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A UNIFYING THEORY OF SEX DISCRIMINATION

Henry L. Chambers, Jr.*

I. INTRODUCTION

Title VII outlaws sex discrimination in employment, directing that an employee's compensation, terms, conditions, or privileges of employment must not be provided in a sexually discriminatory manner.¹ Title VII encompasses various styles of intentional sex discrimination, including disparate treatment discrimination and sexual harassment. While Title VII does not distinguish disparate treatment and sexual harassment, courts historically have.² Disparate treatment generally concerns discrete employment decisions made because of sex or policies that disadvantage an employee or group of employees based on their sex. The employment decisions or judgments at issue in these cases are usually those that businesses must make in the normal course of business, such as hiring, firing, and promotion. Conversely, sexual harassment cases have historically concerned personal sexual gratification, inequality, and dominance. These cases have involved treatment of employees, usually women, as sexual objects or sexual unequals whose function was not merely to be good workers but to be entertainment or enjoyment for other employees.³ When such

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¹ See 42 U.S.C. § 2000e-2(a) (1999) (listing unlawful employment practices). I will generally refer to "terms, conditions and privileges of employment" simply as "terms of employment" or "employment terms."

² See Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 726 (1999) [hereinafter White, *Nothing Special*] ("[F]ederal judges confronting sexual harassment cases have treated these claims as something special or different from run of the mill discrimination claims.")

³ See L. Camille Hébert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 571 (1995) [hereinafter Hébert, *Sexual Harassment*]. The author opines:

Leering, touching a woman in a sexual way, and making sexually

treatment resulted in the discriminatory provision of an employee's terms of employment, Title VII was breached.

Historically, the different visions of disparate treatment and sexual harassment created separate theories of liability under Title VII and distinct contexts in which to explore the different causes of action. The conduct that supported sexual harassment claims and the conduct that supported disparate treatment claims were considered sufficiently different to require separate structures of proof for each claim. Traditionally, disparate treatment claims have focused on whether the employment decision about which the plaintiff complained was motivated by the plaintiff's sex or gender.⁴ The causation was direct. Conversely, sexual harassment cases have confronted two distinct questions. The first question is whether the conduct at issue was of a sexual nature, motivated by sexual desire, or both. The second question is whether the conduct caused the discriminatory provision of terms of employment. Affirmative answers to both inquiries led to the conclusion that the discriminatory provision of terms was caused by sex and, therefore, Title VII liability existed. The causation was indirect in that the harm was deemed caused by gender because the conduct, and thus the harm, was motivated by sexual desire, was of a sexual nature, or both.

The United States Supreme Court's recent clarification of the conduct that can support a sexual harassment claim has altered the doctrinal basis for differentiating disparate treatment and sexual harassment claims.⁵ Now the conduct underlying a sexual harassment claim need merely be harassment undertaken because of the plaintiff's sex or gender rather than harassment based on

explicit comments are all fairly questionable activities in most settings other than an intimate one. In the workplace, such conduct not only shows lack of respect for women workers but also suggests that they are present in the workplace merely to satisfy the sexual desires of men.

Id.

⁴ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (determining that sex stereotyping may have caused or motivated decision to hold plaintiff's partnership bid).

⁵ The Court has also eliminated the historical doctrinal basis for separating *quid pro quo* and hostile work environment sexual harassment claims by noting that the same conduct may support either type of claim. See *infra* Part III.

sexual desire or of a sexual nature.⁶ By expanding the range of conduct that may support a sexual harassment claim in this way, the Court has indicated that a sexual harassment claim may lie whenever gender-related harassment, rather than sex-motivated harassment, affects an employee's terms of employment. This makes many sexual harassment claims practically indistinguishable from disparate treatment claims. Arguably, the two types of claims are no longer doctrinally distinct; sexual harassment is just like disparate treatment. This simplification of sex discrimination law is not surprising; it tracks the Court's desire, evident in *St. Mary's Honor Center v. Hicks*,⁷ to simplify Title VII.⁸

The Court has also recast the distinction between the two types of sexual harassment claims—*quid pro quo* and hostile work environment. Now the distinction between these claims is not in the type of conduct that an employee faces but only in the type of damage that the employee suffers.⁹ If the employee suffers actual job detriment, a *quid pro quo* claim may lie; if the employee does not suffer actual job detriment, a hostile work environment claim may lie. Thus, the prior presumed doctrinal distinction between hostile work environment and *quid pro quo* sexual harassment no longer exists. When this development is combined with the recognition that any gender-based harassment may yield sex discrimination, a unified and simplified theory of sex discrimination emerges: Title VII is implicated whenever gender-based conduct actually or constructively harms an employee's terms of employment. This unified theory is unremarkable in that it merely restates Title VII. However, it represents a dramatic departure in that it allows Title VII to expand to its appropriate limit, as defined by its mission, to promote a truly equal workplace.

While commentators have noted the Court's simplification of sexual harassment and disparate treatment jurisprudence, they

⁶ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (“[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”).

⁷ 509 U.S. 502 (1993).

⁸ See Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1 (1996) (tracking Supreme Court's attempt to simplify definition of discrimination in racial disparate treatment cases).

⁹ *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

have failed to note just how momentous the simplification is.¹⁰ This Article seeks to rectify this oversight. The Court's simplified theory of sex discrimination prepares the way for an expansion of sex discrimination claims. The unified theory must integrate the legal theories supporting sexual harassment and disparate treatment on their own terms.¹¹ Sexual harassment theory recognizes that Title VII may be violated either when a tangible job detriment has occurred or when a hostile work environment results from harassment. Disparate treatment theory recognizes that any gender-motivated conduct may yield sex discrimination. Thus, hostile work environment and disparate treatment theory should combine to produce a new cause of action that makes actionable any non-harassing, gender-related conduct that creates a hostile work environment. Not surprisingly, other somewhat less momentous implications ought to flow from the Court's simplified theory of sex discrimination as well. Each expands Title VII's potential reach and will be discussed below. In summation, the Court's simplification of sex discrimination means that conduct actionable under Title VII may be significantly broader than previously thought.

The structure of this Article is as follows. Part I consists of a hypothetical situation which will be referenced throughout the Article to illustrate sex discrimination jurisprudence. Part II describes the Supreme Court's disparate treatment jurisprudence.

¹⁰ Some commentators view the changes as important, but not extremely so. See, e.g., White, *Nothing Special*, *supra* note 2, at 730 (noting that Supreme Court has merged analysis of sexual harassment law with other claims of intentional discrimination); Steven L. Willborn, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 678 (1999) (noting that *Oncale* "brings discrimination back into sexual discrimination law").

¹¹ See White, *Nothing Special*, *supra* note 2, at 753 (arguing that ideas underlying disparate treatment should inform sexual harassment and vice-versa); see also Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 95 (1991) (suggesting that sexual harassment law's treatment of intent should be imported into disparate treatment law); Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1, 80 (1998) ("A more sensible, workable response would be application of concepts underlying Court's harassment jurisprudence to all disparate treatment cases."); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1714 (1998) (noting hostile work environment's historical antecedents in disparate treatment discrimination); Miranda Oshige, Note, *What's Sex Got To Do With It?*, 47 STAN. L. REV. 565, 567 (1995) (proposing that hostile work environment harassment be treated like disparate treatment).

Part III describes the Court's restructuring of sexual harassment jurisprudence. Finally, Part IV examines the elimination of the distinction between sexual harassment and disparate treatment and its implications, including the new hostile work environment disparate treatment claim.

II. THE HYPOTHETICAL PROBLEM

Susan Jones began working at PW, Inc. ten years ago. PW is an accounting firm. During her first several years at PW, Susan's co-workers told her that women at PW were expected to conform to an antiquated image of femininity. Susan's female co-workers made clear that were she a superb accountant who conformed to the partnership's image of a female partner, she would probably become a partner at PW. However, they also told her of former female employees who would not adjust to PW's idiosyncratic workplace. Each of these employees either quit before her partnership vote or quit after her partnership bid was delayed indefinitely. Those employees whose partnership bids were delayed experienced difficulty finding work after leaving PW, as prospective employers wondered why they would leave PW seemingly on the verge of becoming partners.

During Susan's tenure at PW, many of her male co-workers and partners commented to her on her attire ("not stylish enough for a woman"), her personal style ("too confrontational and masculine"), and her language ("too coarse for a woman"). As Susan neared partnership, she spoke to several partners to ascertain her prospects of becoming a partner. Each told her that, if she wanted to become a partner, she needed to act more ladylike, dress more ladylike, and be more deferential. Most of the partners Susan spoke to noted that while they would support her candidacy, other partners likely would not unless she projected a more feminine and deferential demeanor.

Not surprisingly, Susan was upset that her partnership appeared contingent on altering her personality and behavior. Susan, however, did not change her dress, manner, or appearance. Rather, after becoming a very capable accountant, Susan quit PW to join another firm before her partnership vote. She simply did not believe that she would become a partner at PW. Unfortunately, Susan's pay

at her new firm was lower than it had been at PW, and she would not be eligible for partnership until three years after she would have been eligible at PW.

III. DISPARATE TREATMENT SEX DISCRIMINATION

Title VII is a hybrid civil rights/labor statute that outlaws sex discrimination that results in the discriminatory provision of compensation, terms, conditions, or privileges of employment. It reads, in pertinent part:

It shall be an unlawful employment practice for an employer to—fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex¹²

Title VII covers all aspects of the employment relationship.¹³ It applies to pre-employment conduct, conduct occurring during

¹² 42 U.S.C. § 2000e-2(a)(1) (1999).

¹³ See *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (intimating broad reading of terms, conditions, and privileges of employment); *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) (noting that terms, conditions and privileges of employment are not limited to incidents of employment found in employment contract, but rather that they may arise from treatment generally afforded to employees in course of employment); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (noting that " 'terms, conditions, or privileges of employment' . . . is an expansive concept"); *Jensvold v. Shalala*, 925 F. Supp. 1109, 1113 (D. Md. 1996), *aff'd*, 141 F.3d 1158 (4th Cir. 1998) (noting that while "[n]ot every aspect of an employment relationship constitutes a 'term, condition, or privilege' of employment, . . . the phrase 'terms, conditions, and privileges of employment' includes any benefit that was part and parcel of the employment"); Theresa M. Beiner, *Do Reindeer Games Count As Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643, 654 (1996) (noting broad language in Title VII regarding what employer practices it covers). *But see Reno v. Metropolitan Transit Auth.*, 977 F. Supp. 812, 824-25 (S.D. Tex. 1997) (suggesting that employer's refusal to allow employee to attend training session did not amount to change in terms or conditions of employment); Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1153 (1998) [hereinafter White, *De Minimis Discrimination*] (noting that "terms, conditions and privileges" has been read by some courts to include only "materially adverse employer action").

employment, and post-employment retaliatory conduct.¹⁴

Disparate treatment discrimination is the easiest form of sex discrimination to recognize.¹⁵ Its essence is that an employee is intentionally treated differently with respect to terms, conditions, or privileges of employment than his or her opposite-gendered co-worker because of the employee's sex.¹⁶ In *Phillips v. Martin Marietta Corp.*,¹⁷ *UAW v. Johnson Controls, Inc.*,¹⁸ and *Price Waterhouse v. Hopkins*,¹⁹ the Supreme Court described disparate treatment claims, making clear that policies and actions resulting in differential treatment of men and women with respect to employment can lead to Title VII liability.

In *Phillips*, plaintiff Ida Phillips challenged Martin Marietta's policy of declining to accept "job applications from women with pre-school-age children" at the same time it "employed men with pre-

¹⁴ See *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (holding that former employees are covered by § 704(a), Title VII's retaliation provision); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 157 (3d Cir. 1999) ("Post-employment actions by an employer can constitute discrimination under Title VII if they hurt a plaintiff's employment prospects."); *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 888 (7th Cir. 1996) ("[W]e believe that post-termination acts of retaliation that have a nexus to employment are actionable under Title VII . . ."); *Landon v. Northwest Airlines*, 72 F.3d 620, 626 (8th Cir. 1995) (suggesting that post-termination retaliatory acts may be actionable when certain conditions are met); *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 146 (7th Cir. 1993) (suggesting that refusal to rehire might amount to actionable retaliation).

¹⁵ See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (noting that disparate treatment "is the most easily understood type of discrimination"). Many forms of sex discrimination exist, including disparate treatment, disparate impact, and sexual harassment. Disparate impact discrimination is nonintentional discrimination that occurs when an employment policy unevenly burdens different races, genders, or groups of employees based on protected classifications. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971) (recognizing disparate impact as viable theory under Title VII).

¹⁶ To assert a cause of action, Title VII merely requires that the employee's sex be a motivating factor for the conduct at issue. See 42 U.S.C. § 2000e-2(m) (1999) ("[A]n unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice."); see also *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) ("So long as the plaintiff demonstrates . . . that he would not have been treated in the same way had he been a woman, he has proven sex discrimination. The most direct route . . . is via proof that men and women were treated differently in the workplace."); *Willborn, supra* note 10, at 693 ("If sex is a motivating factor, then the discrimination element [of a Title VII case] is met.")

¹⁷ 400 U.S. 542 (1971).

¹⁸ 499 U.S. 187 (1991).

¹⁹ 490 U.S. 228 (1989).

school-age children."²⁰ Although the United States District Court for the Middle District of Florida²¹ and the United States Court of Appeals for the Fifth Circuit²² both ruled that Martin Marietta was entitled to summary judgment, the Supreme Court decided that Martin Marietta's policy amounted to sex discrimination. The Court's finding was based on the fact that Martin Marietta treated men with pre-school-age children differently than women with pre-school-age children.²³ While noting that Martin Marietta might have sufficient justification for the discriminatory policy to avoid Title VII liability—a suggestion that Justice Thurgood Marshall forcefully challenged²⁴—the Court recognized that the differential treatment of female workers because they are female is sex discrimination that may lead to Title VII liability.²⁵

In *UAW v. Johnson Controls, Inc.*,²⁶ at issue was the employer's different treatment of fertile women and fertile men. Johnson Controls's determination that exposure to elevated levels of lead on its factory floor could heighten the incidence of birth defects in children born to women who worked on the factory floor led to a policy restricting fertile women, but not fertile men, from working in certain well-paying factory floor jobs. The policy distinguished employees based on their sex even though evidence suggested that elevated lead levels harmed male reproduction as well.²⁷ Although

²⁰ *Phillips*, 400 U.S. at 543.

²¹ *Phillips v. Martin Marietta Corp.*, 1968 WL 140 (M.D. Fla. July 9, 1968).

²² *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969).

²³ *Phillips*, 400 U.S. at 544. Martin Marietta's policy can be viewed more accurately as one that is different for women with pre-school-age children than for everyone else in the workplace, including men with pre-school-age children. Nonetheless, it is easiest to isolate the policy's discriminatory impact if women with pre-school-age children are compared to men with pre-school-age children.

²⁴ *See id.* at 545 (Marshall, J., concurring) (noting that Congress sought to eliminate limitations on women's employment opportunities based on stereotypes and "ancient canards about the proper role of women").

²⁵ *Id.* at 544.

²⁶ 499 U.S. 187 (1991).

²⁷ Although the Court did not clarify whether the evidence indicated that the harm to male reproduction was of the same type as the harm to female reproduction, the Court appeared influenced by Johnson Controls's lack of concern regarding male reproductive ability. The Court noted: "Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees." *Id.* at 198.

