

2002

(Un)Welcome Conduct and the Sexually Hostile Environment

Henry L. Chambers, Jr.
University of Richmond, hchamber@richmond.edu

Follow this and additional works at: <https://scholarship.richmond.edu/law-faculty-publications>



Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Henry L. Chambers, *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 Ala. L. Rev. 733 (2002).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

ALABAMA LAW REVIEW

Volume 53

Spring 2002

Number 3

(UN)WELCOME CONDUCT AND THE SEXUALLY HOSTILE ENVIRONMENT

*Henry L. Chambers, Jr.**

INTRODUCTION

The law requires that actionable sexual harassment be unwelcome. This requirement rests on the notion that welcome conduct does not cause sexual harassment harm. When sexual harassment was thought to consist largely of face-to-face sex-based conduct such as sexual advances, the unwelcomeness requirement may have been thought reasonable. However, as courts have broadened the conduct that may support a sexual harassment claim to include all types of gender-based conduct, the justification on which the unwelcomeness requirement rests has faded. Because the application of the unwelcomeness requirement to all potentially harassing, gender-based conduct can lead to results inconsistent with the broadened vision of Title VII, the requirement should be

* Associate Professor of Law, University of Missouri-Columbia School of Law; B.A., J.D., University of Virginia. The author wishes to thank the University of Missouri Law School Foundation for its support throughout the preparation of this Article. In addition, the author wishes to thank Professors Dwight Aarons, Theresa Beiner, Christopher Guthrie, Sylvia Lazos, Vicki Schultz, Jean Sternlight, and those who contributed helpful comments during a faculty colloquium at the University of Missouri School of Law, at the 2001 Midwestern People of Color Legal Scholarship Conference and at the 2000 Law and Society Association Annual Conference. The author also wishes to thank research assistants Sheri Chandler, William Fritzlen, Elizabeth Meyer and Kathryn Pierce for their work. Lastly, the author wishes to thank his wife and the rest of his family for their support.

jettisoned.

Courts, including the Supreme Court, have consistently noted that sexual harassment must be unwelcome to be actionable.¹ The unwelcomeness requirement incorporates the seemingly sensible notion that welcome sexual behavior—conduct that would be sexually harassing were it not welcome—does not cause the gender-related harm that Title VII is supposed to remedy (i.e., the discriminatory provision of terms, conditions or privileges of employment because of sex). When first recognized by courts and the Equal Employment Opportunity Commission (EEOC), sexual harassment focused on face-to-face sex-based conduct (e.g., sexual advances, requests for sexual favors and other conduct of a sexual nature).² That such conduct was not actionable when welcome was a seemingly reasonable concession to the notion that Title VII does not ban all sex-related activity in the workplace. Simply, workplace sexual conduct that did not alter or harm terms of employment was acceptable; unwelcome sexual conduct that harmed an employee's terms of employment was banned.³

Though face-to-face sex-based harassment may still be the most easily recognizable type of sexual harassment, courts have begun to recognize that Title VII covers gender harassment, of which sex-based harassment is a subset.⁴ Non-sex-based gender harassment that some courts until recently may not have considered sexual harassment because it was not sex-related, now may support a sexual harassment claim when it results in the alteration or discriminatory provision of an employee's terms or conditions of employment.⁵ Whether such conduct is sex-based is relevant because sex-based conduct is generally assumed to be undertaken because of the victim's sex (or gender), not because sex-based conduct constitutes the whole of sexually harassing conduct.⁶ As the unwelcomeness requirement rests firmly on the notion that sexually harassing conduct is largely sex-based and face-to-face, it may be in-

1. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68-69 (1986); *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982).

2. Indeed, the EEOC's guidelines regarding sexual harassment only specifically include "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" in its definition of sexual harassment. 29 C.F.R. § 1604.11(a) (2001) (originally codified in 1980 as 42 U.S.C. 4200e).

3. See, e.g., *Vinson*, 477 U.S. at 68-69; *Henson*, 682 F.2d at 901-05.

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

5. *Oncale*, 523 U.S. at 75. Throughout this Article, I use the term "sex-based" to mean related to sexual activity rather than gender. Where appropriate, I use the term gender-based.

6. Sex-based conduct is generally presumed to be gender-related. See *id.* at 80 ("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."). However, this is not always the case. See Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1608 n.73 (2000) (noting that sex-based conduct is not automatically gender-based).

compatible with evolving sexual harassment jurisprudence unless it can be appropriately applied to all potentially harassing gender-based conduct.

As courts refine the theory underlying sexual harassment and sex discrimination, the unwelcomeness inquiry may become irrelevant to determining whether gender-based conduct is sexually harassing. In addition, the one possible remaining purpose that the unwelcomeness requirement may serve—providing notice to a putative harasser or its employer—is now served by an affirmative defense applicable to many sexual harassment claims. Consequently, its role should be reexamined. This Article does that. Part I of the Article describes a hypothetical situation that provides a context in which to consider unwelcomeness. Part II provides a brief overview of the evolving sexual harassment jurisprudence. Part III examines how the unwelcomeness requirement is applied to sexual harassment claims. Part IV analyzes the uneasy and incompatible relationship between the unwelcomeness requirement and sexual harassment jurisprudence. Part V resolves the tension between unwelcomeness and sexual harassment jurisprudence by advocating that the unwelcomeness requirement be jettisoned, but that evidence of welcomeness be used in some cases to help determine damages.

I. THE HYPOTHETICAL SITUATION

Amanda Allen is an outstanding staff accountant at XYZ Corp. (XYZ). She has worked at XYZ for three years, and is friendly, well-liked and well-respected. Amanda has not been up for a promotion in her tenure at XYZ, but has received pay raises and favorable evaluations. Until recently, Amanda never considered leaving XYZ.

XYZ employs two hundred workers, fifteen of whom are managers. Though forty percent of XYZ's employees are women, only three of its managers are women. XYZ's office atmosphere is libertine. Gender-based joking and sexual banter are legion in the office. Dating and intimate relationships between co-workers occur occasionally, but they are usually discreet. Because offices and cubicles are treated as semi-personal space, many male employees regularly post sexually suggestive and gender-related bumper stickers, calendars and quotations in their work spaces.

Most of the male employees seem to enjoy the atmosphere at XYZ, even deeming it fun and progressive in its openness, lack of inhibition, and apparent dearth of friction. Only a few female employees embrace the atmosphere. Though some complain among themselves, no female employees have found the atmosphere sufficiently problematic to complain publicly. Amanda is uncomfortable with the office environment

though she has neither been propositioned nor been the direct target of gender-based conduct or harassment. Amanda has never complained to the managers about the behavior in the office or its general atmosphere; in part because she did not want to be thought of as a prude and in part because, while there is a general sense that some minimum of decorum will be observed in the office, there is no formal harassment policy. Additionally, she assumed that the atmosphere would not affect her work or advancement.

Though women are not required to perform job or office functions that men are not, there is an expectation that women will handle the tasks that might make the workplace somewhat more friendly. Thus, the women managers and female secretaries have always planned office birthday parties, luncheons, retreats and the firm's holiday party. In addition, they have always organized the office's United Way campaign and coordinated the office's official notes of condolences or gifts of flowers for the deaths or births in families of XYZ workers. These tasks are neither credited nor mentioned in work evaluations.

Amanda's outlook on XYZ and its office environment changed when her friend Becky, another staff accountant, was not promoted to manager a few months ago. Becky, like Amanda, is a friendly, professional and outstanding accountant. Becky was told that although her work was outstanding, she was not promoted because she did not get along with her co-workers as well as, or seem to enjoy working at the company as much as, Cindy, the person who was promoted in Becky's stead. Becky is very upset by the decision. The promotion would have meant a \$20,000 pay increase and validation of Becky's superb accountancy skills. The failure to be promoted has shaken Becky's confidence, and she is contemplating leaving XYZ.

Becky's anxiety was heightened when, upon reflection, both she and Amanda realized that prior to being promoted to manager each of the female managers in the office had engaged in sexual banter in the office, had participated in the sexually charged atmosphere, and had volunteered to do the tasks that women in the office were expected to do but were not part of their job duties. While Amanda and Becky do not know if any of the female managers were ever romantically involved with co-workers or other managers, each of the female managers was widely thought to have dated co-workers. Not surprisingly, Becky believes her treatment was related to her refusal to participate in the office's atmosphere. Becky and Amanda have avoided participation in the workplace sexual banter and have not volunteered to coordinate office parties and the like. Amanda is also upset, believing that she also will not be promoted because she has not actively participated in the office atmosphere. Both believe that in order to become managers, ei-

ther they will need to be substantially better candidates for promotion than those who embrace the office atmosphere, or they will have to embrace the atmosphere. Not surprisingly, both are concerned about their futures and are upset that they need to accede to the gendered office culture to succeed.

II. SEXUAL HARASSMENT

Title VII seeks to remove all gender-based barriers to employment success by prohibiting sex discrimination in the workplace.⁷ This Article focuses on intentional discrimination, though Title VII also bans unintentional discrimination.⁸

A. *Sexual Harassment and Disparate Treatment*

Historically, intentional sex discrimination under Title VII has been divided into disparate treatment and sexual harassment, with the two types of discrimination being treated differently.⁹ Disparate treatment was the first type of sex discrimination recognized under Title VII, and has always been indisputably prohibited by Title VII.¹⁰ It occurs when an employee is treated differently with respect to compensation, terms, conditions or privileges of employment because of sex (e.g., when a woman is denied a job because she is a woman or a man is denied a job because he is a man).¹¹ While disparate treatment claims can be quite varied, they all stem from the basic notion that an employee was denied specific job benefits or provided those benefits in a discriminatory manner because of the employee's gender.¹²

Though sexual harassment and disparate treatment have often been considered distinct, both are actionable because they are types of sex

7. Title VII, among other things, prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (2001).

8. Nonintentional discrimination is termed disparate impact discrimination and occurs when a facially neutral job qualification has the impact of disqualifying a disproportionate number of employees of a particular gender, race, etc., from a particular job or benefit of such job. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

9. *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) ("[F]ederal judges confronting sexual harassment cases have treated these claims as something special or different from run of the mill discrimination claims.").

10. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (noting generally that Title VII outlaws disparate treatment).

11. *See Phillips*, 400 U.S. at 542; *Sprogis*, 444 F.2d at 1198.

12. *See, e.g., UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Phillips*, 400 U.S. at 544.

discrimination.¹³ Indeed, the similarities between sexual harassment and disparate treatment are such that some sexual harassment claims can be viewed merely as disparate treatment claims in which the subject conduct is harassing.¹⁴ Nonetheless, from a practical standpoint, the structures of proof surrounding the sexual harassment claim distinguish it from a disparate treatment claim.¹⁵ For example, while disparate treatment discrimination need merely result in harm to an employee's terms of employment, actionable sexual harassment must be offensive and unwelcome.¹⁶ These and other requirements change the nature of sexual harassment from a general sex discrimination claim to a claim ostensibly aimed at a specific type of conduct.

Indeed, the theory underlying the sexual harassment claim was thought sufficiently different than that underlying disparate treatment discrimination that sexual harassment was not immediately recognized as actionable under Title VII.¹⁷ When first examined by courts, sexual harassment was often thought to have occurred when sex-based conduct, such as acquiescence to sexual demands or the willingness to endure sexual advances, was made a term or condition of an employee's employment.¹⁸ Indeed, according to the Equal Employment Opportunity

13. See White, *supra* note 9, at 726-30; 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*, a sexual harassment case, "brings discrimination back into sexual harassment law"). Of course, many courts may provide justifications to treat the types of discrimination somewhat differently. See *Cheek v. Peabody Coal Co.*, 97 F.3d 200 (7th Cir. 1996).

14. Based on the definitions of disparate treatment and sexual harassment, little seems to distinguish them. I and others have argued that sexual harassment is merely a specialized version of sex discrimination. See generally Chambers, *supra* note 6; White, *supra* note 9; Willborn, *supra* note 13.

15. Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), with *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). These distinctions can lead to confusion regarding why sexual harassment is considered sex discrimination. Recently, some commentators have explicitly noted that courts have never explained precisely why sexual harassment is sex discrimination. See Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). Indeed, multiple explanations of why sexual harassment constitutes sex discrimination have always abounded. See generally Abrams, *supra* note 15 (discussing historical and recent theories of sexual harassment); Michael D. Vhay, Note, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 340-41 (1988) (discussing various early sexual harassment theorists).

16. Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), with *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

17. See Vhay, *supra* note 15, at 332 ("When plaintiffs first began to bring sexual harassment claims under Title VII, the courts rejected them.").

18. This was expected given the style of case that those courts saw. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 59-77* (1979) (detailing early sexual harassment cases where sexual activity was nearly invariably linked to the provision of job benefits).

Commission (EEOC), sexual harassment specifically includes, and is arguably defined as, “[u]nwelcoming sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”¹⁹ Not surprisingly, the prototypical sexual harassment allegation was that a male supervisor requested sexual favors from a female subordinate.²⁰

However, rather than view sexual harassment as the improper linking of employment to sex-based conduct barred by Title VII’s prohibition on sex discrimination, some courts determined that sexual harassment was a private matter between a supervisor and a subordinate that did not implicate the employment relationship, the employer, or Title VII.²¹ Sexual harassment was viewed merely as an inappropriate manifestation of sexual desire occurring not because of gender, but because of characteristics of the particular employees involved.²² This vision of sexual harassment has been supplanted by one which recognizes that, when sex-based conduct or sexual activity is linked to terms of employment, Title VII is implicated.²³ Simply, a supervisor who requires that an employee either engage in sex-related activities with him or lose

19. 29 C.F.R. § 1604.11(a) (2001). However, conduct that may not always be viewed as strictly sexual can also support a sexual harassment claim. *See, e.g.*, *Smith v. Sheahan*, 189 F.3d 529, 532-35 (7th Cir. 1999) (describing violent but non-sexual harassment that might support a sexual harassment claim); *Shepard v. Slater Steels Corp.*, 168 F.3d 998, 1002 (7th Cir. 1999) (suggesting that non-sexual harassment can be part of harassment claim).

20. *See MACKINNON, supra* note 18, at 59-77 (detailing early sexual harassment cases which seemed to consist almost exclusively of male supervisors harassing subordinate female employees in that manner).

21. The notion was that the activity involved was driven by the personal proclivities of the putative harasser and therefore was not related to employer policy. *See MACKINNON, supra* note 18, at 59-60. Indeed, courts have continued to argue that sexual harassment is not generally in an employer’s interest. *See, e.g.*, *Dees v. Johnson Controls World Servs., Inc.*, 168 F.3d 417, 421 n.9 (11th Cir. 1999) (“Most sexual harassment, however, arises from gender-based prejudice or a desire for sexual gratification, rather than for the purpose of furthering the employer’s interests.”). Of course, the notion that an employer has no incentive to allow sexual harassment to continue may be wrong. Employers have an incentive to allow sexual harassment to continue if the result is a more productive workplace on average. *See J.M. Balkin, Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2305 (1999) (“Employers may accept (or ignore) sex discrimination by their male employees (including discrimination through sexual harassment) in order to avoid labor disruption and preserve esprit de corps and loyalty among a particular class of valuable (male) workers.”). When the owner of the business is the harasser, that sexual harassment is not in the employer’s interest becomes less tenable. *Cf. Christina A. Bull, Comment, The Implications of Admitting Evidence of a Sexual Harassment Plaintiff’s Speech and Dress in the Aftermath of Meritor Savings Bank v. Vinson*, 41 U.C.L.A. L. REV. 117, 135-43 (1993) (noting that the power to sexually harass may come from power in the workplace wielded by supervisors and business owners). Such was the case in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

22. *See MACKINNON, supra* note 18, at 59-60; *Vhay, supra* note 15, at 334 (“In order to win their discrimination actions, sexually harassed plaintiffs realized that they had to convince the courts that harassment involved more than ‘personal’ acts.”).

23. *See Karibian v. Columbia Univ.*, 14 F.3d 773, 778 (2d Cir. 1994) (conditioning terms of employment on acquiescence to harassing conduct is crux of harassment claim); *Bridges v. Eastman Kodak Co.*, 885 F. Supp. 495, 496-98 (S.D.N.Y. 1995) (noting generally that sexual harassment is based on linking gender-based conduct to terms of employment).

her job has altered the employee's terms of employment and makes the demand at least in part because of the employee's sex.²⁴ Thus, the supervisor has engaged in actionable conduct.²⁵

B. *Quid Pro Quo and Hostile Work Environment Harassment*

Historically, sexual harassment has been divided into quid pro quo and hostile work environment harassment.²⁶ Until relatively recently, the distinction between the types of harassment was thought to be in the type of conduct that caused the harm. Quid pro quo harm was thought to flow from explicit demands for sexual conduct usually initiated by an employee's superior; hostile work environment harm was thought to flow from an atmosphere of abuse surrounding the employee's workplace, whether created by superiors or not.²⁷ However, the Supreme Court has determined that the sole difference between quid pro quo and hostile work environment harassment is that quid pro quo harassment results in tangible job detriment,²⁸ while hostile work environment harassment does not.²⁹ The key is the effect that the harassment has on the terms, conditions or privileges of an employee's employment, rather

24. See *supra* note 6 and accompanying text.

25. That it took so long for some courts to realize this may be a testament to sexism in our society. Cf. Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 45-46 (1990). Pollack states that:

Sexual harassment was first recognized in 1976 as a legal cause of action under Title VII of the Civil Rights Act of 1964. Prior to this, courts treated sexual harassment in the workplace as a personal matter, neither employment-related nor sex-based. But the history and pervasiveness of sexual harassment in the workplace has been well documented.

