

## WORKPLACE HARASSMENT: A PROPOSAL FOR A BRIGHT LINE TEST CONSISTENT WITH THE FIRST AMENDMENT

*Debra D. Burke\**

### I. INTRODUCTION

The law of sexual harassment under Title VII of The Civil Rights Act of 1964<sup>1</sup> has developed substantially over the last twenty years. The statute has been used to prohibit harassment as a form of discrimination if it is based upon race, color, religion, sex, or national origin. Some courts also recognize harassment-based discrimination under other statutes as well, such as the Age Discrimination in Employment Act<sup>2</sup> and the Americans with Disabilities Act.<sup>3</sup> The rate of sexual harassment complaints filed with the Equal Employment Opportunity Commission remained virtually constant at around 15,000 from 1995 through 1999.<sup>4</sup> However, the number of sexual harassment charges filed with the agency and its state counterparts more than doubled from 6,883 in 1991 to 15,618 in 1998, while the number of racial harassment filings shot from 4,910 to 9,908 over the same period.<sup>5</sup> Also increasing is the number of all types of

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\* Professor of Business Law, Western Carolina University. B.A. 1977, University of Texas at Austin; J.D. 1982, University of Texas School of Law; and, M.P.A 1982, Lyndon B. Johnson School of Public Affairs. The author is the former Editor-in-Chief of the Journal of Legal Studies in Business and presently serves as an Articles Editor for the publication. The author gratefully acknowledges the support and insight provided by the participants of the 2003 Huber Hurst Seminar and the University of Florida.

1. 42 U.S.C. § 2000e (2000).

2. 29 U.S.C. §§ 621–634 (2000).

3. 42 U.S.C. §§ 12101–12213 (2000).

4. Larry Keller, *Sexual Harassment: Serious, Subtle, Stubborn*, CNN, at <http://www.cnn.com/2000/CAREER/trends/10/03/harassment/index.html> (Oct. 3, 2000). The settlement figure, however, more than doubled over the same period from \$24.3 million to \$50.3 million. *Id.*

5. Ida L. Castro, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC, at <http://www.eeoc.gov/policy/docs/harassment.html> (June 18, 1999).

harassment complaints in which the agency concluded there was “no reasonable cause to support the charges,” up from 30.4% in 1995 to 44.0% in 1999.<sup>6</sup>

While workplace harassment cases are playing a more and more prominent role in employment regulation, women and minorities are still disproportionately excluded from high paying jobs and positions of power in corporate America. With a few noteworthy exceptions, CEOs and CFOs of large corporations are white males.<sup>7</sup> Further, a report based upon the 2000 Census concluded that women are less likely than men to reach the highest salary brackets.<sup>8</sup> While working in an environment free from harassment is certainly desirable from an equality point of view, harassment is but one facet of employment discrimination—one which is arguably over-emphasized to the exclusion of achieving more important reforms as well as to the potential sacrifice of some First Amendment values. It would seem predictable that as more women and minorities occupy positions of real power in workplaces, the less likely it will be that harassment targeted at women and minorities will be problematic—the preferable route to the eradication of hostile working environments is to achieve this result. But alas, employment discrimination laws of late seem to have lost sight of the forest for the trees not only by perpetuating the glass ceiling, but also at the expense of the Constitution.

This article will first examine how harassment has been defined as a form of discrimination and conclude that further clarity is needed. It will then scrutinize First Amendment issues raised with the suppression

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6. Keller, *supra* note 4 (internal quotations omitted). One of the functions of the EEOC is to weed out claims that are not meritorious. For a review of the EEOC's work with respect to its charging and litigation efforts, see generally Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996).

7. It was not until 1998 that an African-American male became CEO of a Fortune 500 company (Fannie Mae). Roy Johnson, *The 500's First Black CEO*, FORTUNE, May 11, 1998, at 32. “Since 1999, three black men have ascended to become CEOs of FORTUNE 50 companies.” Cora Daniels, *The Most Powerful Black Executives in America*, FORTUNE, July 8, 2002, at 60, 63. Similarly, minorities are extremely under-represented on corporate boards. Gary Strauss, *Good Old Boys' Network Still Rules Corporate Boards; Ethnic Members Scarse, and Gains Happen Slowly*, USA TODAY, Nov. 1, 2002, at 1B, available at [http://www.mqc.com/glass\\_usatoday.html](http://www.mqc.com/glass_usatoday.html). African Americans and Hispanics combined hold less than five percent of the 11,500 Fortune 1,000 board seats while women hold roughly fourteen percent. *Id.*