Arguably, Johnson Controls focused on the harm to the fetus, rather than on the

Johnson Controls's rule was ostensibly designed to protect putative fetuses from exposure to dangerous levels of lead in a mother's bloodstream, it also disqualified fertile women from higher-paying jobs that fertile men could hold. The policy also protected men who worked or wanted to work in factory floor jobs from competition from fertile women. The discriminatory bias of Johnson Controls's rule was clear. The employees excluded from factory floor jobs were exclusively women, and they were therefore ineligible for those relatively lucrative jobs.²⁸ The Court invalidated Johnson Controls's policy because it amounted to sex discrimination that was not statutorily excused.²⁹

While *Martin Marietta* and *Johnson Controls* concerned groups of women who were victims of explicit discriminatory rules or policies, Title VII's prohibition on disparate treatment discrimination also applies to situations in which particular employees are held to different standards of conduct because of their gender. In *Price Waterhouse v. Hopkins*,³⁰ the Supreme Court recounted Ann Hopkins's attempt to become a partner at Price Waterhouse, one of the country's most prestigious accounting firms.³¹ Hopkins successfully completed her work tasks and was, according to the district court, a highly productive manager with the most successful record of bringing substantial business to Price Waterhouse of all managers who were forwarded for partnership the same year as Hopkins. Price Waterhouse, however, proffered Hopkins's interpersonal skills as its justification for declining to make her a partner.³²

policy's burden on female employees. Nonetheless, because only women can become pregnant, only women suffered a direct negative effect from the policy. Of course, Congress has deemed pregnancy discrimination sex discrimination. See 42 U.S.C. § 2000e(k) (1999) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . ."); *Johnson Controls*, 499 U.S. at 198-99 (noting that Pregnancy Discrimination Act includes pregnancy discrimination as sex discrimination).

²⁸ As the Court noted: "The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job." *Johnson Controls*, 499 U.S. at 197.

²⁹ *Id.* at 206.

³⁰ 490 U.S. 228 (1989).

³¹ Ann Hopkins tells her story in ANN BRANIGAR HOPKINS, SO ORDERED: MAKING PARTNER THE HARD WAY (1996).

³² See *Price Waterhouse*, 490 U.S. at 234-35 (discussing partners' appraisal of Ann

In accordance with the trial court's findings, the Supreme Court determined that sex-based biases, along with concerns about Hopkins's interpersonal skills, may have affected the partnership decision. While some partners did mention Hopkins's job-related interpersonal skills in their evaluations, others criticized Hopkins's use of profanity and some of her ostensibly "masculine" personality traits to forestall her elevation to partner.³³ Apparently, some partners wanted Hopkins to act more "femininely" (as defined by the predominantly male partnership) before she was made a partner.³⁴ That this was the partnership's desire was not lost on the partner tasked with telling Hopkins why her partnership was placed on hold. He told Hopkins that "in order to improve her chances for partnership . . . Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"³⁵ The Court determined that a requirement that a woman act in a certain manner in order to procure a partnership she would have obtained based on performance alone were she a man constituted disparate treatment discrimination under Title VII.³⁶ On remand, Hopkins was made a partner.³⁷

Hopkins's interpersonal skills).

³³ See *id.* at 235-37 (noting partners' comments concerning Ann Hopkins's supposedly masculine characteristics). Specifically, the Court noted:

The [district court] judge went on to decide, however, that some of the partners' remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments. He held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping.

Id. at 236-37.

³⁴ *Id.* at 235. At least one commentator has suggested that regardless of the standard of femininity that women are held to, it is an inappropriately male standard. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 71-72 (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*] (suggesting that sex discrimination law requires that women conform to male standard for men or to male standard for women, and that it is unclear that either standard is appropriate).

³⁵ *Price Waterhouse*, 490 U.S. at 235.

³⁶ *Id.* at 258. Price Waterhouse disputed that Hopkins would have been made partner were she a man, claiming that her non-gender-based interpersonal skills alone were sufficient to place her candidacy on hold. *Id.* at 236, 252.

³⁷ Price Waterhouse's claim that its decision would have been the same had Hopkins been

These three cases are merely examples of the Supreme Court's disparate treatment sex discrimination jurisprudence. An employment decision motivated by an employee's sex or gender that harms the employee's terms of employment constitutes actionable sex discrimination.³⁸ At core, Title VII outlaws treating similarly situated employees differently because of their gender. By definition, disparate treatment is differential treatment. Thus, while arguments regarding whether any two employees or any two groups of employees are similarly situated will always exist, once it is determined that a woman and a man—or a group of women and a group of men—are similarly situated, they must be treated similarly.³⁹ Hence, fertile female and male employees had to be treated similarly in *Johnson Controls*;⁴⁰ women and men with school-age children had to be treated similarly in *Phillips*; and worthy female and male partner candidates had to be treated similarly in *Price Waterhouse*.

In each case mentioned above, had the women involved been treated the same as their male co-workers, they would have enjoyed the possibility of better and more lucrative employment. That their employment options were restricted by discrimination triggered Title VII applicability. Absent discrimination, Ida Phillips would have had the opportunity to compete for a job at Martin Marietta; fertile female employees at Johnson Controls would have been able

a man was eventually rejected. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

³⁸ Of course, whether the discrimination is statutorily excused under Title VII is a different question. Justification for discriminatory treatment depends on the narrow bona fide occupational qualification (BFOQ) defense. In *Johnson Controls*, the key issue was whether sex was a BFOQ for the jobs at issue. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200-01 (1991). BFOQ defenses only arise, however, once discriminatory treatment is demonstrated or conceded.

³⁹ See *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) ("An employee is harassed or otherwise discriminated against 'because of his or her sex if, 'but-for' the employee's sex, he or she would not have been the victim of the discrimination."); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN 195-96* (1979) [hereinafter MACKINNON, *WORKING WOMEN*] (suggesting that determining whether treatment would have occurred if plaintiff were male is key inquiry in determining if sex discrimination occurred).

⁴⁰ Interestingly, one of the plaintiffs in *Johnson Controls* was a man who wanted to start a family but could not transfer from his factory floor job without suffering job detriment. *Johnson Controls*, 499 U.S. at 192.

to compete for the higher-paying factory floor jobs; and Ann Hopkins would have been made a Price Waterhouse partner. As the Supreme Court has recognized, if Title VII prohibits anything, it prohibits providing different job opportunities and compensation to employees and potential employees because of sex.

That each of the women in these cases suffered an overt and obvious job detriment or denial of a job opportunity made their cases easy to recognize as disparate treatment cases. In other cases, however, courts disagree about how serious the job detriment must be to be cognizable. While the Supreme Court noted in *Hishon v. King & Spalding*⁴¹ that Title VII covers any benefit that the employer provides to its employees,⁴² whether Title VII covers literally every benefit that could be considered a term, condition, or privilege of employment remains unclear. Professor Rebecca Hanner White analyzed the problems surrounding this issue in her article, *De Minimis Discrimination*.⁴³ Professor White noted that some courts limit disparate treatment claims to those situations in which an actual employment decision or materially adverse employer action has occurred.⁴⁴ Other courts do not require that differential treatment yield a discriminatory employment action but do set a threshold of harm below which disparate treatment claims will not be cognizable.⁴⁵

⁴¹ 467 U.S. 69 (1984).

⁴² *Id.* at 74-75.

⁴³ *Supra* note 13; see also Beiner, *supra* note 13, at 656-63 (discussing what counts as a term, condition or privilege of employment); Schultz, *supra* note 11, at 1714-16.

⁴⁴ See White, *De Minimis Discrimination*, *supra* note 13, at 1136-42 (discussing circuit split concerning requirement of "ultimate employment decision").

⁴⁵ See *id.* at 1135 ("While the courts disagree on how high a threshold of harm is needed, most agree that such a threshold does exist."). For example, in *Crady v. Liberty National Bank*, 993 F.2d 132 (7th Cir. 1993), the plaintiff was transferred from a "branch manager position to a collections officer position[.]" *id.* at 135-36, but with the same salary. The United States Court of Appeals for the Seventh Circuit determined that the transfer was insufficient to constitute an actionable job detriment, noting that "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Id.* at 136. While *Crady* was brought under the Age Discrimination in Employment Act (ADEA) rather than Title VII, its analysis is nonetheless applicable to the Title VII context. Title VII and the ADEA share many core concepts. See *id.* at 134-35 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a Title VII case, regarding ADEA prima facie case and accompanying shifting burdens).

While what constitutes a term or benefit of employment may be construed broadly by many courts, this broad construction occurs in the context of tangible job benefits. How terms of employment will be construed outside of that context is unclear because disparate treatment claims are rarely interpreted outside of the context of actual job detriment.⁴⁶ While Title VII is not limited to remedying economic harm⁴⁷ it is not clear how fully non-economic harms will be remedied in the context of disparate treatment discrimination. This uncertainty would likely eliminate any possibility of recovery for our hypothetical plaintiff, Susan Jones.

The expectations Susan Jones faced at PW are very similar to those Ann Hopkins faced at Price Waterhouse. Both were expected to be a certain type of woman, rather than merely a good worker. After her partnership was delayed, Hopkins was told by a partner that she should be more feminine. Similarly, Jones was told by partners and associates that she should be more ladylike so that she might become a partner.⁴⁸ The *Price Waterhouse* Court indicated that requiring employees to conform to sex stereotypes may constitute sex discrimination.⁴⁹ Under the reigning view of disparate treatment discrimination, however, the course of conduct Susan Jones has endured has yet to affect her employment terms, making the success of her claim highly unlikely. Consequently, Susan Jones will need a change in conventional legal wisdom in order to succeed. Fortunately, the Supreme Court has, possibly unwittingly, paved the way for Susan to make her claim.

⁴⁶ Many of the Supreme Court's seminal disparate treatment cases have involved tangible job benefits. *E.g.*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp.*, 411 U.S. at 792.

⁴⁷ That Title VII covers non-economic harm is clear. *See Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 64 (1986) ("Title VII is not limited to 'economic' or 'tangible' discrimination."). However, *Vinson* was a sexual harassment case in which the offensive nature of the alleged harassment caused the non-economic psychological harm. *Id.* at 60-61. That a number of courts have required an actual adverse employment decision after *Vinson* was decided suggests that many courts view disparate treatment and sexual harassment claims differently.

⁴⁸ Arguably, the hypothetical course of conduct includes any prior conduct by PW partners that has suggested that women should act femininely in order to succeed. *See generally White, De Minimis Discrimination*, *supra* note 13.

⁴⁹ *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 256-58 (1989) (discussing role of sexual stereotyping in employment decisions).

IV. SEXUAL HARASSMENT

Sexual harassment and disparate treatment have historically been distinguished by the style of conduct underlying each cause of action. Disparate treatment liability has usually resulted from a discriminatory employment decision. Sexual harassment liability, on the other hand, has typically resulted from unwelcome gender-motivated harassment⁵⁰ that results in the discriminatory provision of terms of employment.⁵¹ To be clear, being harassed in the workplace, even because of one's sex, is not in itself actionable;⁵² only when such unwelcome harassment changes an employee's terms of employment does the harassment become actionable.⁵³ Recent scholarship suggests that sexual harassment's link to sex discrimination has not been adequately explained.⁵⁴ Nonetheless,

⁵⁰ Sexual harassment must be unwelcome to be actionable. See *Vinson*, 477 U.S. at 68 ("The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome."). While unwelcomeness may be important when an employee does not mind being treated differently than someone of the opposite gender, if the harassment actually changes the terms of employment, it is possible that we should not care whether the harassment was welcome or unwelcome. See Hébert, *supra* note 3, at 577 (noting that often unwelcomeness of harassment need not be proven when context of denigrating and hostile conduct suggests unwelcomeness). Nonetheless, as sexual banter and sexual activity between co-workers can be consensual and desired, unwelcomeness can be in dispute in many harassment cases.

⁵¹ See *Vinson*, 477 U.S. at 67 (finding harassment actionable when it sufficiently alters conditions of employment).

⁵² See *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412-13 (7th Cir. 1997) (holding that use of vulgar, sex-related taunts does not constitute sexual harassment when it is clear that taunts are part of personal vendetta unrelated to victim's gender); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 827 (6th Cir. 1997) (noting that even when harassment occurs, it may not cause workplace to become objectively hostile, as required for liability).

⁵³ Title VII, whether in the disparate treatment context or the sexual harassment context, does not cover harassment that falls below that level. See *Vinson*, 477 U.S. at 67 (noting that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII"); *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (distinguishing between rude comments directed at women and comments directed at a woman because she is a woman); *Holtz v. Marcus Theatres Corp.*, 31 F. Supp. 2d 1139, 1147 (E.D. Wis. 1999) ("Merely yelling at female employees and calling them names does not rise to the level of actionable hostile work environment."); White, *Nothing Special*, *supra* note 2, at 746 (noting that discrimination at large is not prohibited and that discrimination becomes prohibited only when it affects terms, conditions, or privileges of employment).

⁵⁴ Several recent articles have focused on what constitutes sexual harassment and why sexual harassment is sex discrimination. See, e.g., Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 445 (1997) (detailing shortcomings of current

sexual harassment is sex discrimination.⁵⁵ When gender-motivated harassment alters an employee's terms of employment,⁵⁶ such alteration is deemed to have occurred "because of sex," thereby violating Title VII.⁵⁷

Whether an employer will be liable for such harassment under Title VII depends upon whether the employer is deemed responsible for the discrimination. Employer responsibility depends, in turn, on what the employer knew, when the employer knew it, and what steps the employer took to prevent or remedy the harassment that caused the discrimination.⁵⁸ The employer, rather than the employee engaging in harassing conduct, is liable under Title VII⁵⁹

law); Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 692 (1997) ("While our intuitions may lead us to conclude that when a man directs offensive sexual conduct at a female colleague, sex discrimination is afoot, the Supreme Court has not offered a theory as to why this is the case."); Schultz, *supra* note 11.

⁵⁵ See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 752 (1998) (noting that sexual harassment is subsumed under Title VII); see also *Higgins v. New Balance Athletic Shoe, Inc.*, 21 F. Supp. 2d 66, 74 (D. Me. 1998) (noting that differential treatment of sexes is key to sexual harassment claims).

⁵⁶ Nearly any benefit stemming from a job can be considered a term, condition or privilege of employment. See *Jensvold v. Shalala*, 925 F. Supp. 1109, 1113 (D. Md. 1996) (noting that many incidents of employment amount to terms, conditions or privileges of employment when they are traditionally afforded to employees in plaintiff's position). Indeed, seemingly insignificant differences can amount to discrimination under Title VII. See *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1032-33 (7th Cir. 1979) (requiring women to wear uniforms while allowing men to wear own suits violates Title VII). But see *supra* notes 43-45.

⁵⁷ See 42 U.S.C. § 2000e-2(m) (1999) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."); *Vinson*, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."); see also *Willborn*, *supra* note 10, at 687 (suggesting mixed motives type analysis for determining whether discrimination underlies conduct that may support sexual harassment claim).

⁵⁸ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 808-09 (1998) (finding failure to disseminate sexual harassment policy and to keep track of supervisor's conduct to be ineffective communication of policy); *Ellerth*, 524 U.S. at 765 (discussing failure to promulgated sexual harassment policy as evidence of failure to fulfill obligation of reasonable care); Franke, *supra* note 54, at 701 n.29 (suggesting that employer liability standard for sexual harassment is "known or should have known").

