

**EQUAL OPPORTUNITY TO HARASS, UNEQUAL BURDENS OF PROOF: AFFIRMING
THE EQUAL OPPORTUNITY HARASSER DEFENSE**

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I. INTRODUCTION

Title VII is a landmark piece of legislation that has substantially leveled the playing field for traditionally underrepresented minorities in the workplace.¹ While the greatest beneficiaries of Title VII have been women, many scholars have opined that Title VII was not originally intended to provide such protection.² The majority of scholars agree that Congressman Howard W. Smith of Virginia, Chairman of the Rules Committee at the time the bill was being debated, added

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¹ See generally Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2011).

² Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 164 (1991) (quoting "The popular interpretation of the addition of "sex" to Title VII is that "it was the result of a deliberate ploy by foes of the bill to scuttle it") (citing CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 234 (1985)).

“sex” to the bill as a means to defeat its passage in the House. Congressman Smith’s proposal “stimulated several hours of humorous debate, later enshrined as ‘Ladies Day in the House,’ before the amendment was passed.”³ While arguably women have been the greatest beneficiaries of Title VII,⁴ they have also experienced some of the greatest difficulty in establishing viable claims of discrimination due to the confusion associated with the “because of sex” language.⁵ Because of the rushed nature of its inclusion, the precise interpretation of the “because of sex” language has left many scholars and judges in disagreement regarding its intended application.⁶ This confusion has caused a greater level of disarray in the context of sex discrimination claims in hostile work environments, particularly those cases in which the harassing employee equally harasses both men and women in the workplace. In this scenario, it is often more difficult for a female plaintiff-employee to establish the “but for” causation due to the causal nexus between the harassment and the harasser’s motivation for such harassment becomes attenuated.⁷ This reduction in causation often allows sexual harassers to take advantage of what has become known as the equal opportunity harasser defense.⁸

The following example illustrates a typical case involving the equal opportunity harasser. Lawrence, a supervisor for ABC, Inc., is extremely rude and brash towards his subordinate employees. On numerous occasions, he has directed the use of the word “bitch” and other demeaning and derogatory comments towards both male and female employees. Emma Louise, one of Lawrence’s subordinate employees, becomes irritated with Lawrence’s antics and decides to report his conduct to the human resources manager. The human resources manager did nothing with the information, prompting Emma Louise to

³ *Id.*

⁴ Pamela J. Smith, *Part I - Romantic Paternalism - The Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 J. GENDER RACE & JUST. 107 (noting that white women, in particular, have been the greatest economic beneficiaries of Title VII).

⁵ *See infra* Part IV.

⁶ *See infra* note 86.

⁷ *See infra* note 64 and accompanying text.

⁸ *See infra* Part III.

bring an action under Title VII for sex discrimination. While Lawrence's conduct was clearly reprehensible, in jurisdictions that recognize the equal opportunity harasser defense, Emma Louise would have difficulty establishing a hostile work environment claim, because Lawrence's conduct was directed equally at both men and women.

Under the current framework for analyzing equal opportunity harassment cases, the primary burden is on the female plaintiff to establish that she was harassed because of her sex as part of her *prima facie* case.⁹ This is a difficult burden to establish when the harasser directs the same conduct at both men and women because such behavior weakens the nexus between the harassing conduct and the motivation behind it.¹⁰ Instead, the equal opportunity harasser defense should be treated as an affirmative defense, requiring the employer to carry both the burdens of production and persuasion. Thus, the employer would have to establish that the equality of the supervisor's harassment entitles the employer to a favorable judgment. Simultaneously, the plaintiff's burden should be substantially lessened to require that she merely produce sufficient facts to show that it is plausible that she was harassed "because of sex," rather than requiring her to persuade the trier of fact that she actually was harassed "because of sex."¹¹

This shift in burdens is also bolstered by the Court's recent decisions in *Twombly* and *Iqbal*, in which both cases established higher pleading requirements for plaintiffs in civil rights cases.¹² As such, a new framework for analyzing this special type of hostile work environment claim is needed to protect victimized employees who have been treated unjustly and in violation of the spirit of Title VII.

Furthermore, there should be a category of conduct that presumptively establishes a plausible claim of hostile work environment based on sex, regardless

⁹ See *infra* note 67 and accompanying text.

¹⁰ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

¹¹ See *infra* note 114 and accompanying text.

¹² This shift in burdens is necessitated by the Supreme Court's recent decisions in *Iqbal* and *Twombly*, which have established higher pleading requirements for plaintiffs in civil rights cases. See *infra* Section V; *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 548 U.S. 903 (2006).

of whether the conduct is equally directed at persons of the opposite sex. This argument is not without precedent. For example, if a black employee alleged that he was subject to a racially hostile work environment because a white co-employee called him a “nigger,” it would be untenable for an employer to defend such conduct by asserting that the harassing employee also directed the aforementioned slur at other white employees.¹³ In essence, in the context of hostile work environment claims based on race, there are certain actions that “speak for themselves.” Courts should be willing to extend this same idea to hostile work environment claims based on sex.

This Article will establish a new framework for analyzing hostile work environment cases. To further facilitate a discussion of my argument, Section II of this Article will provide a comprehensive background and historical context of the hostile work environment claim. Section III will chronicle the development of the equal opportunity harasser defense. Section IV will analyze the various approaches that other scholars have advanced for dealing with the equal opportunity harasser defense. Finally, Section V will define my resolution to this problem and explain how it will strike a more fair balance for both employers and employees in the context of the equal opportunity harasser defense. In addition, this section of the paper will also explain why my position is strongly supported by other similarly related legal precedent, as well as how *Twombly* and *Iqbal* have operated to close access to the protections of Title VII.

II. HISTORICAL DEVELOPMENT OF THE HOSTILE WORK ENVIRONMENT CLAIM

The first case to recognize claims involving a hostile work environment was *Rogers v. EEOC*.¹⁴ In *Rogers*, an employee alleged that she was discriminated against based upon her status as a Spanish surnamed employee because she: (1) was terminated from her job without any reason other than the

¹³ See *Doe v. City of Belleville*, 119 F.3d 563, 579 (7th Cir. 1997) (quoting “The same is true of racial harassment, for example. If an African American is repeatedly subjected to racial slurs and talk of lynching by his co-workers, we typically do not ask, ‘But was he singled out because of his race?’”) (citing *Daniels v. Essex Grp. Inc.*, 937 F.2d 1264 (7th Cir. 1991)); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir.1986)).

¹⁴ *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971).

fact that there was some “friction” in the workplace, in spite of the fact that her work was “alright”; (2) was abused by her female Caucasian co-employees; and (3) was segregated from some of the patients.¹⁵ The district court held that while the employer’s discrimination against its Spanish surnamed employees may have been offensive to the plaintiff-employee, she nonetheless failed to establish that she was discriminated against. Specifically, the court found that she had not been “aggrieved” by an unlawful employment practice, as defined by Title VII, since the harassment was directed at the patients of the employer and not the employees.¹⁶ The United States Court of Appeals for the Fifth Circuit reversed and held that an:

[E]mployees’ psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase “terms, conditions, or privileges of employment” in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.¹⁷

The court further provided that not all, offensive conduct will rise to the level of creating a hostile work environment.¹⁸

¹⁵ *Id.* at 244. With respect to the third allegation, regarding patient segregation, the employer argued that it was not liable for an unlawful employment practice because segregation of patients, if true, was not an act directed at the plaintiff-employee. *Id.*

¹⁶ The Act states that:

(a) Employer practices [:] It shall be an unlawful employment practice for an employer-- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

See Civil Rights Act, 42 U.S.C. § 2000e-2(a) (2011)

¹⁷ *Rogers*, 454 F.2d. at 238.

¹⁸ *Id.*

[A]n employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of Section 703. But by the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.¹⁹

Approximately fifteen years after *Rogers*, the Supreme Court, in *Meritor*, expanded the theory of hostile work environment to apply in sexual harassment cases.²⁰ In *Meritor*, a bank employee sued her employer after she was terminated for allegedly abusing her sick leave.²¹ The employee claimed that shortly after she began employment she was sexually harassed by her supervisor, the bank's vice president.²² She stated that the vice president "invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations."²³ She indicated that she rebuffed his advances, but ultimately acquiesced because she feared she would lose her job if she did not comply.²⁴ The employee further testified that after she gave into the vice president's sexual advances, he continued to make "repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times."²⁵ She also indicated that he "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her,

¹⁹ *Id.*

²⁰ *Meritor*, 477 U.S. at 57.

²¹ *Id.* at 59.

²² *Id.*

²³ *Id.* at 60.

²⁴ *Id.*

²⁵ *Id.*

and even forcibly raped her on several occasions.”²⁶ The employer denied that the vice president harassed the employee and further advanced that any harassment “was unknown to the bank and engaged in without its consent or approval.”²⁷ The district court denied the employee’s claim and held that if there was in fact a relationship between the employee and the vice president, such relationship was voluntary and had nothing to do with her continued employment.²⁸

The D.C. Circuit Court of Appeals reversed the district court’s decision because it failed to consider a claim of sexual harassment based on a “hostile work environment.”²⁹ The court of appeals clarified that sexual harassment claims may be based on either “harassment that involves the conditioning of concrete employment benefits on sexual favors,³⁰ or harassment that, while not affecting economic benefits, creates a hostile or offensive working environment.”³¹ The court of appeals further opined that it was unclear what the district court meant when it held that the relationship between the employee and the vice president voluntary.³² According to the court, if the vice president made “toleration of sexual harassment [as] a condition of her employment,” whether she voluntarily complied with such harassment was immaterial.³³ Finally, the court of

²⁶ *Id.*

²⁷ *Id.* at 61.

²⁸ *Id.* In light of the fact that the district court determined that no sexual harassment occurred, it went on to hold that the employer had no knowledge of the alleged harassment and therefore could not be held liable for any harassment by the supervisor. *Id.* at 62.

²⁹ *Id.* at 62.

³⁰ This practice is commonly referred to as “*quid pro quo*” which is the Latin term meaning “something for something.” BLACK’S LAW DICTIONARY 1367 (9th ed. 2009). Black’s Law Dictionary further defines *quid pro quo* sexual harassment as “sexual harassment in which an employment decision is based on the satisfaction of a sexual demand.” BLACK’S LAW DICTIONARY 1499 (9th ed. 2009).

³¹ *Meritor*, 477 U.S. at 62.

³² *Id.* at 62.

³³ *Id.*

appeals held that the employer was strictly liable for supervisor harassment regardless of whether it knew or should have known of the harassment.³⁴

On appeal to the Supreme Court, the employer argued that Title VII sexual harassment claims can only arise where such harassment results in an economic or tangible loss such as a demotion, termination or reduction in pay.³⁵ The Supreme Court rejected this argument on two grounds.³⁶ First, it held that “the language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination.”³⁷ “The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”³⁸ Second, the Court held that “the EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.”³⁹ The Court agreed with the court of appeals’ determination that “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.”⁴⁰ However, the Court reversed the court of appeals’ decision regarding employer liability.⁴¹ As noted above, the court of appeals determined that an employer is strictly liable for supervisor harassment. While the Court reversed this holding, it did not adopt the employer’s position that a defendant-employer can never assume liability where it has a policy against harassment and a plaintiff-employee fails to take advantage of such policy. Instead, the Court remanded the case and instructed the district court to determine the employer’s liability by considering agency principles; however, the Court did not provide any guidance as to how to apply those principles.⁴² Despite its failure

³⁴ *Id.* at 69-70.