8. “Of the population 15 and over who were full-time, year-round workers, 6 percent of women earned \$75,000 or more, compared with 16 percent of men.” Press Release, United States Department of Commerce News, U.S. Census Bureau, Women Closing the Gap with Men in Some Measures, According to Census Bureau (Mar. 24, 2003) available at <http://www.census.gov/Press-Release/www/releases/archives/women/000819.html>. Men hold eighty-eight percent of the senior jobs in corporate America. Patricia Sellers, *The 50 Most Powerful Women in Business: Secrets of the Fastest Rising Stars*, FORTUNE, Oct. 16, 2000, at 130, 147.

of verbal abuse as an alleged form of invidious disparate treatment and argue that only speech coupled with conduct can be regulated under federal civil rights law. Finally, the article will survey non-sexual harassment under a bright-line test for unlawful discrimination, which requires overt conduct as a mandatory element, to determine if such cases could result in employer liability.

## II. THE LAW OF WORKPLACE HARASSMENT

### A. Background on Civil Rights Statutes

Title VII of the Civil Rights act of 1964 (“Title VII”) prohibits discrimination in the private sector based upon race, color, religion, sex, or national origin.<sup>9</sup> More specifically, the Act provides that:

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.<sup>10</sup>

The Civil Rights Act of 1991<sup>11</sup> further enhanced the remedies available for acts of intentional employment discrimination by permitting the

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9. 42 U.S.C. § 2000e-2(a) (2000). The Act covers employers whose business affects interstate commerce and who employ fifteen or more persons for twenty or more weeks a year. *Id.* § 2000e(b). Sex, as a forbidden criterion for employment decisions, was actually included in an attempt to *defeat* the legislation. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989).

10. 42 U.S.C. § 2000e-2(a). A homosexual who is discharged because of his or her *gender* can sue under Title VII; however, Title VII does not prohibit discrimination based upon homosexuality. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001). While no federal civil rights law as yet prohibits private employers from discriminating based upon sexual orientation, some state laws do prohibit such discrimination. See, e.g., CONN. GEN. STAT. ANN. § 46a -81c (1995); HAW. REV. STAT. ANN. § 378-2 (1993); MASS. GEN. LAWS ANN. ch. 151b, § 4 (1996).

11. 42 U.S.C. § 1981 (2000). For an overview of additional remedies provided for by the legislation, including a trial by jury and an enhanced damage system, see M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN’S STUD. 311, 318–30 (1999).

recovery of punitive damages<sup>12</sup> for acts done with malice or reckless indifference to federally-protected rights.<sup>13</sup>

Proof that an employer illegally discriminated against an employee's Title VII protected class can be established under either one of two theories of recovery: disparate treatment or disparate impact.<sup>14</sup> For a prima facie discrimination case based upon disparate treatment, generally the employee must allege and prove by circumstantial evidence that 1) s/he was a member of a protected class, 2) s/he suffered an unfavorable or adverse employment decision, 3) s/he was qualified to assume or retain the position, and 4) the employer did not treat race, gender, national origin, age, or disability neutrally in making the decision.<sup>15</sup> In a discrimination case involving disparate treatment, direct proof of discriminatory motive is usually critical to establishing the prima facie case unless it can be inferred given the circumstances.<sup>16</sup>

In the absence of direct evidence of discrimination,<sup>17</sup> the plaintiff may inferentially establish his case by circumstantial evidence according to a three stage, burden-shifting paradigm.<sup>18</sup> After the plaintiff-employee meets his prima facie burden of proof, the burden shifts to the defendant-employer to show that there was a nondiscriminatory reason for the adverse employment decision and that only legitimate factors motivated the employer's decision.<sup>19</sup> If the employer fails to articulate a nondiscriminatory reason for the adverse employment action after the plaintiff-employee has established his prima facie case according to the trier of fact, then the court must enter judgment for the plaintiff.<sup>20</sup> Alternatively, if the employer articulates a legitimate, nondiscriminatory motive,<sup>21</sup> then the burden shifts

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12. Arguably, the increase in the number of civil rights complaints filed with the EEOC in the 1990s was the product of this legislation and its provision for exemplary damages. See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 120-21 (1999).

13. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 546 (1999) (holding that an employer's conduct did not need to be independently egregious to merit an award of punitive damages, although such egregious or outrageous conduct could provide evidence from which to infer an evil motive).

14. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

15. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing the general test for plaintiff's initial burden in a racial discrimination case under Title VII).