⁵⁹ Generally, individual employees who engage in sexual harassment will not be liable under Title VII. See *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995) ("[A] supervisor does not, in his individual capacity, fall within Title VII's definition of an employer . . ."); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995) ("Under Title VII there is no personal liability for employees, including supervisors . . ."); *Miller v. Maxwell, Int'l*, 991 F.2d 583,

because the employer is responsible for creating and maintaining the workplace as well as providing and tailoring the employment relationship, and must generally be responsible for discrimination in its provision.⁶⁰ As a result, employer tolerance of or indifference to sexual harassment can be the precursor to Title VII liability.⁶¹

A. SEXUALLY HARASSING CONDUCT

Sexual harassment may include sexual advances, sexually themed comments and conduct, and non-sexually themed comments and conduct.⁶² While the Equal Employment Opportunity Commission *Guidelines on Discrimination Because of Sex* appear to suggest that sexual harassment may be limited to "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,"⁶³ the Supreme Court has made

587-88 (9th Cir. 1993) (finding no personal liability resulting from employment discrimination); see also Rebecca Hanner White, *Vicarious and Personal Liability For Employment Discrimination*, 30 GA. L. REV. 509 (1996) (suggesting that personal liability for discrimination against employees is defensible but unwise). However, these employees may be liable under other laws. See MACKINNON, *WORKING WOMEN*, *supra* note 39, at 158 (noting that under certain conditions sexual harassment can be criminal or tortious).

⁶⁰ When the terms of employment change, the employer must be held responsible. It is somewhat disingenuous to suggest that the employer is not responsible when an employee's conditions of employment are altered through harassment, given that the employer generally controls the conditions of employment. Without clear evidence to the contrary, a supervisor who is responsible for maintaining the workplace's atmosphere should know that the harassment is occurring. See *Meritor Savings Bank v. Vinson*, 477 U.S. at 57, 76 (1986) (Marshall, J., concurring) ("[A] supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace."). Arguably, when the supervisor knows or should have known that harassment is occurring, the employer knows or should have known as well. However, this assumption might be problematic when the supervisor is the harassing employee. See *Faragher*, 524 U.S. at 810 ("The Court of Appeals also rejected the possibility that it could hold the City liable for the reason that it knew of the harassment vicariously through the knowledge of its supervisors. We have no occasion to consider whether this was error, however.").

⁶¹ See *Hafford v. Seidner*, 183 F.3d 506, 518 (6th Cir. 1999) (noting that employer can be liable for sexual harassment if it knew or should have known of harassment and failed to take corrective action); *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) (noting that hostile work environment *prima facie* case requires that plaintiff argue that employer knew or should have known about harassment but did not take remedial action).

⁶² Commentators have suggested that much gender harassment is unrelated to sexuality. See, e.g., Schultz, *supra* note 11, at 1687 ("[M]uch of the time, harassment assumes a form that has little or nothing to do with sexuality but everything to do with gender.").

⁶³ 29 C.F.R. § 1604.11 (1999).

clear that sexual harassment includes harassment motivated by an employee's gender, whether it is of a sexual nature or not.⁶⁴ In *Oncale v. Sundowner Offshore Services, Inc.*,⁶⁵ the Court ruled that any harassment that could create an inference of discrimination because of sex could be actionable.⁶⁶ Though plaintiff Joseph Oncale was subject to sexualized harassment that could be considered of a sexual nature, including threats of rape,⁶⁷ the Court indicated that if the harassment were actionable, it would be so because it constituted discrimination because of sex.⁶⁸ Indeed, the Court noted that even non-sexualized harassment "motivated by general hostility to the presence of women in the workplace" could constitute sexual harassment.⁶⁹ Consequently, any harassment undertaken or motivated by the victim's gender can be considered sexual harassment.⁷⁰

⁶⁴ Despite the language in its guidelines, the EEOC seems to recognize that sexual harassment need not be of a sexual nature. See Hébert, *Sexual Harassment*, *supra* note 3, at 565 nn.3-4 (noting that in 1993 the EEOC proposed guidelines that were subsequently withdrawn at behest of Congress indicating that "nonsexual conduct motivated by gender [could] also constitute discrimination on the basis of sex"); Schultz, *supra* note 11, at 1732 ("Even though the EEOC Guidelines focus on sexual conduct, the EEOC has long recognized that nonsexual, gender-based harassment may violate Title VII.").

⁶⁵ 523 U.S. 75 (1998).

⁶⁶ See *id.* at 80-81 (arguing that harassment need not be motivated by sexual desire to be classified as discrimination based on sex); White, *Nothing Special*, *supra* note 2, at 733 ("The question is not whether the harassment is sexual but whether it is being directed against this particular individual because of his sex."). The *Oncale* Court further noted that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale*, 523 U.S. at 80.

⁶⁷ See *Oncale*, 523 U.S. at 77 (providing general description of conduct); see also *Doe v. City of Belleville*, 119 F.3d 563, 566-67 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998) (noting plaintiff's same-sex harassment, including grabbing of genitals and numerous sexual threats).

⁶⁸ Harassment can serve many gender-related ends without being focused on sexual activity. See Franke, *supra* note 54, at 696 ("Sexual harassment can also be understood to enforce gender norms when it is used to keep gender nonconformists in line."); Schultz, *supra* note 11, at 1755 (noting that harassment can be used to attempt to keep certain jobs male bastions).

⁶⁹ *Oncale*, 523 U.S. at 80.

⁷⁰ One court suggested this years ago. See *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (noting that sexual harassment need not be sexualized to be actionable); see also Franke, *supra* note 54, at 696 (suggesting "reconceptualization of sexual harassment as gender harassment"); Hébert, *Sexual Harassment*, *supra* note 3, at 567-68 ("Gender harassment—hostile and denigrating nonsexual activity directed at women because they are women (or at men because they are men)—differs from sexual harassment—sexual activity directed at women because they are women (or at men because they are men) often motivated by hostility and intended to be denigrating—only in the choice of weapon used."); Schultz,

The *Oncale* decision was momentous because it clarified what conduct is sufficient to support a sexual harassment claim and thus simplified the sexual harassment cause of action. Before *Oncale*, the requirement that actionable conduct be related to sexual desire or be of a sexual nature led to interesting ramifications for same-sex harassment. The restriction led some courts to limit same-sex harassment causes of action to those involving same-sex harassment by homosexuals who were presumably driven by sexual desire.⁷¹ This left an employee who was sexually harassed by another person of the same gender without a claim unless the harassment was of a specific type. The *Oncale* Court shifted the focus of the harassment inquiry to whether an employee was harassed *because of his sex*, where Title VII suggests it should be.

Harassment motivated by sexual desire, harassment undertaken because of gender, and sexualized harassment can all be considered discrimination because of sex.⁷² However, an evidentiary distinction remains between harassment grounded in sexual desire and harassment not motivated by desire. Conduct motivated by sexual desire can generally be assumed to be motivated by the victim's gender,⁷³ while conduct, not motivated by sexual desire must be

supra note 11, at 1700 (discussing Carroll Brodsky's view that sexual harassment's scope is much broader than sexual advances; sexual harassment is not always "rooted in sexual desire or a need for sexual domination").

⁷¹ Courts have limited same-sex harassment claims in various ways. See *Oncale*, 523 U.S. at 79 (discussing various ways courts have limited same-sex harassment claims, and noting that they were incorrect).

⁷² See *Shepherd v. Slater Steels Corp.*, 168 F.3d 998 (7th Cir. 1999) (noting that there are myriad ways to engage in harassment, including through opposite-sex sexual advances, same-sex sexual advances, and non-sexual general hostility); *Penry v. Federal Home Loan Bank*, 155 F.3d 1257, 1261 (10th Cir. 1998) ("Conduct that is overtly sexual may be presumed to be because of the victim's gender; however, actionable conduct is not limited to behavior motivated by sexual desire."); Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 410 (1996) (noting distinction between gender-specific harassment and gender-based sexual harassment); Willborn, *supra* note 10, at 685-86 (differentiating conduct of sexual nature and conduct not of sexual nature).

⁷³ *Oncale*, 523 U.S. at 80. The Court in *Oncale* noted:

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.

Id.; see also *Schultz*, *supra* note 11, at 1741 (noting that courts have suggested that "sexually

proven to be motivated by the victim's sex to be actionable.⁷⁴ Nonetheless, an employee may be harassed through a single continuous course of sexual harassment that includes any combination of conduct, whether related to sexual desire or not.⁷⁵

B. TYPES OF SEXUAL HARASSMENT

Sexual harassment consists of two branches: *quid pro quo* and hostile work environment harassment.⁷⁶ *Quid pro quo* sexual harassment requires that an actual job detriment be conditioned on and occur as a result of sexual harassment. The prototypical example of *quid pro quo* harassment posits a supervisor who fires an employee for refusing to provide sexual favors.⁷⁷ Hostile work

explicit advances are presumed to be sex-based while other problems must be proven so"). But see *White, Nothing Special*, *supra* note 2, at 733 ("The [*Oncale*] Court also rejected the contention that when harassment is sexual it is necessarily gender-based.").

⁷⁴ Interestingly, the differing nature of conduct of a sexual nature and conduct not of a sexual nature has led some courts to analyze the two types of conduct separately in determining if a Title VII claim exists. *E.g.*, *King v. Board of Regents of Univ. of Wis.*, 898 F.2d 533 (7th Cir. 1990) (disaggregating sexualized harassment and non-sexualized harassment); see *Schultz, supra* note 11, at 1711-12, 1716-20 (discussing courts that treat harassment of sexual nature differently than harassment not of sexual nature); see also *Higgins v. New Balance Athletic Shoe, Inc.*, 21 F. Supp. 2d 66, 75 (D. Me. 1998) (distinguishing sex and gender discrimination).

⁷⁵ If a group of employees engages in sex-based and non-sex-based harassment to harass one of their co-workers because of that co-worker's sex, their conduct may not escape scrutiny merely because neither the sex-based harassment alone nor the non-sex-based harassment alone would be sufficient to support a cognizable claim. See, *e.g.*, *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 (8th Cir. 1994) (noting that conduct supporting hostile work environment claim need not be solely sexual in nature); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (detailing harassment related to sexual activity and harassment unrelated to sexual activity). Some commentators have suggested that courts should be clearer in finding that harassment not of a sexual nature can be aggregated with conduct of a sexual nature in determining that sexual harassment occurred. See *Franke, supra* note 54, at 1709 (suggesting that courts treat harassment of sexual nature and sexual harassment not of sexual nature as part of single course of conduct).

⁷⁶ See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 751-52 (1998) (noting that *quid pro quo* and hostile work environment discrimination have been considered, although arguably incorrectly, different categories of sexual harassment); *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (distinguishing *quid pro quo* and hostile work environment harassment); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987) ("Although sexual harassment may take a variety of forms, courts have consistently recognized two distinct categories of sexual harassment claims: *quid pro quo* sexual harassment, and hostile work environment sexual harassment.").

⁷⁷ See *Schultz, supra* note 11, at 1701 ("Women lost some of the first Title VII cases challenging harassment. These cases involved the by-now-familiar fact pattern: Female

environment harassment, on the other hand, merely requires that an employee's terms of employment be constructively altered by the harassment. The typical hostile work environment is a workplace tinged with sexual advances, explicit sex talk, sexual innuendo, gender-based hostility, or some combination of such conduct that is severe enough to affect an employee's ability to do her job.⁷⁸ *Quid pro quo* and hostile work environment harassment have been thought to be different because the conduct typically supporting each claim is somewhat distinct.⁷⁹ The Supreme Court, however, recently made clear that the distinction between *quid pro quo* and hostile work environment sexual harassment is the concreteness of the harm the harassment causes rather than the style of conduct underlying each cause of action.⁸⁰

plaintiffs complained that they had been fired or mistreated for refusing their male superiors' sexual advances.").

⁷⁸ See *Aldridge v. Kansas*, No. 96-2382-JWL, 1997 WL 614323, at *10 (D. Kan. Sept. 10, 1997) ("Rather than subjecting plaintiff to a few sexual comments, however, the plaintiff's evidence, if believed, is that Mr. Pritchard made weekly suggestive comments about plaintiff's breasts and buttocks for a period of over four years. When viewed together with his other, more sporadic unwelcome sexual innuendos, allegations, and advances, a reasonable and prudent person could conclude that Mr. Pritchard's actions were sufficiently pervasive to create a hostile work environment."); *Stoeckel v. Environmental Management Sys., Inc.*, 882 F. Supp. 1106, 1115 n.13 (D.D.C. 1995) ("The Court notes that cases in which other courts have found conduct to constitute hostile work environment discrimination typically involve explicit sexual advances toward the recipient, sexual innuendo, sexual comments or derogatory comments to the recipient in the presence of other employees, comments or actions of a lewd or tasteless nature, and similarly severe behavior."); cf. *Schultz*, *supra* note 11, at 1710 ("To a large extent, the courts have restricted the conception of hostile work environment harassment to male-female sexual advances and other explicitly sexualized actions perceived to be driven by sexual designs.").

⁷⁹ Not only are the two types of harassment different, *quid pro quo* harassment is arguably worse. See *Nichols v. Frank*, 42 F.3d 503, 510 (9th Cir. 1994) ("The most oppressive and invidious type of workplace sexual harassment is *quid pro quo sex*").

⁸⁰ See *Ellerth*, 524 U.S. at 742 (noting precedent that required harassment to be severe or pervasive if making hostile environment claim); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (noting that whether environment is hostile or abusive depends on looking at all circumstances including frequency and severity of conduct). While the Supreme Court never explicitly distinguished *quid pro quo* and hostile work environment discrimination on the basis of the style of conduct underlying each claim, it has recognized that others have. See *Ellerth*, 524 U.S. at 751 ("The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility."); *Vinson*, 477 U.S. at 65 (noting and implicitly accepting EEOC's distinction between hostile work environment and *quid pro quo* harassment).

1. *Quid Pro Quo Harassment.* *Quid pro quo* sexual harassment explicitly alters the terms of an employee's employment.⁸¹ Thus, a supervisor who conditions the avoidance of job detriment on an employee's provision of sexual favors, then takes adverse action when the employee declines to grant those favors has engaged in *quid pro quo* harassment.⁸² The harassment is undertaken for personal gratification with the leverage being the power and willingness to change concrete terms, conditions, or privileges of employment. Since the harassment stems from the employee's sex,⁸³ the discriminatory provision of the terms of employment has occurred because of sex, and Title VII is therefore violated.⁸⁴ The

⁸¹ See *Ellerth*, 524 U.S. at 752 (indicating that *quid pro quo* harassment concerns explicit alterations in terms or conditions of employment and that hostile work environment harassment concerns constructive alterations in terms or conditions of employment).