³⁵ *Id.* at 64.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* (citing *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

³⁹ *Meritor*, 477 U.S. at 65.

⁴⁰ *Id.* at 68.

⁴¹ *Id.* at 72.

⁴² *Id.* at 73. The Court stated:

to adequately address the employer liability issue, the Court held that a prima facie case of sexual harassment, based on hostile work environment, could be established if an employee could prove each of the following:

- (A) That she was subjected to unwelcome sexual harassment;
- (B) That the harassment was based on sex;
- (C) That the sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff (The third prong of the prima facie case requires both a subjective and objective inquiry, compelling the court to ask whether a reasonable person would find the environment hostile.); and
- (D) That there is a basis for imputing liability to the employer.⁴³

Notwithstanding this clarity on the prima facie requirements, the Supreme Court's failure to adequately determine when an employer could be held liable for a supervisor's harassment caused a circuit split to emerge. Before the Court could resolve this issue, however, it first expounded upon *Meritor's* prima facie requirements by determining whether it was necessary for an employee in a hostile work environment claim to prove that she suffered psychologically.⁴⁴ In *Harris v. Forklift Systems, Inc.*, the plaintiff-employee alleged that she was harassed in violation of Title VII after the president of the company, on multiple

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. (internal citations omitted).

⁴³ *Id.* at 66-67.

⁴⁴ *Harris v. Forklift Sys., Inc.*, 519 U.S. 17 (1993).

occasions, made several demeaning comments to her in the presence of other employees.⁴⁵

After these comments, the plaintiff-employee complained to the president about his inappropriate behavior.⁴⁶ In response, the president apologized, indicated that he was joking, and promised that he would stop.⁴⁷ However, shortly thereafter, he remarked to the plaintiff, in the presence of other employees and while she was working on a deal with one of the company's customers, "What did you do, promise the guy . . . some [sex] Saturday night?"⁴⁸ The United States District Court for the Middle District of Tennessee held that the president's conduct was clearly abusive and offensive, but declined to hold the employer liable for hostile work environment because such conduct was not "so severe as to be expected to seriously affect [Harris'] psychological well-being."⁴⁹ In addition, the court concluded that "a reasonable woman manager under like circumstances would have been offended . . . but [the president's] conduct would not have risen to the level of interfering with that person's work performance."⁵⁰ The Sixth Circuit affirmed the decision of the district court but the United States Supreme Court reversed, reasoning that:

Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological

⁴⁵ *Id.* at 19. Some of the comments the president publicly stated to the employee were, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." The president also occasionally asked Harris and other female employees to get coins from his front pants pocket. Finally, he was known to throw objects on the ground in front of Harris and other women, and asked them to pick the objects up and made sexual innuendos about Harris' and other women's clothing." (internal citations omitted) *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (internal citation omitted).

⁴⁹ *Id.* at 20.

⁵⁰ *Id.*

well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.⁵¹

In reaching this decision, the Court clarified that the critical question in a hostile work environment case is not whether the sexual harassment results in psychological harm but whether the conduct is abusive, as determined by a totality of the circumstances.⁵²

After *Harris*, the Court finally dealt with the issue regarding employer liability for supervisor harassment, in *Burlington Industries, Inc. v. Ellerth*,⁵³ and *Faragher v. City of Boca Raton*.⁵⁴ In these cases, ironically decided on the same day, the Court held that an employer will be vicariously liable for any supervisor harassment where a tangible employment action is present.⁵⁵ The Court defined a tangible employment action as a "discharge, demotion, or undesirable

⁵¹ *Id.* at 22.

⁵² *Id.* at 23.

⁵³ See *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁵⁴ See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

⁵⁵ The U.S. Supreme Court stated that:

The Court of Appeals erred in rejecting a theory of vicarious liability based on § 219(2)(d) of the Restatement, which provides that an employer 'is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.' It makes sense to hold an employer vicariously liable under Title VII for some tortious conduct of a supervisor made possible by use of his supervisory authority, and the aided-by-agency-relation principle of § 219(2)(d) provides an appropriate starting point for determining liability for the kind of harassment presented here.

Id. at 777.

reassignment.”⁵⁶ Where there is no tangible employment action taken against the plaintiff-employee, the employer will be entitled to assert the *Ellerth/Faragher* affirmative defense to liability and damages; however, such defense must be established by a preponderance of the evidence.⁵⁷ Pursuant to this defense, an employer must establish the following two elements: (1) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or failed to otherwise avoid harm.⁵⁸ If the employer can successfully assert each prong, it will escape liability under Title VII.⁵⁹

Although the Court provided clarity regarding hostile work environments for employees and employers, a new issue, known as the equal opportunity harasser defense, emerged under its scope.

⁵⁶ *Id.* at 778 (quoting “No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment”); *see also Ellerth*, 524 U.S. at 765.

⁵⁷ *Faragher*, 524 U.S. at 807 (quoting “When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.”); *see also Ellerth*, 524 U.S. at 745.

⁵⁸ *See Faragher*, 524 U.S. at 807-09.

⁵⁹ *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 745. Another circuit split emerged regarding whether a constructive discharge (this occurs when an employee’s workplace environment is so filled with hostility that the only fitting response is to quit) is a tangible employment action. Some courts held that a constructive discharge could never be a tangible employment action while others held that a constructive discharge could be a tangible employment action if it was precipitated by an official company act. *See also* Stephen F. Befort and Sarah J. Gorajski, *When Quitting Is Fitting: The Need for a Reformulated Sexual Harassment/Constructive Discharge Standard in the Wake of Pennsylvania State Police v. Suders*, 67 OHIO ST. L.J. 593, 596 (2006). The Court in *Suder* ultimately resolved this issue by holding that a constructive discharge will only amount to a tangible employment action when there is a precipitating official act. *See generally Penn. State Police v. Suder*, 542 U.S. 129 (2004).

III. THE DEVELOPMENT OF THE EQUAL OPPORTUNITY HARASSER DEFENSE

While the previous section thoroughly defines the contours of the hostile work environment claim, this section will detail the history of the equal opportunity harasser defense and explain how various courts have ruled on it. The equal opportunity harasser defense was first recognized in *Barnes v. Costle*.⁶⁰ In *Barnes*, a female employee with the Environmental Protection Agency (“EPA”) alleged that she was subjected to sexual harassment by her male supervisor after he repeatedly solicited her for sexual favors, notwithstanding her consistent denial of his advances.⁶¹ The employee’s position was ultimately eliminated after she refused to submit to her supervisor’s advances.⁶² The district court granted the EPA’s motion for summary judgment, reasoning that the employee’s suit was not based on her sex, but instead was predicated on her refusal to engage in sexual activity with her supervisor, which was not protected under Title VII.⁶³ The United States Court of Appeals D.C. Circuit reversed, reasoning that “[b]ut for her womanhood . . . her participation in sexual activity would never have been solicited. . . . Put another way, she became the target of her superior’s sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job.”⁶⁴ Moreover, “[t]o say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel.”⁶⁵ Interestingly, while the concept of the equal opportunity harasser was not an issue before the court, Judge Robinson, writing for the majority, laid the foundation for the defense. In an unassuming footnote, Judge Robinson stated that:

⁶⁰ *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977). In this case, the court seemed to limit the definition of “sex,” for purposes of Title VII, as only including biological differences between men and women and not in the context of sexual gratification. *Id.*

⁶¹ *Id.* at 985.

⁶² *Id.*

⁶³ *Id.* at 993.

⁶⁴ *Id.* at 990.

⁶⁵ *Id.*

[I]t is no answer to say that a homosexual superior of the same gender could impose a similar condition on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender. In each instance, the legal problem would be identical to that confronting us now the exaction of a condition which, but for his or her sex, the employee would not have faced. These situations, like that at bar, are to be distinguished from a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.⁶⁶

After the *Barnes* decision, several circuits began to recognize the equal opportunity harasser defense.⁶⁷ While the Supreme Court has yet to determine

⁶⁶ *Id.* at 990 n.55. The court in *Ryczek* reasoned that there are three possible interpretations for the term “bisexual” as noted in *Barnes*. First, the language in *Barnes* could be interpreted to prohibit Title VII sexual harassment cases any time a supervisor is bisexual. Alternatively, the language could mean that a supervisor is only immune from Title VII suits when there is evidence that the supervisor has actually harassed members of both sexes. The last interpretation would require the court to interpret the word “sex” as used in Title VII to mean something more than gender. However, the last interpretation may have been eliminated by Supreme Court decisions implying that the “because of sex” requirement was congressionally intended to mean gender. *See generally* *Ryczek v. Guest Servs. Inc.*, 877 F. Supp. 754 (D.C. Cir. 1995).

⁶⁷ *See, e.g.*, *Connell v. Principi*, No. 04-1356, 2007 WL 3274185, at *15 (W.D. Pa. Nov. 5, 2007) (granting defendant’s motion for summary judgment because male employees could not show that harassment by female supervisor was “because of sex” rather than just merely offensive sexual innuendos); *Walker v. Sullair Corp.*, 736 F. Supp. 94, 99 (W.D. N.C. 1990) (showing an example of harassment not based on sex where evidence showed supervisor publicly berated both male and female employees), *aff’d in part, rev’d in part*, 946 F.2d 888 (4th Cir. 1991). *But see* *Ocheltree v. Scollon Prods. Inc.*, 335 F.3d 325, 332 (4th Cir. 2003) (en banc) (illustrating that although men were also offended by the daily stream of sex-based behavior in the workplace, it did not mean that the conduct did not occur because of the plaintiff’s gender); *Dattoli v. Principi*, 332 F.3d 505, 506 (8th Cir. 2003) (showing that an alleged harasser who had difficulty interacting with male and female co-workers indicated that his conduct towards the female plaintiff was not sex-based); *Holman v. Indiana*, 211 F.3d 399, 399 (7th Cir. 2000) (demonstrating an equal opportunity harasser who escaped liability under Title VII); *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 964 (8th Cir. 1999) (emphasizing that whether the offensive conduct was directed at both men and women is important in determining if sex-based discrimination occurred); *Pasqua v. Metro. Life*

whether it is in fact a viable defense, many of the circuits that do recognize it have quoted the language in the Court's decisions in *Harris v. Forklift Systems, Inc.*⁶⁸ and *Oncale v. Sundowner Offshore Services*⁶⁹ "as tacit approval of the equal opportunity harasser defense as a means to avoid liability under Title VII."⁷⁰ While *Oncale* was a case involving same-sex sexual harassment, the language the Court used in reaching its holding is suggestive, at least in some circuits, that the Supreme Court would recognize the equal opportunity harasser defense. In *Oncale*, the plaintiff-employee worked as a laborer in an oil field for his employer, Sundowner Offshore Services, Inc. ("Sundowner").⁷¹ The employee alleged that his co-workers sexually assaulted him, threatened him with rape, and forced him to participate in embarrassing sexual acts in front of his colleagues.⁷² The employee complained to his supervisors as well as the company's Safety Compliance Clerk; however, no action was taken.⁷³ As a result, the employee quit because he felt that if he remained in his prior position he ultimately would have been forcibly raped.⁷⁴

The employee brought an action for discrimination based on sex against Sundowner in the United States District Court for the Eastern District of

Ins., 101 F.3d 514, 516 (7th Cir. 1996) (noting that harassment inflicted on both males and females in same setting does not create an actionable claim of harassment based on sex); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1991) (noting that because male and female workers were treated in a like manner, plaintiffs would have no remedy under Title VII); *Weinsheimer v. Rockwell Int'l Corp.*, 754 F. Supp. 1559, 1564 (M.D. Fla. 1990) (noting that the plaintiff's willing and frequent involvement in sexual innuendos prevalent in her workplace negated any hostile work environment), *aff'd*, 949 F.2d 1162 (11th Cir. 1991).