Id. at 45-46 (footnotes omitted). Vhay, *supra* note 15, at 337 (noting that the transformation of viewing sexual harassment as "an outgrowth of inharmonious personal relationships to a recognition that many forms of harassment are discriminatory" took twelve years).

26. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Lucas v. South Nassau Communities Hosp.*, 54 F. Supp. 2d 141, 146 (E.D.N.Y. 1998) (noting that quid pro quo and hostile work environment are the two types of sexual harassment).

27. Compare *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1315 (11th Cir. 1989), with *Lucas*, 54 F. Supp. 2d at 146.

28. See *Ellerth*, 524 U.S. at 753-54. I have argued elsewhere that whenever an employee's terms of employment include the acceptance of any form of sexual harassment, a quid pro quo harassment claim should lie. See Chambers, *supra* note 6, at 1614-15. Whether the job detriment is tangible should matter, not whether the job detriment is substantial. See *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916-17 (7th Cir. 1996) (noting that relatively minor tangible job detriment can support a quid pro quo claim); *Collins v. State of Ill.*, 830 F.2d 692, 703 (7th Cir. 1987) (noting various types of job detriment that do not affect a plaintiff's income). But see Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643 (1996); Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

29. Historically, they had been thought to be more fundamentally different. See *Bryson*, 96 F.3d at 915 (7th Cir. 1996) (noting that basis for quid pro quo harassment was recognized before basis for hostile work environment discrimination).

than the type of conduct that supports each cause of action.³⁰ The prototypical example of quid pro quo harassment—a supervisor's termination of a subordinate for refusing to yield to the supervisor's sexual demands—constitutes quid pro quo harassment because gender-based harassment concretely altered an employee's terms of employment and resulted in a tangible job detriment (i.e., the firing).³¹

Hostile work environment harassment is sexual harassment that constructively alters an employee's terms or conditions of employment,³² but does not result in actual job detriment.³³ Such harassment must be severe or pervasive, offensive to the plaintiff,³⁴ offensive to a reasonable person in the plaintiff's situation, and unwelcome.³⁵ In addition, the employer must be deemed responsible for the harassing conduct or its result.³⁶ The test for what constitutes a hostile work envi-

30. The difference can be so slight that some question whether the terms quid pro quo and hostile work environment are of much value at all. See *Ellerth*, 524 U.S. at 751 (1998) ("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.").

31. See *id.* at 753-54; *Karibian v. Columbia Univ.*, 14 F.3d 773, 778 (2d Cir. 1994).

32. See *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245-46 (11th Cir. 1999).

33. Of course, the atmosphere in which an employee works can be as important as any other term of employment. See Barbara Verdonik, Comment, *Abolishing the Quid Pro Quo and Work Environment Distinctions in Sexual Harassment Cases Under the Civil Rights Act of 1964: Vinson v. Taylor*, 60 ST. JOHN'S L. REV. 177, 190 (1985) ("[E]mployers delegate to their supervisors the authority to maintain a good working environment—and that environment constitutes a significant employment right.").

34. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (noting that actionable harassment must be subjectively offensive to plaintiff); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 876 (D. Minn. 1993) (noting that sexual harassment requires subjective harm, and suggesting that when multiple women are subjected to the same conduct some may be harmed and others may not be harmed).

35. See *Burns v. McGregor*, 955 F.2d 559, 564 (8th Cir. 1992). The Burns court stated that: To prevail in her sexual harassment claim based on 'hostile environment', Burns must show that 1) she belongs to a protected group; 2) she was subject to unwelcome sexual harassment; 3) the harassment was based on sex; 4) the harassment affected a term, condition, or privilege of employment; and 5) McGregor knew or should have known of the harassment and failed to take proper remedial action.

Id. The EEOC guidelines note that conduct is considered sexual harassment:

when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (2001).

36. See Balkin, *supra* note 21, at 2297 (noting that only employers that knew or should have known will be liable under Title VII); accord Note, *Notice in Hostile Environment Discrimination Law*, 112 HARV. L. REV. 1977, 1978 (1999). This requirement has led to the creation of an affirmative defense for the employer. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) ("The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."); *Faragher v. City of Boca Raton*, 524

ronment is not precise, and context matters.³⁷ Therefore, when, as in *Harris v. Forklift Systems, Inc.*,³⁸ the president of a company continually insults an employee because of her gender, suggests that her success with customers may be due to promises of sexual activity, and suggests that her salary could be negotiated with him in a motel room, a hostile work environment may exist.³⁹ Even though no tangible job detriment occurred—the employee quit rather than continue to endure the behavior⁴⁰—the gender-based conduct created an atmosphere in which the harasser's conduct may have made the plaintiff's job significantly more difficult to do because of her gender.⁴¹ The plaintiff suffered harm to be sure, but there did not appear to be a tangible job detriment.

Though the style of behavior underlying the two types of sexual harassment can appear different, the same behavior that can support a quid pro quo claim may also support a hostile work environment claim. For example, in *Meritor Savings Bank v. Vinson*, the plaintiff alleged that her supervisor made sexual advances toward her, fondled her and raped her on several occasions.⁴² The plaintiff interpreted the conduct as quid pro quo-style harassment in that she feared that she would lose her job if she did not engage in sexual relations with her supervisor.⁴³ Indeed, had the supervisor fired the employee for refusing to acquiesce, her claim would have been a quid pro quo one.⁴⁴ However, the Court alternatively characterized the supervisor's alleged behavior as hostile work environment harassment because, even if the supervisor did not condition job benefits on engaging in sexual relations, the conduct was of the type and severity that the plaintiff's terms of employment may have been constructively altered by having to endure it.⁴⁵ That is, the environment that resulted from the conduct amounted to the discriminatory provision of conditions of work because of her sex.

Hostile work environment harassment, whether stemming from

U.S. 775, 807 (1998).

37. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (“[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.”); *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 431 (7th Cir. 1995) (noting that the “line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other” is not bright).

38. 510 U.S. 17 (1993).

39. See *Harris*, 510 U.S. at 19.

40. *Id.*

41. However, that an employee's job was more difficult to do does not mean that the quality of the plaintiff's work declined. See *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1455 (7th Cir. 1994) (“The absence of a noticeable decline in job productivity should therefore not be unduly emphasized where there is ample evidence showing that the campaign of harassment had an impact on its target and made it more difficult for her to do her job.”).

42. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986).

43. *Vinson*, 477 U.S. at 60.

44. *Id.* at 65.

45. *Id.* at 62-73.

conduct affecting the working atmosphere as in *Harris*, or from conduct that can be fairly viewed as a prelude to quid pro quo conduct as in *Vinson*,⁴⁶ focuses on the conditions under which an employee works. These conditions may reflect all conduct that creates the atmosphere to which the employee is subjected, not merely the harassment targeted at her.⁴⁷ In this way, the conduct supporting a hostile work environment harassment claim can encompass far more than the face-to-face conduct that typifies quid pro quo harassment. As we will see later, that hostile work environment harassment can be of a very different style of conduct than quid pro quo harassment is important in considering the role unwelcomeness should play in sexual harassment jurisprudence.

C. Sex, Gender and Sexual Harassment

Sexual harassment's initial focus on sex-based conduct put sexual activity, rather than the differential treatment of employees because of sex, at the heart of sexual harassment jurisprudence, and necessarily put such activity at hostile work environment's core.⁴⁸ However, as sexual harassment jurisprudence has evolved, it has been recognized as gender-based harassment of which sex-based harassment is a subset.⁴⁹ Whether the conduct at issue is sex-based is secondary to whether the conduct is gender-motivated.⁵⁰ Thus, while sex-based conduct can create Title VII liability by constructively altering the terms of an employee's employment, it does not encompass all the conduct that can do so.⁵¹ Because courts have started to realize that hostile work environment harassment may include gender-related harassment that constructively alters an employee's terms of employment, those who harass an employee in a non-sexual way merely because of her gender (e.g., by

46. Conduct from either style of harassment can help support a hostile work environment claim. See *Chambers*, *supra* note 6, at 1620-21.

47. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (detailing various workplace harassment and suggesting that all such harassment could contribute to a hostile work environment); Balkin, *supra* note 21, at 2296-97 ("A hostile environment is made up of individual acts of discriminatory speech and other conduct by all the persons who inhabit a workplace, including managers, employees, and even occasionally clients and customers.").

48. Of course, even when sex-based conduct is key to a sexual harassment claim, sex does not necessarily cause the change in terms of employment, though the misuse of sex can. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1997); Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 543 (1994) (arguing generally that misuse of sex, rather than sex itself, is the problem).

49. See, e.g., *King v. Hillen*, 21 F.3d 1572, 1583 (Fed. Cir. 1994) ("Conduct that is based on the sex of the victim, whether or not the conduct is 'of a sexual nature,' is appropriately considered in determining whether an abusive or hostile environment has been created.").

50. See *Oncale*, 523 U.S. at 78.

51. See, e.g., *Carr v. Allison Gas Turbine*, 32 F.3d 1007, 1009 (7th Cir. 1994) (noting a blend of sex-based and gender-based harassment aimed at the only female worker in a tinsmith shop).

demeaning her to others or destroying her work tools), may engage in hostile work environment harassment.⁵²

Title VII seeks to allow all workers to succeed based on ability rather than their gender. Making hostile work environment sexual harassment actionable embraces this goal by attempting to eliminate harmful gender-motivated harassment.⁵³ Whether workplace conduct produces a uniquely hostile workplace atmosphere for a particular worker through sexual advances, propositions and other conduct, or a generally hostile workplace atmosphere that harms any or all workers of a particular sex, hostile work environment harassment liability can be used to make certain that the conditions under which an employee works will not harm that employee's ability to succeed because of sex.⁵⁴ The evolving nature of sexual harassment law forces us to reexamine whether the unwelcomeness requirement helps or hinders the appropriately forceful application of Title VII.⁵⁵

Our hypothetical situation helps crystallize some of the issues. The workplace at XYZ is gendered and sexualized. That is, gender-based conduct in the workplace is pervasive. If such conduct amounts to harassment that affects Amanda or Becky's terms of employment, Title VII may be breached. The promotion pattern at XYZ may suggest that unless Amanda and Becky are willing to participate in and perpetuate the gendered and sexualized atmosphere at XYZ, they will not reach their potential at XYZ. This appears to be a gender-based harm. Were Becky to bring a claim, it would stem from her advancement having been contingent on embracing the workplace atmosphere. Similarly, Amanda's potential hostile work environment claim would be based on the notion that the gendered workplace atmosphere necessarily makes

52. Recognition of this may be somewhat uneven because some courts have regarded gender-based harassment as sexual harassment for a long time while others have only recently realized it. See *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129, 1131 (D.C. Cir. 1985); see also Bull, *supra* note 21, at 138-40 (noting that co-workers can send powerful sexually harassing signals that are unrelated to sex).

53. Conduct that is not harmful would not be a problem. See Radford, *supra* note 48, at 541 ("The goal of sexual harassment law in general is not to eliminate the sexual undercurrent at work, an undercurrent that may be beneficial or at least nonoffensive to many individuals of both genders, but rather to hold those who would force it on others responsible for their actions.").

54. The employee need not be harmed enough to hurt her performance. She need merely be provided poorer conditions in which to work because of her sex. See *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998) (noting generally that worker's ability to function in job need not be impaired for worker to suffer from hostile work environment); *King v. Hillen*, 21 F.3d 1572, 1583 (Fed. Cir. 1994) ("That women who are the objects of discriminatory behavior because of their sex are able to maintain satisfactory job performance is not grounds for denigrating their concerns.").

55. For an example of a particularly aggressive (and possibly correct) stance toward protecting workers, see Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Work Environment Claim Brought By a Nude Dancer?*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 314 (1998) (concluding that Title VII should protect nude dancers from sexual harassment).

her job more difficult to do because of gender, by forcing her to accept the workplace atmosphere or be a better worker in order to have a chance to advance. Because the workplace conduct and atmosphere appear to limit Amanda's and Becky's potential because of sex—a real Title VII harm—whether Amanda or Becky will have a viable Title VII claim may depend on whether the conduct at issue is sufficient to sustain a sexual harassment claim, including whether the conduct at issue is unwelcome.

III. UNWELCOMENESS

A. *The Genesis of Unwelcomeness*

Sexual harassment's unwelcomeness requirement stems from the EEOC's Guidelines on Discrimination Because of Sex, originally promulgated in 1980.⁵⁶ Those Guidelines note that:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.⁵⁷

These Guidelines have been consistently cited by courts as a working definition of sexual harassment.⁵⁸ Though the Guidelines provide a list of conduct that may constitute sexual harassment, some courts seem to take the Guidelines to be the definition of sexual harassment, treating the listed conduct as exclusive.⁵⁹ Regardless of how fully the Guidelines

56. 29 C.F.R. § 1604.11(a) (2001).

57. § 1604.11(a).

58. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (citing the Guidelines and nothing more to support its suggestions that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'"); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619 (6th Cir. 1986) (citing the Guidelines and noting that plaintiff had to prove that she "was subjected to unwelcomed sexual harassment"); *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (citing the Guidelines to support notion that an element of a hostile work environment claim is that "[t]he employee was subject to unwelcome sexual harassment.") (emphasis omitted).

59. Indeed, courts suggesting that sexual harassment conduct must be sex-based, rather than merely gender-based, would seem to have taken this position. See, e.g., *Jones v. Flagship Int'l*, 793 F.2d 714, 720 n.5 (5th Cir. 1986); *Downes v. Fed. Aviation Admin.*, 775 F.2d 288, 290 (Fed. Cir. 1985).

are deemed to have defined sexually harassing conduct, courts have consistently suggested that conduct supporting an actionable sexual harassment claim must be unwelcome.⁶⁰

Underlying the unwelcomeness requirement is the notion that conduct related to sexual activity is at the core of sexual harassment law, and that because it can be welcome outside of the workplace, it can also be welcome when it occurs in the workplace.⁶¹ In addition, the fact that unwelcomeness is required suggests that all conduct supporting a harassment claim must be unwelcome to be actionable.⁶² Two problems accompany the above notion. First, because sex-based conduct is not the only type of sexually harassing conduct in the workplace, requiring that all conduct supporting an actionable sexual harassment claim be unwelcome may not be sensible. Second, as sex-based workplace behavior may have different implications than sex-based behavior outside of the workplace, treating them as similar may not make sense.⁶³ The power inequalities inherent in the workplace may suggest that sex-based workplace conduct should not be treated merely as sex-based conduct that happens to occur in the workplace.⁶⁴

Nonetheless, the unwelcomeness requirement has at least two possible justifications. The first is that welcome conduct causes no harm to the employee's terms, conditions or privileges of employment. This would seem to stem from the belief that sexual harassment prototypically involves sexual advances and requests for sexual activity—conduct

60. See *supra* notes 1, 58.

61. See Janine Benedet, *Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law*, 3 MICH. J. GENDER & L. 125, 159 (1995) (noting that “[t]he EEOC has defended the inclusion of this [unwelcomeness] element in the prima facie case on the ground that the same behavior can amount to harassment or to enjoyable sexual activity, depending on the attitudes of those involved” and citing the EEOC’s amicus brief in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986)).

62. Some courts appear to view the ultimate sexual activity as the activity that must be welcome or unwelcome, with the steps leading up to the activity being important but not central to the inquiry. This theory would suggest that if a supervisor thinks that an employee might be sexually attracted to him, then the steps used to determine whether the attraction exists are not really subject to liability. See *Dockter v. Rudolf Wolff Futures, Inc.* 913 F.2d 456, 459-60 (7th Cir. 1990) (suggesting that the fondling of a subordinate’s breast may merely have been misguided attempt at signaling attraction rather than harassment).

63. The power inequality occurring in the workplace may not occur in other situations. See MACKINNON, *supra* note 18, at 1-2 (noting the power dynamic in the workplace that makes sexual harassment particularly problematic); Ann C. Juliano, Note, *Did She Ask For It?: The “Unwelcome” Requirement In Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1575 (1992) (“[T]he ‘unwelcomeness’ requirement . . . does not adequately account for the power dynamics of the workplace.”).

64. See Benedet, *supra* note 61, at 166 (“To argue that welcomeness is presumed and that unwelcomeness must be proven is to assume that sexual comments or physical touching are wanted by women at work.”); Radford, *supra* note 48, at 504-05 (“While physical contact may be inevitable and normal in a crowded world, sexual advances in the workplace need not be an inevitable aspect of a gender-integrated work environment and will only be characterized as ‘normal’ if machismo is used as the measuring standard of normalcy.”).

that can literally be enjoyed. Were sexual harassment so limited, and were such conduct required to be affirmatively welcomed by the target to be deemed welcome, such conduct might be harmless to the employee's terms of employment. When unwelcome harassment in the form of a sexually predatory boss is juxtaposed with welcome sex-based conduct in the form of a pleasurable office romance,⁶⁵ requiring unwelcomeness may appear reasonable. Similarly, when playful sexual banter and mild off-color joking is juxtaposed with ugly, unwanted harassment based on gender animus, requiring unwelcomeness may seem reasonable. However, as suggested below, some conduct deemed not unwelcome may cause sexual harassment harm.

The possibility that some sex-based workplace conduct may not cause harm has led some courts to assume that such conduct is welcome until proven otherwise.⁶⁶ This assumption takes an overly simplified view of such conduct.⁶⁷ It suggests that a particular employee's willingness to engage in sex-based conduct in the workplace justifies assuming that any employee may be open to an office romance until that employee makes clear that she is not.⁶⁸ Further, it suggests that an employee's possible openness to romance with one co-worker allows the assumption that the employee is open to romance with any co-worker until the employee makes clear that she is not.⁶⁹

65. See Niloofar Nejat-Bina, *Employers as Vigilant Chaperones Armed with Dating Waivers: The Intersection of Unwelcomeness and Employer Liability in Hostile Work Environment Sexual Harassment Law*, 20 BERKELEY J. EMP. & LAB. L. 325, 326 (1999) (noting prominent examples of successful workplace courtship, including that of Melinda French and her husband Bill Gates).