16. *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

17. Under the direct evidence approach, a plaintiff carries the initial burden by showing that the employment decision was based solely or in part upon illegal criteria. *Oates v. Discovery Zone*, 116 F.3d 1161, 1170 (7th Cir. 1997) (citing *Randle v. LaSalle Telecomm., Inc.*, 876 F.2d 563, 568 (7th Cir. 1989)).

18. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

19. *Id.*

20. *Id.* at 254.

21. An unjustified refusal to work is an example of a legitimate non-discriminatory reason for

back the employee to prove that the alleged nondiscriminatory justification was merely a pretext for discrimination.<sup>22</sup> Under a disparate impact theory, the plaintiff may establish that seemingly neutral criteria used by an employer is, nevertheless, an invidious form of discrimination because it disproportionately impacts persons who are protected under the legislation.<sup>23</sup>

Other acts of Congress complement Title VII and further prohibit discrimination based upon age or disability. Congress enacted the Age Discrimination in Employment Act (“ADEA”)<sup>24</sup> in 1967 as part of a scheme to eliminate invidious bias in employment decisions, including those related to hiring, promotion, compensation, and terms and conditions of employment.<sup>25</sup> The ADEA makes it unlawful for a covered employer

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age; (2) to limit, segregate, or classify his employees 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 age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.<sup>26</sup>

The Americans with Disabilities Act (“ADA”),<sup>27</sup> passed in 1990, protects handicapped individuals, who are otherwise qualified workers, from

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termination. *Thompson v. Price Broad. Co.*, 817 F. Supp. 1538, 1544 (D. Utah 1993).

22. *Tex. Dep’t of Cmty. Affairs*, 450 U.S. at 248. This burden-shifting method of proving discrimination may be applicable to claims under the Age Discrimination in Employment Act as well. *O’Connor v. Consol. Coin Caterers Group*, 517 U.S. 308, 311 (1996) (assuming that the Title VII framework is applicable to the ADEA).

23. For example, the EEOC Guidelines suggest that an “English only” rule in a workplace can establish a prima facie case of disparate impact, subject to the employer’s rebuttal that there is business justification for the rule. 29 C.F.R. § 1606.7(a), (b) (2000). The theories of disparate treatment and disparate impact discrimination, however, are not necessarily mutually exclusive. Cheryl Anderson, “*Thinking Within the Box*”: *How Proof Models Are Used to Limit the Scope of Sexual Harassment Law*, 19 HOFSTRA LAB. & EMP. L.J. 125, 166 (2001).

24. 29 U.S.C. §§ 621-634 (2000). The Act covers nonfederal employers “affecting commerce” which employ at least twenty non-seasonal employees, labor unions with at least twenty-five members or which operate as a hiring hall, employment agencies, state and local government employees in non-policy making positions and federal employees in certain sectors. *Id.* § 630. It covers employees over forty years old and also expressly prohibits discrimination with regard to benefits. *Id.* §§ 623(a), 631(a).

25. Congress passed the statute in an effort to eradicate arbitrary and stigmatizing stereotypes about the lower performance level of older workers in favor of assessments based upon ability. *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983).

26. 29 U.S.C. § 623 (a)(1)-(3).

27. 42 U.S.C. §§ 12101-12213 (2000).

employment discrimination.<sup>28</sup> The ADA defines the term “qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual hold or desires,” with consideration being given to the employer’s judgment as to what job functions are essential.<sup>29</sup> In other words, a qualified individual must be able to satisfy the prerequisites for the position, such as proper training, skills, and experience, in addition to possessing the ability to perform the essential function of the job either with or without reasonable accommodation.<sup>30</sup> Unlike the other civil rights laws, the ADA imposes an obligation on employers not only to refrain from discrimination, but also to act affirmatively in appropriate circumstances to make a reasonable accommodation.

### *B. Workplace Harassment: An Overview*

Harassment can be a form of discrimination under Title VII.<sup>31</sup> While the first cases to articulate such a proposition involved national origin and racial harassment,<sup>32</sup> sexual harassment cases<sup>33</sup> have primarily been responsible for developing the law in this area.<sup>34</sup> The standards for judging hos-

28. *Id.* § 12112(a), (b)(5)(B).

29. *Id.* § 12111(8).

30. 29 C.F.R. § 1630.2(m) (2003).

31. For a doctrinal discussion as to why harassment can be considered a form of disparate treatment, see generally Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1714–16 (1998).