⁶⁸ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

⁶⁹ *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

⁷⁰ Mark J. McCullough, Note, *One is a Claim, Two is a Defense: Bringing an End to the Equal Opportunity Harasser Defense*, 67 U. PITT. L. REV. 469, 476 (2005).

⁷¹ *Oncale*, 523 U.S. at 77.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

Louisiana.⁷⁵ The court held that “a male has no cause of action under Title VII for harassment by male co-workers.”⁷⁶ On appeal, the Fifth Circuit affirmed and the United States Supreme Court granted certiorari for a determination on the validity of same-sex sexual harassment claims brought under Title VII.⁷⁷ The Supreme Court reversed the lower courts’ decisions, holding that claims alleging “sex discrimination consisting of same-sex sexual harassment are actionable under Title VII.”⁷⁸ Specifically, the Court reasoned that Title VII’s reference to discrimination “because of sex” is intended to protect both men and women from unequal treatment in places of employment.⁷⁹ However, while the Court did extend protection to the plaintiff-employee in *Oncale*, the Court clearly indicated that not all workplace harassment will result in a claim of sexual harassment.⁸⁰ In support of this position, the *Oncale* Court specifically referenced Justice Ginsburg’s concurrence in *Harris*, which as some courts have opined, lends support for the idea that the Court would recognize the equal opportunity harasser defense. “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”⁸¹

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* (internal quotation marks omitted).

⁷⁸ *Id.* at 82. When the harasser is of the same sex as the plaintiff-employee, the Court held that there are several frameworks that a plaintiff-employee can use to establish that such harassment occurred because of sex, including: (1) showing that the harasser is homosexual; (2) showing that the harasser is motivated by a general hostility towards the presence of employees of the same sex in the workplace; or (3) showing how the harasser treated men versus women in a mixed-sex workplace. Interestingly, with respect to the second framework, a general hostility towards a particular group would not be a viable option if the same-sex harasser worked in an environment that was dominated by one group. *Id.* at 70, 80-81.

⁷⁹ *Oncale*, 523 U.S. at 78 (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983)).

⁸⁰ *Oncale*, 523 U.S. at 81.

⁸¹ *Id.* at 80.

IV. INTERPRETING THE “BECAUSE OF SEX” LANGUAGE

The fundamental basis for the equal opportunity harasser defense lies within the meaning of the phrase “because of sex”⁸² which, unfortunately, is extremely vague.⁸³ Since the inception of Title VII, courts and commentators have continuously examined, theorized, defined, refined, accepted, and expelled various ideas and approaches to the “because of sex” question. In fact, the phrase “because of sex” could mean a number of things, such as: the biological differences between men and women; gender⁸⁴; sexual preference; gender stereotypes and identity; sexual imagery and epithets; or sexual behavior.⁸⁵ Congress’ failure to specify which of these definitions it intended for the “because of sex” language to encompass has led to considerable confusion, as courts have struggled to adequately determine what conduct is sufficient to violate Title VII.⁸⁶ Due to the ambiguity of the “because of sex” language, courts and scholars have disagreed as to whether the equal opportunity harasser defense should be available in sexual harassment cases based on hostile work environments.

⁸² Deborah Zalesne, *Lessons From Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL’Y 535, 537 (2007).

⁸³ David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1740-41 (2002).

⁸⁴ Zalesne, *supra* note 82, at 546 n.75 (citing *Hamner v. St. Vincent Hosp. & Health Care Ctr. Inc.*, 224 F.3d 701, 701 (7th Cir. 2000) (holding that “Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation”)). Within this Article, gender generally refers to the social construction of roles, actions, attitudes, behaviors, and attributes that society as a whole considers appropriate for men and women, whereas sex generally refers to the biological and physiological aspects that define the differences between men and women.

⁸⁵ Zalesne, *supra* note 82, at 546 nn.75-79.

⁸⁶ In addition to failing to define sex in Title VII, its inclusion in the statute was motivated by one congressman’s efforts to thwart the bill’s approval. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); Christopher W. Deering, Comment, *Same-Gender Sexual Harassment: A Need to Re-examine the Legal Underpinnings of Title VII’s Ban on Discrimination “Because Of” Sex*, 27 CUMB. L. REV. 231, 268-69 (1996-1997).

Some commentators and scholars argue that the evolution of Title VII through the judicial process has allowed the primary goal of Title VII to become distorted or eviscerated; thus, allowing the equal opportunity harasser defense to gain a foothold and, in some instances, flourish.⁸⁷ In these jurisdictions, several legal theories have been adopted to avoid the harsh results of its application, including: (A) eliminating the causation requirement; (B) conducting an individualized analysis of the harassment directed at each employee without considering whether the harasser was an equal opportunist; (C) adopting a “sex per se” rule; and (D) evaluating the comparative seriousness of the harassment directed at each plaintiff.

A. Elimination of the Causation Requirement

One approach for dealing with the problems created by the equal opportunity harasser defense is to eliminate the requirement of causation.⁸⁸ While Professor Gudel’s article primarily focuses on the elimination of the causation requirement in mixed motive cases,⁸⁹ his argument for the elimination of causation is equally viable in the context of sexual harassment cases.⁹⁰ His primary point is that “placing the burden on the plaintiff in a Title VII case to establish ‘but for’ causation is simply incompatible with the nature of Title VII as a remedial statute.”⁹¹ Further, by equating the “because of sex” requirement to a “but for” test, a plaintiff is placed in an eminent position of failure.⁹² By using that particular assessment, the offending conduct becomes isolated to a specific incident of harassment in a chain of events, which may have occurred in

⁸⁷ See generally Zalesne, *supra* note 82; Schwartz, *supra* note 83, at 1709.

⁸⁸ Paul J. Gudel, Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, 70 TEX. L. REV. 17, 30 (1991).

⁸⁹ A mixed motive case is one that involves two motives, one that is discriminatory and another that is non-discriminatory. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 157-60, n.6-7 (7th ed. 2004).

⁹⁰ See generally Gudel, *supra* note 88.

⁹¹ *Id.* at 32 (internal citations omitted).

⁹² *Id.* at 30.

producing the final outcome. The purpose of Title VII is to make individuals, subjected to discrimination, able to seek justice against their perpetrators for the purpose of furthering social policy considerations.⁹³ Title VII was not enacted for the purpose of establishing a new tort action.⁹⁴ Instead, it should be treated as a statute prohibiting offending conduct.⁹⁵ As such, this purpose can only be truly effectuated through elimination of the causation requirement. This idea is further supported by the fact that it is the defendant's own conduct that creates the problem of discrimination.⁹⁶

An excellent example of how courts dispense with the causation requirement is provided by the United States Court of Appeals for the Seventh Circuit in *McDonnell v. Cisneros*.⁹⁷ In *Cisneros*, two plaintiff-employees, Boockmeier (male) and McDonnell (female), brought suit against the Department of Housing and Urban Development ("HUD"), alleging that they were subjected to a hostile work environment and retaliatory discharges.⁹⁸ According to the plaintiffs, someone provided the Secretary for HUD with two anonymous letters falsely accusing them of sexual misconduct.⁹⁹ The letters specifically provided that "McDonnell was Boockmeier's 'in-house sex slave,' who provided sexual favors to him in exchange for more rapid promotion and other preferential treatment."¹⁰⁰ Thereafter, HUD initiated an investigation into the allegations contained in the letter.¹⁰¹ The plaintiffs claimed that the investigations were

⁹³ *Id.*

⁹⁴ *Id.* at 98.

⁹⁵ *Id.*

⁹⁶ *Id.* at 32 (stating "This intuition is usually coupled with another one: that fairness requires that the burden of proof in mixed motive cases be placed on the defendant because the defendant's actions have created the problem of proof.") *Id.*

⁹⁷ *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996).

⁹⁸ *Id.* at 257.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Because the plaintiffs were employees of the Inspector General's Office—the office that normally conducts investigations involving these types of complaint—HUD retained outside federal investigators from the Defense Department. *Id.*

conducted in a hostile and unprofessional manner.¹⁰² In fact, the investigators indicated to several of the interviewees that it was “their personal belief that the plaintiffs were guilty of the charges made in the anonymous letters.”¹⁰³ As a result of:

[t]he manner in which the investigation was conducted . . . even more lurid rumors [arose], widely circulated within HUD, including rumors of incest and other sexual deviance on the part of Boockmeier and a rumor that Boockmeier was the true father of McDonnell’s child. These rumors made the plaintiffs pariahs. Male employees of HUD shunned McDonnell, female employees Boockmeier.”¹⁰⁴

Notwithstanding the investigators’ questionable tactics, the plaintiffs were completely exonerated.¹⁰⁵ However, in order to remove the veil of impropriety, Boockmeier was reassigned to HUD’s Washington, D.C. office for ninety days, “ostensibly to dilute any perception that he had a sexual relationship with McDonnell.”¹⁰⁶ Thereafter, “Boockmeier filed an informal complaint that the treatment by the investigators constituted a form of sexual harassment forbidden by Title VII.”¹⁰⁷ Approximately one year later, McDonnell also filed a claim for sexual harassment as well as a claim of retaliation, alleging that “management ostracized, disdained, and ridiculed her in retaliation for her having filed complaints.”¹⁰⁸ After McDonnell filed this complaint, Boockmeier received notice that his original ninety-day transfer was changed to a permanent transfer

¹⁰² *Id.* at 258.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ The court dismissed McDonnell’s retaliation claim, reasoning that “there was no causal connection between McDonnell’s filing of the complaints and the alleged retaliation against her,” because she was ostracized, disdained, and ridiculed both prior to and after the filing of the complaint. Therefore, because nothing changed, it could not be said that these actions were the result of her filing the complaint. *Id.* at 258-59.

because he failed to prevent McDonnell from filing her complaint.¹⁰⁹ In response, Boockmeier also filed a claim for retaliation.¹¹⁰

With respect to the hostile work environment claims, the court held that the district court's decision to dismiss was correct because the Federal Tort Claims Act barred the plaintiffs' claims against the federal investigators.¹¹¹ In reaching its decision, the court addressed the government's argument that the plaintiffs' claims of sexual harassment could not be established because the harassment was equally directed at both employees.¹¹² In rejecting this argument, the court criticized other courts that have interpreted the "because of sex" language to require a difference in biological sex as a necessary condition of sexual harassment.¹¹³ Instead, the court directed attention away from the

¹⁰⁹ *Id.* at 258.

¹¹⁰ *Id.* In regards to Boockmeier's retaliation claim, the court held that while 42 U.S.C. § 2000e-3(a) prohibits discrimination "against any individual . . . because he has made a charge . . . or participated in any manner in an investigation, proceeding, or hearing." *Id.* at 262. Boockmeier nevertheless pled sufficient facts to establish a claim of retaliation. *Id.* at 262. The court reasoned that while it was clear that the situation presented by Boockmeier was not clearly contemplated by the legislature, it was necessary to hold that such a claim for retaliation could be established based on the facts of this case to avoid an absurd result whereby "employers could obtain immunity from the retaliation statute by directing their subordinates to take steps to prevent other workers (as by threat of dismissal or other discipline) from complaining about discrimination." *Id.* at 262.