66. See discussion *infra* Part III.B. Of course, this is the logical implication. See Nejat-Bina, *supra* note 65, at 330 (noting that the implication of requiring proof of unwelcomeness is to assume that sexual conduct was welcome). There is a difference between an employee who makes sexual advances that become harassing and an employee who harasses through sexual advances. That we cannot necessarily tell the difference between the two does not suggest that we should assume that all employees are merely making sexual advances that may become harassing.

67. Some have criticized the general view harshly. See, e.g., Miranda Oshige, Note, *What's Sex Got To Do with It?*, 47 STAN. L. REV. 565, 577 (1995) ("The unwelcomeness requirement is gratuitous, punitive, and reflects some of society's most insidious and outdated stereotypes about women and sexual behavior.").

68. Of course, this concern might be addressed if the employee's openness to romance with others was not treated as evidence of openness to romance to the subject harasser. See Juliano, *supra* note 63, at 1590 (suggesting that evidence regarding welcomeness be limited to conduct occurring between the plaintiff and harasser); Radford, *supra* note 48, at 505-06 (suggesting that evidence regarding welcomeness be limited to conduct occurring between the plaintiff and the harasser).

69. See Benedet, *supra* note 61, at 140 (noting that the investigation of woman's sexual background in harassment cases is based on the notion that "[s]exual acts are . . . essentially fungible for women, both as to the partner with whom they engage in them and as to the location in which they take place."); Bull, *supra* note 21, at 128 (noting that when evidence that plaintiff engaged in sexual relations with co-worker is deemed relevant to unwelcomeness the suggestion is made that the willingness to sleep with one co-worker implies a willingness to sleep with other co-workers); Juliano, *supra* note 63, at 1591 (noting that employee's desire for romance with one co-worker does not necessarily suggest the desire for romance with all co-workers); Joan S. Weiner, Note, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a*

The second explanation or justification for the unwelcomeness requirement is that the requirement is necessary to protect the employer or the putative harasser or both. This stems from the twin notions that the employer must be responsible for the Title VII harm⁷⁰ and that potentially harassing conduct is only problematic when the victim complains about it.⁷¹ These notions suggest that it is not the nature of the harasser's conduct, but the response it engenders, that makes it problematic. Thus, knowledge that the conduct was unwelcome informs the harasser and might alert the employer that official corrective action needs to be taken. This would provide the factual background to prove that harm flowed from the continuation of the conduct. When viewed this way, the unwelcomeness inquiry would require that the mistaken putative harasser or the employer be given notice that the conduct is harassing or unwelcome, with such notice being provided when the victim tells the harasser that the conduct is problematic.⁷²

Though the requirement that sexual harassment be unwelcome to be actionable may seem reasonable to some, the lack of judicial analysis regarding why all sexually harassing conduct must be unwelcome to support an actionable claim is problematic.⁷³ While the interpretation that courts have consistently given the Guidelines—and the implication that all actionable sexually harassing conduct must be unwelcome to be actionable—may be reasonable, it has not been rigorously analyzed and is not the only plausible interpretation of the Guidelines. For example, the Guidelines can be read as requiring merely that sexual advances, but not other potentially harassing conduct, be unwelcome to be actionable. That sexual advances alone could be required to be unwelcome to be actionable is plausible precisely because welcome sexual advances could be innocuous precursors⁷⁴ to a personal relationship that might or

Proposal For Reform, 72 NOTRE DAME L. REV. 621, 631 (1997) (“Admission of these kinds of facts reflects the old-fashioned view that if a woman is willing to have sex with one man, she must be the type willing to have it with everyone.”).

70. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (noting that respondeat superior is a requirement of a sexual harassment claim).

71. See *Benedet*, *supra* note 61, at 132 (suggesting that requiring proof of unwelcomeness assumes that the plaintiff consented to being harassed unless it is proved otherwise).

72. Knowledge that the conduct was not welcome becomes imperative. See *Radford*, *supra* note 48, at 548 (“The rationale for this approach [of unwelcomeness] is that, because sexual interplay in the workplace is often ambiguous, the legal system should include protections against those who ‘innocently’ engage in sexual conduct.”).

73. This is similar to concerns that have been voiced about the Supreme Court's lack of explanation regarding why precisely sexual harassment is sex discrimination. See *supra* note 15 and accompanying text.

74. Of course, there may be a harm in making the advance. See generally Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U. PENN. L. REV. 1069, 1080-95 (1999) (suggesting that the advance may signal a differentiated status between the person making the advance and the subject of the ad-

might not develop.⁷⁵ Conversely, requests for sexual favors in the workplace, whether unwelcome or not, can be viewed as always potentially actionable because in the context of an employment relationship such a request may be troublesome in the office environment even when welcomed by the person propositioned. The Guidelines note that, under certain conditions, providing job benefits as a result of acquiescence to sexual favors can support a sexual harassment claim by an employee who was qualified to receive the job benefit but did not.⁷⁶ This suggests that implicitly linking job benefits to sex or sex-based activity can be problematic for the workplace even when the subject of the favoritism is not harmed by it.⁷⁷ Similarly, verbal or physical conduct of a sexual nature could be considered sufficiently inappropriate that such conduct could support a sexual harassment claim, whether unwelcome or not. As unwelcomeness' role in hostile work environment harassment is discussed below, it will become clear how verbal or physical conduct of a sexual nature may logically support a Title VII claim though the conduct is not unwelcome to the subject of the conduct. The fact that conduct is not deemed sexual harassment until it alters a plaintiff's terms of employment also supports the plausibility of the above suggestion. If terms of employment are altered as a result of conduct, the fact that the conduct was not unwelcome could be deemed irrelevant to whether Title VII liability existed.

This argument should not be viewed as a suggestion that this alternative reading of the Guidelines is the correct reading. The accepted

vance that can lead to workplace problems); Vhay, *supra* note 15.

75. Two factors support the possibility that the welcomeness requirement should be limited to sexual advances. First, a workplace in which employees are allowed to ask each other on dates as long as the request is not unwelcome, but are never allowed to ask each other for sexual favors or engage in conduct of a sexual nature does not seem particularly bizarre. In such a workplace, employees would be allowed to attempt to begin a personal relationship in the workplace, but would not be allowed to make sexual demands or otherwise turn the workplace into a sexualized one. Second, given that sexual harassment does not become actionable until the conduct alters the terms of an employee's employment, the EEOC may have assumed that even requests for sexual favors or conduct of a sexual nature that are not unwelcome can alter an employee's terms of employment or impair the employee's working atmosphere.

76. See 29 C.F.R. § 1604.11(g) (2001) ("Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit."). Without a clear suggestion that the submission to the advances must encompass the submission to unwelcome advances, it is reasonable to suggest that the submission to welcome advances still may cause the harm to an employee who was denied a job benefit as a result of the submission to advances. Though the EEOC's Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, N-915-048, clarifies this language somewhat in suggesting that the sexual favoritism must be rampant, it does not suggest that the claim will depend on the welcomeness of the conduct. See EEOC: Policy Guidance on Employer Liability for Sexual Favoritism Under Title VII, 8 LAB. REL. REP. (BNA) (EEOC Notice No. 915-048 (Jan. 12, 1990)).

77. See *infra* notes 190-92 and accompanying text.

interpretation of the Guidelines—that all types of sexually harassing conduct must be unwelcome to be actionable—may be precisely what the EEOC intended. However, the accepted interpretation has yielded a received wisdom regarding the implications of the Guidelines that may be inconsistent with current Title VII jurisprudence. The lack of analysis in adopting and maintaining the accepted interpretation may have led to the particular manner in which the Guidelines and the unwelcomeness requirement have been used by courts in sexual harassment litigation. By gravitating toward a view requiring that all conduct supporting a sexual harassment claim be unwelcome, many courts have endorsed a narrow view of sexual harassment and a broad view of unwelcomeness that may not serve Title VII well. This may have occurred, in part, because some courts, including the Supreme Court on occasion, have been willing to invest the EEOC Guidelines with almost as much import as Title VII itself, leading to a lack of reexamination of the implications that flow from the accepted interpretation of the Guidelines.⁷⁸ As fidelity to the principles underlying Title VII may provide a different vision of the unwelcomeness requirement and the conduct that can support a sexual harassment claim, a reexamination of unwelcomeness is appropriate. However, before a reexamination can occur, one needs a working theory of unwelcomeness. Ours is that unwelcomeness stems from the notions that welcome conduct does not tend to cause harm and that harassers and employers need affirmative notice that conduct is harassing before the employer is deemed responsible for subsequent similar conduct.

B. *Defining Unwelcomeness*

That conduct must be unwelcome to be actionable is clear;⁷⁹ what constitutes unwelcome conduct is not. Two issues arise in determining whether conduct is unwelcome for Title VII purposes. The first issue is how intensely unwelcome conduct must be to be considered unwelcome under the requirement. The second issue is whether unwelcomeness should be viewed from the plaintiff's perspective, the defendant's per-

78. See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (noting the importance of the EEOC's interpretation of Title VII); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (deference to EEOC interpretation of Title VII); *Henson v. City of Dundee*, 682 F.2d 897, 903 n.7 (1982) (commenting on the influence of EEOC interpretation of Title VII); Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1163 (1995) (noting the influence of the EEOC Guidelines on courts). Of course, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), was a noticeable departure from this method of analysis.

79. See Monnin, *supra* note 78, at 1168 ("After *Meritor* and the extension of the Court's imprimatur, the concept of unwelcomeness is firmly entrenched in sexual harassment law.").

spective or an objective perspective. Courts have not resolved either issue in any unified fashion.⁸⁰

1. *What is Unwelcome Conduct?*

Determining whether conduct is unwelcome is difficult. Though courts seem to have a general sense of what the unwelcomeness inquiry entails, they have been spare in enunciating unwelcomeness principles. For example, that unwelcome conduct must not have been encouraged or incited is one of the few long-standing rules of unwelcomeness.⁸¹ However, this common-sense rule can have widely different practical implications and may leave many situations unaddressed. For example, the rule can be read to focus on the harasser's belief regarding the welcomeness of the conduct. When read in this way, the rule would seem to deem conduct welcome if a putative harasser mistakenly believed his conduct had been encouraged, and would seem to apply even if a harasser had an idiosyncratic view of encouragement or incitement.⁸² Conversely, the rule could be assumed to focus on encouragement and incitement as a way to determine if the subject actually welcomed the conduct at the time it occurred, and therefore presumably was not harmed by the conduct.⁸³ However defined, the lack of clear guidance regarding a rule that is so commonly invoked is a problem.

Regardless of its interpretation, the rule certainly leaves uncovered ambiguous situations in which no response to the conduct was made. So, where the subject of the harassment either attempts to ignore the conduct or declines to specifically address it, the rule seems to leave the default solution—that the conduct is not unwelcome—undisturbed. The same may be true when the harassing conduct occurs before the subject had any other interaction with the putative harasser. The point is not necessarily to demand more specific rules regarding unwelcome-

80. This is hardly surprising given that resort to common sense seems to guide the resolution of these issues. *See Benedet, supra* note 61, at 131 (“The content of the unwelcomeness requirement is being developed by the courts on an ad hoc basis, apparently by reference to judicial common sense.”).

81. *See 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.”); *Radford, supra* note 48, at 519 (“The generally accepted definition of ‘unwelcome’ conduct is conduct that the plaintiff did not solicit, invite, or incite and that was offensive or undesirable to the plaintiff.”).

82. Such a view can be used to suggest that conduct that would appear to be clearly unacceptable may yet be desired. *See Brooks v. City of San Mateo*, 214 F.3d 1082 (9th Cir. 2000); *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991).

83. This conventional way of viewing unwelcomeness causes concern in part because it begins to resemble the consent inquiry in rape cases. *See infra* notes 139-43 and accompanying text.

ness; rather, it is to appreciate that the lack of guidance regarding the precise parameters of unwelcomeness, combined with the EEOC's suggestion that the unwelcomeness inquiry is context-driven,⁸⁴ allows courts to write on a relatively blank slate each time one examines unwelcomeness, and that that freedom has created a patchwork of caselaw regarding unwelcomeness.⁸⁵

Multiple approaches exist to determine whether conduct is unwelcome, and each is defensible. Sex-related conduct, like all conduct, can be clearly welcome, clearly unwelcome or any shade in between.⁸⁶ How to treat possibly welcome conduct and possibly unwelcome conduct for sexual harassment purposes are open questions. Some courts have defined welcome conduct to include all conduct except that which is specifically objected to by an employee; others have defined welcome conduct to include only that conduct that is expressly welcomed by an employee.⁸⁷

The most restrictive courts view the incite-or-encourage rule very broadly and seem to believe that literally any conduct is potentially welcome.⁸⁸ Thus, even in situations where plaintiffs have been horribly abused, some courts have deemed the victim's workplace behavior sufficient to render the abuse welcome and to immunize the harassment visited upon her.⁸⁹ For example, in *Reed v. Shepard*,⁹⁰ the Court viewed the plaintiff's supposed exhibitionism, suggestive gift-giving and foul mouth as sufficient encouragement of sexually suggestive conduct that the conduct she received in response was deemed welcome.⁹¹ The conduct she endured was extreme:

84. See 29 C.F.R. § 1604.11 (2001).

85. For example, compare *Henson*, 602 F.2d at 903, with *Brooks*, 214 F.3d at 1082.

86. See Radford, *supra* note 48, at 501 ("Sexual advances and conduct in the workplace appear in the same varieties as these guests—some invited, some not invited but happily accepted, some merely tolerated, and others actually rejected."). For example, note these four responses to an objectively offensive joke: 1) "that was hilarious, let me tell you one just like it," 2) "you should not tell jokes like that in the office," 3) silence and 4) "please do not tell jokes like that around me." The responses suggest that the joke can be categorized respectively as clearly welcome; possibly, but not clearly, welcome; possibly, but not clearly, unwelcome; and clearly unwelcome.

87. Many commentators have suggested that courts presume that conduct is unwelcome unless clearly welcomed by the plaintiff and that the presumption should run in the opposite direction. See, e.g., Benedet, *supra* note 61, at 173 ("The element of unwelcomeness should be removed from the prima facie case, and the burden should be on the defendant to show that the plaintiff actually wanted the impugned conduct."); Radford, *supra* note 48, at 505 (suggesting that the burden of proving unwelcomeness shift to defendant who would then have to prove welcomeness).

88. See Benedet, *supra* note 61, at 143 n.65 (detailing cases in which plaintiff's behavior was seen as justification for sexual harassment by co-workers).

89. See Schultz, *supra* note 15, at 1730-32.

90. 939 F.2d 484 (7th Cir. 1991).

91. *Reed*, 939 F.2d at 486-87, 491-92.

Plaintiff contends that she was handcuffed to the drunk tank and sally port doors, that she was subjected to suggestive remarks. . . , that conversations often centered around oral sex, that she was physically hit and punched in the kidneys, that her head was grabbed and forcefully placed in members laps, and that she was the subject of lewd jokes and remarks. She testified that she had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs, and that they frequently tickled her. She was placed in a laundry basket, handcuffed inside an elevator, handcuffed to the toilet and her face pushed into the water, and maced.⁹²

Though proof that this conduct occurred does not necessarily mean that a sexual harassment claim is proven, the notion that the conduct was actually welcome seems a strange conclusion at best. The willingness to allow terribly abusive behavior to be deemed welcome suggests that the *Reed* court and others like it deem conduct welcome unless unequivocally stated to be unwelcome.⁹³ Otherwise, abusive conduct would always be deemed unwelcome.⁹⁴ Those courts seem to confuse the notion that some welcome conduct may not yield Title VII harm with the notion that any potentially harassing conduct that does not yield Title VII harm is potentially welcome. This misapplication of the unwelcomeness requirement seems to stem from the failure to realize that not all un-

92. *Id.* at 486.

93. Unfortunately, some people need to be told explicitly that their conduct is not welcome. This may explain some courts' requirement that plaintiff show unambiguous unwelcomeness. *See Dockter v. Rudolf Wolff Futures, Inc.*, 684 F. Supp. 532, 533 (N.D. Ill. 1988). The court stated that the:

Plaintiff began working for Wolff on January 27, 1985. For the first few weeks, James, as he occasionally did with other female employees at the office, made sexual overtures to—in the vernacular of the modern generation, ‘came on to’—her. Although Plaintiff rejected these efforts, her initial rejections were neither unpleasant nor unambiguous, and gave James no reason to believe that his moves were unwelcome. . . . After one misguided act, in which he briefly fondled Plaintiff's breast and was reprimanded by her for doing so, he accepted his defeat and terminated all such conduct.

Dockter, 684 F. Supp. at 533. It is unclear why anyone would view the unrequested fondling of a subordinate's breast as presumptively welcome merely because the subordinate has not specifically objected to prior conduct.

However, other courts do not require such clear conduct. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990) (“Where, as in the present case, the employee never verbally rejects the supervisor's sexual advances, yet there is no contention or evidence that the employee ever invited them, evidence that the employee consistently demonstrated her unalterable resistance to all sexual advances is enough to establish their unwelcomeness.”). In *Chamberlin*, the plaintiff continually pulled away from her harasser when he touched her and changed the subject whenever the harasser made sexually inappropriate comments. *See id.* at 779-80.