32. *Rogers v. EEOC*, 454 F.2d 234, 238, 240 (5th Cir. 1971) (stating that employer’s segregation of Hispanic clientele could create an offensive work environment for Hispanic employees); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) (stating that “[r]acial harassment in the course of employment is actionable under Title VII’s prohibition against discrimination in the ‘terms, conditions, or privileges of employment.’”).

33. The EEOC has defined sexual harassment as:

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

29 C.F.R. § 1604.11(a) (2003). The Supreme Court has held that Title VII covers same-sex discrimination including same-sex sexual harassment, and that the “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

34. One of the first scholars to advocate the recognition of sexual harassment as a form of actionable discrimination was Professor MacKinnon. CATHARINE A. MACKINNON, *SEXUAL*

tility are sufficiently demanding so as to filter out ordinary tribulations in the work place, such as abusive language, in an effort to assure that Title VII does not become a “general civility code.”<sup>35</sup> The Supreme Court has held that actionable sexual harassment must be sufficiently severe and pervasive so as to alter the conditions of employment and to create an abusive environment judged from the totality of the circumstances.<sup>36</sup> In hostile working environment cases, the “objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”<sup>37</sup> Courts must consider the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”<sup>38</sup> Further, the Supreme Court recently reiterated that illegal harassment must create a hostile environment that is both objectively and subjectively offensive.<sup>39</sup> It is not necessary for an employee to prove that the offensive conduct has been psychologically injurious before the situation is actionable.<sup>40</sup> Conduct which forms the basis of the complaint, however, must be unwelcome.<sup>41</sup>

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HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (defining and explaining *quid pro quo* and hostile environment cases). The D.C. Circuit was a pioneer in developing the early law in this area. *See, e.g.*, Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 813 (2002). For the early, now landmark, cases on sexual harassment, see generally *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *vacated sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

35. *Oncale*, 523 U.S. at 80–81.

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

37. *Oncale*, 523 U.S. at 81 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

38. *Harris*, 510 U.S. at 23. The EEOC guidelines state that in sexual harassment cases the trier of fact should look at “‘the record as a whole’ and ‘the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.’” *Meritor Sav. Bank*, 477 U.S. at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)). The guidelines describe hostile environment harassment as conduct which “‘has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.’” *Id.* at 65 (citing 29 C.F.R. § 1604.11(a)(3) (1985)). These guidelines, while not controlling on courts, “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Id.* (internal quotations omitted).

39. *Harris*, 510 U.S. at 21–22.

40. *Id.* at 22.

41. *Meritor Sav. Bank*, 477 U.S. at 60–61. Voluntary participation in sexual conduct does not necessarily mean that the overtures are welcome. *Id.* at 68. However, an employee’s enthusiastic acquiescence of the conduct, which later forms the basis of the complaint, mitigates against employer liability. *Hansen v. Dean Witter Reynolds, Inc.*, 887 F. Supp. 669, 674 (S.D.N.Y. 1995). Query to what extent a plaintiff’s past sexual conduct is relevant in determining whether the questionable conduct is unwelcome. *See* Lisa Dowlen Linton, *The Louis Jackson National Student Writing Competition: Past Sexual Conduct in Sexual Harassment Cases*, 75 CHI.-KENT L. REV. 179 (1999) (discussing

Since Title VII does not create a cause of action against the harasser,<sup>42</sup> the issue of the employer's responsibility is critical to a plaintiff. Two 1998 Supreme Court decisions addressed that issue.<sup>43</sup> In *Burlington Industries, Inc. v. Ellerth*,<sup>44</sup> the Supreme Court held that

when a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe and pervasive.<sup>45</sup>

The Court characterized a tangible employment action as one which constitutes "a significant change in employment status, such as the hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."<sup>46</sup>

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admissibility of plaintiff's past sexual conduct in a sexual harassment case under the Federal Rules of Evidence).

42. *Parsons v. Nationwide Mut. Ins. Co.*, 889 F. Supp. 465, 468 (M.D. Fla. 1995). For an argument that liability should lie in tort against the actual perpetrators, not the employer, see Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 376-77 (1998).

43. For a discussion of these cases and their potential ramifications, see generally Kerri Lynn Bauchner, *From Pig in a Parlor to Boar in a Boardroom: Why Ellerth Isn't Working and How Other Ideological Models Can Help Reconceptualize the Sexual Harassment*, 8 COLUM. J. GENDER & L. 303 (1999); Paul Buchanan & Courtney W. Wiswall, *The Evolving Understanding of Workplace Harassment and Employer Liability: Implications of Recent Supreme Court Decisions Under Title VII*, 34 WAKE FOREST L. REV. 55 (1999); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671 (2000); Vicki J. Limas, *Significant Employment Law Decisions in the 1997-98 Term: A Clarification of Sexual Harassment Law and a Broad Definition of Disability*, 34 TULSA L.J. 307 (1999).