¹¹¹ *Id.* at 259. The Court stated that:

If, as alleged, the investigators in this case told the people whom they were interviewing that the plaintiffs had engaged in job-related sexual misconduct, then, because the statement was false and defamatory, the investigators committed the tort of defamation, for which the plaintiffs could sue them. But the investigators would have a defense of qualified immunity. . . . The Tort Claims Act makes specific provision for suits arising out of abuses by federal investigators in a proviso to 28 U.S.C. § 2680(h) that conspicuously omits defamation from the list of abuses that can impose liability on the United States under the Act. The plaintiffs are trying to use Title VII, which does not have any specific provision with regard to federal investigators, to amend the Tort Claims Act and circumvent the Westfall Act."

Id. at 261.

¹¹² *Id.* at 260.

¹¹³ *Id.*

“because of sex” language and focused its attention on the exceedingly perverse outcome that would result “if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female.”¹¹⁴ This shift in the court’s analysis marked a realization that applying the “but for” causation test in cases with an equal opportunity harasser thwarts the purpose of Title VII. Thus, in order to reach what it considered to be the most reasonable conclusion under the circumstances, the court refused to apply a strict “but for” causation determination.¹¹⁵

B. Applying an Individualized Analysis

Another way to mitigate the equal opportunity harasser defense is to conduct an individualized analysis to determine whether the alleged harassment was “because of sex.” Under an individualized analysis of the “because of sex” requirement, courts modify the traditional “but for” determination by conducting

¹¹⁴ *Id.* (internal citation omitted); see also Zalesne, *supra* note 82, at 550 (quoting “Some commentators have advocated abandoning the causation requirement entirely, and some courts have gotten around the problem by simply directing attention away from the ‘because of sex’ language.”) The elimination of the causation requirement is also buttressed by the fact that:

[A] difference in sex is not a necessary condition of sexual activity and hence (most courts think) of sexual harassment. . . . There is plenty of homosexual activity these days (perhaps all days); some of it occurs in the workplace; and some involves the extorting of sexual favors by superiors, or other behaviors that when heterosexual expose employers to liability for sexual harassment in violation of Title VII’s prohibition of sex discrimination. And then there is the specter of the perfectly bisexual harasser- a number three on the Kinsey Scale of sexual preference—who by definition is indifferent to the sex of his victims and so engages in sexual harassment without discriminating on the basis of sex.

McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996). Alfred Kinsey created what is affectionately known as the Kinsey Scale. The Kinsey Scale is a numerical continuum, ranging from 0 to 6, which measures an individual’s sexual preference. On the scale, an exclusively heterosexual person is represented by a score of 0, whereas as an exclusively homosexual person is represented by a score of 6. Thus, a score of 3 would represent an individual who is indifferent to sexual preference, a perfect bisexual. See ALFRED C. KINSEY, WARDELL B. POMEROY, & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638-41 (1948).

¹¹⁵ See *McDonnell*, 84 F.3d at 260.

a closer examination of the harasser's conduct.¹¹⁶ Rather than stopping with a facial inquiry and dismissing a case because the harasser's conduct was directed at both females and males, the court would accept the premise that both females and males can be victims of the same harasser, thereby sustaining an actionable cause.¹¹⁷ In order to establish this burden, the employee presents one of the three types of evidence listed in *Oncale* as proof that the harassment was because of sex.¹¹⁸ Next, the court isolates and examines the conduct of the harasser solely as it relates to the plaintiff and without regard for the harassment of any other employee of the opposite sex.¹¹⁹ Through this approach, the inquiry properly focuses on exactly what Title VII was created to remedy—individual discrimination.¹²⁰ The claim is not founded on extraneous facts outside the individual claim that are “unrelated to the instances of discrimination.”¹²¹ More accurately, the court will address the conduct of the harasser as it specifically relates to the victim.¹²² Under this line of inquiry, sex-specific conduct that would be dismissed under a traditional analysis, because the harasser utilized a

¹¹⁶ Shylah Miles, *Two Wrongs Do Not Make A Defense: Eliminating The Equal-Opportunity-Harasser-Defense*, 76 WASH. L. REV. 603, 623 (2001); see generally McCullough, *supra* note 70; Zalesne, *supra* note 82. An individualized analysis approach:

[W]ould examine each plaintiff's claim separately without regard to other claims against the same defendant and without requiring comparative evidence showing that the other sex was treated differently. As noted in *Brown v. Henderson*, “[i]n determining whether an employee has been discriminated against ‘because of such individual’s . . . sex,’ the courts have consistently emphasized that the ultimate issue is the reason for the individual plaintiff’s treatment, not the relative treatment of different groups within the workplace.”

Zalesne, *supra* note 82, at 551 (citing *Brown v. Henderson*, 257 F.3d 246 (2001) (alterations in original) (internal citations omitted).

¹¹⁷ See Miles, *supra* at note 116, at 623.

¹¹⁸ *Id.* at 624. See *supra* note 78 (discussing the three ways that an employee can prove a claim under *Oncale*).

¹¹⁹ *Id.* at 623.

¹²⁰ *Id.* at 624.

¹²¹ *Id.*

¹²² *Id.*

similar form of conduct on both males and females, would instead be determinative in establishing that the harasser's behavior was gender-based.¹²³

This approach was applied by the district court in *Chiapuzio v. BLT Operating Corp.*¹²⁴ In *Chiapuzio*, four plaintiffs alleged that they were sexually harassed by a male supervisor.¹²⁵ The plaintiffs consisted of a married couple, a married man, and an individual female.¹²⁶ The married couple alleged that the supervisor regularly and consistently made sexually abusive remarks, primarily based on the premise that the supervisor would do a much better job of sexually pleasing the wife than her husband.¹²⁷ The other married man alleged that he and his wife¹²⁸ were subjected to conduct that was substantially similar to the conduct alleged by the married couple—the most egregious act occurred when the supervisor offered the married man's wife "\$100 dollars if she would sit on his lap."¹²⁹ The individual female alleged that the supervisor made "an incessant series of sexual advances" towards her.¹³⁰ Each of the plaintiffs complained about the supervisor's conduct, but the employer took no action.¹³¹ After the plaintiffs filed suit, the employer argued that there was no discrimination "because of sex" since the supervisor harassed both the female and the male employees equally; therefore, the harassment could not have occurred "but for" their gender.¹³² The court disagreed, reasoning that the supervisor's harassment fell within the ambit of Title VII because his primary purpose was to demean each

¹²³ *Id.*

¹²⁴ *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993).

¹²⁵ *Id.* at 1335.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* The married man's wife was not a party to the litigation because she was not an employee of BLT.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 1336.

of the parties specifically because of his or her gender.¹³³ Instead of applying an analysis that would compare the harassing conduct directed at all of these employees as a whole, the court determined that each employee's complaint should be reviewed individually.¹³⁴ Accordingly, the court concluded that each employee, individually, had been subjected to sexual harassment.¹³⁵

This approach was also recognized by the Ninth Circuit Court of Appeals in *Steiner v. Showboat Operating Co.*¹³⁶ In *Steiner*, the plaintiff-employee's evidence established that her supervisor was abusive to both men and women, but that his abuse of women was different because of his use of "sexual epithets, offensive, explicit references to women's bodies, and sexual conduct."¹³⁷ The court further reasoned that even if the supervisor "used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby 'cure' his conduct toward women. *Ellison* unequivocally directs us to consider what is offensive and hostile to a reasonable *woman*."¹³⁸ The court reiterated that:

[w]e . . . prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ The United States Court of Appeals for the Ninth Circuit court stated:

An odd and inefficient result would obtain if the plaintiffs were unable to bring one lawsuit as a group, but could successfully bring individual suits against the defendant. Thus, this Court concludes that if an individual plaintiff could sue BLT and survive summary judgment, then the plaintiffs as a group also should survive.

Id. at 1338.

¹³⁶ *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994).

¹³⁷ *Id.* at 1462. The court specifically found that while the defendant referred to male employees as "assholes" this language did not relate to their gender, but that defendant's references to female employees as "dumb fucking broads" and "fucking cunts" clearly centered on gender. *Id.* at 1462.

¹³⁸ *Id.* at 1464 (quoting *Ellison v. Brandy*, 924 F.2d 872 (9th Cir. 1991)).

perspectives of men and women. Conduct that many men consider unobjectionable may offend many women.¹³⁹

As this section demonstrates, although the individualized analysis model does not eliminate the “because of sex” requirement, it does refine the basis upon which that determination is made.¹⁴⁰ By applying this approach, courts review the sufficiency of evidence as it applies only to the harasser’s conduct towards the individual complainant—with no consideration of the harasser’s conduct toward other employees of the same sex—, thereby allowing the court to limit application of the equal opportunity harasser defense.¹⁴¹

C. The “Sex Per Se” Rule

The “sex per se” rule is a literal interpretation of the “because of sex” requirement. Under this approach, “sexual conduct in the workplace is always, without more, ‘because of sex.’”¹⁴² Application of the “sex per se” rule, however, does not necessitate that all sexually based conduct result in a valid claim of sex discrimination.¹⁴³ Instead, this approach lightens the employee’s burden of proving the “but for” causation.¹⁴⁴ In essence, once an employee establishes that the conduct is “sex related,” the causation component of the hostile work environment claim is established.¹⁴⁵ This approach recognizes that sexually harassing conduct does not have to be motivated by the harasser’s sexual interest in the victim and that the intent of the harasser could be immaterial; therefore, it should not be considered.¹⁴⁶ Proponents of this argument argue that this straightforward approach will eliminate the confusion caused by the “because of

¹³⁹ *Id.*

¹⁴⁰ *See generally* Miles, *supra* note 116.

¹⁴¹ *Id.*

¹⁴² Schwartz, *supra* note 83, at 1705.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1719 (noting that desire-based “but for” causation theories contain misplaced emphasis on the sexual behavior and motivations of the harasser).

sex” requirement.¹⁴⁷ According to proponents of the “sex per se” rule, the traditional “but for” theory of causation does not work well in sex discrimination cases for two reasons.¹⁴⁸ First, under the “but for” theory, the primary consideration focuses on the subjective intent and sexual behavior of the harasser.¹⁴⁹ This focus is misplaced because:

[F]actual inquiry into the harasser’s actual motivation could mean an intrusion into his inner mind: such an inquiry would likely be murky, unduly psychological, and traumatic for everyone involved—not just the alleged harasser, but also the other participants in the litigation who would undergo the ordeal of learning more than they would want to know about the harasser’s psyche.¹⁵⁰

Furthermore, determining the subjective intent and behavior of the harasser often requires that the employee introduce evidence of the harasser’s conduct outside of the workplace in order to sufficiently prove whether his conduct within the workplace is “because of sex.”¹⁵¹ To meet this burden, an employee “might be entitled fairly to open discovery into the harasser’s sex life to identify how, and toward whom, he makes sexual overtures. Yet, in the end, the complexities of sexuality might render this unseemly and difficult inquiry indeterminate.”¹⁵² As a result, the “but for” theory of causation may coerce an unreasonable expedition into the private life of the harasser and place an insurmountable burden on the employee to make such inquiry.¹⁵³

A second criticism of the “but for” theory of causation is that it may exclude from coverage, under Title VII, harassment that is not motivated by

¹⁴⁷ *Id.* at 1705.