⁸² In some situations, linking job benefits with sex is not actionable. See *EEOC: Policy Guide on Employer Liability for Sexual Favoritism Under Title VII*, 8 Lab. Rel. Rep. (BNA) No. 694, at 6817 (Jan. 12, 1990) (noting that preferential treatment based on consensual romantic relationship may be unfair to women and men and is therefore generally not in violation of Title VII because both are disadvantaged for reasons other than gender); see also *Hentosh v. Herman M. Finch Univ. of Health Sciences*, 167 F.3d 1170, 1175 (7th Cir. 1999) (suggesting that sexual favoritism in form of giving job benefits to person with whom one is having affair is likely not sufficient to support another worker's hostile work environment claim); *Elger v. Martin Mem'l Health Sys., Inc.*, 6 F. Supp. 2d 1351, 1353-54 (S.D. Fla. 1998) (noting that claim that plaintiff was terminated so that his boss's girlfriend could be promoted to plaintiff's job was not hostile work environment claim, rather it was akin to nepotism not actionable under Title VII); *Ayers v. American Tel. & Tel. Co.*, 826 F. Supp. 443, 446 (S.D. Fla. 1993) (determining that favoritism in hiring or promoting former lovers is more akin to nepotism than sexism and is not prohibited by Title VII). Of course, this is problematic. Title VII is supposed to remove the link between sex and employment from the workplace. Allowing job benefits to be linked to sex allows this link to remain. Consequently, if Title VII were read relatively expansively, any person who was denied a job benefit because the benefit went to someone who was a sexual favorite of the supervisor could sue. But see Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 549-50 (1994) (disagreeing with many courts and commentators who have suggested that Title VII liability could lie for harm to those disadvantaged by sexual favoritism).

⁸³ We assume the supervisor would not have added the term to the employment relationship of a person of the opposite gender. Although, under this theory, a bisexual supervisor escapes exposing the employer to Title VII liability, this is of little moment. See Willborn, *supra* note 10, at 683 n.22 (noting rarity of bisexual harasser). Regardless of how offensive a supervisor's behavior may be, if the supervisor's action is not taken because of sex or on the basis of sex, Title VII does not appear to prohibit the behavior. However, other statutes may. See MACKINNON, *WORKING WOMEN*, *supra* note 39, at 158 (suggesting that many acts of sexual harassment could be treated as independently criminal or tortious).

⁸⁴ See *Barnes v. Costle*, 561 F.2d 983, 989 (D.C. Cir. 1977) (noting that harassment would not have occurred had plaintiff been male); Franke, *supra* note 54, at 702-05 (noting that one justification for treating sexual harassment as sex discrimination under Title VII was that

actual job detriment is proof that the terms of the employment relationship were concretely altered. Indeed, the Supreme Court has recently ruled that actual job detriment must visit a plaintiff before an actionable *quid pro quo* harassment claim arises, meaning that actual job detriment is the only proof sufficient to demonstrate the concrete alteration of employment terms.

In *Burlington Industries v. Ellerth*,⁸⁵ plaintiff Kimberly Ellerth charged that Ted Slowik, her supervisor's superior, harassed her by making numerous inappropriate sexual comments regarding her dress and appearance. The offending comments included possible threats to harm Ellerth's employment if she did not provide sexual liberties or act in a more sexually accessible manner.⁸⁶ Rather than face additional harassment, Ellerth quit her job of fourteen months.⁸⁷ The Court indicated that until Ellerth suffered actual job detriment, her treatment could not be considered *quid pro quo* sexual harassment:

When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII.

harassment occurred because of employee's sex). *But see* Schultz, *supra* note 11, at 1701 (explaining that in early cases, discrimination on basis of refusal to yield to sexual advances was not viewed as discrimination because of sex). Of course, *quid pro quo* harassment can be analogized to disparate treatment sex discrimination. The harassed employee's employment relationship includes an additional term of employment—submission to a supervisor's sexual advances—not required of employees of the opposite sex. *See* Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17, 39-40 (1998) ("Courts began to rule that Title VII was violated because submission to a sexual act was made a condition of employment for a woman but not for a man; consequently, sexual harassment was understood to be sexual discrimination 'because of a woman's gender.'").

⁸⁵ 524 U.S. 742 (1998).

⁸⁶ Of particular note was Slowik's comment that he could make life easy or hard for Ellerth at Burlington. *Id.* at 748. The Court concluded that a "trier of fact could find in Slowik's remarks numerous threats to retaliate against Ellerth if she denied some sexual liberties." *Id.* at 751. Indeed, Slowik may have attempted to delay Ellerth's promotion by commenting negatively on some of her personality traits. *See id.* at 748 ("Slowik expressed resolutions during [a] promotion interview because [Ellerth] was not 'loose enough.'").

⁸⁷ *Id.*

For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.⁸⁸

Though the Court found that a reasonable factfinder could have determined that Slowik explicitly threatened Ellerth's employment, it concluded that Ellerth could not state a *quid pro quo* claim because she had not suffered any tangible job detriment. Even though Ellerth's fear that Slowik would hinder her career caused her to quit after only fourteen months, likely hurting her career in the short term, Ellerth's resignation did not constitute actual job detriment. Presumably, the Court would require a claim akin to constructive discharge for Ellerth's resignation to be deemed a tangible job detriment.⁸⁹

The *Ellerth* Court certainly clarified exactly what *quid pro quo* harassment is: sexual harassment resulting in actual job detriment. The Court, however, by focusing on job detriment rather than the terms of employment as the employee understood them, may have fundamentally altered the *quid pro quo* harassment claim as well. After *Ellerth*, *quid pro quo* harassment requires that threats actually be fulfilled; the making of threats is no longer sufficient. The Court minimized the importance of conditioning of job benefits on sexual activity by eliminating the possibility that terms of employment may be concretely altered by such conditioning alone.⁹⁰

⁸⁸ *Id.*

⁸⁹ Proof of a hostile work environment may not be sufficient to prove constructive discharge. See *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999) ("To show 'constructive discharge, a plaintiff must show more than just a Title VII violation by her employer.'" (quoting *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998))); see also *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 155 (3d Cir. 1999) (noting that hostile work environment can exist well before plaintiff is constructively discharged).

⁹⁰ Other courts have suggested that the conditioning of job benefits on sexual activity is a very important aspect of the harassment. See *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994) ("[W]e hold that *quid pro quo* sexual harassment occurs whenever an individual explicitly or implicitly conditions a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct."); *Karibian v. Columbia Univ.*, 44 F.3d 773, 779

The Court did this even though the conditioning of benefits on sexual activity may cause the employee to react to the putative change in terms of employment by acquiescing to the unwanted harassment, resisting the harassment forcefully enough to cause the supervisor to impose job detriment, or quitting the job.⁹¹ While the Supreme Court may have merely been suggesting that actual job detriment is *conclusive* proof that terms of employment had been altered, its language suggests otherwise. Rather than indicate that actual job detriment or *any other competent proof* would serve as evidence that job benefits had been conditioned on sexual activity,⁹² the Court noted explicitly that actual job detriment was necessary.⁹³

The Court's decision in *Ellerth* is clear. When the implications of *Ellerth* and *Oncale* are combined, however, an interesting issue regarding the scope of *quid pro quo* harassment arises. Before *Ellerth* and *Oncale*, *quid pro quo* sexual harassment was typified by and limited to a supervisor's advances to a subordinate that concretely altered the terms of that subordinate's employment. After *Ellerth* and *Oncale*, *quid pro quo* sexual harassment should be considered actionable whenever non-acquiescence to sexual harassment of any form results in tangible job detriment.⁹⁴ That construct would allow any sexual harassment, including physical or

(2d Cir. 1994) ("[O]nce an employer conditions any terms of employment upon the employee's submitting to unwelcome sexual advances, a *quid pro quo* claim is made out, regardless of whether the employee (a) rejects the advances and suffers the consequences, or (b) submits to the advances in order to avoid those consequences."); *Quarles v. McDuffie County*, 949 F. Supp. 846, 852 (S.D. Ga. 1996) ("*Quid pro quo* sexual harassment requires proof that plaintiff's acceptance of the harassment is an express or implied condition to receiving a job benefit or not receiving negative treatment.").

⁹¹ Indeed, even implicit conditioning of terms on sexual activity can be problematic. See *Nichols*, 42 F.3d at 512 ("We note that difficult factual and legal questions will almost always arise whenever either the conditioning of benefits (or absence of detriment) or the request for favors is not explicit, but is instead implicit in the harasser's communications or dealings with his prey.").

⁹² Now that the focus of *quid pro quo* harassment is job detriment rather than the conditioning of concrete job terms on sexual activity, *quid pro quo* harassment is quite similar to disparate treatment sex discrimination. See *infra* Part IV.

⁹³ *Ellerth*, 524 U.S. at 753-54.

⁹⁴ The United States Court of Appeals for the Seventh Circuit heard and rejected this theory before *Ellerth* was issued by the Supreme Court. See *Brill v. Lante Corp.*, 119 F.3d 1266, 1274-75 (7th Cir. 1997) (rejecting argument that generalized harassment could serve to support *quid pro quo* claim when employee's refusal to acquiesce in such banter was reason employee was terminated). The argument might fare differently now.

verbal harassment from supervisors, co-workers, or anyone else in the workplace,⁹⁵ to support a *quid pro quo* claim if actual job detriment flowed from non-acquiescence to the harassment. For example, giving less lucrative tables to a waitress who does not allow customers to touch or grab her should amount to *quid pro quo* sexual harassment if male waiters were not forced to endure such harassment.⁹⁶ That such conduct should be treated as *quid pro quo* sexual harassment is sensible because gender-based harassment has caused actual job detriment. While the Supreme Court has not yet ruled that *quid pro quo* harassment covers such conduct, no doctrinal impediments exist to such a decision.

After *Ellerth* and *Oncale*, the *quid pro quo* sexual harassment claim looks like a disparate treatment claim where the relevant conduct amounts to sexual harassment. This simplification of sex discrimination jurisprudence may expand liability under Title VII. While the *quid pro quo* action will always involve a superior, as a superior is the only person able to visit actual job detriment on an employee, it may not be limited to situations where the superior has engaged in the conduct that preceded the job detriment. Removing this limitation may produce liability for *any* employment decision related to harassment, rather than limiting recovery to situations in which the superior's harassment led directly to the decision that caused the job detriment.

Unfortunately, this will not yet help Susan Jones, our hypothetical plaintiff. Her case is not a *quid pro quo* harassment case because she does not appear to have suffered job detriment. While her resignation may have been caused by her belief that she would suffer tangible job detriment, the conduct involved is unlikely to rise to the level of a constructive discharge. Additionally,

⁹⁵ Sexual harassment inflicted by non-employees can support a sexual harassment claim. See 29 C.F.R. § 1604.11(e) (1999) ("An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.")

⁹⁶ See MACKINNON, WORKING WOMEN, *supra* note 39, at 2 (noting that advances by customers should be considered workplace sexual harassment). This claim could be considered akin to a hostile work environment claim because the environment literally becomes hostile. The facts suggested, however, fit within the Court's simplified vision of *quid pro quo* harassment.

although the sentiments underlying her treatment were largely unwelcome, the treatment itself is unlikely to be considered harassing.⁹⁷

2. *Hostile Work Environment Harassment.* Hostile work environment sexual harassment is relatively easy to define, but difficult to describe precisely.⁹⁸ In general terms, hostile work environment sexual harassment is unwelcome⁹⁹ gender-motivated harassment that constructively alters the terms, conditions, or privileges of employment without causing tangible job detriment.¹⁰⁰ The major legal distinction between hostile work environment and *quid pro quo* harassment is that tangible job detriment is unnecessary for a hostile work environment harassment claim.¹⁰¹ The major practical distinction between the two types of claims is that hostile work environment harassment must be severe or pervasive¹⁰² to be actionable.¹⁰³ Though the Supreme Court has

⁹⁷ Although the distinction between harassing and merely discriminatory comments may be narrow, the comments Susan Jones faced appear to be clearly of the discriminatory type.

⁹⁸ See Bernstein, *supra* note 54, at 448 (noting Supreme Court's general inability to describe hostile work environment harassment adequately).

⁹⁹ Whether unwelcomeness should be required in hostile work environment cases is debatable. See Schultz, *supra* note 11, at 1729-32 (suggesting problems with unwelcomeness requirement). Indeed, some have suggested abolishing unwelcomeness as an element of the sexual harassment cause of action. See, e.g., Hébert, *Sexual Harassment*, *supra* note 3, at 588 ("The abandonment of the unwelcomeness requirement for sexual harassment claims would serve to bring the law of sexual harassment into line with the law applicable to other employment discrimination claims under Title VII."); Willborn, *supra* note 10, at 697-98 (stating that unwelcomeness is not element of harassment cause of action under discrimination-centered model). For a good discussion comparing unwelcomeness requirement in the racial and sexual harassment areas, see L. Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 849-53 (1997) [hereinafter Hébert, *Analogizing Race and Sex*].

¹⁰⁰ The elements of a hostile work environment are described more fully in other legal commentary. See, e.g., Epstein, *supra* note 72, at 411-15 (1996); see also Schultz, *supra* note 11, at 1714 ("The essence of a hostile work environment claim is that actions for which the defendant is responsible have made the work environment more difficult for women (or men) because of their sex."); White, *Nothing Special*, *supra* note 2, at 726-27 ("In Meritor, the Court set forth a standard for determining when a hostile work environment will be present: Unwelcome sexual conduct that is sufficiently severe or pervasive so as to constitute a hostile or abusive working environment will support a Title VII claim.").

¹⁰¹ See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 751-52 (1998) (noting that distinction between *quid pro quo* and hostile work environment harassment is concrete versus constructive alteration of terms, conditions, or privileges of employment).

¹⁰² The offending conduct need not be both severe and pervasive. See *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1413 (10th Cir. 1997) ("The Meritor test is a disjunctive one, requiring that the harassing conduct be sufficiently pervasive or sufficiently severe to

ruled that an employee's terms of employment are not constructively altered absent severe or pervasive harassment, the Court has not indicated what conduct might be minimally sufficient to meet the severe or pervasive standard,¹⁰⁴ even declining to determine whether a single instance of harassment is categorically insufficient to support a hostile work environment claim.¹⁰⁵ The Court has explained only that, in addition to being severe or pervasive, actionable hostile work environment harassment must create an environment that was subjectively problematic for the plaintiff and would be objectively problematic for a reasonable person.¹⁰⁶

alter the terms, conditions, or privileges of Plaintiff's employment.”).

¹⁰³ *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 67 (1986); see also *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999) (describing *Ellerth*, *Faragher*, and *Oncale* as “hold[ing] that sexual harassment which does not culminate in an adverse employment decision must, to create a hostile work environment, be severe or pervasive”); Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649 (1997).

Professor Epstein argues:

[A] plaintiff must show that the harassment is either severe or pervasive. The required showing of severity varies inversely with the pervasiveness of the abuse; because verbal harassment is inherently less severe than its physical counterpart, it will be actionable only in extreme situations when it saturates a target's work environment.

Id. at 663.

¹⁰⁴ The Court has not set a clear standard; rather it has set a fuzzy standard with clarity. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (“We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment[.]”); *Vinson*, 477 U.S. at 67 (noting that sexual harassment must be severe or pervasive to be actionable).

¹⁰⁵ See *Ellerth*, 524 U.S. at 754 (“[W]e accept the District Court's finding that the alleged conduct was severe or pervasive. . . . The case before us involves numerous alleged threats, and we express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.”); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993) (noting imprecise nature of determining what is sufficiently severe or pervasive to constitute sexual harassment); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1109 (9th Cir. 1998) (recognizing that in hostile work environment cases, context matters and that incidents must be interpreted in context of workplace).

¹⁰⁶ *Faragher*, 524 U.S. at 787; *Harris*, 510 U.S. at 21-22; *Penry v. Federal Home Loan Bank*, 155 F.3d 1257, 1261 (10th Cir. 1998) (noting that hostile work environment must be objectively and subjectively hostile); *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408 (10th Cir. 1997) (indicating that workplace must be objectively and subjectively hostile). In the hostile work environment context, courts appear to want to make certain that working conditions are quite bad before an employer is held liable. See, e.g., *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997) (overturning jury verdict because court was not sufficiently offended by comments to find objectively hostile work environment).