44. 524 U.S. 742 (1998).

45. *Id.* at 753-54.

46. *Id.* at 761. The Court reasoned that such decisions by their very nature ensure that the injury could not have been inflicted absent the agency relationship between the company and the supervisor. *Id.* at 762. Since tangible employment actions require an official act of the enterprise, such actions taken by the supervisor become the actions of the employer under Title VII. *Id.* Courts are still grappling with this definition. See, e.g., *Molnar v. Booth*, 229 F.3d 593, 600 (7th Cir. 2000) (finding that the confiscation of a teacher's art supplies, which were necessary for her to perform her assigned tasks, coupled with a negative evaluation, which was subsequently reversed six months later, could constitute a tangible employment action); *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461-62 (6th Cir. 2000) (suggesting that there is a de minimis exception for either temporary actions or non-materially adverse actions; for example, those with no economic loss); *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999) (stating that a lateral transfer, in which there is no diminution in pay or benefits, cannot reasonably be viewed as causing objective tangible harm absent some other materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities).



In both *Ellerth* and *Faragher v. City of Boca Raton*,<sup>47</sup> the Supreme Court announced the following holding: “An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . .”<sup>48</sup> This affirmative defense requires the employer to show by a preponderance of the evidence that 1) reasonable care was exercised to prevent and promptly correct any sexually harassing behavior and 2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities the employer provided.<sup>49</sup> Commensurately, the Court asserted that there is no affirmative defense available in cases where the employer’s harassment culminates in a tangible employment action.<sup>50</sup> Presumably, employer liability for co-worker harassment was unchanged by the decisions, and an employer will still be liable for the actions of a co-worker if the employer either knew or should have known of the misconduct, unless the employer can prove that it took immediate and appropriate corrective action.<sup>51</sup>

In announcing this framework for evaluating employer liability, the Court de-emphasized what had once been a critical distinction in sexual

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47. 524 U.S. 775 (1998).

48. *Id.* at 807; *Ellerth*, 524 U.S. at 765. For a discussion of the affirmative defenses, see Steven D. Baderian, Elise M. Bloom, & Valerie K. Wilde, *Managing Employment Risks in Light of the New Rulings in Sexual Harassment Law*, 21 W. NEW ENG. L. REV. 343 (1999) (evaluating potential employer responses); Allan H. Weitzman, *Employer Defenses to Sexual Harassment Claims*, 6 DUKE J. GENDER L. & POL’Y 27 (1999).

49. The Court surmised in *Faragher* that “[w]hile proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.” *Faragher*, 524 U.S. at 807. The Court also highlighted the need for a well-publicized complaint-reporting system with respect to the second prong of the affirmative defense, which focuses on the reasonableness of the employee’s conduct in failing to report. *Id.* at 806–07.

And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense.

*Id.* at 807–08.

50. *Id.* at 808.

51. The standard remains one of negligence. *See* Castro, *supra* note 5. Therefore, the plaintiff in such cases must establish that he or she was subject to unwelcome harassment based upon sex which “affected a term, condition or privilege of employment,” and “that the employer knew or should have known of the harassment and failed to take proper remedial action.” *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 965 (8th Cir. 1999). *See also* *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 561 (6th Cir. 1999) (applying the “knew or should have known” standard).

harassment cases: the difference in quid pro quo<sup>52</sup> and hostile environment cases.<sup>53</sup> The Court explained that the terms, while still helpful in distinguishing cases in which a supervisor carries out a threat to sanction an employee who refuses to submit to sexual demands from cases where the threat does not materialize, should no longer define employer responsibility.<sup>54</sup> Although the law of workplace harassment has been addressed by the Court over the last twenty years, it still remains intolerably unclear. Courts in different jurisdictions continue to look at similar circumstances and reach opposite results as to employer liability while issues continue to surface that seemingly raise more questions than have ever been sufficiently answered by the high court.