¹⁴⁸ *Id.* at 1720.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 1746.

sexual desire.¹⁵⁴ This is highly problematic because sexual harassment in the workplace is not always motivated by sexual desire.¹⁵⁵ In fact, there is substantial evidence to suggest “that men engage in offensive sexual conduct in the workplace primarily as a way to exercise or express power, not desire.” Psychological studies, for example, have correlated workplace sexual harassment with strong beliefs in sex-role stereotypes.”¹⁵⁶

As a response to these criticisms, the “sex per se” rule was first applied by the United States District Court for the Middle District of Florida in *Robinson v. Jacksonville Shipyards, Inc.*¹⁵⁷ In *Robinson*, the plaintiff-employee sued her employer for sexual harassment claim based on a hostile work environment.¹⁵⁸ Specifically, the employee alleged that the workplace environment was littered with pictures of nude and partially nude women, that other male employees were allowed to read pornographic magazines in the workplace without sanction, and that several employees made inappropriate comments about the pictures in the presence of the plaintiff-employee’s presence and directed inappropriate sexual comments towards her.¹⁵⁹ The employer argued that the employee’s claim was not valid under Title VII because the harassment did not occur because of sex.¹⁶⁰ The court disagreed, reasoning that the employer’s workplace environment created a barrier to the progress of women and conveyed a clear message that they did not belong unless they were willing to “subvert their identities to the sexual stereotypes prevalent” in the employer’s workplace.¹⁶¹ Moreover, the court reasoned that the employee’s evidence suggested “that the presence of the pictures, even if not directed at offending a particular female employee,

¹⁵⁴ *Id.* at 1753.

¹⁵⁵ *Id.* at 1721.

¹⁵⁶ *Id.* (internal citations omitted).

¹⁵⁷ *Robinson v. Jacksonville Shipyards Inc.*, 760 F. Supp. 1486, 1491 (M.D. Fla. 1991).

¹⁵⁸ *Id.* at 1520

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1520-22.

¹⁶¹ *Id.* at 1523.

sexualizes the work environment to the detriment of all female employees.”¹⁶²

Relying on this same reasoning, the Seventh Circuit, in *Doe v. City of Belleville*, also applied the “sex per se” rule.¹⁶³ In *Doe*, two teenage brothers (“H” and “J”),¹⁶⁴ who were hired by the City to perform yard work, quit after only two months of employment and brought suit against the City, alleging that they were sexually harassed by their former male co-workers.¹⁶⁵ The district court granted summary judgment in the City’s favor, reasoning that the harassment occurred because the boys were perceived as homosexuals, which the court opined is not protected under Title VII since the harassers were not motivated by any sexual desire for the boys.¹⁶⁶ The court of appeals reversed, holding that sexually explicit conduct alone is generally sufficient to establish that the harassment occurred because of sex.¹⁶⁷ It further reasoned that:

¹⁶² *Id.*

¹⁶³ *Doe v. City of Belleville*, 119 F.3d 563, 579 (7th Cir. 1997).

¹⁶⁴ For the most part, J was spared from the sexual harassment. Instead, J’s co-workers would merely tease him about the fact that he was overweight. However, on one occasion the comments did have a sexual undertone. After H contracted poison ivy, Dawe asked J if he also had it from having anal sex with his brother. *Id.* at 567.

¹⁶⁵ *Id.* at 566. The facts of the case were undisputed and were uncontested by the City. *Id.* at 567. Between the two brothers, H was subjected to the most harassment. H’s co-workers would frequently call him a “queer,” “fag,” “bitch,” and urge him to “go back to San Francisco with the rest of the queers.” His co-workers would also repeatedly inquire into whether H was a “boy or a girl.” In addition, one co-worker in particular, Dawe, called “H his bitch” and regularly threatened to take H “out to the woods” and “get [him] up the ass.” These comments were made in the presence of other employees, prompting them to join in on the sexually charged banter, often remarking that Dawe should “take [H] out and ‘get a piece of that young ass.’” On one occasion, H’s supervisor indicated that he was going to take H out to the woods, asked Dawe whether H was “tight or loose,” and asked whether H “would . . . scream” if he was sodomized. The harassment directed at H culminated in a physical attack when Dawe trapped H against a wall, grabbed H’s testicles, and announced in front of the other employees, “I guess he’s a guy.” It was after this incident that the brothers decided to quit. *Id.* at 566-67.

¹⁶⁶ The district court found the deposition testimony of the boys compelling on this issue wherein the boys admitted that the harassers never “made a sexual advance” toward either of them, “asked for sexual favors,” asked to “have sex” with them, or had physical contact with them “of a sexual nature.” *Id.* at 567-68.

¹⁶⁷ *Id.* at 590.

[p]roof that the harasser was motivated to target (or in practice did target) one gender and not the other may be necessary where the harassment is not on its face sexual, as we have discussed, but such proof would seem unnecessary when the harassment itself is imbued with sexual overtones.¹⁶⁸

In reaching this decision, the court in *Doe* focused more on the conduct and its effect on the plaintiff, not on the subjective intent of the harasser and whether or not he was in fact motivated by some sort of sexual desire.¹⁶⁹ In doing so, the court deflected attention away from the causation requirement altogether and onto considerations it found to be more critical to the outcome. These courts presumably took their lead from Supreme Court cases that use “because of sex” in the analysis but do not elucidate the causal requirement implicit in Title VII.¹⁷⁰

While the “sex per se” rule is a viable approach, there is some evidence that the Supreme Court would reject this idea based on the following language from *Oncale*: “We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.”¹⁷¹ This language suggests that mere proof of sexually related harassment is insufficient to establish a prima facie case of hostile work environment without establishing the requisite level of causation. Although the Court has yet to definitively rule that such interpretation is inconsistent with Title VII, the language from *Oncale* may render the “sex per se” rule less attractive than one of the other three approaches to the equal opportunity harasser defense.

¹⁶⁸ *Id.* at 577-78.

¹⁶⁹ *Id.* at 590 (quoting “Men sexually harass women in the workplace for reasons other than sexual desire; but that does not detract either from the sexual content of the harassment or from the uniquely intrusive and denigrating impact sexual harassment has upon the women who experience it.”).

¹⁷⁰ Zalesne, *supra* note 82, at 550-51.

¹⁷¹ *Oncale*, 523 U.S. at 80 (1998).

D. Comparative Seriousness

A fourth approach towards interpreting the “because of sex” requirement requires that courts analyze the comparative seriousness of the harassment directed at plaintiff-employees in comparison to the harassment leveled at other employees.¹⁷² As such, if the harassment directed at the plaintiff-employee can be perceived as having a greater effect on the plaintiff from a protected class, as opposed to a class of unprotected persons, then harassment has occurred because of sex and the equal opportunity harasser defense is not applicable.¹⁷³ The Eighth Circuit in *Kopp v. Samaritan Health System, Inc.*, provides an excellent example of how courts apply the comparative seriousness test.¹⁷⁴ In *Kopp*, the evidence established that the defendant doctor verbally and physically harassed the female plaintiff-employee as well as other men and women in the workplace.¹⁷⁵ The defendant asserted that because he targeted both males and females, it could not be shown that the discrimination was based on gender.¹⁷⁶ Disagreeing, the court held that the incidents involving the female employees were “of a more serious nature than those involving male employees” and that a “fact-finder could conclude that [the defendant’s] treatment of women is worse than his treatment of men.”¹⁷⁷ The defendant’s harassing conduct was unequally balanced because he harassed ten women but only four men.¹⁷⁸ Even more telling was the fact that the defendant’s alleged abuses of women involved actual physical contact and harm, while all of the incidents involving male employees consisted only of a raised voice or a verbal insult.¹⁷⁹

In summary, the comparative serious test analyzes the severity of the harassment directed at each victim individually, then evaluates the conduct on a

¹⁷² See Miles, *supra* note 116.

¹⁷³ *Id.*

¹⁷⁴ *Kopp v. Samaritan Health Sys. Inc.*, 13 F.3d 264 (8th Cir. 1993).

¹⁷⁵ *Id.* at 269.

¹⁷⁶ See *id.* at 265.

¹⁷⁷ *Id.* at 269.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 269-70.

comparative sliding scale, in relationship to each party's claim, to determine whether such conduct is "because of sex."

V. EQUALIZING THE BURDENS OF PROOF

While each of the aforementioned theories provides some help to plaintiff-employees in establishing a claim of sexual harassment against an equal opportunity harasser, they each fail to adequately balance the policies underlying Title VII. It is highly unlikely that courts will completely eliminate the causation requirement, especially given its importance both in determining whether the plaintiff actually has a viable claim of harassment and ensuring that defendant-employers are not unreasonably subjected to expensive litigation. With respect to the individualized analysis, it suffers from the fact that it requires a court to isolate the conduct of the harasser when such analysis undercuts the idea of evaluating the entire scope of the conduct in its totality. As for the "sex per se" rule, this theory also seems unlikely to gain widespread adoption given the Supreme Court's language in *Oncale*, where it reasoned that "[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."¹⁸⁰ Given this language, it seems improbable that the Court would automatically hold that a plaintiff can establish a prima facie case of discrimination by the mere suggestion that harassment has occurred "because of sex."¹⁸¹ Finally, the comparative seriousness theory places an additional and unreasonable burden on the plaintiff-employee, namely, that the plaintiff-employee must establish that the harm she suffered is greater than that of the harm another employee suffered. Title VII was not intended to force such an absurd legal responsibility.

Due to the inadequacies in the approaches discussed in the previous paragraphs, courts should be willing to recognize an exception to the traditional approach for allocating the burdens of production and proof when the equal opportunity harasser defense is asserted in a sexual harassment claim based on hostile work environment. In hostile work environment cases involving single-

¹⁸⁰ *Oncale*, 523 U.S. at 80.

¹⁸¹ See *supra* note 78-80 and accompanying text.

sex harassment, cases not involving an equal opportunity harasser, courts can continue to apply the current standard for determining causation, wherein the plaintiff is required to prove that the discrimination occurred “but for” his or her sex.¹⁸² However, in cases where the harassment is perpetrated by an equal opportunity harasser, courts should place a larger burden on the employer, similar to how they treat disparate treatment cases where there is a mixed motive.¹⁸³

Under my suggested approach, if an employer asserts the equal opportunity harasser defense in response to a valid claim of sexual harassment based on hostile work environment, this defense would be treated like an affirmative defense, and the employer would be required to establish the burdens of both production and persuasion in establishing that the harassing employee was an equal opportunity harasser. To meet this burden, the employer would have to establish proof of what I refer to below as a “reverse *Oncale*” analysis.¹⁸⁴ There are two primary bases upon which the motivation behind my approach is supported. First, there is an established precedent for adopting different frameworks in employment discrimination claims based on the same category of discrimination in the context of disparate treatment claims. Second, given the heightened pleading standards imposed by *Twombly* and *Iqbal*, it is imperative to more fairly allocate the burdens of proof and production.

A. Judicial Acceptance of Disparate Treatment Discrimination Claims

While the concept of disparate treatment is relatively straight forward, not all factual circumstances involving disparate treatment are the same.¹⁸⁵ For example, an employer’s adverse employment decision could be the result of one

¹⁸² See *supra* notes 60-65 and accompanying text.

¹⁸³ See *supra* note 88-89.

¹⁸⁴ See *supra* pp. 99-100.