A work environment need not literally be "hostile" to support a hostile work environment claim. As EEOC Guidelines note, hostile work environment harassment includes conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or create[s] an intimidating, hostile, or offensive working environment."¹⁰⁷ Thus, a hostile work environment can be viewed as simply one in which an employee has an unreasonably more difficult time doing her job because of her gender.¹⁰⁸ Of course, this does not require an employee to claim that her work became substandard as a result of the harassment.¹⁰⁹ While an employee's work might be more difficult to do because of harassment or workplace atmosphere, it may clearly remain of good quality.¹¹⁰

The harm of a hostile work environment is not merely the impact that the harassment may have on the employee's work, it is also in the toll that such harassment can take on the employee's psyche.¹¹¹ Both physical stress and mental distress often accompany hostile work environment harassment. Indeed, until *Harris v. Forklift Systems, Inc.*,¹¹² some courts believed that severe emotional distress was required before a hostile work environment claim was cognizable.¹¹³ Fortunately, the *Harris* Court held that psychological

¹⁰⁷ *Vinson*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1999)).

¹⁰⁸ This is one way to prove that a hostile work environment exists. See *Harris*, 510 U.S. at 23 (noting that proving harassment interfered with employee's work performance is method of proving that hostile work environment exists); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 (8th Cir. 1994) (suggesting that key issue in hostile work environment case is whether employee suffered disadvantageous terms of employment because of sex); *Janopoulos v. Harvey L. Walner & Assocs.*, 866 F. Supp. 1086, 1091 (N.D. Ill. 1994) ("In order to constitute sexual harassment, a plaintiff's work environment must unreasonably interfere with her work performance or be intimidating, hostile or offensive.")

¹⁰⁹ See *Smith*, 129 F.3d at 1413 (ruling that "plaintiff is not required to prove that her tangible productivity or work performance declined or that her ability to do her job was impaired by [harassment]").

¹¹⁰ Complaining that one's work conditions are inferior does not necessarily indicate that one's work was substandard. In *Faragher*, *Ellerth*, and *Vinson*, the plaintiffs' workplace atmospheres appeared to be hostile, though each appears to have been a competent employee. See *Faragher*, 524 U.S. at 780 (noting that Faragher had worked at her job for five years); *Ellerth*, 524 U.S. at 748 (noting that Ellerth had received promotion prior to quitting due to harassment); *Vinson*, 477 U.S. at 59-60 (indicating that Vinson was repeatedly promoted on merit alone).

¹¹¹ Bernstein, *supra* note 54, at 462; Epstein, *supra* note 72, at 405.

¹¹² 510 U.S. 17 (1993).

¹¹³ *Id.* at 20 (noting that Supreme Court granted certiorari to resolve split among circuits regarding whether serious psychological harm is required to state hostile work environment

distress is merely one factor to consider in determining if an employee has been subjected to a hostile work environment.¹¹⁴

Hostile work environment harassment and *quid pro quo* harassment have traditionally described different workplace problems.¹¹⁵ *Quid pro quo* harassment has traditionally focused on the explicit trading of sex for the avoidance of job detriment, while hostile work environment harassment has traditionally focused on an employee's reaction to environmental harassment in the workplace. This traditional distinction is illustrated in *Meritor Savings Bank v. Vinson*,¹¹⁶ where the Supreme Court first recognized the viability of a hostile work environment claim. In *Vinson*, the Court recounted plaintiff Mechelle Vinson's testimony that her supervisor, Sidney Taylor, made sexual advances toward her, fondled her, and raped her on several occasions.¹¹⁷ Though Vinson testified that she had, after initially refusing Taylor's advances, agreed to have sexual relations with him, she indicated that she did so out of fear of losing her job.¹¹⁸ Taylor denied that he made any inappropriate comments, sexual advances, or engaged in any sexual activity with Vinson.¹¹⁹ The conduct alleged in *Vinson* did not constitute *quid pro quo* harassment because, according to the Court, no concrete terms or conditions of employment were conditioned on Vinson's acquiescence to sexual activity and no economic harm in the form of reduced job benefits flowed from the putative harassment.¹²⁰

claim).

¹¹⁴ *Harris*, 510 U.S. at 23 ("The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.").

¹¹⁵ *But see* Franke, *supra* note 54, at 691 (suggesting that hostile work environment harassment in toto stems from disparate treatment discrimination); White, *Nothing Special*, *supra* note 2, at 729 (suggesting that disparate treatment analysis should generally guide analysis of all sexual harassment claims).

¹¹⁶ 477 U.S. 57 (1986).

¹¹⁷ *Id.* at 60.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 61.

¹²⁰ *Vinson* apparently received all promotions to which she was entitled. *See id.* at 59-60 (documenting Vinson's promotion pattern).

Although the Court was uncertain whether sexual advances occurred and whether they were unwelcome even if they did occur,¹²¹ it determined that Vinson's hostile work environment claim was viable since the conduct Vinson charged appeared to be sufficiently severe or pervasive to constructively alter the terms or conditions of Vinson's employment, if proven.¹²² Mechelle Vinson's working conditions may have included demands for sex, explicit sexual advances, and more subtle signals suggesting that part of her function was to be sexually available to her supervisor. Although her terms of employment may not have been explicitly altered, they may have been discriminatorily provided because Vinson had to endure such working conditions because she was a woman.

The lesson of *Vinson* seemed relatively simple. Repeatedly requesting sexual favors from an employee without more could constitute hostile work environment harassment because of the effect it could have on the employee's working conditions; repeatedly demanding sexual favors from a subordinate and linking concrete job benefits to those favors could constitute *quid pro quo* harassment precisely because of the linkage of sex to explicit terms of employment.¹²³

Despite the *Vinson* Court's lesson, the *Ellerth* Court distinguished *quid pro quo* and hostile work environment harassment based on whether the conduct charged caused actual job detriment. As a result, hostile work environment harassment can be divided into two types: pre-*quid pro quo* and atmospheric. I call one type pre-*quid pro quo* harassment because it is functionally equivalent to *quid pro quo* harassment and is exemplified by

¹²¹ According to Vinson, Taylor stopped harassing Vinson once she began dating someone else. *Id.* at 60.

¹²² See *id.* at 67 (noting that Vinson's allegations were "plainly sufficient to state a claim for 'hostile environment' sexual harassment"). Of course, if the facts in *Vinson* were changed slightly, the plaintiff could have demonstrated *quid pro quo* harassment. For example, had Taylor fired Vinson in response to a refusal to engage in sexual relations with him, as Vinson feared, the case would have been a *quid pro quo* harassment case.

¹²³ Note that sexual harassment need not be sexualized. See *supra* Part IV.A. Indeed, some commentators suggest that sexualizing the hostile work environment is problematic. See Schultz, *supra* note 11, at 1710 (suggesting that sexualization of hostile work environment obscures "some of the most pervasive forms of gender hostility experienced on a day-to-day basis by many women (and men) in the workplace").

unfulfilled threats to an employee's terms of employment.¹²⁴ I call the other type atmospheric harassment because it is exemplified by a working environment that is sufficiently ingrained with sexual advances, sex-based discrimination, or manifestations of gender inequality or hostility to effectively alter the conditions of the employee's employment because of sex.¹²⁵

a. *Pre-Quid Pro Quo Harassment.* Pre-*quid pro quo* harassment is identical to *quid pro quo* sexual harassment, except that pre-*quid pro quo* harassment does not yield actual job detriment.¹²⁶ Unfulfilled gender-motivated threats to concrete terms of employment, at most, constitute pre-*quid pro quo* hostile work environment harassment.¹²⁷ For example, a supervisor who tells a subordinate, "Sleep with me or I will make sure you never get another promotion," but who does not act on the threat, only engages in pre-*quid pro quo* harassment.¹²⁸ This clarifies the relationship between *quid pro quo* and hostile work environment harassment. If *quid pro quo* harassment encompasses the conditioning of concrete terms of employment on sexual activity, as

¹²⁴ See, e.g., *Burlington Indus. v. Ellerth*, 524 U.S. 742, 747-48 (1998) (finding that Ellerth received demands that "could be construed as threats to deny her tangible job benefits").

¹²⁵ See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 782 (1998) (noting that Faragher's work environment included demeaning comments and unwanted touching); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991) (describing extensive harassment, including repeated anonymous postings of nude calendars in workplace).

¹²⁶ See *Ellerth*, 524 U.S. at 751. The Court noted:

Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility.

Id.

¹²⁷ Interestingly, the trial court in *Ellerth* indicated that there was a *quid pro quo* component to Ellerth's claim. *Burlington Indus. v. Ellerth*, 912 F. Supp. 1101, 1121 (N.D. Ill. 1996). The United States Court of Appeals for the Seventh Circuit was split on whether Ellerth had proven a *quid pro quo* claim. *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 494 (7th Cir. 1997).

¹²⁸ A similar threat was made in *Faragher*. See *Faragher*, 524 U.S. at 780 ("Date me or clean the toilets for a year."). The impact of the threat on the plaintiff's employment was unclear.

some courts have suggested it should,¹²⁹ the above threat would support a *quid pro quo* claim.¹³⁰ That such a threat, if unfulfilled, is only sufficient to support a hostile work environment claim cements the notion that the concreteness of the harm visited upon an employee is the sole distinction between *quid pro quo* and hostile work environment harassment.

The impact of the "severe or pervasive" requirement on pre-*quid pro quo* claims further supports this point. Severity or pervasiveness is required to ensure that the employee's terms of employment have sufficiently changed when no actual job detriment has occurred. The "severe or pervasive" requirement thus acts as a proxy for actual job detriment in the pre-*quid pro quo* harassment context. However, the severity or pervasiveness of the subject threat may not have any impact on whether a credible threat convinces the employee that the terms of her employment have changed. Indeed, pervasive threats that are not fulfilled may, over time, appear to the employee to be less likely to be fulfilled, and may become less credible.

When credible threats are made in the pre-*quid pro quo* context, little reason exists to question whether the terms of employment have actually changed.¹³¹ The terms of employment change, at least in an employee's mind, when one's supervisor, who may be

¹²⁹ See, e.g., *Nichols v. Frank*, 42 F.3d 503, 512-13 (9th Cir. 1994) (noting that implicit suggestion that job benefits were based on sexual activity constitutes *quid pro quo* harassment); *Karibian v. Columbia Univ.*, 14 F.3d 773, 778 (2d Cir. 1994) (stating that employee who acquiesces to unwelcome sexual advances may state *quid pro quo* claim when "the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances"); see also *Jansen*, 123 F.3d at 499 (Flaum, J., concurring) (noting that "a clear and serious *quid pro quo* threat alters the 'terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled").

¹³⁰ Whether credible or not, the threat also might be part of a general atmospheric hostile work environment claim. In *Oncale and Faragher*, threats of this sort were part of a hostile work environment. *Faragher*, 524 U.S. at 780; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998).

¹³¹ Of course, any inappropriate request from a supervisor may appear to carry an implied threat. See Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, With Particular Application To Sexual Harassment*, 147 U. PA. L. REV. 1069, 1081 (1999) ("In the case of solicitation by a supervisor, the obvious explanation for why the 'offer' is resented is that it often carries with it an implied threat to fire or otherwise discriminate against the woman if she refuses. The resentment may be a product of the threat rather than of the solicitation per se.").

empowered to change the terms of employment, says that the terms have changed. If a supervisor credibly asserts that the terms of employment have changed, that no actual job detriment has occurred does not mean that the terms have not changed;¹³² it means that the supervisor has not acted to effectuate the changed terms. Simply, a term of employment can be altered through harassment that may be considered neither severe nor pervasive in a colloquial sense.¹³³

The concerns attending unfulfilled threats to employment are akin to those accompanying *quid pro quo* harassment. Consider those situations in which a supervisor does not have the opportunity or need to fulfill a threat (i.e., when an employee quits or acquiesces to the advances).¹³⁴ In those cases, the harasser may get what he wants without acting on the threat. If the employee acquiesces, the

¹³² It cannot be the case that the terms, conditions or privileges of employment do not change until the supervisor acts on the threats. Assume that a supervisor offers jobs to two secretarial applicants, one male and one female with annual salaries of \$30,000 and \$20,000, respectively, for no reason other than gender. If both applicants accept the offers, the terms of the female secretary's offer will be discriminatory even before she receives her first paycheck. While a court might limit some portion of her damages to salary accrued, surely that court would not suggest that the terms of the female secretary's agreement might not be discriminatory because her boss might pay her a \$30,000 salary. To further illustrate, consider a hypothetical university where men are required to produce four articles before being tenured while women are required to produce five articles before being tenured. At that university, women are being discriminated against even before a specific job detriment visits a particular plaintiff. Although damages may be difficult to calculate, a female employee who produces five articles and is granted tenure is still a victim of sex discrimination. Similarly, in the context of *Ellerth*, little suggests that the terms of Ellerth's employment were not actually changed just because Slowik might not have successfully halted Ellerth's promotions. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 748 (1998) (noting that Slowik raised concerns about Ellerth possibly in attempt to halt her promotion).

¹³³ For example, the threat that Faragher needed to date her supervisor or clean the toilets for a year might be deemed neither severe nor pervasive. *Faragher*, 524 U.S. at 780. The severity is only apparent if the threat is fulfilled. In that case, however, the harassment is *quid pro quo* harassment. Some might answer that being forced to prove severity or pervasiveness is likely not a problem when a supervisor's threat is credible. Not only is this argument not at all clear, it is beside the point. After Title VII's enactment, a woman should not be forced to deal with threats to her employment based on her willingness to engage in sexual activity, let alone be forced to gauge which threats are severe or pervasive enough to be actionable.

¹³⁴ Mechelle Vinson may have acquiesced to what she believed to be implicit threats; Kimberly Ellerth quit. Both claimed harm, though neither of their supervisors needed to fulfill the threats to their employment. See *supra* notes 85-89, 114-120 and accompanying text (outlining factual scenarios of these two cases).

harasser engages in desired sexual activity;¹³⁵ if the employee quits, the harasser need not interact with the sexually unavailable subordinate. In either case, an employee's terms of employment have been altered because her supervisor provided a discriminatory term. The supervisor's dominion and control over the employee is precisely the concern accompanying *quid pro quo* harassment,¹³⁶ where the severity or pervasiveness of the conduct is not particularly important. This concern is particularly salient when the harassment is severe or pervasive enough to influence that employee into acquiescing or quitting, but not severe or pervasive enough to change the terms or conditions of employment according to a court or jury.¹³⁷ Some have noted that whether the employee submits to the harassment or quits ultimately depends on economic factors that may be unrelated to the severity or pervasiveness of the harassment.¹³⁸

The Court has determined that pre-*quid pro quo* harassment is hostile work environment harassment, even though it looks like *quid pro quo* harassment. This determination makes clear that the old ways of thinking of *quid pro quo* and hostile work environment harassment may no longer be useful.¹³⁹ Rather than differentiating

¹³⁵ Giving a harasser any leeway to harass in this situation is surely unfair. Cf. *Karibian v. Columbia Univ.*, 14 F.3d 773, 773 (2d Cir. 1994) ("Under the district court's rationale, only the employee who successfully resisted the threat of sexual blackmail could state a *quid pro quo* claim. We do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome sexual encounters. Such a rule would only encourage harassers to increase their persistence.").