### C. What Really is Actionable Harassment?

One such question concerns how to judge the combined subjective and objective circumstances of the severity of the harassment. Although the severity and pervasiveness of the environment must be viewed from “the perspective of a reasonable person in the plaintiff’s position,”<sup>55</sup> some courts are still influenced by what the Ninth Circuit views to be the reasonable woman standard in cases of sexual harassment.<sup>56</sup> This standard,

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52. Such discrimination can embrace situations in which job opportunities, promotions, merit pay increases, and the like are given out in exchange for sexual favors or when a person is terminated, demoted, or otherwise adversely treated for refusing sexual overtures. *See generally* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

53. *Ellerth*, 524 U.S. at 751–54. For a critique of the classification of the two types of discriminatory conduct, see Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL’Y 307 (1998). *See also* Henson v. City of Dundee, 682 F.2d 897, 903–09 (11th Cir. 1982) (articulating the elements of both cases).

54. *Ellerth*, 524 U.S. at 753–54.

55. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

56. The Ninth Circuit recognizes a prima facie case of hostile environment sexual harassment when conduct is what “a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). Most of the federal circuit courts implicitly approve of women-specific standards for hostile environment cases. Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 456 n.96 (2002). Plaintiffs tend to have a higher success rate when courts mention such a standard. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 555 (2001).

For a discussion of the reasonable woman standard after the Ninth Circuit’s decision, see Robert S. Adler & Ellen R. Pierce, *The Legal, Ethical, and Social Implications of the “Reasonable Woman” Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993); Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619 (1993); Robert Unikel, Comment, “Reasonable” Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326 (1992).

even if employed, produces different results among reasonable women.<sup>57</sup> The Equal Employment Opportunity Commission (“EEOC”) suggests that the employee-plaintiff’s race, color, religion, gender, national origin, age, or disability should be considered in defining hostile environment.<sup>58</sup> In some cases, the plaintiffs may claim harassment on two grounds; for example, race and sex. Should those claims then apply some combined standard embracing both gender and race?<sup>59</sup> Should the discriminatory acts be aggregated in order to establish the totality of circumstances?<sup>60</sup> Query what place reason and reasonableness have in the determination of hostile working environments.<sup>61</sup>

There also appears to be no golden thread as to how severe is severe, how abusive is abusive, and how pervasive is pervasive.<sup>62</sup> The Court has observed that Title VII is not limited to such conduct “that would seriously affect a reasonable person’s psychological well-being,”<sup>63</sup> but it does not specify what less injurious words or actions will suffice.<sup>64</sup> Only one thing

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57. See Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 445, 472–74 (1997) (relating the differing views among female attorneys as to the severity of the harassment in the Ninth Circuit case that announced the reasonable woman standard).

58. Castro, *supra* note 5.

59. For a discussion of the reasonable minority woman standard, see Tam B. Tran, Comment, *Title VII Hostile Work Environment: A Different Perspective*, 9 J. CONTEMP. LEGAL ISSUES 357 (1998) (evaluating such a standard). See also Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 119 (1992) (remarking that the convergence of race and sex discrimination often makes the two indistinguishable); Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1472 (1992) (arguing that “intersections of racism and sexism must be acknowledged”).

60. Some courts permit such an aggregation. See, e.g., *Hafford v. Seidner*, 183 F.3d 506, 514–15 (6th Cir. 1999) (race and religion); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416–17 (10th Cir. 1987) (race and sex); *Jefferies v. Harris County Cmty. Action Ass’n*, 615 F.2d 1025, 1032–33 (5th Cir. 1980) (race and sex). But see *Watkins v. Bowden*, 105 F.3d 1344, 1356 (11th Cir. 1997) (affirming district court’s decision that plaintiff was not entitled to a jury instruction that required jurors to consider race and gender from the victim’s perspective). For a critique of *Watkins*, see Sarah McLean, Comment, *Harassment in the Workplace: When Will the Reactions of Ethnic Minorities and Women Be Considered Reasonable?*, 40 WASHBURN L.J. 593, 594–95 (2001).

61. See Bernstein, *supra* note 57, at 482–524 (arguing for a “respectful person” standard as an alternative to the “reasonable person” standard in sex discrimination cases).

62. For a review of sexual harassment cases and the issue of what circumstances are actionable, see Jeffrey M. Lipman & Hugh J. Cain, *Evolution in Hostile Environment Claims Since Harris v. Forklift Systems, Inc.*, 47 DRAKE L. REV. 585 (1999); Susan Weber Wright, *Emroch Lecture: Uncertainties in the Law of Sexual Harassment*, 33 U. RICH. L. REV. 11 (1999).

63. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). In *Harris*, the Court was responding to the tendency of lower courts to require proof of such harm before the plaintiff could succeed in hostile environment cases. *Id.*; see also *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619 (6th Cir. 1986) (stating that “an offensive work environment could . . . constitute Title VII sexual harassment without the necessity of asserting or proving tangible job detriment by the harassed employee . . .”).

