedly harassing language be of a sexual nature to the gender inequality standard will assure that victims of verbal sexual harassment are provided the protection that Title VII was created to give them.