¹³⁶ The fear or discomfort that accompanies the threat is a concern. See *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 499-500 (7th Cir. 1997) (Flaum, J., concurring) ("A supervisor's unambiguous communication that adverse job action is imminent if sexual favors are not forthcoming causes the employee real emotional strife.").

¹³⁷ Cf. *Breeding v. Arthur Gallagher & Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999) ("We conclude that the conditions of which Ms. Breeding complains, even if they make out a basis for a sexual harassment hostile environment claim, do not amount to sufficient evidence to support a finding of constructive discharge.").

¹³⁸ See, e.g., *Nichols v. Frank*, 42 F.3d 503, 510 (9th Cir. 1994) (noting that even when facing harassment "[f]or economic reasons, most workers cannot simply abandon their employment—new jobs are hard to find").

¹³⁹ See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 752-54 (1998) (suggesting that old distinctions between *quid pro quo* and hostile work environment harassment are not as stark as has been suggested); see also *White, Nothing Special*, *supra* note 2, at 730 (suggesting that distinction between *quid pro quo* and hostile work environment should be dropped, with focus being on whether harassment has resulted in tangible job detriment).

quid pro quo and hostile work environment discrimination based on the style of the supervisor's conduct, the Court focuses solely on the effect the conduct has on the employee's job. This focus suggests that *quid pro quo* and hostile work environment harassment are essentially the same cause of action with slight variations, rather than fundamentally different causes of action.

b. *Atmospheric Harassment.* In contrast to *quid pro quo* and pre-*quid pro quo* harassment, which often focus on specific incidents of harassment, atmospheric harassment focuses on the employee's overall working environment. An atmospheric hostile work environment claim may lie when a particular employee or group of employees is unwelcome,¹⁴⁰ welcome only under certain discriminatory conditions, treated as irrelevant or treated as sexual objects, or when their working environment is such that the employees labor under qualitatively different terms of employment because of gender.¹⁴¹ As the EEOC noted, and the Supreme Court echoed, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."¹⁴² When such intimidation, ridicule, or insult occurs because of sex and results in discriminatory terms of employment, the Title VII prohibition against sex discrimination is implicated.

Atmospheric harassment can appear quite different from pre-*quid pro quo* harassment because it can easily stem from gender hostility rather than sexual attraction,¹⁴³ and may not involve

¹⁴⁰ See Hébert, *Sexual Harassment*, *supra* note 3, at 569 (noting that harassment can be concrete method of indicating that women are not welcome in particular workplace).

¹⁴¹ See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (noting that discriminatory atmosphere can alter terms, conditions or privileges of employment).

¹⁴² *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (citing EEOC Guidelines); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (noting that Title VII does not tolerate workplaces that are "permeated with 'discriminatory intimidation, ridicule, and insult'").

¹⁴³ Of course, the desire to treat women as sexual beings may stem from the same desire to drive them out of the workplace. Sometimes it is unclear which desire motivates specific harassing conduct. Fremling and Posner note: "When men want to drive women out of the workplace, they sometimes do so by flaunting symbols of male sexuality, as by using obscene language, exhibiting their genitalia, and posting pornographic photographs." Fremling & Posner, *supra* note 131, at 1085. Of course, sexual harassment may be designed generally to make women feel uncomfortable and incompetent in certain workplaces. See Schultz, *supra* note 11, at 1687 (noting that many forms of sexual harassment are meant "to undermine . . . female colleagues' perceived (or sometimes even actual) competence to do the work").

sexual advances.¹⁴⁴ Gender-motivated harassment from any source, including co-workers, subordinates, or customers, may support an atmospheric hostile work environment harassment claim.¹⁴⁵ Of course, the harassment must be severe or pervasive to be actionable. In the atmospheric harassment context, the severe or pervasive requirement makes sense because the severity or pervasiveness of the harassment is directly related to how different an employee's working conditions are from her male co-workers. The difference in working conditions constitutes the constructive alteration of the terms of employment.

That a workplace is rife with sexual commentary, sexual innuendo, or sexual advances, however, does not render it sexually hostile for sexual harassment purposes.¹⁴⁶ Rather, a hostile work environment is one in which the workplace atmosphere amounts to a discriminatory term of employment for a particular employee or group of employees because of their sex.¹⁴⁷ Though a workplace atmosphere may be common to all employees (or may not be if a particular employee is targeted for harassment), the sexually hostile workplace imposes more difficult working conditions on the complaining employee than on other employees.¹⁴⁸ Even if men and women co-exist in a sexually charged workplace, the nature of the

¹⁴⁴ At times, of course, it does. See generally *Vinson*, 477 U.S. at 57; *Bundy v. Jackson*, 641 F.2d 934, 939-40 (D.C. Cir. 1981) (noting that plaintiff was propositioned by several co-workers and supervisors).

¹⁴⁵ See 29 C.F.R. § 1604.11(e) (1999) (noting that employer may be deemed responsible for harassing acts of non-employees).

¹⁴⁶ Some commentators seem to disagree. See Kimball E. Gilmer & Jeffrey M. Anderson, *Zero Tolerance For God?: Religious Expression in the Workplace After Ellerth and Faragher*, 42 HOW. L.J. 327 (1999) (arguing generally that *Ellerth* and *Faragher* express preference for zero tolerance).

¹⁴⁷ See MACKINNON, WORKING WOMEN, *supra* note 39, at 209 (noting that sexual harassment can become condition of work because it effectively places additional burdens on women in workplace).

¹⁴⁸ The workplace described in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), was rife with atmospheric harassment and exemplified a hostile workplace. In *Robinson*, plaintiff Lois Robinson and her female co-workers were constantly exposed to language and conduct that indicated that a woman's primary function in life was to be a sexual partner and that a woman's primary function at the job site was to provide entertainment for male workers. Though most of the conduct amounted to comments and non-physical conduct, such as the posting of pictures, the actions were designed to keep the workplace a boy's club. See *id.* at 1493 (noting that one male employee referred to subject workplace as a boy's club).

harassment may affect employees of one gender differently than employees of the other gender.¹⁴⁹ Indeed, employees of the same gender may feel differently about the hostility of a particular workplace.¹⁵⁰

In *Faragher v. City of Boca Raton*,¹⁵¹ the Supreme Court described a workplace where comments and physical conduct were sufficiently offensive to yield a hostile work environment.¹⁵² In *Faragher*, the offensive conduct consisted of "repeatedly subjecting . . . female lifeguards to uninvited and offensive touching, . . . making lewd remarks, and . . . speaking of women in offensive terms."¹⁵³ On one occasion, plaintiff Beth Ann Faragher was tackled by one of her supervisors and told that "but for a physical characteristic [the supervisor] found unattractive, he would readily have had sexual relations with her."¹⁵⁴ In addition, individual supervisors often made reference to wanting to have sex with particular subordinate female lifeguards, and generally discussed women's bodies around female lifeguards.¹⁵⁵ The trial court determined that the conduct was not merely annoying; it severely

¹⁴⁹ See Hébert, *Sexual Harassment*, *supra* note 3, at 574-75 (noting that sexualized workplace common to both sexes may harm women more than men).

¹⁵⁰ Different people may experience discrimination differently. The same conduct can be welcome by some employees, but unwelcome to other employees of the same sex. See, e.g., *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 460 n.4 (7th Cir. 1990) (noting that conduct that one female employee found flattering another female employee found harassing).

¹⁵¹ 524 U.S. 775 (1998).

¹⁵² Egregious, but less severe, conduct can be actionable. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 747-48 (1998) (describing conduct consisting of inappropriate sexual comments and suggestive caressing); *Harris v. Forklift Sys.*, 510 U.S. 17, 19 (1993) (describing, as potentially actionable, conduct consisting largely of derogatory comments and incidents, including company president's request that female employees retrieve coins from his pants pocket).

¹⁵³ *Ellerth*, 524 U.S. at 780.

¹⁵⁴ *Id.* at 782; see also *Abieta v. Transamerica Mailings, Inc.*, 159 F.3d 246, 248-49 (6th Cir. 1998) (describing hostile work environment where comments consisted generally of desire to have sex with other women).

¹⁵⁵ Many cases involving similar conduct exist. See, e.g., *Sharp v. City of Houston*, 164 F.3d 923, 927 (5th Cir. 1999) (detailing conduct that included talk from employee's supervisors about employee's body, invitations to have sex, and other talk of sexual nature, but not including touchings); *Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d 1257, 1260-61 (10th Cir. 1998) (relating that supervisor made comments about female body parts in general and engaged in relatively minor touching of plaintiff); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826-27 (6th Cir. 1997) (noting comments made were disrespectful of women in general and indicated juvenile obsession with female body parts).

affected plaintiff's working conditions and work.¹⁵⁶ Because the conduct was undertaken because of sex and resulted in discriminatory work conditions, the Supreme Court ratified the trial court's conclusion that the plaintiff had pled a hostile work environment.¹⁵⁷

As should be clear from *Faragher*, workplace atmosphere is shaped by all workplace conduct. Thus, atmospheric harassment need not be directed invariably at a particular employee to support that employee's atmospheric harassment claim.¹⁵⁸ In fact, one of the first cases dealing with a racial hostile work environment (a precursor to sexual hostile work environment) was brought by an employee who was aggrieved by conduct directed at customers of her race rather than at her.¹⁵⁹ While the term "harassment" may seem to require the intent to harass or at least an intent to affect a particular employee, the term may not always have that connotation in the context of hostile work environment discrimination. When conduct creates a hostile work environment, the motivation of those engaging in the harassing conduct may be irrelevant.¹⁶⁰ Rather

¹⁵⁶ See *Ellerth*, 524 U.S. at 783 (finding conduct "alter[ed] the conditions of Faragher's employment and constitut[ed] an abusive working environment").

¹⁵⁷ See *id.* at 786 (ruling in Faragher's favor).

¹⁵⁸ See *Black*, 104 F.3d at 826 (mentioning that most comments, though generally offensive, were not directed at plaintiff); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415-16 (10th Cir. 1987) (noting that harassment not directed at plaintiff may be used to prove hostile work environment claim); *Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981) (noting that harassment need not be directed at plaintiff to be cognizable); *Rogers v. EEOC*, 454 F.2d 234, 238-39 (5th Cir. 1971) (noting generally that conduct need not be aimed specifically at employee to result in discriminatory hostile work environment with respect to employee); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (detailing activity not exclusively aimed at plaintiff). That many comments were not directed at plaintiff may affect the likelihood that an environment will be found to be objectively hostile. See *Black*, 104 F.3d at 826 ("[W]e note that in this case most of the comments were not directed at plaintiff; this fact contributes to our conclusion that the conduct here was not severe enough to create an objectively hostile environment.").

¹⁵⁹ *Rogers*, 454 F.2d at 234. While racial and sexual hostile work environment harassment can be analogized, comparing them can also be tricky. See *Faragher*, 524 U.S. at 787 n.1 ("Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment."); MACKINNON, *WORKING WOMEN*, *supra* note 39, at 127-41 (comparing approaches to sex discrimination and race discrimination); see also Hébert, *Analogizing Race and Sex*, *supra* note 99 (suggesting that, due to differences between racial and sexual harassment, analogizing them can lead to improper characterization of both).

¹⁶⁰ Some commentators suggest that not only should intent be relevant, but comments

than focusing on a co-worker's intent, the issue is what effect the harassment had on the complaining employee's working conditions.¹⁶¹ If the result of the harassment is the discriminatory provision of terms of an employee's employment because of sex, an atmospheric harassment claim may lie.¹⁶²

A collection of small and large indignities may yield an environment in which the complaining employee may not thrive because of gender discrimination.¹⁶³ That comments combined with fairly minor physical contact¹⁶⁴ or lewd and offensive remarks alone¹⁶⁵ may be sufficient to create an actionable hostile work

should not be actionable unless directed at the plaintiff. *See, e.g., Eugene Volokh, What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997) (arguing that only targeted speech should be actionable as harassment).

¹⁶¹ *See Maatman, supra* note 11, at 74-75 ("A harasser's objections that no harm was meant are irrelevant in determining whether a hostile environment has been created: the *Meritor* and *Harris* standards focus nearly exclusively on the effect of the harasser's acts, and not on their intended purpose or motivation.").

¹⁶² *See Bundy*, 641 F.2d at 934; *Rogers*, 454 F.2d at 234. The constructive alteration occurs if the employee endures conditions that employees of the opposite gender do not face or the employee endures conditions she would not have to face were she a man.

¹⁶³ *See Abieta v. Transamerica Mailings, Inc.*, 159 F.3d 246, 252 (6th Cir. 1998) (noting that even relatively mild statements can create hostile work environment if "commonplace, ongoing, and continual"); *Bundy*, 641 F.2d at 934; *Rogers*, 454 F.2d at 234; *Robinson*, 760 F. Supp. at 1486; J.M. Balkin, *Free Speech and Hostile Environment*, 99 COLUM. L. REV. 2295, 2297 (1999) ("Even if individual acts do not constitute a hostile environment separately, they can be actionable when taken together.").

¹⁶⁴ This reference is not meant to suggest that undesired touching is appropriate; rather it is meant to suggest that some kinds of unwanted physical contact in the workplace are far more offensive than others. *Compare Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 60-61 (1986), and *Faragher*, 524 U.S. at 780, 782, with *Burlington Indus. v. Ellerth*, 524 U.S. 742, 747-48 (1998), and *Harris v. Forklift Sys.*, 510 U.S. 17, 19-20 (1993).

¹⁶⁵ Many reported cases exist where no touching has occurred, but speech and conduct were sexual. *E.g., Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998); *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1417 (10th Cir. 1997) (noting that hostile work environment claim does not require physical conduct or touching); *see also* Cecilee Price-Huish, "Because the Constitution Demands It": *Specific Speech Injunctive Relief for Title VII Hostile Work Environment Claims*, 7 WM. & MARY BILL RTS. J. 193, 194-97 (1998) (suggesting that words alone can easily create hostile work environment). Indeed, same-sex harassment may generally involve commentary rather than physical acts. *See* William E. Foote & Jane Goodman-Delahunty, *Same-Sex Harassment: Implications of the Oncale Decision for Forensic Evaluation of Plaintiffs*, 17 BEHAV. SCI. & L. 123, 130 (1999) ("When same-sex harassment occurs among males, it is most often verbal in nature. Incidents involving put-downs, homosexual epithets, and similar statements occur ten times more often than incidents involving sexual touching or coercion."); *Schultz, supra* note 11, at 1700 (noting Carroll Brodsky's suggestion that sexual harassment can take form of "men teasing other men about sexual potency or interest"). Conversely, same-sex harassment can also involve physical harassment of the most offensive type. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*,

environment has disturbed some commentators.¹⁶⁶ However, that multiple minor indignities can create an actionable hostile work environment is consistent with the notion that atmospheric harassment relates more to overarching workplace conditions than isolated harassing acts.¹⁶⁷ Hostile work environment harassment is more about whether the employee feels disadvantaged each time she enters her workplace than about whether she is harassed episodically or periodically. Consequently, a hostile workplace can be created by incidents that might not be actionable if pled individually.¹⁶⁸

Whether a workplace drips with sexual hostility, sexual commentary, sexual desire, or some combination of all three, the critical inquiry is whether the individual employee's working conditions have been adversely affected. Related to that concern is whether the workplace atmosphere is one in which all employees can thrive, regardless of gender.¹⁶⁹ That Title VII prohibits an

523 U.S. 75 (1997) (recognizing same-sex harassment claim based on sexual harassment by heterosexual men); *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

¹⁶⁶ See Epstein, *supra* note 72, at 400 n.8 (citing articles criticizing harassment law on First Amendment grounds); Volokh, *supra* note 160, at 627 n.2 (noting articles discussing First Amendment concerns with restricting workplace speech even in context of hostile work environment discrimination). Commentators, however, have answered the attacks. See, e.g., Bernstein, *supra* note 54, at 517-19 (noting possible co-existence of respect demanded by sexual harassment law and First Amendment protections); Epstein, *supra* note 72, at 400 ("The implicit holding of the *Bundy* case—that speech alone can create a discriminatory hostile work environment—went unquestioned for many years."); Willborn, *supra* note 10, at 719.