94. Unfortunately, such determinations may stem from courts' opinion of the plaintiff's character. *See Schultz, supra* note 15, at 1729 (noting that courts have often suggested that sexually harassing behavior was not unwelcome when the victim did not fit the court's vision of an appropriately demure victim).

welcome harassing conduct is sufficient to sustain a sexual harassment claim.⁹⁵

Other courts have suggested a more nuanced approach to unwelcomeness that would allow a wider range of conduct to be considered unwelcome in the absence of statements of unwelcomeness and in the face of some workplace playfulness.⁹⁶ Thus, harassment that is a substantial overreaction to workplace playfulness is not viewed as automatically welcome merely because the plaintiff demonstrated some receptivity to ribaldry.⁹⁷ In *Lauro v. Tomkats, Inc.*,⁹⁸ the court noted that the plaintiff's use of foul language did not suggest that she welcomed all of the conduct she experienced in return. That conduct included being propositioned, screamed at, being called vulgar names by various people on a regular basis and being threatened with beatings.⁹⁹ However, the court noted that:

the fact that Lauro might have willingly participated in the use of foul language does not foreclose the possibility that the harassment of which she complains was unwelcome. To so conclude would be to assume that as a result of Lauro's occasional use of foul language, she would as a matter of law have approved of the sexually explicit and offensive comments to which she was subjected. The Court declines to make such a formulaic and unsubstantiated inference.¹⁰⁰

Similarly, in *Nuri v. PRC, Inc.*,¹⁰¹ the court deemed the transmittal of dirty jokes and the use of foul language insufficient to make requests for oral sex and repeated physical touchings of a sexual nature wel-

95. In *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991), the court might have felt compelled to find that sexual harassment had occurred if the conduct involved had been unwelcome. That may have been sufficient for it to pervert the unwelcomeness inquiry and find the conduct welcome.

96. See *Cuesta v. Texas Dep't of Crim. Justice*, 805 F. Supp. 451, 456-57 (W.D. Tex. 1991) (noting that though plaintiff did not initially object to somewhat problematic overtures, that she objected as soon as they became clearly inappropriate meant that they were unwelcome).

97. See *Nejat-Bina*, *supra* note 65, at 333-34 ("An employee who engages in sexual behavior at work cannot 'cry foul' when her co-workers reciprocate, but the reciprocation should match the instigator's conduct in degree and kind. Otherwise, it may be considered unwelcome sexual harassment.").

98. 9 F. Supp. 2d 863 (M.D. Tenn. 1998).

99. *Lauro*, 9 F. Supp. 2d at 867.

100. *Id.* at 872; see also *Morgan v. Fellini's Pizza*, 64 F. Supp. 2d 1304, 1309-10 (N.D. Ga. 1999) (noting that use of foul language does not waive "that plaintiff's legal protections against unwelcome harassment"). However, in some situations, foul language and sex-related activities in the workplace can render potentially harassing conduct welcome. See *Lucas v. S. Nassau Cmty. Hosp.*, 54 F. Supp. 2d 141, 148 (E.D.N.Y. 1998) (noting that male hospital employee's discussion of sexual conquests and amorous activity at the workplace might render conduct he was subjected to welcome).

101. 13 F. Supp. 2d 1296 (M.D. Ala. 1998).

come.¹⁰²

Also, other courts have noted that a willingness to engage in sex-related banter does not make other gender-based harassment welcome. In *Carr v. Allison Gas Turbine Division, General Motors Corp.*,¹⁰³ the Seventh Circuit determined that efforts to be “one of the boys” does not suggest that all manner of sexual harassment is welcome.¹⁰⁴ In that case, plaintiff’s willingness to tell dirty jokes had been offered to demonstrate that the “campaign of harassment” she was subjected to, including numerous gender-based insults, defacement of her work equipment, and gender-based jokes at her expense, was welcome; the offer was rejected.¹⁰⁵ Similarly, in *Lewis v. McDade*,¹⁰⁶ the subject workplace’s sexually-charged nature was offered as proof that the abusive and derogatory harassment directed specifically at women in the office was not unwelcome.¹⁰⁷ The *Lewis* court noted that sexual repartee that could yield welcome sexual repartee in return would not support the characterization of the abusive gender-based conduct at issue as welcome.¹⁰⁸ Thus, regardless of the office’s general atmosphere, the specific harassment at issue was not welcome.¹⁰⁹

One court has gone one step further and noted that conduct that reasonably appears welcome may yet be unwelcome. In *Gray v. Tyson Foods, Inc.*,¹¹⁰ the court recognized that plaintiff’s actions may have stemmed from the plaintiff’s perceived need to go along to get along. The court noted the following:

Although there was evidence that the plaintiff voluntarily participated in the activity she now complains of and that she en-

102. *Id.* at 1301. The *Nuri* court stated that:

PRC’s pointing to Nuri’s participation in the general office banter, and her stating that she did not object to it, is not enough to support the conclusion that she was not subject to unwelcome conduct. Using foul language, or sending or receiving dirty jokes, does not waive the protections of Title VII.

Id.

103. 32 F.3d 1007 (7th Cir. 1994).

104. *Id.* at 1011. The *Carr* court stated that:

[e]ven if we ignore the question why ‘unladylike’ behavior should provoke not a vulgar response but a hostile, harassing response, and even if Carr’s testimony that she talked and acted as she did in an effort to be ‘one of the boys’ is (despite its plausibility) discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct and exonerate their employer.

Id.

105. *Id.* at 1010-12.

106. 54 F. Supp. 2d 1332 (N.D. Ga. 1999).

107. *Lewis*, 54 F. Supp. 2d at 1336-37.

108. That conduct included screaming and cursing at the female employees in the office, guaranteeing that they were put into demeaning positions in the office and hitting female employees. *See id.* at 1337.

109. *See id.* at 1344.

110. 46 F. Supp. 2d 948 (W.D. Mo. 1999).

joyed it, there was also evidence and reasonable inferences from the evidence supporting the conclusion that the complained about conduct was unwelcome. The jury could have concluded reasonably that a woman in the work environment existing at defendant's plant had to appear to enjoy participating in the hostile conduct in order to maintain any status in that workplace. The jury could have concluded that despite plaintiff's involuntary participation, she, in fact, found the conduct offensive and unwelcome.¹¹¹

Simply, when a workplace is so ingrained with harassment that the only reasonable course of conduct is to seem willing to join in the unwelcome activity, the harassment may not be deemed welcome.¹¹² The *Gray* court's approach, while sensible, eviscerates the unwelcomeness requirement, by allowing a victim to shield her discomfort and then prove that the conduct involved was unwelcome. This would not provide the putative harasser any reason to believe that his behavior was inappropriate, given that the behavior might appear to be a measured response to a plaintiff who seemed willing to engage in sex-based or gender-based conduct. Arguably, the incite-or-encourage rule was designed to immunize just such conduct. At a minimum, the unwelcomeness inquiry seems geared in part to protect against conduct that the plaintiff affirmatively seemed to welcome. While the *Gray* court's rule is not inconsistent with Title VII's principles, the rule alters the unwelcomeness inquiry so much that it may make more sense to eliminate the unwelcomeness inquiry than to view it in this way.

Precisely how unwelcomeness is to be defined remains an open question given the courts' lack of uniformity. The unwelcomeness inquiry is a contextual one during which courts may use all relevant factors, including whether the plaintiff's actions were reasonable responses to unwelcome conduct given the workplace atmosphere and whether the putative harasser's responses were reasonable, to determine if the conduct at issue was welcome. The uncertainty attending the substance of

111. *Gray*, 46 F. Supp. 2d at 953.

112. See Benedet, *supra* note 61, at 151 Benedet notes that:

Ostracism for refusal to participate in sexual behavior at work may itself become a form of harassment . . . It is therefore hardly surprising that plaintiffs may resign themselves to joining in [the behavior]. This may mean weathering the comments and advances good-naturedly, or it may mean more active participation.

Id.; Bull, *supra* note 21, at 144-45 (noting that joining in banter can simply be an attempt to fit in, rather than an indication that such banter is welcome). If ostracism is not a form of harassment, the worker suffering from it might have no recourse but to accept it. See *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1039 (7th Cir. 1998) (noting that ostracism by co-workers may not constitute harm covered by Title VII); *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 882-85 (7th Cir. 1998) (noting that ostracism by co-workers may not be actionable).

the unwelcomeness inquiry is all the more troubling because the inquiry can be used to serve very different purposes. However, before examining those purposes and finalizing the content of the unwelcomeness inquiry, we must examine the perspective from which unwelcomeness should be viewed.

2. *From Whose Perspective?*

How precisely the unwelcomeness inquiry should be constructed may depend on the perspective from which unwelcomeness is analyzed. The three major perspectives from which welcomeness can be viewed are the plaintiff's subjective perspective, the putative harasser's subjective perspective and an objective perspective.¹¹³ Each of these can be an appropriate perspective from which to view unwelcomeness, depending on what the unwelcomeness inquiry is supposed to add to the general sexual harassment inquiry¹¹⁴ (i.e., depending on whether the focus is to be on the harm to plaintiff's well-being, the defendant's knowledge of the inappropriateness of the conduct or the general appropriateness of sex-based or gender-based conduct in the workplace).

If harm to plaintiff is the ultimate focus of sexual harassment and the intermediate focus of the unwelcomeness inquiry, viewing unwelcomeness from plaintiff's subjective perspective is sensible. Whether the conduct was welcome *by the plaintiff* would be the key issue. Otherwise, there would be no reason to believe that all conduct deemed not unwelcome does not cause harm.¹¹⁵ Additionally, because the targets of the conduct may have different views than the perpetrator regarding its unwelcomeness, the target's view of the conduct would seem most important in addressing the harm flowing from such conduct.¹¹⁶

However, viewing unwelcomeness from the putative harasser's perspective is sensible if a defendant's intent to harass is important¹¹⁷ or if

113. There are five total perspectives, if one includes the perspective of the reasonable person in plaintiff's position or the reasonable person in the harasser's position. However, I subsume them in the broad category of the objective perspective. Though this consolidation leaves some issues unexamined, those issues do not affect this Article's analysis.

114. See Monnin, *supra* note 78, at 1165 (noting that courts have had difficulty determining the appropriate perspective from which unwelcomeness should be viewed).

115. However, this might lead to the unwelcomeness inquiry being subsumed into sexual harassment's subjective offense inquiry. This would not be appropriate as unwelcomeness would merely provide an additional and possibly improper way to analyze subjective offense.

116. A counter-argument set forth more fully below is that because subjective offense is already required for sexual harassment to be actionable, an unwelcomeness inquiry viewed from the plaintiff's perspective would be largely redundant.

117. See Benedet, *supra* note 61, at 145-48 (noting that some courts find the putative harasser's knowledge of the unwelcomeness of his conduct important). Again, there is the concern that the inquiry will look quite a bit like the consent inquiry in rape, where the putative rapist's belief about consent can become important. See Nejat-Bina, *supra* note 65, at 350-52 (noting that requiring proof of unwelcomeness makes sexual harassment law look remarkably similar to rape

the defendant needs to know that his conduct was harassing.¹¹⁸ Because the workplace is a setting in which men and women must interact and may annoy each other without the intent to do so,¹¹⁹ an intent to harass may be considered necessary so that the workplace does not become an unmanageable minefield.¹²⁰ Unfortunately, some unintentional harassment may merely be a manifestation of the differing ways that men and women interact. Because the same conduct can be unwelcome or welcome depending on who is subjected to it, the conduct itself is arguably not problematic unless the target indicates it is unwelcome.¹²¹ Thus, as long as the conduct clearly would not be unwelcome to everyone subject to it, requiring that the harasser know that the conduct is unwelcome by the target before the conduct is deemed harassing and actionable may be sensible. Of course, the counter-argument is that it is precisely because potentially harassing conduct may be deemed harassing by some target that the harasser's perspective should be irrelevant in determining whether the conduct was unwelcome.¹²²

law).

118. Society may care about the intent to harass, not out of the desire to roughly equate sexual harassment to rape, but because making sexual advances and other "non-abusive" forms of harassment may not be viewed as problematic—a view possibly at odds with Title VII.

119. See Richard L. Wiener & Linda E. Hurt, *Social Sexual Conduct At Work: How Do Workers Know When It Is Harassment and When It Is Not?*, 34 CAL. W.L. REV. 53 (1997) (charting differences in how men and women react to behavior that may be harassing); Weiner, *supra* note 69, at 635 (noting a study in which men and women are shown to interpret behavior as harassing at very different rates).

120. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (noting that Title VII is not a general civility code); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (noting that sexual harassment "is not designed to purge the workplace of vulgarity"); *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986). The *Rabidue* court noted that:

It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

Rabidue, 584 F. Supp. at 430.

121. In addition, the employer can argue that it cannot be expected to know that conduct is harassing unless the harasser knows that the conduct is harassing.

122. Of course, harassers can have strange notions of what constitutes encouragement and welcomeness. In *Brooks v. City of San Mateo*, 214 F.3d 1082 (9th Cir. 2000), the court noted:

At some point during the evening, Selvaggio approached Brooks as she was taking a call. He placed his hand on her stomach and commented on its softness and sexiness. Brooks told Selvaggio to stop touching her and then forcefully pushed him away. Perhaps taking this as encouragement, Selvaggio later positioned himself behind Brooks's chair, boxing her in against the communications console as she was taking another 911 call. He forced his hand underneath her sweater and bra to fondle her bare breast.

Id. at 1086. The notion that a harasser could feel encouraged by a command to stop is disturbing. While the court's statement could be read as a tongue-in-cheek suggestion at the sheer silliness of an argument suggesting that the plaintiff might have encouraged the conduct, the court's later suggestions that the implications of the attack could be dealt with easily may suggest otherwise. See *id.* at 1087 ("Despite the city's prompt remedial action, Brooks had trouble recovering from the incident."). The suggestion is that the mere fact that the harasser was fired should alleviate

Lastly, unwelcomeness may reasonably be viewed from an objective or societal perspective. Such a view would avoid the possible apportionment of Title VII liability based on an ostensibly overly sensitive victim or an obtuse harasser.¹²³ From an objective perspective, certain conduct or courses of conduct could be deemed unacceptable, and considered unwelcome, regardless of the target's actual response to the conduct.¹²⁴ While other sexual harassment rules might render the conduct not actionable, the unwelcomeness doctrine would not. While this approach *might* cause some workplaces to lose their particular sexual character, if that character was defined in part by sexual harassment, eliminating such workplace atmospheres would probably not be particularly problematic given Title VII's goals.¹²⁵

The reasonableness of each perspective, combined with the lack of guidance by courts, has left the issue of perspective open.¹²⁶ For example, in *Gray v. Tyson Foods, Inc.*,¹²⁷ the court's suggestion that a plaintiff can hide her discomfort with conduct, yet still have it viewed as unwelcome, unabashedly suggests that unwelcomeness be viewed from the plaintiff's perspective.¹²⁸ However, in *Meritor Savings Bank v. Vinson*,¹²⁹ the Supreme Court's commentary about unwelcomeness can support viewing unwelcomeness from any perspective.¹³⁰ There, the Court

the effect of the sexual assault.

123. The offense inquiry deals with this issue as well. However, for purposes of this section, we will explore the unwelcomeness inquiry as if the offense inquiry did not exist.

124. This does not mean conduct that is not problematic to the victim will be subject to liability. Other sexual harassment requirements ensure that the conduct complained of has actually harmed a plaintiff.

125. Ultimate equality may require the elimination of the harassment in all workplaces.

126. Some suggest that the issue of perspective has already been resolved. Radford, *supra* note 48, at 512-13. Radford notes that:

Despite the somewhat confusing 'defense' language in *Vinson*, the combination of the *Vinson* opinion and the EEOC Policy Guidance clearly indicates that the Supreme Court and the EEOC believe that the target of sexual advances or conduct may not successfully bring an action for sexual harassment unless she can prove that she clearly indicated to the alleged harasser the unwelcomeness of his conduct.

Id.; Weiner, *supra* note 69, at 626-28 (indicating that EEOC's view of unwelcomeness puts burden on plaintiff to demonstrate unwelcomeness to the alleged harasser).

127. 46 F. Supp. 2d 948 (W.D. Mo. 1998).

128. Similarly, in *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982), the Eleventh Circuit indicated that for conduct to be unwelcome, an employee must not solicit or incite harassment and that the employee must have been offended by the conduct. This arguably suggests that unwelcomeness is viewed from the plaintiff's perspective in that the inquiry is focused on her and she must actually have been offended by the conduct. This could allow a plaintiff to deem the conduct involved unwelcome even though such was never indicated to the putative harasser. Of course, the *Henson* court may have viewed the unwelcomeness inquiry in that case as a timing issue, its point being that conduct may be deemed unwelcome if it occurs before the victim has an opportunity to indicate its unwelcomeness. If that is the case, *Henson* provides no additional insight on the perspective from which unwelcomeness should be viewed.

129. 477 U.S. 57 (1986).

130. *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988) (noting that *Meritor* "leaves open the question of whose perspective—that of the harasser or that of the victim—should be

indicated that “[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome.”¹³¹ It is possible that the Court meant to suggest that the plaintiff’s discomfort was a factual issue for the jury that could be proven by reference to her conduct.¹³² However, the Court’s determination that the unwelcomeness inquiry could be aided by the presentation of evidence regarding “complainant’s sexually provocative speech or dress”¹³³ suggests that unwelcomeness, as a signal to cease the conduct, should be demonstrated to the putative harasser.¹³⁴ If so, the Court suggests that unwelcomeness could appropriately be viewed from the harasser’s subjective perspective or the perspective of a reasonable person in the harasser’s position.