64. Justice O’Connor, writing for a unanimous court in *Harris*, acknowledged that the test of actionable discrimination in hostile environment cases “is not, and by its nature cannot be, a

seems to be vaguely certain: an isolated incident is not enough<sup>65</sup> unless it is “extremely serious.”<sup>66</sup> The line that ultimately must be drawn is between “merely”<sup>67</sup> and “deeply”<sup>68</sup> offensive conduct given the *totality of the circumstances*: a standard one state judge characterized as being more “analogous to corrosion than explosion.”<sup>69</sup> For example, the Seventh Circuit held that calling a subordinate a “pretty girl,” making “um, um, um” sounds when she wore a leather skirt, and commenting about how “hot” his office became when she entered<sup>70</sup> were not to be considered harassment.<sup>71</sup> Moreover, the Eleventh Circuit held that a supervisor’s habit of following the plaintiff around, looking at her groin and making a sniffing motion was not actionable.<sup>72</sup> Yet actionable harassment existed when six offensive

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mathematically precise test.” *Harris*, 510 U.S. at 22. Justice Scalia voiced the same concern in his concurring opinion, stating that “[a]busive’ (or ‘hostile,’ which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb ‘objectively’ or by appealing to a ‘reasonable person[‘s]’ notion of what the vague word means.” *Id.* at 24.

65. Recently, the Supreme Court determined that a single incident of allegedly lewd joking could not alter the terms and conditions of employment required for a Title VII violation. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001). The single incident involved a supervisor, during a joint review of job applicants, reading a report that an applicant had once told a co-worker that making love to her was like making love to the Grand Canyon. *Id.* at 269. A male employee told the supervisor, who claimed not to understand the remark, that he would explain later; both men then chuckled. *Id.*; see also *Bennett v. N.Y. City Dep’t of Corrs.*, 705 F. Supp. 979, 983 (S.D.N.Y. 1989) (noting only a single incident of racial harassment).

66. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). “[E]ven a single incident of sexual assault sufficiently alters the conditions of the victim’s employment and clearly creates an abusive work environment for purposes of Title VII liability.” *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (dealing with verbal harassment culminating in sexual assault). Single incident cases are “highly unusual.” *Juliano & Schwab*, *supra* note 56, at 567.

67. See, e.g., *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1181 (7th Cir. 1998) (merely offensive); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997) (merely offensive); *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 431 (7th Cir. 1994) (merely unpleasant); see also *Gleason v. Mesirov Fin., Inc.*, 118 F.3d 1134, 1140 (7th Cir. 1997) (vulgar and boorish).

68. See *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1010 (7th Cir. 1994) (determining that words and deeds “crossed the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing”).

69. *Clifton v. Mass. Bay Trans. Auth.*, No. 95-2686-H, 2000 Mass. Super. LEXIS 22, at \*15 (Feb. 3, 2000).

70. *Baskerville*, 50 F.3d at 430.

71. *Id.* at 431. The court characterized Title VII as being designed to protect women from behavior that makes the workplace hellish, but not to rid the workplace of vulgarity. *Id.* at 430; see also *Russell v. Bd. of Trs. of Univ. of Ill. at Chi.*, 243 F.3d 336, 343 (7th Cir. 2001) (calling staff of three women the “staff from hell,” referring to each as a “bitch” and that stating one of them “dressed sleazy and like a whore” does not constitute harassment directed at the plaintiff). One commentator has suggested that the Seventh Circuit restricts hostile environment sexual harassment to those situations that involve sexual conduct directed at employees out of sexual desire. *Anderson*, *supra* note 23, at 127.

72. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1247 (11th Cir. 1999). For a thorough summary

comments were made to the plaintiff by her supervisor, stating, for example, that he hoped she would “get a little this weekend” so she would come back to work in a better mood, and that she had to be “a sad piece of ass” if she could not keep a man.<sup>73</sup> In other words, often the line between the legal and the illegal can seem to be a hazy one; a court can make the novel determination that sniffing sounds directed at the plaintiff’s groin are not threatening or humiliating based upon a single, unremarkable case involving a joke told in the plaintiff’s presence about a prophylactic, which did not involve the plaintiff’s genitalia.<sup>74</sup>

Further, consider a *naturally* abusive environment, such as the blue-collar job site. Should courts employ a “coarseness factor” in whether the environment is sufficiently hostile?<sup>75</sup> To what extent should other context-specific aspects of the workplace culture, such as the social relationship between the harasser and the plaintiff or whether the conduct took place in a public or private setting, be considered in examining the totality of the circumstances?<sup>76</sup> What of silence and inaction? One state court has suggested that giving someone the cold shoulder treatment can be actionable.<sup>77</sup> How should “associational” harassment claims be judged, where co-workers experience hostile working environments based upon their association with members of protected classes?<sup>78</sup>

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of cases examining the relative severity and pervasiveness of the hostility, see *id.* at 1246–47; *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 934–35 (8th Cir. 2002).