¹⁶⁷ See, e.g., *Bundy*, 641 F.2d at 940 (noting that essence of hostile work environment was propositioning and harassing that was "standard operating procedure" in workplace).

¹⁶⁸ In *Draper*, the court described plaintiff's work environment:

Here, Draper has testified that she was subject to the same sort of harassment by Anelli on a regular basis, and that she constantly felt uncomfortable and upset at work. As in most claims of hostile work environment harassment, the discriminatory acts were not always of a nature that could be identified individually as significant events; instead, the day-to-day harassment was primarily significant, both as a legal and as a practical matter, in its cumulative effect.

Draper, 147 F.3d at 1108; Balkin, *supra* note 163. Hostile work environment harassment can be less about driving women away from the workplace and more about keeping women "in their place" in the workplace. See MACKINNON, *WORKING WOMEN*, *supra* note 39, at 9-23 (noting generally that harassment is used to keep women in lower position in workplace); Franke, *supra* note 54, at 693 ("Sexual harassment is a technology of sexism.").

¹⁶⁹ See Epstein, *supra* note 72, at 405 (noting physical and psychological problems that can

employer from creating or tolerating an environment in which an employee or group of employees cannot be expected to thrive due to their gender is no surprise given Title VII's goal of the elimination of all discriminatory workplace barriers.¹⁷⁰

Atmospheric harassment is not just about an individual employee taking offense at poor treatment in the workplace.¹⁷¹ The hostile work environment must make it more difficult, either physically or emotionally, for the employee to do her job because of her gender.¹⁷² In short, workplace conduct can effectively alter the conditions of an employee's employment even when the employer or supervisor does not explicitly change the terms of employment. Because the employer is generally responsible for the workplace atmosphere, it may be liable when that workplace becomes hostile when the employer knew or should have known about the harassing conduct.¹⁷³

accompany sexual harassment).

¹⁷⁰ See *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982) ("Title VII prohibits employment discrimination on the basis of gender, and seeks to remove arbitrary barriers to sexual equality at the workplace . . ."); Schultz, *supra* note 11, at 1796 ("From the beginning, the central purpose of [Title VII's] . . . prohibition against sex discrimination has been to enable everyone—regardless of their identities as men or women, or their personae as masculine or feminine—to pursue their chosen endeavors on equal, empowering terms.").

¹⁷¹ Of course, actionable sexual harassment does cause offense. See Bernstein, *supra* note 54, at 462 (noting that hostile work environment harassment is about "disturbance of inner equilibrium, a notion inherently connected to emotional turmoil").

¹⁷² This can be a problem even when the complaining employee is a supervisor or manager. See, e.g., Schultz, *supra* note 11, at 1722-23 (describing case in which woman subforeman was harassed out of her job by subordinates who wanted male subforeman). Regardless of the employee involved, atmospheric harassment may lead to lower work performance which may, in turn, lead to the inability to share in tangible job benefits (such as promotion) or to an employee's resignation or termination. See *id.* at 1764 (noting that harassment may lead to poor performance that can seem to legitimize employee's failure to advance). Even though one need not allege that one's actual work production suffered in order to state a claim, atmospheric harassment creates conditions under which an employee may not thrive because of her gender.

¹⁷³ See White, *Nothing Special*, *supra* note 2, at 742 (detailing Supreme Court's standard for employer liability after *Ellerth* and *Faragher*). Given that supervisors act as the employer for workplace discipline, it seems an unusual workplace in which a responsible supervisor did not know that atmospheric sexual harassment was occurring. Of course, when the supervisor helps create the hostile work environment, charging the employer with vicarious knowledge of the hostile work environment may not make sense. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 810 (1998) (declining to determine propriety of court of appeals's refusal to find employer was vicariously knowledgeable about hostile work environment created by supervisors). But see *Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999) (suggesting that where workplace is isolated from headquarters, employer may be liable for hostile work

Unfortunately, our hypothetical plaintiff Susan Jones probably does not have an actionable hostile work environment claim. As noted earlier, it is unlikely that the conduct she was subjected to amounted to unwelcome harassment sufficient to support a sexual harassment claim.¹⁷⁴ This is worrisome given that the harm that Susan Jones suffered was very similar to the harm suffered by plaintiffs pleading actionable hostile work environment claims. Based on the conduct involved, Susan believed that her opportunities would likely be limited by the gender-motivated conduct of those around her. Her choice was similar to that faced by Kimberly Ellerth: acquiesce or quit.¹⁷⁵

Any emotional stress Susan Jones suffered as a result of her treatment would likely be sufficient to sustain a hostile work environment claim were she able to plead such a claim.¹⁷⁶ Because neither actual job detriment nor severe psychological harm is required for hostile work environment liability, Susan's legitimate fear of being denied job benefits would be sufficient to yield an

environment harassment engaged in by supervisors even where commanders at headquarters were unaware of supervisors' harassment). Of course, a supervisor may know that gender-motivated activity is occurring, without recognizing the conduct as harassment. In that case, the inquiry should shift to whether the supervisor should have known that the conduct amounted to harassment.

¹⁷⁴ See *supra* Part III.

¹⁷⁵ Had the conduct involved been harassing, Susan Jones surely would be able to state an actionable hostile work environment claim. For instance, had Susan been told repeatedly that she would not become a partner at PW unless she slept with a partner, she would surely be able to state a hostile work environment claim. Susan would arguably be in precisely the position Ellerth was, believing that she has to quit or become more sexually accessible. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 747-49 (1998). In such an instance, Susan would have suffered the same type, if not amount, of damage as in the hypothetical.

Precisely what kind of conduct is actionable is somewhat unclear. Some student commentators have suggested that the Supreme Court has not demarcated any lines; it is not clear what type of conduct falls short of actionable harassment under Title VII. See, e.g., John Davidson Miller III, Note, *Same-Sex Sexual Harassment Is Actionable Under Title VII of the Civil Rights Act of 1964: Is This the End of Horseplay as We Know It?*, 29 SETON HALL L. REV. 787, 811 (1998) (suggesting difficulty in distinguishing when "ordinary socializing" becomes offensive socializing that creates hostile work environment); Wendy M. Parr, Casenote, *When Does Male-on-Male Horseplay Become Discrimination Because of Sex?: Oncale v. Sundowner Offshore Services, Incorporated*, 25 OHIO N.U. L. REV. 87 (1999) (suggesting *Oncale* decision did not clarify when horseplay stops and hostile work environment begins).

¹⁷⁶ See *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1413 (10th Cir. 1997) (instructing that to state hostile work environment claim "[i]t is sufficient that Plaintiff's testimony reflects that [supervisor's] comments were intolerable, publicly made, and caused humiliation and a loss of self-respect").

actionable claim.¹⁷⁷ Susan's fear was reasonable if the comments from PW's partners and employees reflected the reality of PW's partnership selection process.¹⁷⁸ Her damages would simply depend on the stress she faced.¹⁷⁹

C. REALIGNING SEXUAL HARASSMENT

The Supreme Court's recent sexual harassment rulings have realigned the sexual harassment causes of action. The Court's focus on the necessity of actual job detriment to support *quid pro quo* harassment has produced three varieties of harassment claims, *quid pro quo*, pre-*quid pro quo*, and hostile work environment. Pre-*quid pro quo* harassment and atmospheric hostile work environment combine to define hostile work environment harassment as actionable sexual harassment that does not yield actual job detriment. This realignment helps focus the Court's position regarding *quid pro quo* and hostile work environment harassment.

Before the realignment, *quid pro quo* and hostile work environment harassment were fundamentally different causes of action, though some conduct could support either.¹⁸⁰ *Quid pro quo* harassment focused on the concrete terms of an employee's relationship with the employer; hostile work environment focused on an employee's relationship to the workplace. That an employer or supervisor had determined that concrete job terms would depend on its employee's willingness to have sex was the essence of a *quid pro quo* claim. Conversely, that supervisors, co-workers, and others continually pestered an employee for sex, treated her like a sexual

¹⁷⁷ Severe emotional stress is not required. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (stating that "conduct need not severely affect [the employee's] psychological well-being"); *Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d 1257, 1261 (10th Cir. 1998) ("While the plaintiff must make a showing that the environment was both objectively and subjectively hostile, she need not demonstrate psychological harm, nor is she required to show that her work suffered as a result of the harassment.").

¹⁷⁸ Prior PW employment decisions might be sufficient to create the stress that supports a hostile work environment claim (i.e., the fear that non-conformity might lead to a negative employment decision).

¹⁷⁹ See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 253 (1994) (holding that Title VII plaintiff may recover damages for emotional harm).

¹⁸⁰ See *Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986) (allowing sexual advances to support hostile work environment claim).

object, or simply made it more difficult for her to do her job because she was a woman was the essence of a hostile work environment claim. Today, because *quid pro quo* and hostile work environment harassment are distinguished merely by the existence or non-existence of actual job detriment, they are essentially the same cause of action with a marginally meaningful distinction.¹⁸¹ As we see in the next Part, that redefinition has serious implications for the future of sexual harassment law.

V. DISPARATE TREATMENT AND SEXUAL HARASSMENT

A. REALIGNING DISPARATE TREATMENT AND SEXUAL HARASSMENT

Although both disparate treatment discrimination and sexual harassment constitute sex discrimination, they have been treated as distinct forms of sex discrimination.¹⁸² Disparate treatment discrimination generally describes an employment decision made because of an employee's sex;¹⁸³ sexual harassment generally describes unwelcome gender-motivated harassment that culminates in the discriminatory provision of terms of employment.¹⁸⁴ The Supreme Court's recent elimination of the doctrinal distinction between *quid pro quo* and hostile work environment harassment coupled with its expansion of the type of conduct that can support a sexual harassment claim has eliminated much of the distinction between disparate treatment discrimination and *quid pro quo* sexual harassment.¹⁸⁵ Sexual harassment now includes any gender-

¹⁸¹ See *Gilmer & Anderson*, *supra* note 146, at 338 (suggesting that because the Court has eliminated distinction between *quid pro quo* and hostile work environment harassment there may be more sexual harassment lawsuits in future).

¹⁸² See *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151 (8th Cir. 1999) (differentiating sex discrimination and sexual harassment); *Holtz v. Marcus Theatres*, 31 F. Supp. 2d 1139 (E.D. Wis. 1999) (treating sexual harassment and sex discrimination claims as requiring different forms of proof). That disparate treatment and sexual harassment are subsumed by Title VII means that some similarity exists between them. This similarity, however, need not mean that they are *very* similar.

¹⁸³ See *supra* Part II.

¹⁸⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

¹⁸⁵ See generally *White, Nothing Special*, *supra* note 2, at 725 (discussing treating disparate treatment and sexual harassment similarly); *Willborn*, *supra* note 10, at 677

motivated harassment that can support an inference of discrimination.¹⁸⁶ Thus, disparate treatment discrimination consists of gender-based conduct, treatment, or decisions resulting in actual job detriment;¹⁸⁷ *quid pro quo* sexual harassment consists of gender-based harassment that results in actual job detriment. *Quid pro quo* sexual harassment is merely a subset of disparate treatment discrimination where the conduct charged constitutes harassment. While some may argue that *quid pro quo* harassment has always been a subset of disparate treatment discrimination, there was in fact a real distinction between the type of conduct that supported a sexual harassment claim and the type of conduct that supported a disparate treatment claim. At the very least, the distinction was sufficient to substantially delay the recognition of required sexual harassment claims as unquestionably actionable, unlike disparate treatment discrimination claims.¹⁸⁸ Rather than being considered sex discrimination, sexual harassment was viewed by some courts as merely harassment based on physical attraction.¹⁸⁹

The assimilation of *quid pro quo* harassment into disparate treatment discrimination seemingly leaves the hostile work environment sexual harassment claim as a misfit piece of the Title

(suggesting doctrinal links between sexual harassment and sex discrimination).

¹⁸⁶ Any gender-motivated conduct that can be viewed as harassment may be actionable as sexual harassment. See *Oncale*, 523 U.S. at 80 (noting that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex"); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1008 (7th Cir. 1999) ("The single question that we need to answer after *Oncale* is a straightforward one: Can one reasonably infer from the evidence before us that the harassment Shepherd describes was discrimination 'because of his sex?').

¹⁸⁷ Some courts require tangible job detriment for a disparate treatment claim. See, e.g., *Breeding*, 164 F.3d at 1157 ("We conclude that Ms. Breeding has not presented a submissible case of either direct or indirect evidence of either age or sex discrimination against her, because she has not demonstrated that she suffered any adverse employment action."); see also *White*, *De Minimis Discrimination*, *supra* note 13.

¹⁸⁸ See *Franko* *supra* note 54, at 698 ("After a period of unsuccessful litigation in which sexual harassment claims were dismissed . . . , feminist advocates provoked a paradigm shift in the late 1970s and early 1980s in which the sexism in sexual harassment was recognized in the law."); *Schultz*, *supra* note 11, at 1701 ("Women lost some of the first Title VII cases challenging harassment."); Ann C. Juliano, Note, *Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1563 (1992) ("It was thirteen years before a court finally used Title VII to remedy sexual harassment.").

¹⁸⁹ See MACKINNON, *WORKING WOMEN*, *supra* note 39, at 59 (detailing early sexual harassment cases); *Schultz*, *supra* note 11, at 1701 (noting that during Title VII's formative years, some courts did not consider sexual harassment to be sex discrimination).

VII puzzle. It is not. The hostile work environment harassment claim's position actually clarifies the legal theory supporting Title VII. Hostile work environment harassment consists of gender-based harassment that causes a change in the terms of an employee's employment but does not result in actual job detriment. Symmetry would require that there be a disparate treatment analog to hostile work environment sexual harassment, a hostile work environment disparate treatment claim consisting of gender-based conduct, treatment, or decisions that cause a change in the terms of an employee's employment without resulting in actual job detriment. The Susan Jones hypothetical purposely illustrates this point.

In a nutshell, Susan Jones was told by partners and employees at PW that she needed to conform to an antiquated view of a woman in order to become a partner. Upset at her treatment, unwilling to alter her behavior, and fearing that a negative partnership vote would adversely affect her career, Susan Jones left PW to join another accounting firm. The conduct Susan encountered at PW indicated that she was to be held to a different standard than male accountants; her partnership was contingent on gender-influenced criteria not related to her job. The conduct also created working conditions that were more difficult for Susan Jones because of her sex. Not only was she concerned about whether her candidacy would be judged the same way as a male partner candidate's would, she also was told repeatedly that PW valued her as a particular type of woman rather than merely as an accountant. The conduct Susan endured was gender-motivated sex stereotyping similar to the conduct in *Price Waterhouse*,¹⁹⁰ and would support a disparate treatment claim had actual job detriment occurred.