Though *Vinson* and *Gray* provide arguments that would allow a court to analyze unwelcomeness from whatever perspective it favored, the perspective from which unwelcomeness should be viewed may depend on the purpose unwelcomeness is to serve in the broader sexual harassment inquiry. Thus, reference to other requirements of an actionable sexual harassment claim may be useful before further sketching the outlines of the unwelcomeness inquiry.

3. *Unwelcomeness and Offense*

Examining other requirements of a sexual harassment claim to determine the independent significance of the unwelcomeness requirement

used in assessing ‘unwelcomeness’”).

131. *Vinson*, 477 U.S. at 68.

132. See *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 565 (8th Cir. 1992) (suggesting that a plaintiff’s speech or dress is relevant to deciding if she viewed the conduct as unwelcome).

133. *Vinson*, 477 U.S. at 69.

134. This aspect of the Court’s decision has been widely criticized. See, e.g., Benedet, *supra* note 61, at 142-45 (discussing the use of dress and demeanor to determine unwelcomeness); Bull, *supra* note 21, at 134-35 (noting generally that much seemingly irrelevant information has been admitted as relevant to the unwelcomeness issue); Juliano, *supra* note 63, at 1587-90 (assessing the use of dress, speech and demeanor to determine unwelcomeness); Radford, *supra* note 48, at 505-06 (suggesting the inappropriateness of using speech, dress and demeanor to determine unwelcomeness). However, the Federal Rules of Evidence may soften the effect of the Court’s decision. See *Socks-Brunot v. Hirschvogel, Inc.*, 184 F.R.D. 113, 119 (S.D. Ohio 1999) (“While relevant evidence is generally admissible under Federal Rule of Evidence 403, evidence subject to Rule 412 is presumptively inadmissible, even when offered to disprove ‘unwelcomeness’ in a sexual harassment case.”); *Barta v. City & County of Honolulu*, 169 F.R.D. 132, 137 (D. Haw. 1996) (disallowing discovery of evidence of plaintiff’s sex life); *Weiner*, *supra* note 69, at 637-38 (noting that the revised Rule 412 of the Federal Rules of Evidence can stop the admission of the most problematic evidence); see also *Monnin*, *supra* note 78 (analyzing the interplay between sexual harassment and Federal Rule of Evidence 412). Unfortunately, the Court’s decision may have other effects when courts allow defendants to probe sexual backgrounds. See *Sanchez v. Zahibi*, 166 F.R.D. 500, 503 (D. N.M. 1996) (allowing limited discovery of past sex-related activity even in the face of Federal Rule of Evidence 412); *Oshige*, *supra* note 67, at 581 (noting that a defense counsel’s ability to probe to prove welcomeness may deter plaintiffs from filing meritorious harassment claims).

is advisable before constructing the content of the unwelcomeness inquiry. Actionable hostile work environment harassment must be subjectively offensive to a plaintiff and objectively offensive to a person in plaintiff's position.¹³⁵ As the Supreme Court has noted:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.¹³⁶

That both offense and unwelcomeness are independently required suggests that they should be viewed independently.

Though both the unwelcomeness and offense requirements focus on harm or discomfort to the plaintiff, unwelcome conduct and offensive conduct are not coextensive. Assume that an employee makes a sexual advance toward a co-worker in a particularly inappropriate manner. The style of the advance, and hence the advance itself, may be offensive even if the sentiment underlying the advance, and therefore the advance itself, was arguably not unwelcome. Conversely, an advance may be inoffensive, but undoubtedly unwelcome, whether the subject is interested in the propositioner or not.¹³⁷ Assume one co-worker sends a dozen red roses to the office of her co-worker with whom she is having a personal relationship. The gesture, particularly if seen by others, may be unwelcome, though not offensive, because the discreet nature of the relationship was highly prized by the recipient of the roses. Though subjective offense and welcomeness can cover different ground,¹³⁸ they are sufficiently related to be considered redundant in many situations.¹³⁹

135. See *Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1456-57 (7th Cir. 1994) (describing objective offense).

136. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

137. Imagine that a boyfriend sends a scantily clad male dancer to his girlfriend's office to deliver a strip-o-gram proposing marriage. Even if the girlfriend wants to marry her boyfriend, the strip-o-gram may be unwelcome for at least three reasons. First, the girlfriend may object to receiving strip-o-grams. Second, the girlfriend may not want to receive strip-o-grams at work. Third, the girlfriend may want to keep her private life completely separate from her work life such that no workplace intrusion of this or any other personal type is welcome. While the strip-o-gram may not be welcome, it may not be offensive. Conversely, the strip-o-gram may be welcome in that the sentiment underlying the strip-o-gram may be welcome, while the strip-o-gram itself may be offensive.

138. *Benedet*, *supra* note 61, at 134 (“[O]bjectively severe or pervasive sexual harassment is considered potentially consistent with welcomeness.”); *Monnin*, *supra* note 78, at 1165 (noting that conduct can be “offensive or undesirable to the plaintiff, yet nonetheless ‘welcomed’ by her in the eyes of her harasser”).

139. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 833 (1991). Estrich stated that: the welcomeness inquiry is either utterly gratuitous or gratuitously punitive. It is

However, unless unwelcomeness is to be of extremely limited utility, it must serve a purpose as independent of subjective offense as possible.

Viewing unwelcomeness from the plaintiff's perspective nearly eliminates the unwelcomeness requirement's effect. While it is possible that a plaintiff may be subjectively offended by welcome conduct, such would seem to be a very narrow and arguably confusing use of unwelcomeness. Conversely, viewing unwelcomeness from the putative harasser's perspective affords the unwelcomeness requirement a greater impact by describing a broader, though still narrow set of cases (i.e., one in which the harasser believes objectively offensive conduct to be welcome). Though reasonable arguments exist to view unwelcomeness from any perspective, the unwelcomeness inquiry would seem to have its greatest practical import and significance when viewed from the harasser's subjective perspective or possibly from that of a reasonable person in the harasser's position.

C. *Assessing Unwelcomeness*

Based on the theories underlying unwelcomeness—that conduct may be welcome to one person, but unwelcome to another,¹⁴⁰ and that conduct must be unwelcome to cause harm—the unwelcomeness requirement is best conceived as requiring that the putative harasser know or should have known that the potentially harassing conduct was unwelcome before it is deemed unwelcome. This construction of the requirement guarantees that harm to the plaintiff occurred—though it is underinclusive of situations where harm has occurred—because there will be little reason for the harasser to know that the conduct was unwelcome unless the conduct was actually unwelcome to the plaintiff, and guarantees that the putative harasser has notice that the conduct was problematic. Once the putative harasser knows or should have known that the conduct is harassing and unwelcome, the continuation of the conduct is necessarily harassing, and is actionable if the employee's terms of employment are actually or constructively altered as a result. Conversely, if the harasser had reason to be unclear that the potentially harassing conduct was unwelcome—possibly because the conduct was welcome—the continuation of the conduct might not lead to harm, and the putative

gratuitous when the environment is not proven objectively to be hostile, because an unwelcome environment which is not objectively hostile does not give rise to liability in any event. It is gratuitously punitive if the environment is found objectively hostile, for in that case the employer can nonetheless escape the burden of addressing the issue, by portraying this particular woman as so base as to be unworthy of respect or decency.

Id.; Nejat-Bina, *supra* note 65, at 347 (suggesting that the unwelcomeness requirement is superfluous).

140. See *supra* notes 71-72.

harasser's conduct would not be deemed actionable.

While this formulation of the unwelcomeness requirement is reasonable given that the requirement must have some content, it is still troubling. When the unwelcomeness inquiry is viewed in this way, it appears to protect the conduct of a putative harasser who may have mistakenly not realized that his conduct was unwelcome (e.g., if the subject of the conduct did not react to the conduct or reacted to it with silence). Allowing the harasser's mistake to shield the employer from liability treats sexual harassment somewhat similarly to rape. Although the Supreme Court, in *Meritor Savings Bank v. Vinson*,¹⁴¹ noted specifically that the consent inquiry in a rape case and the welcomeness inquiry in a sexual harassment suit are different,¹⁴² they bear an uncomfortable similarity.¹⁴³ In neither rape nor sexual harassment cases is proof that sex or sex-based conduct occurred proof of harm, because the sexual conduct ostensibly can be consensual. Both voluntariness and unwelcomeness focus on consent. Indeed, the *Vinson* Court nearly said as much, even as it denied that the inquiries were identical.¹⁴⁴ Thus, unless the unwelcomeness requirement is applied carefully, some of the problems attending the consent inquiry in rape cases will attend the unwelcomeness inquiry in sexual harassment cases.¹⁴⁵

However, no matter how it is structured, an unwelcomeness requirement will put the burden of proving unwelcomeness on the plaintiff and create the presumption that sex-related workplace conduct is not unwelcome until proven otherwise.¹⁴⁶ That presumption suggests either

141. 477 U.S. 57 (1986).

142. That sex can be consensual vis-a-vis a rape prosecution does not mean that the sexual advances that preceded it were welcome in the employment context. See *Vinson*, 477 U.S. at 68 ("The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.").

143. Benedet, *supra* note 61, at 126 ("Such an inquiry reveals several parallels between the approach of courts to sexual harassment claims and their traditional treatment of the criminal offense of rape."); Estrich, *supra* note 139, at 815. Estrich states that:

These very same doctrines, unique in the criminal law, are becoming familiar tools in sexual harassment cases. The rules and prejudices have been borrowed almost wholesale from traditional rape law. The focus on the conduct of the woman—her reactions or lack of them, her resistance or lack of it—reappears with only the most minor changes.

Id.; Juliano, *supra* note 63, at 1576-77 ("The factors considered bear a striking resemblance to factors formerly considered in rape cases."); Radford, *supra* note 48, at 516 (noting that courts following *Vinson* seem "to require nothing less than a clear and adamant 'no' on the plaintiff's part before believing that her communication of unwelcomeness was unambiguous").

144. *Vinson*, 477 U.S. at 69 ("While 'voluntariness' in the sense of consent is not a defense to such a [sexual harassment] claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome.").

145. See Estrich, *supra* note 139, at 833.

146. Benedet, *supra* note 61, at 132 (suggesting the existence of a presumption of consent to harassment in sexual harassment cases); Nejat-Bina, *supra* note 65, at 346 ("The presumption of

that a factfinder should believe that sex-based conduct in the workplace is actually welcome until proven otherwise, or that a sexual harassment case has not been proven unless the subject conduct is proven to be unwelcome. These meanings are somewhat related because placing the burden to prove that sex-based workplace conduct is unwelcome on the plaintiff is more sensible if courts believe that most in society believe that sex-based workplace conduct is generally not unwelcome unless plaintiff indicated such to the putative harasser.¹⁴⁷ Conversely, presuming that potentially harassing conduct is unwelcome unless the plaintiff initiated or encouraged the conduct at issue, or that the unwelcomeness inquiry be limited to those situations where the conduct at issue was openly welcome, may be just as reasonable.¹⁴⁸ That is, a presumption of unwelcomeness could follow proof of objectively offensive sex-based workplace conduct.¹⁴⁹ Nonetheless, courts have noted that proving unwelcomeness is part of the plaintiff's prima facie case.¹⁵⁰

Though no one wants to be harassed,¹⁵¹ particularly given that ac-

welcomeness unfairly burdens victims; instead, the presumption should be that sexual conduct at work is unwelcome."); Oshige, *supra* note 67, at 590-91 (suggesting that welcomeness be an affirmative defense, rather than part of the plaintiff's proof); Vhay, *supra* note 15, at 344 ("Welcomeness in this context is most analogous to a justification for the defendant's act. . . . The plaintiff should not bear the burden of rebutting the defendant's affirmative defense in her prima facie case.").

147. Unfortunately, the lack of clarity regarding the interpretation of unwelcome conduct may lead to the result that how the unwelcomeness inquiry ends may depend on where it starts. If sex-based conduct is presumed unwelcome, more conduct will tend to be viewed as unwelcome regardless of the standard used to determine unwelcomeness. Similarly, if conduct is presumed welcome, more conduct will tend to be viewed as welcome regardless of the standard used to determine unwelcomeness.

148. Benedet, *supra* note 61, at 166 ("The idea of welcomeness is wholly inapplicable in cases where the conduct is not specifically solicited."); Mary Jo Shaney, Note, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109, 1112 (1986) (suggesting that welcomeness "focus on whether the victim overtly consented to the sexual conduct rather than on whether the victim resisted a harasser's behavior").

149. Seemingly, this would be the tack taken if unwelcomeness were required in racial harassment cases. Potentially harassing race-based conduct would be assumed unwelcome unless proven otherwise. Cf. L. Camille Hebert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 577 (1995) (noting that unwelcomeness is generally presumed outside of the sexual harassment context).

150. See, e.g., *Splunge v. Shoney's, Inc.*, 874 F. Supp. 1258, 1270 (M.D. Ala. 1994).

151. Some have suggested that sexual harassment, by definition, is always unwelcome. Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1008 (7th Cir. 1994) ("'Welcome sexual harassment' is an oxymoron."). While this is certainly true once conduct is defined as sexual harassment, particular conduct may be harassing or not depending on context. Some conduct that could be deemed harassment could also be viewed as welcome in another context, even among the same participants. For example, if an employee has a sexual relationship with his boss, we can assume that sexual foreplay may occur in private, and may be welcome. This is so even if the subordinate employee views sexual foreplay as unwelcome when his boss/girlfriend attempts foreplay at work.

It is possible that a court would not consider such foreplay as unwelcome by virtue of the preexisting relationship between the boss and the subordinate. Because the definition of unwelcome requires that conduct not be incited or invited, it may be that conduct of a sexual nature between certain people should never be considered unwelcome. At some point, this cannot be

tionable harassment entails the discriminatory provision of terms, conditions, or privileges of employment, whether someone is deemed to have been harassed depends, in part, on whether they appear to have acquiesced to the potentially harassing conduct.¹⁵² When proving the lack of acquiescence becomes the key to recovery, employees become fair targets for gender-motivated conduct until putative harassers are told their conduct is unwelcome. This is problematic because, although sexual advances can be welcome in some contexts,¹⁵³ the suggestion that sex-based or gender-motivated conduct in the workplace should be considered welcome until the employee subjected to those advances objects may not be a reasonable one.

The conduct that Amanda and Becky faced in our hypothetical situation raises just such problems. Though Amanda and Becky appear to face a workplace in which it is more difficult to get their jobs done because of their gender, they will need to confront the unwelcomeness requirement and its need for notice to the putative harasser. Regardless of whether XYZ's workplace constitutes an actionable hostile work environment, whether the answer should depend on whether the conduct is deemed unwelcome is the issue. As noted above, the unwelcomeness requirement is problematic even as it applies to face-to-face sexual harassment consisting largely of sexual advances and requests for sex. However, as sexual harassment moves farther away from its traditional sex-based moorings and toward a gender-based outlook, the unwelcomeness requirement may become more difficult to apply to the kind of conduct that may cause harm similar to that in Becky's and Amanda's cases. Thus, the question is: Does the unwelcomeness requirement continue to serve any appropriate function in the evolving sexual harassment inquiry?

IV. UNWELCOMESNESS AND SEXUAL HARASSMENT

When sexual harassment was first made cognizable and was thought largely to comprise sex-based conduct, requiring that sexual harassment be unwelcome stemmed from the notion that potentially harassing conduct might be enjoyed by employees, and therefore might not cause Title VII harm.¹⁵⁴ However, the unwelcomeness requirement fits rather uneasily with current sexual harassment law and its applicability to all

true, as even sexual relations between married partners can become marital rape.

152. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); Bull, *supra* note 21, at 118.

153. See Nejat-Bina, *supra* note 65, at 349 (noting that some have suggested that workplace conduct of a sexual nature may be welcome); see also Fremling & Posner, *supra* note 74, at 1081 (noting that the workplace is an increasingly important site for courtship as most women are now entering the workforce before marriage).

154. See Benedet, *supra* note 61, at 144-45; Bull, *supra* note 21, at 124.

gender-based conduct that can support sexual harassment claims. As gender harassment has become clearly actionable, sexual harassment law may have outgrown the unwelcomeness requirement.

A. *Unwelcomeness and Quid Pro Quo Sexual Harassment*

In quid pro quo harassment cases, the unwelcomeness requirement is largely irrelevant. Recent Supreme Court cases have made it clear that quid pro quo harassment requires that actual job detriment result directly from sexually harassing conduct.¹⁵⁵ Unless it causes actual job detriment, sexually harassing conduct, including a threat conditioning job benefits on acquiescence to harassment, is insufficient to support a quid pro quo case.¹⁵⁶ Were a supervisor to tell a subordinate, "You must have sex with me or you will be fired," the threat alone would not support a quid pro quo case until the subordinate was fired or suffered some other actual job detriment.¹⁵⁷ Though requiring unwelcomeness may have seemed sensible when quid pro quo harassment encompassed the conditioning of job benefits on sex and like conduct¹⁵⁸—a situation in which the trade and the underlying conduct could, under limited circumstances, have been viewed as welcome—it makes little sense today given that quid pro quo harassment focuses on actual job detriment inflicted as a result of a refusal to acquiesce to sexual harassment.¹⁵⁹

Constructing a scenario in which welcome conduct creates actual job detriment may be impossible. The closest scenario would seem to be one in which the continuation of conduct, which at one point was welcome, is made a term of employment, and then causes actual job detriment to the employee when the employee refuses to acquiesce in the continuation. For example, assume that an employee who previously had a voluntary and consensual affair with his boss is fired for refusing to continue the affair. If the result of the refusal to continue the conduct results in job detriment, either the conduct or the conditioning of continued employment on continuing the conduct would seem to have necessarily been unwelcome at the time the condition was placed on continued employment. Even if one argues that the harasser must have notice of the unwelcomeness, the refusal to continue the affair would seem to qualify as notice of unwelcomeness. Were the conduct

155. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998).