¹⁸⁵ Disparate treatment cases are usually similar in that they typically involve a situation where an employer makes an adverse employment decision such as a failure to hire, a failure to promote, a demotion or a reassignment to a less desirable position. See DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 61-62, 68 (7th ed. 2004).

of the following: a single motive, a mixed motive, after acquired evidence or a pattern or practice of discrimination.¹⁸⁶ Each of these types of disparate treatment cases invokes a different analytical framework for determining whether a plaintiff-employee has suffered a cognizable claim of disparate treatment. Given that courts are willing to adopt different frameworks for analyzing different categories of disparate treatment cases, courts should be willing to do the same in the context of hostile work environment cases.

In single motive disparate treatment cases, there is a single motive behind an employer's alleged discrimination, and the plaintiff-employee is attempting to establish the employer's discriminatory intent with circumstantial evidence. The appropriate framework for analyzing such claims is known as the McDonald Douglas burden shifting framework as set forth by the United States Supreme Court in *McDonald Douglas v. Green*.¹⁸⁷ In *McDonnell Douglas*, an employee was laid off due to a general reduction in the employer's labor force.¹⁸⁸ The employee was later arrested for participating in a "stall in"¹⁸⁹ to protest the layoffs. The employer thereafter advertised for an open position and the employee applied for it.¹⁹⁰ The employer declined to hire the employee because

¹⁸⁶ See DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 157-60, n.6-7 (7th ed. 2004).

¹⁸⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹⁸⁸ *Id.* at 793.

¹⁸⁹ In context, a "stall-in" is an effort to block access to the company. Disgruntled employees staged the "stall-in" by stopping their cars in strategic locations, thereby cutting off road access to the company. The Court explained this in detail, stating:

[F]ive teams, each consisting of four cars would 'tie up' five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

Id. at 794.

¹⁹⁰ *Id.* at 796.

of his participation in the “stall-in.”¹⁹¹ The employee brought suit against the employer, alleging that the employer’s decision not to rehire him violated Title VII.¹⁹² The district court found for the employer, reasoning that the employer’s motivation for not rehiring the employee was based on his involvement in the illegal demonstrations rather than his legitimate participation in civil rights activities.¹⁹³ The Court of Appeals for the Eighth Circuit found that the employee had established a prima facie case of discrimination and that the employer had failed to meet its burden of defense against the employee’s claim and, therefore, ruled against the employer.¹⁹⁴ The employer appealed and the Supreme Court affirmed the decision of the appellate court that the employee had established a prima facie case of discrimination; however, it reversed the appellate court’s conclusion that the employer had failed to carry its burden of defense against the claim.¹⁹⁵ The Court reasoned that the employer’s only burden in a single motive case of disparate treatment, based on circumstantial evidence, is rather low—the employer must only produce evidence of a legitimate, nondiscriminatory reason for the discrimination.¹⁹⁶ As the Court concluded, the employer met this burden by producing evidence that the reason for its refusal to rehire the employee was based on his participation in illegal activity.¹⁹⁷ However, the Court also held that the employee would be given an opportunity to rebut this presumption by proving that the employer’s legitimate, non-discriminatory reason was merely pretextual.¹⁹⁸

¹⁹¹ *Id.*

¹⁹² *Id.* at 797.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 798.

¹⁹⁶ *Id.* at 802.

¹⁹⁷ *Id.* at 807.

¹⁹⁸ The Court suggested that the employee in *McDonnell Douglas* might accomplish this by introducing:

- (1) evidence that other employees participated in “stall-ins” and/or “sit-ins” yet were rehired, (2) evidence of how the employee was treated prior to the reduction in force, (3) evidence of how the employer responded to the

As demonstrated by the Court's conclusion, *McDonnell Douglas* sets forth the proper burden-shifting framework for analyzing single motive disparate treatment cases where an employee is trying to prove his or her case with circumstantial evidence.¹⁹⁹ Under this framework, the employee has the initial burden of establishing a prima facie case of discrimination by showing that:

[(1)] the belongs to a racial minority; [(2)] he applied and was qualified for a job for which the employer was seeking applicants; [(3)] despite his qualifications, he was rejected; and [(4)] after his rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications.²⁰⁰

Once an employee meets this burden, there is a rebuttable presumption that the employee has suffered from discrimination.²⁰¹ To rebut this presumption, the burden shifts to the employer to provide a nondiscriminatory reason for rejecting the employee.²⁰² At this point, the only burden on the employer is the burden of production.²⁰³ Once the employer meets this very minimal burden, the

employee's participation in lawful conduct, (4) evidence of how the employer's policy and general treatment of minority employees in the workplace, and (5) evidence of statistical disparities between whites and minority employees.

Id. at 804-05.

¹⁹⁹ *Id.* at 802.

²⁰⁰ *Id.*

²⁰¹ As the Court noted, it is willing to presume that discrimination has occurred once an employee establishes a prima facie case of discrimination:

[B]ecause we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in the business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

Id. at 802-03.

²⁰² *Id.* at 802.

²⁰³ *Id.*

burdens of production and persuasion merge and the employee must establish that the employer's articulated legitimate, non-discriminatory reason is pretextual.²⁰⁴

The scenario described above, however, involves only single motive discrimination cases. In mixed motive cases where an employer has two possible motives for the alleged disparate treatment—one legitimate and one discriminatory—the *McDonnell Douglas* burden-shifting framework does not work. As a result, courts analyzing mixed motive cases utilize the framework that was adopted by the Supreme Court in *Price Waterhouse v. Hopkins*.²⁰⁵

In *Price Waterhouse*, the plaintiff-employee was a senior manager with a large accounting firm.²⁰⁶ After she had been employed for approximately five years, she was recommended for partnership status, pending a formal vote by the partners.²⁰⁷ The firm did not accept or reject her for partnership; instead, the firm decided to put a “hold” on her candidacy until the following year.²⁰⁸ The following year, when the employee was not granted partnership, she quit and sued the firm, alleging that she was discriminated against based on her sex.²⁰⁹ More specifically, she alleged that she did not earn partnership in the firm because she failed to conform to the firm's gender expectations of women in the workplace.²¹⁰ In support of her claim, she introduced evidence of several partners' comments that (1) she was “macho,” (2) she was “overcompensated for being a woman,” (3) she should take “a course at charm school,” (4) her use of profanity in the workplace was unbecoming for a woman, and (5) she had “matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate.”²¹¹ However, the employee's most compelling evidence of gender discrimination was provided by

²⁰⁴ *Id.* at 804.

²⁰⁵ *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

²⁰⁶ *Id.* at 231.

²⁰⁷ *Id.* at 232-33.

²⁰⁸ *Id.* at 233.

²⁰⁹ *Id.* at 231-32.

²¹⁰ *Id.* at 234-36.

²¹¹ *Id.* at 235.

the partner who informed her that her partnership candidacy would be placed on hold.²¹² In an effort to “help” her in future efforts to obtain partnership, this partner informed the employee that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”²¹³ The employee also bolstered her case with testimony by a social psychologist that gender stereotyping likely influenced the firm’s selection process.²¹⁴

The district court held that the firm had “unlawfully discriminated against [the employee] on the basis of sex by consciously giving credence and effect to partners’ comments that resulted from sex stereotyping.”²¹⁵ The court also determined that the firm did not meet its burden of “proving by clear and convincing evidence that it would have placed [the employee’s] candidacy on hold even absent this discrimination.”²¹⁶ The Court of Appeals for the D.C. Circuit affirmed the district court’s ultimate decision but clarified that “even if a plaintiff proves that discrimination played a role in an employment decision, the defendant will not be found liable if it proves, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination.”²¹⁷ The Supreme Court adopted the general framework used by the court of appeals; however, the Court lowered the burden of proof, stating that the employer need only prove it would have reached the same decision by a preponderance of the evidence.²¹⁸

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 235-36.

²¹⁵ *Id.* at 237. “The judge went on to decide, however, that some of the partners’ remarks about [the employee] stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments.” *Id.* at 236-37.

²¹⁶ *Id.* at 237.

²¹⁷ This approach was slightly different than the trial court’s approach since under the trial court’s approach, the defendant remained liable under Title VII even if it had proved that it would have reached the same decision. *Id.*

²¹⁸ The Court stated:

Accordingly, the mixed motive framework, as established in *Price Waterhouse*, places upon a plaintiff-employee the initial burden of showing that a discriminatory reason was a motivating factor in the employment decision.²¹⁹ Once the employee meets this burden, the employer must prove, by a preponderance of the evidence, that it would have reached the same decision based on a legitimate, nondiscriminatory reason.²²⁰ Thus, in the mixed motive context, an employer assumes a much higher burden than the burden it assumes in single motive cases.²²¹ Specifically, in mixed motive cases, employers carry the burdens of both production and persuasion to establish the same decision defense.²²² If the employer is able to meet both burdens and establish the same decision defense, the employee's damages are limited to declaratory relief, injunctive relief, and attorney fees.²²³ If, however, the employer cannot establish the same decision defense, the employee is entitled to the full panoply of damages under Title VII.²²⁴

We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Because the courts below erred by deciding that the defendant must make this proof by clear and convincing evidence, we reverse the Court of Appeals' judgment against Price Waterhouse on liability and remand the case to that court for further proceedings.

Id. at 258. Moreover, while the Court's opinion in this case caused some confusion as to whether the mixed motive framework applied only where the plaintiff-employee established his or her case with direct evidence, the Court later clarified that the mixed motive framework was equally applicable in cases where the plaintiff used circumstantial evidence to prove his or her case. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). As a result, some scholars have opined that *Costa* essentially eliminated the single motive analysis. *See also AVERY supra* note 182, at 157-60, n.6 (7th ed. 2004).

²¹⁹ *See Price Waterhouse*, 490 U.S. at 258.

²²⁰ *Id.*

²²¹ *See Desert Palace*, 539 U.S. at 91.

²²² *Id.*

²²³ *Id.* at 94-95.

²²⁴ *See Civil Rights Act of 1991*, 42 U.S.C. § 1981(a) (2011).

Hostile work environment claims involving equal opportunity harassers can be bifurcated in a similar way that disparate treatment cases have been divided into single motive and mixed motive frameworks. For example, in hostile work environment cases involving single motive sexual harassment, courts can continue to apply the traditional “but for” standard for determining causation. Under the “but for” framework, the plaintiff carries the burdens of both production and persuasion to establish a prima facie case of sexual harassment.²²⁵ This requires that a plaintiff-employee establish that: (1) the conduct was unwelcome, (2) the conduct occurred because of the employee’s sex, (3) the conduct was sufficiently severe and/or pervasive, and (4) that there is a reason to impute liability for such conduct to the employer.²²⁶

In contrast to these heavy burdens placed upon the plaintiff-employee, the “but for” test places a very low burden of production on the employer. Essentially, all that an employer must do is produce evidence that the harasser is an equal opportunist; the employee is then placed in the precarious position of establishing that the harassment occurred “but for” the employee’s sex.²²⁷ This is substantially easier in the equal opportunity harasser context because the nexus between the harassing conduct and its motivation is weakened. In contrast to this approach, courts should place a heavier burden of proof on the employer.

Under my proposed analytical approach, the employee would have to introduce facts that would lead a reasonable trier of fact to conclude that the harassment occurred “because of sex.” This burden would be similar to the “sex per se” rule or the individualized analysis approach discussed in Section IV.²²⁸ Once the employee meets this burden, the employer carries the burdens of production and persuasion to establish the equal opportunity harasser defense. To meet this burden, the employer has to utilize the “reverse *Oncale*” approach.²²⁹ For example, in a typical situation involving a female plaintiff and a male harasser, this approach would require the employer to produce evidence, as well

²²⁵ See *Meritor*, 477 U.S. at 72.