¹⁹⁰ See *supra* notes 30-37 and accompanying text (discussing *Price Waterhouse* case). Had Susan been declined a partnership, her treatment would support a disparate treatment claim if the gender-motivated sexual stereotyping by PW's partners directly informed the decision to decline her partnership. Susan's case could also be treated as a *quid pro quo* sexual harassment case. Her partnership was held because she refused to model herself as a stereotypical woman partner. A *quid pro quo* case requires gender-motivated harassment resulting in a tangible job detriment. Susan suffered a tangible job detriment after declining to change her appearance or behavior. If the PW partners' acknowledged requirement that Susan acquiescence to a gender-based vision of a woman partner to gain a partnership can be fairly considered sexual harassment, her case might state a *quid pro quo* harassment case. See *supra* notes 94-96 and accompanying text.

The remaining issue is whether the offending conduct led to the discriminatory provision of terms of employment because of sex in the same way that sexual harassment results in discrimination in a hostile work environment case. The conduct described in the hypothetical would likely have the same effect that harassment would.¹⁹¹ Susan Jones was told by PW's partners and her co-workers that, in order to become a partner, she needed to change her behavior to conform to the partnership's gender-influenced vision of a woman partner.¹⁹² Even if the statements from her co-workers did not indicate that Susan needed to change her behavior, the statements from PW's partners clearly did. Being told by partners who will vote on one's partnership that behavior modification should occur suggests that the partnership requires modification. Whether the statements indicating that Susan should change her behavior came in the form of friendly advice from those

¹⁹¹ Indeed, the conduct to which Susan was subjected could, in theory, constitute sexual harassment. Since *Price Waterhouse* tells us that sex stereotyping is conduct motivated by sex, the conduct directed at Susan was "sexual" for sexual harassment purposes. The remaining question is whether the conduct was harassing. It may be, as the intent of the conduct was to have Susan alter her behavior for gender-motivated reasons.

The conduct Susan endured was arguably unwelcome. Unwelcomeness is usually defined in the context of sexually offensive conduct or sexual advances, and in such situations can be easy to identify. Conduct is unwelcome or not welcome because plaintiffs wish the conduct would stop or wish it had never occurred. See, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) ("In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."). Being told to change one's appearance and personality is unwelcome, as is being told that women are to be judged by personal characteristics unrelated to accounting. This is particularly true when the comments come from partners who might have the power to control or influence whether employees become partners. Conversely, Susan may welcome the comments if she has no problem conforming to PW's stereotypical vision of a woman partner and views the comments as helpful hints, even while she does not welcome the underlying method of choosing partners. However, if Susan does not want to conform, being told that one will be judged on how well one fits a stereotypical ideal is not welcome. The partners' conduct could be viewed as unwelcome because it is arguably part of the official message from the partnership about the decisionmaking process. For the same reason, the partners' conduct could be harassment—it seeks an involuntary change of behavior. While an argument can be made that the conduct at PW was harassment, it looks much more like non-harassing discriminatory conduct.

¹⁹² This advice is similar to that which the partner at Price Waterhouse gave Hopkins after her partnership vote. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (recalling that Hopkins was told that "in order to improve her chances for partnership . . . [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry'").

who wanted her to become a partner or in the form of threatening commands from those who believed she would resist change, the statements indicated to Susan that she must change in order to advance professionally.¹⁹³ To the extent that she faced the same type of harm, including fear and emotional distress, that a victim of a hostile work environment sexual harassment may face,¹⁹⁴ Susan Jones should be able to recover for that harm.

Susan Jones endured conduct that would be sufficient to support both a disparate treatment and a hostile work environment sexual harassment claim. Any concerns that a hostile work environment disparate treatment claim would inappropriately link disparate treatment conduct to sexual harassment harm is misplaced. As explained above, the Supreme Court implicitly resolved this concern by leveling distinctions between disparate treatment discrimination and sexual harassment through its realignment of disparate treatment, *quid pro quo*, and hostile work environment sexual harassment claims. Susan Jones should be able to state a sex discrimination claim of some sort.

Susan should be able to recover based on discriminatory conduct that has yet to cause actual job detriment. In some circumstances, Title VII provides recovery for conduct that occurs even before a plaintiff has taken a job.¹⁹⁵ Presumably, had Susan been told that she would need to promise to act femininely or she would not be hired, the job offer would be actionable under Title VII.¹⁹⁶ In addition, Susan could also recover for sex stereotyping that affected an actual partnership decision.¹⁹⁷

¹⁹³ Encouraging unwanted behavior modification is often the essence of harassment. The desire to prevent employers from forcing employees to change their behavior in order to procure job benefits is arguably at the heart of anti-discrimination statutes. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 34, at 104 (arguing that laws against sexual harassment are call for self-determination). This does not necessarily suggest that the conduct Susan endured was harassment, just that it had the same impact as harassment.

¹⁹⁴ See *supra* notes 111-114 and accompanying text (discussing emotional distress in hostile work environment claims).

¹⁹⁵ See 42 U.S.C. § 2000e-2(a) (1999) (stating that discriminatory failures to hire are covered by Title VII).

¹⁹⁶ In the civil rights/employment context, discriminatory offers can form the basis of a suit. *E.g.*, *Sharkey v. Lasmo*, 992 F. Supp. 321 (S.D.N.Y. 1998); *Currie v. Danna*, No. 92 C 8021, 1994 WL 494708 (N.D. Ill. Sept. 6, 1994).

¹⁹⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Susan Jones's hostile work environment disparate treatment claim is simply a middle ground between the discriminatory offer and the denied partnership. If she can prove that comments from the partners about the partnership decision indicated that her terms of employment were different from or more onerous than those of her male colleagues and that the comments created or reflected an atmosphere that made it more difficult for her to thrive professionally, she should be able to recover. Little reason exists to immunize from liability statements and actions that reflect the reality that an employment decision will be based on discriminatory attitudes.

The harm that Susan Jones suffered is a hostile work environment harm. Consequently, she should be able to recover the same type of damages that any hostile work environment plaintiff could recover. Whether Susan's damages are few or substantial, she should be able to state a Title VII claim.¹⁹⁸ Title VII does not generally excuse proven discrimination from liability based on seriousness.¹⁹⁹ Rather than being immunized, relatively insubstantial discrimination should yield small damages.²⁰⁰

That PW should be deemed responsible for Susan's injury cannot be seriously challenged. Rather than making certain that Susan had every reason to believe she would be treated fairly regardless of her gender, PW's partners condoned and encouraged sex stereotyping. Consequently, PW is responsible for Susan's predicament, and Title VII should be available to remedy the situation even before Susan's partnership decision is made. PW's actual responsibility supports liability.²⁰¹ While sexual harassment

¹⁹⁸ See *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997) (noting that inconsequential effect of discrimination relates to amount of damages, not to existence of liability); *White, De Minimis Discrimination*, *supra* note 13, at 1141 (suggesting that even inconsequential discrimination should result in liability and small damages rather than finding of no liability).

¹⁹⁹ See generally *White, De Minimis Discrimination*, *supra* note 13.

²⁰⁰ See *id.* at 1163-64 ("In cases where the worker is motivated to sue over discrimination, however, any 'de minimis' nature of the discrimination may be addressed at the remedial stage. It should not be addressed by reading such discrimination out of the statute.").

²⁰¹ Though many suggest that sexual harassment is based on vicarious liability, sexual harassment law is actually based on employer responsibility. For example, when a supervisor acts as the employer, he becomes the employer for purposes of the action undertaken. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 790-91 (1998) (citing numerous cases to support employer liability). Vicarious liability exists when an employer is deemed responsible for

liability may be vicarious, it is not merely assigned liability. Title VII liability describes liability for which the employer is actually responsible, rather than merely liability for which the employer must compensate.²⁰²

Were Susan not allowed to bring a hostile work environment disparate treatment claim, she would have four options. First, Susan might attempt to shoehorn her case into a traditional hostile work environment framework. She would have to rely on an extremely sympathetic court with an expansive definition of harassment. Second, Susan could hope to make partner, risking failure because of PW's sex stereotyping, all the while suffering emotional damage that could affect her work sufficiently to make her a questionable candidate on the merits. She would have to wait for a negative employment decision, then sue.²⁰³ At that point, she would be able to state a disparate treatment claim.²⁰⁴ Third, Susan might quit, preferring not to risk a negative decision that she would

something arguably out of its control. That is generally not the case with sexual harassment. Supervisors act as the employer for many purposes. The employer is not merely *deemed* responsible for the workplace, the employer, through the supervisor, *is responsible* for the workplace. Consequently, what occurs in the workplace with respect to compensation, terms, conditions, or privileges of employment generally is the employer's responsibility. Most employers are able to control conduct if they put forth serious effort. See Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 *FORDHAM L. REV.* 1517, 1591-93 (1999) (suggesting that employers add bright-line rules to employment contracts allowing employer to punish gender-motivated conduct short of sexual harassment).

²⁰² Title VII bases liability on unlawful employer practices: "It shall be an unlawful employer practice for an employer—to . . ." 42 U.S.C. § 2000e-2(a) (1999). Consequently, if the employer is actually not responsible for the discriminatory terms, conditions, or privileges of employment, no liability should exist under Title VII; the conduct should not be considered an unlawful *employer* practice. Since the employer, however, is generally responsible for the workplace, it should be responsible for what occurs there except in a narrow set of circumstances. Nonetheless, some call for a negligence standard in sexual harassment cases. See, e.g., Stephen Kent Madsen, Note, *Placing the Blame Where it Does Not Belong: Burlington Industries, Inc. v. Ellerth*, 35 *IDAHO L. REV.* 311 (1999) (arguing for negligence standard in harassment cases).

²⁰³ This is a problem for two reasons. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (indicating plaintiff need not conform to sexual stereotypes); *Bundy v. Jackson*, 641 F.2d 934, 946 (D.C. Cir. 1981) (indicating that conditions of employment change well before tangible job detriment occurs and that employee need not wait for tangible job detriment to sue).

²⁰⁴ However, since Title VII's goal is to eliminate sex-influenced decisionmaking in employment, rather than merely to provide a suit when such a decision occurs, that option is not particularly palatable.

have to challenge later or explain to a future employer. Presumably she would not be able to sue successfully unless she alleged a constructive discharge, a difficult path considering how stringent the standards are for such cases.²⁰⁵ Fourth, Susan might alter her behavior to conform to that of PW's stereotypical female partner. This is what many of the PW partners and some of Susan's co-workers want but is not what Susan wants.

Susan Jones should not be limited by or to these options; she has suffered employment harm as a result of gender-based conduct. Thus, it should not be difficult for Susan to recover if she can prove the facts of her case. When an employee is harmed for refusing to conform to sexual stereotypes, she can recover under Title VII. The employee should be able to do so even before the conduct causes an actual job detriment.

B. SIMPLIFYING TITLE VII

The addition of a hostile environment disparate treatment claim would complete the realignment and simplification of sex discrimination that the Supreme Court has begun. When disparate treatment discrimination, *quid pro quo* harassment, and hostile work environment harassment were conceptually distinct, it arguably made sense to limit disparate treatment claims to those resulting in actual job detriment. Disparate treatment focused on employment decisions; given its focus on conduct of a sexual nature, sexual harassment seemed to cause the alteration of terms of employment in a very specific way. This no longer describes sex discrimination jurisprudence.

Today, the Supreme Court seems to be asking two questions regarding any particular course of conduct: (1) Was the conduct gender-motivated?; (2) Were the employee's terms of employment discriminatorily offered or explicitly or constructively altered as a result of the conduct?²⁰⁶ If the answer to both questions is yes,

²⁰⁵ See *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994) ("A finding of constructive discharge must not be based only on the discriminatory act; there must also be aggravating factors that make staying on the job intolerable."); see also cases cited *supra* note 89.

²⁰⁶ See *Schultz*, *supra* note 11, at 1799 ("[A] simplified cause of action should require only

liability should lie in all instances. The results of such a vision would be simple. Gender-motivated conduct resulting in tangible job detriment would be analyzed as *quid pro quo* harassment or disparate treatment discrimination.²⁰⁷ Gender-motivated conduct not yielding tangible job detriment would be treated as hostile work environment harassment or hostile work environment disparate treatment discrimination. This simplification would result in a more streamlined vision of disparate treatment discrimination, a vision that the Court seems to desire.

The stage was set for this realignment a long time ago. In *Rogers v. Equal Employment Opportunity Commission*,²⁰⁸ the United States Court of Appeals for the Fifth Circuit ruled that an Hispanic employee pleaded an unlawful employment practice based, in part, on her employer's segregation of Hispanic patients because such segregation could cause psychological and emotional damage.²⁰⁹ Put differently, the court ruled that non-harassing discrimination could create an actionable racially hostile work environment. The time has come for the Supreme Court to ratify this vision in the sex discrimination area.

VI. CONCLUSION

Disparate treatment, *quid pro quo*, and hostile work environment were once distinct causes of action that shared some resemblance. The Supreme Court's recent simplification and realignment of these causes of action, however, suggest that they are merely slight variations on the same theme. The Court's simplified reading of

three elements: (1) Causation—Did the challenged conduct occur because of sex (or gender)? (2) Harm—Was the conduct sufficiently harmful to 'alter the conditions of . . . employment and create an abusive working environment'? (3) Employer Responsibility—Was it conduct for which the employer is legally responsible?"); Willborn, *supra* note 10, at 696 ("In summary, a discrimination-centered model of sexual harassment would focus on the two elements required in every Title VII cause of action: discrimination and an effect on a term or condition of employment.").

²⁰⁷ Some courts have already treated disparate treatment discrimination and sexual harassment *prima facie* cases similarly. See *Stilley v. University of Pittsburgh*, 968 F. Supp. 252 (W.D. Pa. 1996) (treating sexual harassment *prima facie* case just like disparate treatment *prima facie* case).

²⁰⁸ 454 F.2d 234 (5th Cir. 1971).

²⁰⁹ *Id.* at 240.

Title VII suggests that gender-motivated conduct that causes the constructive or explicit discriminatory provision of terms of employment may yield Title VII liability whenever an employer knows or should have known about the conduct. This vision of Title VII demands the creation of a hostile work environment disparate treatment cause of action encompassing gender-motivated conduct that constructively alters an employee's terms of employment. It also suggests quite sensibly that nearly any gender-related conduct in the workplace that substantially negatively affects an employee's work is potentially actionable.²¹⁰ While a hostile work environment disparate treatment cause of action could open the floodgates to additional Title VII litigation, it is nevertheless the logical extension of the Supreme Court's recent rulings. Having begun to simplify sexual harassment and sex discrimination, the Supreme Court should complete the task and face the implications of its actions.²¹¹

²¹⁰ This is not particularly problematic; given Title VII's goal of ridding the workplace of discrimination, suggesting that Title VII provide a remedy for all workplace discrimination is not at all radical. See *Maatman*, *supra* note 11, at 81 ("What is needed, then, is a vision of what constitutes discrimination and its resulting injuries, so courts could consistently scrutinize employer conduct and employee injuries to determine if interests protected by antidiscrimination laws have been invaded.")

²¹¹ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (indicating that harm to employee's job performance is sufficient for Title VII recovery); *Meritor Savs. v. Vinson*, 477 U.S. 57, 64 (1986) (noting that Title VII does not require tangible job detriment for recovery). The harm involved need not cause severe psychological or emotional distress. See *Harris*, 510 U.S. at 21-22 (ruling that neither severe psychological injury or actual injury is necessary for recovery). *But see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (suggesting that de minimis discrimination is not actionable).