156. *Ellerth*, 524 U.S. at 754.

157. *Id.*

158. *See* *Bryson v. Chicago State Univ.*, 96 F.3d 912, 915 (7th Cir. 1996) (suggesting that the conditioning of job benefits on sex was sufficient for quid pro quo case); *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir. 1994); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 186 (6th Cir. 1992) (suggesting that conditioning of benefits on sexual harassment is sufficient for quid pro quo case).

159. *See Ellerth*, 524 U.S. at 754.

welcome, the employee would presumably have engaged in the required conduct, particularly since his job was the cost of noncompliance.¹⁶⁰

Whether the harassing conduct would have been welcome had it not been tied to job detriment surely cannot matter to whether a quid pro quo claim exists.¹⁶¹ The fact that potentially harassing conduct was welcome in the past cannot mean it continues to be welcome even though it leads to actual job detriment.¹⁶² Rather, potentially harassing conduct would always seem to be potentially unwelcome, and arguments that the conduct was welcome in the past should be largely irrelevant to determining whether it was welcome at the time it precipitated the actual job detriment. It appears impossible for a quid pro quo claim to be predicated solely on welcome conduct, because the nature of a quid pro quo claim is such that when quid pro quo harm (i.e., actual job detriment) occurs, no argument exists that all of the conduct underlying the claim was welcome.

Applying the unwelcomeness requirement to Becky's situation in our hypothetical suggests the requirement's irrelevance to, or the fact that unwelcomeness always exists in, quid pro quo cases. Becky's quid pro quo claim could be based on the notion that she was denied a promotion, and the pay raise that came with it, because of her refusal to accept and participate in the sexually harassing atmosphere. Because her refusal to participate in the workplace atmosphere was recognized and used in part to deny her the promotion, even a strict standard of unwelcomeness requiring notice would seem to have been met in

160. Cf. Bull, *supra* note 21, at 124. Bull states that:

The *Meritor* standard is premised on a notion of welcomeness, that women welcome certain behavior by dressing or talking a certain way. While this logical inference might make sense to some in the context of a hostile environment claim, it is untenable in the context of quid pro quo harassment. Clearly, no woman intentionally provokes losing her job.

Id.; Nejat-Bina, *supra* note 65, at 329 (“[I]n a quid pro quo case, a supervisor’s sexual request is implicitly unwelcome and unwelcomeness is not a key element.”).

161. Were the mere conditioning of job benefits on harassment still considered to be quid pro quo harassment, one could argue, rather weakly, that requiring that an employee acquiesce to something that is not unwelcome does not cause any harm, and therefore should not be sanctioned as sexual harassment. However, since the mere conditioning of job benefits on sexual harassment (i.e., unfulfilled threats, does not amount to quid pro quo sexual harassment that argument is no longer available). *Ellerth*, 524 U.S. at 754.

162. This argument is distinct from one that suggests that previously welcome conduct may not appear harassing precisely because it had previously been welcome. Assume that an employee who has historically been willing to plan office parties is now required to plan such parties. When she refuses, she is demoted. That the employee had no complaints about voluntarily planning such parties before does not mean that being required to plan parties is not unwelcome. The refusal to plan the parties suggests unwelcomeness. However, that the employee does not welcome being required to plan parties does not mean that the requirement is harassment; it may simply be annoying. See *Galdieri-Ambrosini v. Nat’l Realty & Dev.*, 136 F.3d 276 (2d Cir. 1998) (noting that assignment of secretarial tasks is not gender-related discrimination when the secretary is the person assigned tasks and there is no indication that male secretaries would have been treated differently).

Becky's situation. Of course, an employer hardly needs notice that conduct leading to an adverse job action is unwelcome. This analysis, of course, relates only to the unwelcomeness question, and would not affect XYZ's argument that the conduct Becky endured was not gender-based harassment.

B. Unwelcomeness and Hostile Work Environment Harassment

The interplay between hostile work environment harassment and unwelcomeness is more complicated than that between unwelcomeness and quid pro quo harassment. The lack of a requirement of actual job detriment in the hostile work environment area makes the application of the unwelcomeness requirement to hostile work environment harassment somewhat different.¹⁶³ As there need not be an adverse job action in the hostile work environment context, there need not be a refusal to acquiesce to harassment that necessarily creates notice of unwelcomeness, or any particular action by a supervisor that would be unquestionably unwelcome to all employees. Consequently, a hostile work environment may exist without notice being provided to the putative harasser or the employer that conduct is unwelcome.

Over time, the hostile work environment claim has changed somewhat as non-sexual gender-based conduct has grown in importance in supporting hostile work environment claims.¹⁶⁴ As the style of conduct that may support a hostile work environment claim has broadened, workplace situations yielding hostile work environment claims may not appear as egregious as in earlier cases like *Vinson*. This can cause problems because the unwelcomeness requirement may appear to require that courts ignore conduct deemed not unwelcome when determining whether a hostile work environment has been proven.

The type of conduct that may support a hostile work environment claim can be of a different nature than that which has historically supported a quid pro quo claim. The nature of the conduct supporting a

163. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). *Meritor Savings Bank* is the case in which the Supreme Court first recognized the hostile work environment claim was grounded on sex-based conduct. *Id.* Had the sex-based conduct alleged in *Vinson*—sexual advances, sexual propositions and sexual activity—somehow been actually welcome and no job detriment occurred, no Title VII claim would have been cognizable, because the situation would have presumably amounted to consensual sexual activity in the workplace having little or no bearing on plaintiff's employment. *Id.* at 68. Applying the unwelcomeness requirement seemed no less appropriate in the hostile work environment area than in the quid pro quo area, though the Supreme Court's suggestion that the plaintiff's dress was relevant to whether the conduct was unwelcome, and therefore supported a hostile work environment claim, may have been inappropriate. See *id.* at 69.

164. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (allowing impersonal harassment through calendars, magazines and other media to support a hostile work environment claim).

prototypical sex-based quid pro quo case may afford a visceral response of unwelcomeness that has no parallel with respect to conduct that may support gender-based hostile work environment cases. Though Title VII harm may exist in either case, there is a difference between a demand to have sex with one's boss on pain of losing one's job, and constant gender-based joking and non-physical harassment at the hands of one's co-workers.¹⁶⁵ If, to be deemed unwelcome, conduct underlying a hostile work environment claim must elicit a visceral response of unwelcomeness similar to that which one would expect to accompany conduct supporting a quid pro quo case, the unwelcomeness requirement may be an inappropriate part of the hostile work environment landscape, because conduct that may be deemed not unwelcome may actually help create a work environment that causes Title VII harm, whether it is credited with doing so or not.

This problem is even larger given that a hostile work environment need not literally be hostile to support a hostile work environment claim. A hostile work environment claim exists whenever an employee's terms of employment have been constructively altered by harassment because of her gender.¹⁶⁶ This may occur when a workplace is hostile, abusive, or of such a nature that it causes an employee to have an unreasonably more difficult time doing her job or advancing because of her gender.¹⁶⁷ For example, in *Harris v. Forklift Systems, Inc.*,¹⁶⁸ the plaintiff claimed that the company owner's conduct toward her and other female workers in the office created a hostile work environment.¹⁶⁹ The owner's conduct included requiring female workers to retrieve coins from his pocket, implying that plaintiff had promised sex to a customer to close a deal, and suggesting that the plaintiff go to a motel to negotiate a raise with him.¹⁷⁰ Even though the plaintiff only claimed that she had suffered some, though not necessarily severe, psychological harm, the owner's conduct was deemed sufficient to support a hostile work environment claim.¹⁷¹ The harm of hostile work environment harassment can be the toll that such harassment takes on an

165. However, conduct may be harassing whether it would be viewed as mild in isolation and therefore not actionable, or severe in isolation and possibly actionable. Whether workplace conduct demonstrates that an employee is seen merely as a sex object, or as a subject of ridicule because of her sex, or as a member of a gender that is the subject of ridicule, it may create a hostile work environment if it is sufficiently severe or pervasive. See Nejat-Bina, *supra* note 65, at 349-50 (noting that seemingly harmless request for a date can suggest to employee that she is merely a sex object).

166. See *Ellerth*, 524 U.S. 742 (1998).

167. See discussion *supra* Part II.B.

168. 510 U.S. 17 (1993).

169. *Id.*

170. *Id.* at 19.

171. *Id.* 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.").

employee's psyche, or any detrimental impact on the employee's work or working conditions.¹⁷² Indeed, physical stress and mental distress, rather than actual job detriment, can be the only demonstrable effects of hostile work environment harassment.¹⁷³ While the conduct in *Harris* was crude, one could argue that it was potentially not unwelcome, depending on the workplace in which the conduct occurred, or at least as welcome as conduct that other courts have deemed welcome.¹⁷⁴ The conduct Ms. Harris endured was treated as unwelcome, and she was not required to react as negatively as we would expect her to act to quid pro quo propositioning, though a clear visceral response might have been appropriate.¹⁷⁵ However, the issue is not fully resolved. The unwelcomeness requirement may still require some response unequivocally indicating unwelcomeness before such conduct is deemed unwelcome. This is troubling because subtle gender-based conduct that may help create a workplace atmosphere may not yield, or appear to warrant a strong response, or any response at all.

The fundamental problem underlying the interplay between unwelcomeness and hostile work environment harassment is that all workplace conduct is a part of the workplace atmosphere, whether such conduct elicits any response at all, or is deemed welcome or unwelcome. The concerns underlying unwelcomeness—proof of harm and notice to the harasser—are arguably irrelevant to many hostile work environment claims that focus on the workplace atmosphere and its effect on a plaintiff's ability to do her job, or to advance in her job. Whether one feels sufficiently harassed to complain may have little to do with whether it is actually more difficult to do one's job because of one's gender. The unwelcomeness requirement must be able to be appropriately applied to all types of conduct that can support hostile work environment claims to remain relevant. If the unwelcomeness requirement cannot be so applied, the old vision of unwelcomeness must yield to the new vision of hostile work environment.

1. *Hostile Work Environment Harassment and Undirected Conduct*

A workplace atmosphere can be shaped, in part, by conduct not directed at any particular person, such as the posting of material in the workplace.¹⁷⁶ Thus, posting offensive gender-related material, such as

172. *Id.* at 22.

173. *See* Chambers, *supra* note 6, at 1631.

174. Courts have found much more egregious conduct welcome. *See supra* notes 88-95 and accompanying text.

175. *Harris*, 510 U.S. 17 (1993).

176. *See, e.g.*, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla.

pinups, sexist commentary about the role of women in the workplace, and graffiti, would seem to shape the workplace atmosphere, and might help create a hostile work environment.¹⁷⁷ Requiring notice of the conduct's unwelcomeness is problematic.

One issue is whether such conduct should be considered directed at everyone or no one.¹⁷⁸ If posted material is deemed to be directed at everyone, the unwelcomeness inquiry may be simplified, but might also be misguided. There may be little reason to believe that material posted inside one's workspace is directed at everyone unless the person posting the material intends it to be. For example, when material is posted inside someone's office, that material may be directed only at the individual who posts it in the same way that the display of pictures of one's family can be directed solely at the individual in whose office the pictures sit. That co-workers may be able to see the material may suggest that the material impacts the workplace atmosphere, but it hardly means that the material was actually directed at everyone.¹⁷⁹ Conversely, if the conduct is considered literally to be directed at no one, complaining about it—the mechanism that would provide notice—would make little sense. In order for the unwelcomeness requirement to serve its function, the conduct would seem required to be treated as if it were directed at everyone, or at least at anyone who sees the material, even if it actually is not.¹⁸⁰

Unless the person posting the material should have known of its unwelcomeness without being told, the putative plaintiff would need to tell the putative harasser that the posted material is unwelcome in order to have it support a hostile work environment claim.¹⁸¹ Merely noting that the material could be offensive to some would not be sufficient to provide notice that the plaintiff viewed the material as unwelcome.¹⁸² This specific notice would be necessary because material can be welcome or unwelcome to a particular employee depending on that em-

1991) (noting that pinups and other ostensibly non-directed conduct can create hostile work environment); *see also* Balkin, *supra* note 21, at 2297 (noting that conduct that can help create a hostile work environment can be directed at a particular employee or no one at all); Christopher M. O'Connor, Note, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV. 501, 521-25 (1999) (noting that undirected conduct, including obscene pictures, can be the basis for Title VII claims).

177. *See Robinson*, 760 F. Supp. at 1495 (detailing workplace conduct including defacement of work equipment and gender-based graffiti).

178. Indeed, one commentator has suggested that actionable harassment be limited to conduct directed at someone. *See* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997).

179. *See* Balkin, *supra* note 21, at 2316 (discussing non-directed conduct and distinguishing speech for public consumption by the workplace masses and speech not for such consumption).

180. However, even those who do not see the material may be affected by its existence if information about the posted material is discussed in the workplace.

181. *See Notice in Hostile Environment Discrimination Law*, *supra* note 36, at 1977-82.

182. *See id.*

ployee's reaction to it. However, whether or not the plaintiff alerts the putative harasser of the material's unwelcomeness, the posted material may still help create the workplace atmosphere and can help explain why it was more difficult to succeed in her job. Thus, the conduct should almost certainly be relevant to prove whether the workplace atmosphere amounts to a hostile work environment.¹⁸³

Whenever conduct that is not complained about cannot be used to support a hostile work environment claim, a court or jury reviewing a sexual harassment case centered on that workplace's atmosphere does so based on incomplete material about the plaintiff's working conditions. Conversely, allowing conduct that has not been deemed unwelcome to support a hostile work environment claim, while sensible, effectively eliminates the unwelcomeness requirement. This clash may make eliminating the unwelcomeness requirement, as it applies to undirected conduct, sensible.

Applying the unwelcomeness requirement in this context presents plaintiff with an unpalatable choice: either complain about every bit of unwelcome conduct in the workplace or risk that such conduct will be deemed welcome and unable to support a hostile work environment claim. The first choice places a large onus on the plaintiff and raises the practical problem that the plaintiff is required to inform the harasser of discomfort with conduct that may be considered personal and not directed at the plaintiff. Given that single incidents are very rarely sufficient to constitute hostile work environment harassment¹⁸⁴ and the employer will often have an affirmative defense that may stop suits based on single instances of harassment,¹⁸⁵ complaining about single incidents of potentially harassing conduct amounts to complaining about conduct that does not constitute actionable harassment. Complaining about such conduct, if it is viewed as insubstantial, can be quite risky. Such complaints may lead to unsavory situations such as being treated as an outcast¹⁸⁶ or as an overly sensitive inflexible person who cannot deal with

183. See FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

184. On occasion, single incidents might support liability. See *Torres v. Pisano*, 116 F.3d 625, 631 (2d Cir. 1997); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 n.4 (7th Cir. 1991); *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 599 (8th Cir. 1999) (R. Arnold, J., concurring in judgment).

185. As noted below, the affirmative defense stemming from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), require that in most situations, the employer be required to have notice of prior harassment before it can be held liable for a hostile work environment.

186. See *Brooks v. City of San Mateo*, 214 F.3d 1082, 1087 (9th Cir. 2000) (noting plaintiff's complaint that she was ostracized after reporting harassment); *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1031 (7th Cir. 1998) (complaining that ostracism was the result of a report of sexual harassment).

diverse people. Indeed, forcing a plaintiff to complain about conduct before it amounts to actionable harassment may be as likely to guarantee that the conduct is never the subject of complaint as it is to encourage it to be the subject of complaint.¹⁸⁷

We may consider Amanda's situation in our hypothetical. Requiring that Amanda complain about the posted material in her co-workers' semi-private office space or lose the ability to present such conduct in a hostile work environment case is a problematic choice. Amanda must make her decision whether to complain knowing that complaining will make her seem unable to get along with others—precisely the reason used to refuse to promote Becky. Though complaining may stop the posting of material, it may trigger unpalatable, but non-actionable conduct toward Amanda and end any chance that she may have to become a manager.¹⁸⁸

2. *Conduct Directed at Those Other Than Plaintiff*

Like undirected conduct, conduct directed at those other than the plaintiff can help shape a workplace atmosphere that may yield a hostile work environment claim.¹⁸⁹ By infecting the workplace with gender bias or gender-based hostility, conduct directed at those other than plaintiff may create an environment that is hostile, abusive, or more difficult to advance in because of gender. More specifically, conduct directed at others may yield a hostile work environment when either sexual favoritism or third-party harassment has occurred.¹⁹⁰ It is unclear that the un-

187. In addition, it is difficult to believe that the Supreme Court wants employees to complain about every incident that could support a hostile work environment claim. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (noting that Title VII is not a civility code).

188. To be clear, I am not referring to retaliation, but to ostracism and beliefs about Amanda's personality that may make her advancement more difficult. *See, e.g., Campbell v. Fla. Steel Corp.*, 919 S.W.2d 26, 29 (Tenn. 1996) (describing ostracism that accompanied harassment complaint).