²²⁶ *Id.* at 66-67.

²²⁷ See *supra* notes 60-65 and accompanying text.

²²⁸ See *supra* Part IV, Section B.

²²⁹ See generally *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75.

as persuade the trier of fact of one or more of the following: (1) that the harasser is homosexual, (2) that the harasser is motivated by a general hostility towards the presence of all employees in the workplace, or (3) that the harasser treated men and women equally in a mixed-sex workplace. In essence, the equal opportunity harasser defense would be treated as an affirmative defense. If the employer fails to meet its burden, judgment would be for the plaintiff. If, instead, the employer is able to establish its burden, the employer would prevail and summary judgment in the employer's favor would be appropriate.

Under the first method, proof that a male harasser, who harasses a female employee, was homosexual would provide some evidence that the harasser did not harass the female "because of sex" since his homosexuality would suggest that he was not acting based on any sexual desire for the female employee.²³⁰ If the employer introduced this type of evidence, it is highly likely that he would also be required to establish proof of either the second or third method since it is possible that there could be a case where a homosexual male is harassing a female for the very fact that he may be envious of her femininity or attempting to exert power over her.²³¹ Pursuant to the second method, proof that the harasser is motivated by a general hostility towards all employees in the workplace would help to reduce the likelihood of "but for" causation since it could be argued that the harassment is not occurring "because of sex" but instead because the harasser has a distain for all people in the workplace. Finally, pursuant to the third method, much like the second method, evidence that all employees were treated the same, regardless of sex, again, establishes that the harassment did not occur "because of sex," but for some other unrelated reason.

Treating the equal opportunity harasser defense as an affirmative defense²³² recognizes that an employer may have a legitimate defense to an

²³⁰ See *supra* notes 163-69 and accompanying text.

²³¹ See *supra* note 154-56 and accompanying text; Schwartz, *supra* note 83 at 1741.

²³² The U.S. Supreme Court stated:

Moreover, since we hold that the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not the one of "shifting burdens" that we addressed in *Burdine*. Instead, the employer's burden is most appropriately deemed an affirmative

employee's hostile work environment claim. Regardless, the burdens of production and persuasion should be allocated to the employer, which essentially shifts the unfair requirement from the plaintiff to the employer.

B. Leveling the Burdens of Proof: Fair Allocations of Production and Persuasion

The Supreme Court's decisions in *Twombly* and *Iqbal* have generated a substantial amount of discussion regarding the necessary pleading requirements for plaintiffs in civil rights cases. More importantly, these cases have reshaped plaintiffs' ability to challenge discrimination that violates Title VII by closing the doors of opportunity for plaintiffs in civil rights cases.²³³

First, it will be helpful to describe the initial standard for pleading that was established in *Conley v. Gibson*.²³⁴ In 1957, during a time period when the Supreme Court was changing its attitude about race relations and the use of the federal courts to redress racial discrimination, Justice Black drafted the *Conley* decision, which invited plaintiffs to federal court and allowed the use of discovery to substantiate their cases.²³⁵ After fifty years of a "no set of facts" standard set forth in *Conley v. Gibson*, which opened the door for plaintiffs in employment discrimination cases, the Supreme Court established the heightened standard for plaintiffs in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.²³⁶ In 2007, the Supreme Court began its transformation of the pleading standard when the Court "retired" the "no set of facts" standard and established the plausibility standard in

defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another.

See Price Waterhouse, 490 U.S. at 246.

²³³ *See generally* David Green, Friend or Foe: The Supreme Court's "Plausible Claim" Standard Provides Another Barrier for Plaintiffs in Employment Discrimination Cases (forthcoming Spring 2012).

²³⁴ *See generally* *Conley v. Gibson*, 355 U.S. 41.

²³⁵ *See id.*

²³⁶ *See generally* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Conley v. Gibson*, 355 U.S. 41 (1961).

anti-trust conspiracy claims.²³⁷ Although it was initially unclear whether the plausibility standard was limited to anti-trust claims, the Supreme Court in *Iqbal* established that the standard would apply in all cases.²³⁸ Interestingly, neither *Twombly* nor *Iqbal* were employment discrimination cases; however, the Supreme Court's new standard clearly raised the bar for plaintiffs in all cases, including employment discrimination cases.²³⁹

To adequately explain why my burden-shifting/reverse *Oncale* approach is of critical importance, it is necessary to first provide a brief background of the *Twombly/Iqbal* plausibility pleading standard. I will then discuss how this standard has set an unreasonably high pleading requirement for plaintiff-employees, especially in the context of hostile work environment sexual harassment cases.

1. *The Twombly and Iqbal Plausibility Pleading Standard*

The *Twombly* and *Iqbal* decisions of the Supreme Court have commenced a revolution in pleading standards.²⁴⁰ These cases stand for the proposition that plaintiffs, in order to survive dismissal, must establish a plausible claim of discrimination.²⁴¹ In *Twombly*, a group of plaintiffs, identified as subscribers of telephone and internet services, filed suit alleging that the defendants violated the first section of the Sherman Antitrust Act of 1890 by inflating charges for local telephone and high-speed internet services.²⁴² The plaintiffs made two specific

²³⁷ See generally *Twombly*, 550 U.S. 544 (2007).

²³⁸ See generally *Iqbal*, 129 S. Ct. 1937, 556 U.S. 662 (2009); *Twombly*, 550 U.S. 544 (2007); *Conley*, 355 U.S. 41 (1961).

²³⁹ *Id.*

²⁴⁰ See generally David Green, *supra* note 233.

²⁴¹ See *Iqbal*, 129 S. Ct. 1937, 556 U.S. 662 (2009); *Twombly*, 550 U.S. 544 (2007).

²⁴² The plaintiffs were a group of Competitive Local Exchange Carriers ("CLECs") and the defendants were a group of Incumbent Local Exchange Carriers. ILEC's were created after American Telephone & Telegraph Company ("AT&T") divested itself of its local exchange carriers as part of its agreement to settle a lawsuit filed by United States Justice Department for antitrust violations. The local exchange carriers ("LECs") were responsible for providing regional telephone service for their respective geographic localities. After the agreement, there were seven

allegations.²⁴³ First, the plaintiffs alleged that the defendants engaged in “parallel conduct” in each of their respective geographic regions that was designed to thwart the plaintiffs’ efforts to compete with the defendants.²⁴⁴ Second, the plaintiffs alleged that the defendants illegally agreed to refrain from competing against each other.²⁴⁵

The district court dismissed the case, holding that mere allegations of parallel business conduct, without more, are insufficient to establish a claim under the Sherman Antitrust Act.²⁴⁶ A plaintiff must adduce facts that “ten[d] to exclude independent self-interested conduct as an explanation for defendants’

LECs including: Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Southwestern Bell, SBC Communications, and U.S. West. The LECs that were in existence at the time of the divestiture are referred to as incumbent local exchange carriers (“ILECs”), whereas any subsequently created LEC is referred to as a competitive local exchange carrier (“CLEC”). Additionally, as part of the settlement agreement, the ILECs were obligated “to share [their] network[s] with [the CLECs].” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402 (2004). A CLEC could make use of an ILEC’s network in any of three ways: by (1) “purchas[ing] local telephone services at wholesale rates for resale to end users,” (2) “leas[ing] elements of the [ILEC’s] network ‘on an unbundled basis,’” or (3) “interconnect[ing] its own facilities with the [ILEC’s] network.” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (quoting 47 U.S.C. § 251(c)).”

²⁴³ *Twombly*, 550 U.S. at 550.

²⁴⁴ These actions “included making unfair agreements with the [plaintiffs] for access to [the defendants’] networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the [plaintiffs’] relations with their own customers.” *Twombly*, 550 U.S. at 550-51. Because of this conduct, the plaintiffs argued that they were disadvantaged by having to pay more for services. *See id.*

²⁴⁵ In support of their argument, the plaintiffs alleged that such illegal agreements could be “inferred from the [defendants’] common failure ‘meaningfully [to] pursu[e]’ ‘attractive business opportunit[ies]’ in contiguous markets where they possessed ‘substantial competitive advantages.’” The plaintiffs included a direct quote from a defendant CEO who stated that competing in the territory of another defendant “might be a good way to turn a quick dollar but that doesn’t make it right.” The plaintiffs’ contention was that this statement provided sufficient evidence that the defendants’ decision not to compete against each other was predicated upon an illegal agreement. *Id.* at 551.

²⁴⁶ *Id.* at 552.

parallel behavior.”²⁴⁷ According to the court, the plaintiffs failed to do this because the defendants’ resistance to incursion of the plaintiffs could be fully explained by the fact that the defendants were primarily concerned with defending their own territories and not because of a mutual conspiracy.²⁴⁸ As to the plaintiffs’ second argument, that the defendants refrained from competing with each other, the district court found that there was no real evidence to suggest that the defendants would have gained a financial benefit from competing with each other.²⁴⁹ Thus, their decision not to compete with each other was not suggestive of a conspiracy.²⁵⁰

The Court of Appeals for the Second Circuit, relying upon the Supreme Court’s decision in *Conley*, reversed the district court.²⁵¹ In *Conley*, the Supreme Court held that “a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”²⁵² In *Twombly*, the Second Circuit determined that the plaintiffs had satisfied *Conley*’s “no set of facts” test for pleading requirements.²⁵³ The Supreme Court, however, reversed the Second Circuit and overruled the “no set of facts” standard of pleading set forth in *Conley*.²⁵⁴ Finding that the plaintiffs’ complaint failed to sufficiently plead a cause of action for a violation of the Sherman Antitrust Act, the *Twombly* Court replaced the old *Conley* rule with a new “plausibility standard” that established the threshold requirements for adequate pleading in a complaint:

While a complaint . . . does not need detailed factual allegations, a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 553-56.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

formulaic recitation of a cause of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.²⁵⁵

The Court emphasized that this new plausibility standard “does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the plaintiff’s allegations].”²⁵⁶

While the new plausibility standard itself was clear enough, the Court’s decision in *Twombly* caused considerable confusion because it left the legal community wondering if the standard would apply only to antitrust matters—as was the specific situation in *Twombly*—or to complex litigation in general, or to all cases.²⁵⁷ This question was answered by the Court in its 2009 decision in *Ashcroft v. Iqbal*.²⁵⁸

In *Iqbal*, the plaintiff, who was Muslim, brought a discrimination suit against numerous federal officials after he was arrested and detained following the events of September 11.²⁵⁹ The plaintiff alleged that these officials “each knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”²⁶⁰ The federal officials filed a motion to dismiss which the district court denied.²⁶¹ The district court, applying the *Conley* standard, reasoned that “it cannot be said that there [is] no set of facts on which [the plaintiff] would be entitled to relief as against” the federal officials.²⁶² The court of appeals also held

²⁵⁵ *Id.* at 555 (internal citations omitted).

²⁵⁶ *Id.* at 556.

²⁵⁷ *See Iqbal*, 129 S. Ct. 1937.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 1942.

²⁶⁰ *Id.* at 1944 (internal quotation marks omitted).