189. *See Howard v. Burns Bros., Inc.*, 149 F.3d 835, 838 (8th Cir. 1998) (noting that harassment of other employees can "be relevant to show pervasiveness of the hostile environment"); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) ("The second question is whether incidents of sexual harassment directed at employees other than the plaintiff can be used as proof of the plaintiff's claim of a hostile work environment. The answer seems clear: one of the critical inquiries in a hostile environment claim must be the *environment*."); *Van Jelgerhuis v. Mercury Fin. Co.*, 940 F. Supp. 1344, 1359 (S.D. Ind. 1996) ("Courts may consider third parties', or co-plaintiff's, impressions of and experiences in a work environment when a plaintiff maintains she was aware of defendant's sexual harassment of other employees in a workplace."); *Leibovitz v. New York City Transit Auth.*, 4 F. Supp. 2d 144, 150-51 (E.D.N.Y. 1998) (noting that workplace environment is created by action that may not be directed at the plaintiff); *O'Connor*, *supra* note 176, at 509-12 (citing cases in which courts have recognized the cognizability of bystander claims).

190. *Cf. O'Connor*, *supra* note 176, at 517-18 (citing *Rogers v. EEOC*, 409 U.S. 1059 (1972), a case in which racial harassment of customers was used to support an employee's hostile work environment claim, and noting that bystander injury claims have been imbedded in racial hostile work environment claims since hostile work environment claims were first recognized).

welcomeness of the conduct does or should matter in either of these situations.

Though individual instances of sexual favoritism are not actionable,¹⁹¹ rampant sexual favoritism in the workplace can create a hostile work environment when those affected by the favoritism suffer.¹⁹² To whom the favoritism is directed is unimportant; that it created an atmosphere in which sexual availability was linked to advancement and other terms of employment is.¹⁹³ When a pattern develops such that it is clear that employees who advance are those who are or have been the supervisor's paramours and the advancement is related to the relationship, a hostile work environment may exist.¹⁹⁴ Attempts to apply the unwelcomeness inquiry to sexual favoritism to make sure that the unwelcomeness requirement is honored are fruitless. Applying it to the subject of the favoritism seems pointless, as that employee may welcome the favoritism or the underlying conduct or both. Additionally, whether the subject welcomes the sexual favoritism is irrelevant to whether the conduct has created a hostile environment for others.¹⁹⁵ The favoritism itself and the message it sends about the workplace may be sufficient to support a hostile work environment claim.¹⁹⁶

Likewise, applying the unwelcomeness inquiry to the plaintiff (i.e., requiring that plaintiff complain) appears pointless. The plaintiff would surely find the favoritism unwelcome because his job prospects were harmed by the conduct. In this way, the plaintiff in a sexual favoritism case can be likened to a quid pro quo plaintiff who may not have found the underlying harassing conduct unwelcome, but certainly found the

191. See *Hentosh v. Herman M. Finch Univ. of Health Sciences.*, 167 F.3d 1170, 1175 (7th Cir 1999); *Elger v. Martin Mem'l Health Sys., Inc.*, 6 F. Supp. 2d. 1351, 1353-54 (S.D. Fla. 1998); *Keenan v. Allan*, 889 F. Supp. 1320, 1375 n.66 (E.D. Wash. 1995) (listing numerous cases).

192. Even though providing benefits to paramours is not generally considered sexual harassment, the EEOC has recognized that where such conduct fully infects the workplace ethos, a hostile work environment may exist. See EEOC: Policy Guide on Employer Liability for Sexual Favoritism Under Title VII, 8 Lab. Rel. Rep. (BNA) 405:6817, at 405:6819 (EEOC Notice No. 915-048 (Jan. 12, 1990)). The EEOC Policy Guide states that:

If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors.

Id.

193. *Id.*

194. If it was made clear that the only people who would get promotions in a particular office were those who had dated supervisors, a problem would exist. While such behavior would be insidious, more innocuous behavior could be a problem as well. Indeed, depending on the context, the mere request for a date could suggest that the employee was a sex object who should be treated as such. See Nejat-Bina, *supra* note 65, at 350 n.186.

195. See *supra* notes 192-94 and accompanying text.

196. See *id.*

inability to advance because of gender-based conduct unwelcome. Additionally, there may be literally nothing to complain about. Individual acts of sexual favoritism may not merely be tolerated by the EEOC, but may not even be considered individual acts of harassment.¹⁹⁷ Only when the favoritism becomes systematic and pervasive does the overall conduct appear to become actionable.¹⁹⁸ However, complaining only after the favoritism is rampant would not seem to give timely notice that earlier instances of favoritism were unwelcome. Seemingly, the unwelcomeness requirement must be severely altered or abandoned as it applies to sexual favoritism.

Third-party harassment, like sexual favoritism, can be evidence of a hostile work environment, and the unwelcomeness inquiry may be similarly difficult to apply to it.¹⁹⁹ In *Leibovitz v. New York City Transit Authority*,²⁰⁰ the court allowed suit based almost exclusively on third-party harassment.²⁰¹ The plaintiff did not work in the area where the harassment occurred and had not been a direct witness to much, if any, of the harassment.²⁰² While the targets of the harassment worked at the Transit Authority, they did not work directly with the plaintiff and were not friends of the plaintiff.²⁰³ After the plaintiff learned of the third-party harassment, she reported it to Transit Authority personnel, who did little to correct the situation.²⁰⁴ The jury determined that the Transit Authority's response indicated a deliberate indifference to plaintiff's "right to a gender-bias-free environment" and that the subject workplace was so permeated with discriminatory sexual behavior that "it altered the conditions of her own employment, and created an abusive

197. See *supra* note 189 and accompanying text.

198. See *id.*

199. See O'Connor, *supra* note 176, at 544-45 (noting generally that the bystander cause of action follows from more traditional hostile work environment cases by merely recognizing that harassment against anyone can lead to effects on the entire workplace atmosphere).

200. 4 F. Supp. 2d 144 (E.D.N.Y. 1998).

201. The theory of recovery is simple. See *Leibovitz v. New York City Transit Auth.*, 4 F. Supp. 2d 144, 150 (E.D.N.Y. 1998) ("Plaintiff suffered emotional trauma. The trauma was directly traceable to the sexually harassing environment in her workplace. She sought relief through her employer; it was either denied or delayed. She has established constitutional standing."). *Leibovitz* was reversed on the grounds that the plaintiff's workplace or working conditions were not hostile. See *Leibovitz v. New York City Transit Auth.*, 252 F.3d 179, 190 (2d Cir. 2001). However, the Second Circuit continued to note that claims based in part on harassment by others could be cognizable. See *Leibovitz*, 252 F.3d at 190.

202. See *Leibovitz*, 4 F. Supp. 2d at 146 ("She was never discriminated against on the basis of sex, nor was she personally the target of inappropriate sexual behavior. There was, however, evidence of sexual harassment of other women in her shop that caused her emotional distress."). The court made the general point that courts have recognized that someone who has not been the object of harassment can claim that a hostile work environment existed. See *id.* at 151.

203. See *id.* at 146 ("It was conceded that much of the alleged harassment did not occur in plaintiff's immediate vicinity and much of what she knew about the situation was second- or third-hand.").

204. *Id.* at 147.

working environment for her.”²⁰⁵ Whether the *Leibovitz* opinion will herald a trend or be viewed as an outlier is unclear.²⁰⁶ However, the theory underlying it is the well-established notion that conduct not directed at a plaintiff can help create an atmosphere that may yield a hostile work environment claim.²⁰⁷

The unwelcomeness requirement does not adapt well to claims based on third-party conduct. The first problem is determining whether the focus should be the plaintiff’s reaction to the conduct or the target’s reaction. A hostile work environment claim depends on whether the plaintiff’s conditions of employment have been discriminatorily altered because of plaintiff’s gender.²⁰⁸ Thus, if the unwelcomeness inquiry applies at all, it should focus on whether the plaintiff found the conduct unwelcome, rather than on whether the subject of the conduct found it unwelcome. Plaintiff’s harm may be related to her belief that the harassing conduct may eventually be aimed at her or the belief that the conduct devalues one gender such that all workers of that gender, including plaintiff, have a more difficult time doing their job. Though plaintiff’s concern may be most credible and reasonable if the target of the conduct finds it unwelcome—because it would suggest that the putative harasser will engage in harassing conduct though it causes discomfort to the subject of the conduct—plaintiff’s fears may still be reasonable even if the target finds the conduct welcome.²⁰⁹ As different people can find conduct unwelcome or not based on personal proclivities,²¹⁰ it should hardly be surprising that a target of potentially harassing conduct might not find the conduct unwelcome while a co-worker would.

However, there may be a limited situation in which the subject’s reaction to the conduct is dispositive. One focus of the unwelcomeness inquiry in a third-party harassment case presumably may be on either

205. *Id.*

206. Some commentators have challenged the particulars of the ruling. *See, e.g.,* L. Robert Guenther III, *Who is the Victim Here?: Vicarious Sexual Harassment After Leibovitz v. New York City Transit Authority*, 55 WASH. U. J. URB. & CONTEMP. L. 299, 314 (1999) (advocating limiting third-party claims to situations where the plaintiff has witnessed the harassment and is a member of the class of persons harassed). *Leibovitz* has been reversed, but the general cause of action stands.

207. *See Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (noting that the courts addressing the issue had determined that the harassment of third parties was relevant to a plaintiff’s claim of harassment); *Shepard v. Frontier Communications Serv., Inc.*, 92 F. Supp. 2d 279, 288-89 (S.D.N.Y. 2000) (“A claim for hostile work environment, however, does not require that the harassing conduct be directed at the person bringing suit. . . . Restricting claims only to those to whom the harassment occurred personally would unduly limit the scope of the provision.”); *Waterson v. Plank Road Motel Corp.*, 43 F. Supp. 2d 284, 288 (N.D.N.Y. 1999) (noting that third-party harassment can be relevant to creating a hostile work environment).

208. *See supra* notes 1-3 and accompanying text.

209. In *Leibovitz*, the underlying conduct did not appear to be welcome. *See Leibovitz*, 4 F. Supp. 2d at 146-47.

210. *See discussion supra* Part III.A.

whether the plaintiff found the harassment of others in the workplace unwelcome or whether the plaintiff would have found the conduct unwelcome had it been directed at her. When the focus is plaintiff's concern about the harassment of others, the subject's reaction to the conduct may inform the issue. That is, if the subject does not find the conduct unwelcome, the complaint cannot rest on the notion that the plaintiff was damaged by seeing harm to others, as no one was harassed. Conversely, when the focus is whether plaintiff would have found the conduct unwelcome had it been directed at her, whether the subject found the conduct unwelcome would be irrelevant. Of course, much of the discussion above may be purely academic if unwelcomeness is to be reviewed solely from the putative harasser's perspective.

Demonstrating that the harasser knew or should have known that the conduct was unwelcome is also tricky in the third-party harassment context. Because the conduct is not directed at plaintiff and the putative harasser is not likely to know that the conduct was unwelcome to someone he has not met, the requirement would seem to require that the plaintiff tell the putative harasser or the employer that the conduct would be unwelcome by plaintiff had it been directed at plaintiff. Of course, unless the target of the conduct also found the conduct unwelcome, the typical and appropriate response might be, "so what." The requirement that a plaintiff complain about all conduct that is unwelcome, even if it would be somewhat irrational to complain at the time it occurred raises the same concern as above—that the plaintiff may become subject to non-actionable but problematic conduct after complaining about conduct that is not actionable.

Requiring notice in this context seems strange. Assume that a supervisor treats his secretary in an objectively offensive and gender-specific manner, but that the secretary has not indicated that the conduct is unwelcome. This would not necessarily be surprising given that even consensual and voluntary relationships may yield behavior that may appear gendered and offensive from outside of the relationship, but may not be unwelcome to those inside of the relationship.²¹¹ Assume that the secretary sees the conduct as relatively harmless gender-based playfulness that will stop if she requests.²¹² The supervisor is likely

211. Of course, inappropriate conduct can occur in intimate relationships. *See* Benedet, *supra* note 61, at 162-63 ("As the cases discussed above indicate, however, a good deal of the conduct ultimately considered welcome is equally inappropriate outside the workplace, even in the context of an otherwise mutual intimate relationship.")

212. Some people find playfulness flattering, regardless of possible future implications. *See* *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 460 n.4 (7th Cir. 1990). The *Dockter* court stated that:

Ms. Rosenberg worked for five months as an Account Executive for Rudolf Wolff. She testified that Gannon called her at home on a number of occasions to ask her out to dinner—and that she went to dinner with him one time. Ms. Rosenberg also

concerned about whether the secretary finds the conduct unwelcome, not whether a different worker would find the conduct unwelcome were it directed at her. Of course, even if the target were clear that the conduct was unwelcome, that would not provide notice to the putative harasser that a third-party plaintiff found the conduct unwelcome. Simply, there may be no reason for the harasser to know or suspect that the conduct was unwelcome unless he was specifically told that by the plaintiff.

If the unwelcomeness requirement is to protect the putative harasser and the employer, it serves no function if the plaintiff is not required to tell the putative harasser about the discomfort. Nonetheless, whether the putative harasser is informed or not, the conduct may create a workplace atmosphere in which a willingness to accede to inappropriate gendered conduct is or seems to be a means to advancement.²¹³ An employee who fears the gender-based conduct that may attend a sex-infused workplace or does not function as well in such a workplace should not have to endure discriminatory conditions of employment that may come with working in such a workplace merely because the harassment has not yet been visited on her or she has not spoken up about conduct that has not been aimed at her. Simply, a hostile work environment may actually exist for the plaintiff, but based in part on conduct deemed not unwelcome under the current unwelcomeness requirement.

The unwelcomeness inquiry is clearly in tension with hostile work environment harassment based on conduct directed at others. In the sexual favoritism context, the EEOC is likely willing to ignore the unwelcomeness requirement or presume it proved once the conduct is pervasive. In third-party harassment cases, courts have acknowledged that such conduct can support a hostile work environment claim without analyzing the unwelcomeness requirement.²¹⁴ Rather than ignore the requirement, courts should recognize that the unwelcomeness requirement should not apply at all in these situations.

3. *Conduct Directed at Plaintiff*

Though the unwelcomeness requirement's supposed utility is most

testified that Gannon would attempt to hold her hand at work, but she found it flattering. Finally, Ms. Rosenberg did not believe that she had been sexually harassed by Gannon.

Dockter, 913 F.2d at 460.

213. Of course, such conduct may never be meaningfully welcome in such situations. *Cf. Estrich*, *supra* note 139, at 831 (“[T]here is no such thing as truly ‘welcome’ sex between a male boss and a female employee who needs her job.”).

214. *See, e.g., Leibovitz v. New York City Transit Auth.*, 4 F. Supp. 2d 144 (E.D.N.Y. 1998).

easily seen with respect to sex-based conduct directed at a plaintiff, some of the most severe practical problems with the unwelcomeness requirement arise when it is applied to such conduct. While conduct not directed at a plaintiff may not be expected to conform to the unwelcomeness inquiry precisely because it is so different from the traditional harassment to which the inquiry has been applied, conduct that is directed at plaintiff does seem sufficiently similar to traditional harassment for us to expect the unwelcomeness inquiry to apply. Nonetheless, there is an inherent conflict between the unwelcomeness inquiry and hostile work environment harassment in this situation. Seemingly welcome conduct can harm an employee's terms of employment when the discriminatory nature of an employee's working conditions is unrelated to whether the conduct creating the conditions is unwelcome.

The problem is most pronounced when the conduct is not intentionally hurtful to the plaintiff and might not be viewed as hurtful by many to whom similar conduct has been directed. For example, assume that, like in our hypothetical, the female managers are expected, but not required, to plan office birthday parties, office luncheons and firm retreats. The expectation that these tasks will be done by women reflects the firm's and arguably society's vision of women as nurturers who, in addition to their assigned jobs, will help make the workplace a more humane place.²¹⁵ The tasks are not considered work duties when promotions are determined, but may shape the company's opinion of a female manager's willingness to be a team player.

The expectation that such tasks be done by women may not appear objectionable or unwelcome to particular female employees or even to substantial numbers of female employees precisely because it reflects societal gender bias, and could be considered too insignificant to merit serious Title VII concern.²¹⁶ Indeed, some of the female managers who are expected to engage in such tasks may simply not care about the tasks or their implications. However, when such conduct combines with other conduct that sends the message that women employees are not as highly valued as their male colleagues, or can be treated differently based on societal gender stereotypes, the atmosphere can make a particular employee's job more difficult to do or advancement more diffi-

215. The notion that refuge in familiar sex roles may cause problems is not new. *See* Vhay, *supra* note 15, at 341. Vhay cites to Barbara Gutek and notes:

[M]any men are uncomfortable with women in a work role, and as a result many revert to familiar sex roles. Regardless of the reason, however, when sex roles are injected into the workplace, sexual expressions often follow. When these expressions lack mutuality and present a barrier to work, they become harassment.

Id.

216. For a general discussion of what is significant enough to constitute a change in terms, conditions or privileges of employment, see Beiner, *supra* note 28. White, *supra* note 28.

cult to obtain because of gender.²¹⁷ Were such conduct severe or pervasive enough to constructively alter the terms of an employee's employment, it would seem, by definition, to create a hostile work environment, but for the unwelcomeness requirement.

Application of the unwelcomeness inquiry to this conduct would require that the plaintiff complain about the gendered nature of the party-planning roles. Whether the party-planning expectations resulted from firm culture, or from signals given by supervisors or the head of the office, the plaintiff would have to tell a supervisor or the head of the firm that expecting female, but not male, managers to plan parties, luncheons and retreats is inappropriate. The danger of such a complaint is particularly acute if some female managers do not view the conduct as unwelcome. While the appropriate solution might seem to be to let the complaining manager decline to plan luncheons, the complaint itself may lead the employee to be viewed as someone who borrows trouble and is not appropriate for advancement. The putative plaintiff's workplace comfort may decline, but not in an actionable way, when treatment by co-workers and her likelihood of advancement is recalibrated based on her new reputation.²¹⁸ Not surprisingly, it may be more sensible to keep quiet.