²⁶¹ *Id.*

²⁶² *Id.* (internal quotation marks omitted).

that the plaintiff's complaint was sufficient to establish a valid claim of discrimination, but for different reasons.²⁶³ According to the court of appeals, the district court erred in applying *Conley*'s "no set of facts test," since the Court retired that standard in *Twombly*.²⁶⁴ Specifically, the court of appeals interpreted *Twombly* to require a "flexible plausibility standard" that compels a pleader to amplify his factual allegations only in certain cases.²⁶⁵ Reasoning that the plaintiff's case in *Iqbal* was not one of the types of cases that *Twombly* was intended to affect, the court of appeals held that amplification was unnecessary and that the plaintiff's claim was sufficient.²⁶⁶

The Supreme Court reversed the appellate court because the plaintiff's claim did not meet the plausibility requirement set forth in *Twombly*.²⁶⁷ According to the Court, *Twombly* was intended to apply to all pleadings.²⁶⁸ Moreover, it reasoned that its retirement of the "no set of facts" doctrine and implementation of the plausibility requirement was premised upon two principles.²⁶⁹ First, while a court must accept as true the allegations that a plaintiff pleads in his complaint, such deference does not apply when a plaintiff pleads legal conclusions.²⁷⁰ As such, mere conclusory statements relating to the elements necessary to establish a cause of action are not enough to meet the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure.²⁷¹ The second principle necessitates that "only a complaint that states a plausible claim

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 1954.

²⁶⁸ *Id.* at 1953.

²⁶⁹ *Id.* at 1949.

²⁷⁰ *Id.*

²⁷¹ *Id.* (noting that "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, ... it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.") *Id.* at 1950.

for relief survives a motion to dismiss.”²⁷² Determining whether a complaint sets forth a plausible claim is described as:

[A] context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not “show[n]”--that the pleader is entitled to relief.²⁷³

Applying this standard to the plaintiff’s claim, the Court held that the complaint was insufficient.²⁷⁴ The Court first determined that the conclusory statements in the plaintiff’s complaint were not entitled to any assumption of truthfulness.²⁷⁵ As such, the plaintiff’s statements were merely “bare assertions, much like the pleading of conspiracy in *Twombly* amount[ed] to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim, namely, that [the defendants] adopted a policy “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”²⁷⁶ After dealing with these statements, the Court considered the remaining nonconclusory statements in the complaint and determined that they alone were insufficient to establish that the plaintiff’s claim was plausible.^{277 278}

²⁷² *Id.*

²⁷³ *Id.* (quoting FED. R. CIV. P. 8(a)(2)).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* (internal citations omitted). The plaintiff asserted that:

(1) [That the defendants] knew of, condoned, and willfully and maliciously agreed to subject [him]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest;

(2) that Ashcroft was the ‘principal architect’ of this invidious policy; [and]

(3) that Mueller was ‘instrumental’ in adopting and executing it

Id. at 1951.

²⁷⁶ *Twombly*, 550 U.S. at 551.

²⁷⁷ Since Arab Muslim hijackers perpetrated the September 11 attacks, the Court reasoned that:

Therefore, in considering the plaintiff's allegation of intentional discrimination, the Court ruled that the discrimination complained of by the plaintiff was attributable to a legitimate nondiscriminatory policy and thus the plaintiff's averment was not plausible.²⁷⁹ In sum, after *Twombly* and *Iqbal*:

[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'²⁸⁰

The main thrust of the *Twombly* and *Iqbal* decisions is that legal conclusions will not allow a complaint to survive a motion to dismiss.²⁸¹ Instead,

[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges[,] the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.

Iqbal, 129 S. Ct. at 1951.

²⁷⁸ *See id.*

²⁷⁹ *Id.* at 1954. Even if the allegations in the plaintiff's complaint were sufficient to establish a plausible claim of unintentional discrimination, that alone would have been insufficient because such an allegation also requires that a plaintiff plead "facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin." *Id.*

²⁸⁰ *Iqbal*, 129 S. Ct. at 1949 (internal citations omitted).

²⁸¹ *Id.*

the facts must be pled sufficiently so that the reviewing party can determine whether the factual allegations present a plausible claim upon which relief can be granted.²⁸² Further, this plausibility must appear on the face of the complaint, and mere inferences will not be sufficient to escape a motion to dismiss.²⁸³ Now, judges must “draw on [their] judicial experience and common sense” in deciding whether a plaintiff has alleged sufficient facts for each element to make the plaintiff’s claim plausible.²⁸⁴ Because of this conclusion, some commentators have opined that the directed verdict, motion for summary judgment, and motion to dismiss have been morphed into one animal.²⁸⁵ As a result, there exists a real question as to how the plausibility standard is to be applied and to what extent.²⁸⁶

Based on the *Twombly/Iqbal* standard, cases involving state-of-mind, intent, and motivation elements are particularly susceptible to dismissal.²⁸⁷ As such, this newly created pleading standard “may shut ‘the doors of discovery’ on the very litigants who need the procedural resources the Federal Rules previously made available.”²⁸⁸ As one critic has opined:

Perhaps it is appropriate to obligate plaintiffs to plead in greater detail about those matters on which they are informed or on which they reasonably can inform themselves, even though there may be understandable tactical reasons why they might not want to do so. The pleading system should not be reduced to a game of hide the ball nor should it tolerate laziness or sloth. But to demand fact pleading on pain of dismissal when the facts are unknown or

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 1950.

²⁸⁵ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 44 (2010).

²⁸⁶ The Court’s ruling in *Swierkiewicz* wherein it refused to establish a heightened pleading standard in employment discrimination suits by judicial interpretation further exacerbates this confusion. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

²⁸⁷ *Iqbal*, 129 S. Ct. at 1949.

²⁸⁸ Miller, *supra* note 285, at 43.

unknowable is a negation of the pleader's ability to access the civil justice system.²⁸⁹

In light of this new standard, victims of sexual discrimination must now endure even more adversity to introduce their claim into a court of law.

2. *Twombly/Iqbal's Effect on Hostile Work Environment Cases*

Hostile work environment cases fit squarely within the confines of the very cases that *Twombly* and *Iqbal* may eliminate. Because hostile work environment cases require that plaintiffs establish a harasser's state of mind, such information is difficult to ascertain. Thus, many plaintiffs will have to rely heavily on discovery to unearth the facts necessary to help them to prove their cases.²⁹⁰

The United States District Court for the Northern District of Florida's decision in *Ansley v. Florida Department of Revenue* provides an excellent example of how the Supreme Court's rulings in *Twombly* and *Iqbal* have lessened opportunities to remedy discrimination.²⁹¹ In *Ansley*, a plaintiff-employee filed a claim pursuant to both Title VII and Florida's Civil Rights Act for gender and disability discrimination, alleging that he was treated badly and terminated based on pretext.²⁹² The plaintiff, however, never articulated the employer's alleged

²⁸⁹ *Id.* at 43-44; cf. PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 231 n.211, 595 (2004) (noting that in the German procedural system, which requires the pleadings to contain developed factual assertions and identify potential sources of proof for them, less detail is required when the necessary information is held by the opposing party or nonparty).

²⁹⁰ *Twombly* and *Iqbal* have also discouraged attorneys from bringing legitimate claims – claims that would have been litigated prior to *Twombly* and *Iqbal*. “Plaintiffs’ lawyer Elizabeth Cabraser, a partner at San Francisco’s Lief Cabraser Heimann & Bernstein, said the plausibility requirement has forced her to reject some cases that she might have taken on prior to the two decisions because ‘often the truth is implausible on its face.’ She said that the cases that are never brought can be the cases that would be most important.” Jeff Jeffrey, *Assessing the Changing World of Civil Procedure Post-‘Twombly,’ ‘Iqbal,’* NAT’L L.J. (2010), available at <http://www.law.com/jsp/article.jsp?id=1202462842283>.

²⁹¹ *Ansley v. Fla. Dep’t of Revenue*, No. 4:09cv161–RH/WCS, 2009 WL 1973548 (N.D. Fla. July 8, 2009).

²⁹² *Id.* at *2.

pretextual reason for the decision.²⁹³ The plaintiff also failed to provide any factual basis for his conclusion that other employees “who were treated better, were similarly situated.”²⁹⁴ Additionally, the plaintiff’s discrimination claim, which was based on his employer’s alleged violation of Florida’s Civil Rights Act, failed to articulate the nature of his medical condition or his employer’s perception of his medical condition that resulted in the discrimination.²⁹⁵ For these reasons, the court granted the employer’s motion to dismiss.²⁹⁶ However, of particular importance, the court noted that the plaintiff’s allegations:

[M]ight have survived a motion to dismiss prior to *Twombly* and *Iqbal*. But now they do not. The plaintiff in an employment-discrimination case must allege facts that are either (1) sufficient to support a plausible inference of discrimination, or (2) sufficient to show, or at least support an inference, that he can make out a prima facie case under the familiar burden-shifting framework set forth in *McDonnell Douglas*²⁹⁷

To ensure that the protections of Title VII are not unreasonably trammled by the Court’s holdings in *Twombly* and *Iqbal*, it is imperative that the law recognizes a complete reallocation of the burdens of proof where harassment is perpetrated by an equal opportunity harasser.

V. CONCLUSION

My proposed framework will strike a more fair balance in allocating the burdens of proof, as well as the pleading requirements, in hostile work environment sex discrimination claims where harassment is perpetrated by an equal opportunity harasser. Additionally, it will significantly enhance the ability of female plaintiff-employees to access the protections of Title VII. At the same

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

time, this model balances the rights of employers to remain free from frivolous and unnecessary litigation.

In considering the current framework, plaintiffs in these types of cases have a difficult, and often times, insurmountable burden of proof, which is wholly inconsistent with the purpose of Title VII. While there has been some progress, nearly fifty years after President Lyndon B. Johnson signed Title VII into law, the reality of a level playing field continues to remain a dream for many women. President Barack Obama captured the essence of this struggle during a speech on International Women's Day when he eloquently stated:

[A]s we reflect on the hope of our history, we must also face squarely the reality of the present -- a reality marked by unfairness, marked by hardship for too many women in America. The statistics of inequality are all too familiar to us -- how women just earn 77 cents for every dollar men make; how one in four women is the victim of domestic violence at some point in her life; how women are more than half the population, but make up only 17 percent of the seats in Congress, and less than 3 percent of Fortune 500 CEOs.

These, and any number of other facts and figures, reflect the fundamental truth that in 2010, full gender equality has not yet been achieved; that the task of perfecting America goes on; and that all of us, men and women, have a part to play in bending the arc in America's story upward in the 21st century.

....

And today, as I see Sasha and Malia getting older, I think about the world that they -- and all of America's daughters -- will inherit. And I think about all of the opportunities that are still beyond reach for too many young women and too many of our brothers and sisters -- too many of our sisters and mothers and aunts -- all of the glass ceilings that have yet to be shattered. We have so much more work to do, and that's why we're here today. I think about this because it reminds me of why I'm here. I didn't run for President so that the dreams of our daughters could be deferred or denied. I didn't run for President to see inequality and injustice persist in our

time. I ran for President to put the same rights, the same opportunities, the same dreams within the reach for our daughters and our sons alike. I ran for President to put the American Dream within the reach of all of our people, no matter what their gender, or race, or faith, or station.²⁹⁸

My hope is that my suggested framework can be used as a viable means to accomplish the true intent of Title VII—to provide and promote equality. Increasing the burden for employers is a small step towards justice for victims of sexual discrimination. However, it brings America one step closer to achieving the equality the framers of Title VII hoped to achieve so long ago.

²⁹⁸ Lynn Sweet, *Obama, Michelle Mark International Women's Day*, CHI. SUN-TIMES, http://blogs.suntimes.com/sweet/2010/03/obama_michelle_mark_internatio.html (Mar. 8, 2010, 5:14 PM).