Keeping quiet is problematic, particularly because the signal taken from the unwillingness to tell a supervisor that conduct is unwelcome may be that the conduct is welcome, rather than that it is not worth the potential price to tell the supervisor that the conduct is unwelcome. Accepting the harassment makes it appear non-problematic and susceptible to repetition; telling the harasser to stop risks other problems, such as making an enemy or being labeled unfriendly or overly sensitive. While these risks may not seem to be substantial, they are. To the extent that the Supreme Court has suggested that a personal vendetta against someone may qualify as a non-discriminatory reason to fire them, making an enemy in the workplace can be job-threatening.²¹⁹ Ignoring the conduct and bearing it may be wise even though the result may be an increasingly uncomfortable workplace for the employee.²²⁰ This hardly advances Title VII's goals.

217. This does not suggest that merely treating women and men differently in the workplace automatically results in sexual harassment. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1997) (noting generally that the different ways that men and women interact in the workplace will not usually support hostile work environment harassment). Rather, it is that such behavior, depending on its nature, can result in a hostile work environment.

218. *See, e.g., Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 961 (8th Cir. 1999) (noting poor treatment following harassment complaints).

219. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Jennings v. Tinley Park Cmty. Consol. Sch. Dist. No. 146*, 864 F.2d 1368 (7th Cir. 1988).

220. *See, e.g., Gray v. Tyson Foods, Inc.*, 46 F. Supp. 2d 948 (W.D. Mo. 1999).

V. RESOLVING THE TENSION BETWEEN UNWELCOMENESS AND SEXUAL HARASSMENT LAW

When sexual harassment was characterized by sexual demands and conduct accompanying highly sexualized workplaces, the harm of sexual harassment stemmed from the plaintiff's negative reaction to the conduct, and the unwelcomeness requirement may have fit. Whether the plaintiff actually welcomed the conduct seemed relevant because if the plaintiff welcomed the conduct, the employee's terms, conditions and privileges of employment would not have been altered to the employee's detriment by the conduct. While many quarreled with how courts determined that conduct was welcome and have suggested that the unwelcomeness requirement should not have existed even under the old vision, the theory of unwelcomeness appeared to mirror the theory of sexual harassment harm.²²¹ However, the evolution of sexual harassment has changed the relationship between unwelcomeness and sexual harassment harm.

Sexual harassment now focuses squarely on harassing conduct that causes Title VII harm—the discriminatory provision of terms, conditions and privileges of employment because of sex.²²² As has been argued elsewhere, sexual harassment can often be thought of merely as sex discrimination where the conduct underlying it is harassing.²²³ When sexual harassment focuses squarely on all aspects of harm to an employee's terms of employment, much of the theoretical justification for the unwelcomeness requirement—even when narrowly applied—vanishes. The theory of sexual harassment harm no longer mirrors the theory of unwelcomeness.

The unwelcomeness requirement's two possibly appropriate purposes—guaranteeing that harm has occurred and providing notice—are already served by other features of sexual harassment law. The harm element is served by the requirement that plaintiff's terms, conditions or privileges of employment be altered or provided in a discriminatory manner and by the objective and subjective offense inquiries.²²⁴ The notice-serving function has been supplanted by the affirmative defense

221. Not surprisingly, many have suggested that unwelcomeness' use be sharply curtailed or eliminated completely. Benedet, *supra* note 61, at 174 (“Welcomeness should only be invoked in the unusual case in which a hostile environment sexual harassment claim is based on sexual intercourse or related behavior and where the defendant can establish that the impugned conduct was mutual, consensual, and unaffected by workplace hierarchies.”); Estrich, *supra* note 139, at 858 (“The ‘welcomeness’ inquiry should be eliminated in both quid pro quo and hostile environment cases, because the additional requirements of proof in both types of cases make the welcomeness inquiry doctrinally gratuitous and personally humiliating for women.”).

222. See generally Chambers, *supra* note 6.

223. See generally *id.*

224. See discussion *supra* Part III.B.3.

to sexual harassment detailed in *Burlington Industries, Inc. v. Ellerth*²²⁵ and *Faragher v. City of Boca Raton*,²²⁶ applicable to supervisor harassment, and the knew or should have known standard, applicable to non-supervisor harassment.²²⁷ Given that the employer, not the putative harasser, is liable under Title VII, notice is necessary only so that the employer can remedy the harassing situation.²²⁸ The affirmative defense focuses on the employer's culpability or complicity in failing to detect or remedy the subject harassment.²²⁹ By requiring that the employer provide some reasonable method for employees to complain about sexual harassment and the employee not unreasonably refuse to use the system, the defense allows a vigilant employer to detect a pattern of harassment. While this affirmative defense is certainly not specifically addressed to the unwelcomeness inquiry, it encourages employers to construct responsive complaint systems that provide precisely the notice that the unwelcomeness requirement ostensibly provides.

To be clear, this Article is critical of the notice-serving function that the unwelcomeness requirement serves and argues that notice should not be required in many circumstances. However, in situations where requiring notice is appropriate, it is already served by defenses the employer already has, obviating the need for the unwelcomeness requirement.²³⁰ Of course, putting the onus of ferreting out problematic conduct on the employer will likely cause employers to police workplace conduct.²³¹ However, because the employer is the liable party under Title VII, that an employer may be vigilant regarding Title VII violations is hardly surprising.²³² While this may cause concern to those who believe that hostile work environment jurisprudence already violates the First Amendment in some respects,²³³ those issues are outside

225. 524 U.S. 742 (1998).

226. 524 U.S. 775 (1998).

227. See *supra* notes 35-36 and accompanying text.

228. While some might suggest that notice is important so that the harasser will know to stop because of sanctions he might face from his employer, the employer's policy on disciplining employees may or may not provide that notice of unwelcomeness is important. Whether such a policy requires notice *may* be a matter of fairness, but is not relevant to the unwelcomeness requirement's notice-serving function.

229. See *Faragher*, 524 U.S. at 775; *Ellerth*, 524 U.S. at 742.

230. Where the unwelcomeness requirement or the affirmative defense encourages an employee to confront the putative harasser or inform a supervisor without negative consequences, it may provide a warning that certain behavior is inappropriate, thereby allowing the employer to deal with the behavior before liability develops. To the extent that Title VII seeks compliance rather than litigation, this may be the notice-serving function's only redeeming feature.

231. See Balkin, *supra* note 21, at 2298 (suggesting that employers will create broad prohibitions on speech to avoid Title VII liability in part because employers must eliminate all conduct that can help create a hostile environment, not merely individual comments).

232. See *id.* at 2305 & n.32 (noting that it is sensible to hold employers responsible for hostile environments even if the result is collateral censorship of employees).

233. Various arguments have been made suggesting that hostile work environment harassment is inconsistent with the First Amendment. *Id.* at 2296. Balkin notes that two arguments have been

of the scope of this Article.²³⁴

Were retaining the unwelcomeness requirement costless, doing so might appear sensible. However, there is harm in keeping it. The emerging doctrine of sexual harassment recalls Title VII's core goals of eliminating gender discrimination and empowering all workers.²³⁵ As courts continue to recognize that sexual harassment law protects workers from all types of gender-based harassment that can limit their opportunities,²³⁶ the unwelcomeness requirement improperly limits the type of conduct that may yield sexual harassment liability. As eliminating gender-related barriers to workplace success is a proper aim of Title VII,²³⁷ sexual harassment law must be structured toward that end, or at least should not be structured in opposition to those ends.

In addition, the unwelcomeness requirement's central message—that potentially harassing workplace conduct should be considered welcome until someone complains about it—may delay the realization of Title VII's goals. That message allows and, in some respects, encourages the sexualization of a workplace up to the level where an employee will complain about the conduct and allows the sexualization of a workplace up to the level at which an individual employee no longer will or can tolerate it.²³⁸ This puts the onus on those who feel uncomfortable to complain rather than on those engaging in potentially harassing conduct

made that liability for hostile work environment harassment is incompatible with the First Amendment:

The first concedes that the creation of a hostile [work] environment is not protected speech, but argues that fear of Title VII liability will lead employers to censor employee speech and that this chilling effect violates the First Amendment. . . . The second, and more radical attack on hostile environment liability argues that when employers create a hostile environment that materially alters working conditions to the disadvantage of women and minorities, they are engaged in protected speech.

Id.

234. For now, other scholars can explain why Title VII's prohibition on providing terms or conditions of employment on a discriminatory basis does not violate the First Amendment. *See, e.g.,* Balkin, *supra* note 21, at 2318-20; Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649 (1997).

235. As Professor Vicki Schultz has noted, unwelcomeness' narrow focus on sex has limited sexual harassment law's use in broadly "promot[ing] women's empowerment and equality as workers." Schultz, *supra* note 15, at 1729 (noting that the unwelcomeness inquiry is related to courts' willingness to "focus[] on sexual advances as the quintessential harassment").

236. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1997) (ruling that same-sex sexual harassment should be analyzed like any other type of sexual harassment).

237. *See Schultz supra* note 15, at 1796. Schultz notes that:

The new account of hostile work environment harassment would restore harassment law to Title VII's original purpose. From the beginning, the central purpose of the statute'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.

Id.

238. However, this does not mean that the employee will actually complain; the employee may simply quit. Radford, *supra* note 48, at 523 (presenting studies suggesting that victims of harassment are as likely to change jobs as to complain).

to refrain.²³⁹ While workplaces infused with sexual banter, potentially harassing behavior, and the expectation of conformity to gender roles can be nondiscriminatory, little reason exists to believe that they generally are. If employees are free to engage in potentially harassing behavior until being told to stop, such behavior could be legion well before any such conduct would be actionable, thereby making employees' jobs more difficult to do because of their gender, based on conduct not considered by the courts to be unwelcome.

As noted above, a strictly enforced unwelcomeness requirement would require that all conduct used to support a hostile work environment claim be unwelcome, putting the plaintiff in the difficult position of accepting potentially harassing conduct without future recourse or complaining enough to garner a troublesome reputation and poor treatment in the workplace.²⁴⁰ Unfortunately, such a reputation may create problems for the employee that can make her working environment difficult or shape future employment decisions respecting her.²⁴¹ This is a choice that an employee should not have to face in the wake of Title VII.²⁴²

The unwelcomeness requirement also affirmatively protects the putative harasser who did not realize that the target of his conduct did not welcome it. Such protection inappropriately validates a putative harasser's mistake even when the harasser's conduct occurs in the workplace—a place Title VII suggests should be free of sex discrimination—and even though actionable sexual harassment does not render the harasser personally liable.²⁴³ However, more important than protecting the putative harasser from nonexistent Title VII liability, the unwelcomeness requirement may help protect the harasser's reputation in the

239. See *Weiner*, *supra* note 69, at 649 (“Sexual harassment policies that instruct victims that they must stand up to their harassers also have the effect of teaching harassers that they may do or say anything sexual to anyone until they are told to stop.”).

240. See *Brooks v. City of San Mateo*, 229 F.3d 917, 922 (9th Cir. 2000) (noting plaintiff's complaints of ostracism after reporting harassment); *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 839 (8th Cir. 1998) (noting that one of the issues raised by the plaintiff was that she was ostracized after she helped another employee with a harassment complaint).

241. This is not a reference to retaliation, just a reference to those situations in which the ability to get along with difficult people is viewed as merit.

242. However, at least one court has suggested that the discomfort stemming from reporting sexual harassment is to be borne by the plaintiff, at least in some contexts. See *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1150 (D. Nev. 1999). The *Alberter* court stated that:

Discussing inappropriate sexual behavior with managers or employers will cause some degree of discomfort in almost all cases. Many victims of sexual harassment fear reprisals or negative reaction. Yet the high court has stated that it is, at least in part, the duty of the victim of sexual harassment to take action.

Alberter, 70 F. Supp. 2d at 1150.

243. See *Van Jelgerhuis v. Mercury Fin. Co.*, 940 F. Supp. 1344, 1362 (S.D. Ind. 1996) (finding no individual liability under Title VII for harassing supervisor); *Chambers*, *supra* note 6, at 1605 n.59 (listing cases ruling that there is no individual Title VII liability for harassers).

workplace. By allowing the harasser to argue that he literally did nothing wrong because the plaintiff welcomed the conduct and was not harmed by it, the unwelcomeness requirement may allow the harasser to fairly claim that he did not breach workplace or societal norms.²⁴⁴ Thus, the requirement may allow harassment to pass as unremediable horseplay and may allow the harasser to suggest that his conduct was playful or misunderstood, and thereby brand the plaintiff a dishonest flirt who welcomed the conduct or an inflexible prude. The possibility of such reprisals may deter others from challenging harassment, either in the workplace or in court.²⁴⁵ Of course, harassment that is not charged formally or addressed informally will not be remedied.

Hostile work environment harassment jurisprudence is geared toward giving every worker an environment free of harassing conduct that may lead to the discriminatory provision of terms or conditions of employment;²⁴⁶ it is not about eliminating sex or incivility from the workplace.²⁴⁷ Flowing from Title VII, hostile work environment doctrine should be used to protect employees from the effects of gendered workplaces that yield discriminatory terms or conditions of employment. The unwelcomeness requirement allows some potentially harassing conduct to go unchecked and without consequence unless someone

244. However, that the unwelcomeness requirement may lead to a dismissal of a case does not necessarily suggest that the underlying conduct involved was appropriate or beneficial to the workplace atmosphere, it merely suggests that Title VII will not make the employer liable for the behavior.

245. See *Leibovitz v. New York City Transit Auth.*, 4 F. Supp. 2d 144, 147 (E.D.N.Y. 1998), *rev'd*, 252 F.3d 179 (2d Cir. 2001) (noting incident in which plaintiff was told that "her [harassment] complaints could be detrimental to her career."); *Notice in Hostile Environment Discrimination Law*, *supra* note 36, at 1987 ("Harassment complaints often lead to negative job evaluations, denials of promotions, transfers, and firing. Informal sanctions from co-workers and supervisors, such as withdrawal of job support and social support, are also common. Moreover, a harassment victim may be publicly labeled a liar, hysteric, or troublemaker.") (footnotes omitted); *Monnin*, *supra* note 78, at 1159. *Monnin* states that:

Few women complain of being sexually harassed because the noneconomic costs of reporting an incident are seen as prohibitive. Women fear that they will be blamed for the conduct, that nothing would be done in the event of a complaint, and that they would suffer negative repercussions in the form of retaliation and further harassment.

Id.

246. Of course, the elimination of objectively offensive conduct does not require the elimination of all workplace harassment. See *Benedet*, *supra* note 61, at 134. *Benedet* states that:

The presence of an objective standard [of offense] indicates that some verbal or physical conduct of a sexual nature, even if unwanted by and unwelcome to the plaintiff, is not actionable sexual harassment. Some degree of harassment is thus permissible, regardless of its effects on the plaintiff, because it does not possess the characteristics that render it objectively unreasonable.

Id.

247. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (noting that Title VII is not a civility code); *Balkin*, *supra* note 21, at 2308 (noting that Title VII's prohibition on sexual harassment is not about civility, it is about prohibiting conduct that attempts "to maintain the inferior status of women").

complains about it contemporaneously. The unwelcomeness requirement conflicts with Title VII's goals and must yield because potentially harassing conduct, whether welcome or not or complained of or not, can help create a hostile work environment. As sexual harassment jurisprudence has outgrown any reasonable use of the unwelcomeness requirement, the requirement should be eliminated. Though merely relaxing the requirement may seem preferable, keeping the requirement in any form would allow courts to misuse it.

However, one role may remain for welcomeness. Welcomeness may always remain an evidentiary issue related to damages in a sexual harassment case by informing how severely a plaintiff's conditions of employment were changed and how much damage a plaintiff suffered. It might be relevant to some issues in some cases, though it would not be dispositive of the existence of a claim.²⁴⁸ This narrow evidentiary use is the only appropriate use of welcomeness in sexual harassment law.

VI. CONCLUSION

Title VII's goal is to stop gender discrimination in the workplace. The unwelcomeness requirement no longer serves that goal, if it ever did.²⁴⁹ Indeed, the unwelcomeness requirement no longer serves either of its theoretically appropriate purposes: to guarantee that sexual harassment harm has occurred and to provide notice to the putative harasser or the employer that the conduct is unwelcome. As conduct that can support a sexual harassment claim has been broadened to include all gender-based harassment that affects an employee's terms or conditions of employment, the lack of unwelcomeness does not guarantee the lack of harm, and when notice is required, other provisions of sexual harassment law guarantee that notice exists.

The unwelcomeness requirement encourages the sexualization of workplaces in ways that can harm the ultimate goal of workplace gender equality by suggesting that offensive gender-motivated workplace conduct should be deemed normal and go unchecked until someone is willing to say it is unwelcome. This allows for a gendered workplace

248. Indeed, such an approach may accommodate those who suggest that the unwelcomeness requirement should be retained in some form, lest its elimination indicate that women lack the ability to consent to sexual conduct in or related to the workplace. *See Abrams, supra* note 15, at 1222-24 (arguing that a number of commentators wish to retain the unwelcomeness requirement and providing an alternative to the current unwelcomeness model).

249. Commentators have noted that theories underlying the unwelcomeness requirement would not be at all convincing outside of the sexual harassment context. *See, e.g., Benedet, supra* note 61, at 165 (suggesting that unwelcomeness is used inappropriately in the sexual harassment context in a way it would never be used in the racial harassment context); *see also Hebert, supra* note 149, at 588.

that appears acceptable even as employees' terms or conditions of employment are actually being harmed by the workplace atmosphere.

The unwelcomeness requirement should be eliminated because it no longer serves any useful purpose that is not already served by another feature of sexual harassment law and is at odds with Title VII's goals.