73. *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1414–15 (10th Cir. 1997); see also *Canada v. Boyd Group, Inc.*, 809 F. Supp. 771, 774–76 (D. Nev. 1992) (holding that repeated actions of rubbing up against an employee, telling off-color jokes and commenting suggestively about an employee’s appearance survived the defendant employer’s motion for summary judgment).

74. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1260–61 n.5 (11th Cir. 1999) (Tjoflat, J., concurring in part and dissenting in part) (citing *Long v. Eastfield Coll.*, 88 F.3d 300, 309 (5th Cir. 1996)). Judge Tjoflat characterized the defendant’s conduct in *Mendoza* as being like “some beast marking its prey.” *Id.*; see also *Hathaway v. Runyon*, 132 F.3d 1214, 1217 (8th Cir. 1997) (holding that disturbing noises and physical contact, which intimidated the plaintiff and made it difficult for her to perform her job, were sufficient to conclude that there was hostile conduct).

75. See Rebecca Brannan, Note, *When the Pig Is in the Barnyard, Not the Parlor: Should Courts Apply a “Coarseness Factor” in Analyzing Blue-Collar Hostile Work Environment Claims?*, 17 GA. ST. U. L. REV. 789 (2001) (arguing that employing such a mitigating factor would undermine the remedial goals of Title VII).

76. The Court in *Oncale* instructed courts to examine the “social context” in evaluating hostile environment in same-sex harassment cases. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). For a discussion of this imperative, see Frank, *supra* note 56.

77. *Campbell v. Fla. Steel Corp.*, 919 S.W.2d 26, 29 (Tenn. 1996). Even though the employer was not legally responsible, the court described the treatment by the plaintiff’s co-workers as being “appalling” and “totally and completely reprehensible.” *Id.* at 36.

78. For an overview of such claims, see David B. Hawley, Note, “*Standing*” *Up for Minority Coworkers? White Males Do Not Have “Aggrieved Person” Standing for Hostile Environment Actions Under Childress v. City of Richmond*, 77 N.C. L. REV. 865 (1999). See also *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 881 (7th Cir. 1998) (rejecting an associational discrimination claim).

Not only is the line between the permissible and the impermissible a difficult one to draw consistently across contexts and jurisdictions,<sup>79</sup> but who is responsible for making the call is also debatable. While some appeals courts conclude that whether an alleged hostile environment is sufficiently severe and pervasive to be actionable is a question of law, others allow the resolution to be made by the trier of fact.<sup>80</sup> This question is critical for determining whether summary judgments should be granted.<sup>81</sup> In sum, the allegedly *objective* standard for determining whether there has been unlawful discrimination on the basis of illegal criteria is intolerably *subjective*,<sup>82</sup> reminiscent of another context when Justice Stewart penned his famous phrase for defining obscenity under federal law: “But I know it when I see it. . . .”<sup>83</sup>

79. This lack of uniformity among hostile environment standards is particularly burdensome for employers who operate across jurisdictional lines. Frank, *supra* note 56, at 495 n.282.

80. For a discussion of this issue, see Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277 (1999).

81. Compare Beiner, *supra* note 12, at 75 (arguing that summary judgment is inappropriate in most harassment cases since the issue is fact-specific and juries should determine what would be offensive to a reasonable person), with Shira A. Scheindlin & John Eloffson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813, 814–15 (1999) (arguing that summary judgment should not be a disfavored way of resolving harassment claims since Title VII's proper interpretation is at stake). See generally Medina, *supra* note 11 (arguing that juries should define appropriate workplace norms). Given the substantial amount of litigation concerning workplace harassment and the costs to defend such suits, it is imperative that employers be able to rely on the predictable shield of summary judgment. Robert J. Aalberts & Lorne Seidman, *Seeking a "Safe Harbor": The Viability of Summary Judgment in Post-Harris Sexual Harassment Litigation*, 20 S. ILL. U. L.J. 223, 227–32 (1996).

82. See Frank, *supra* note 56, at 493 (“[J]udges and scholars from various political persuasions who frequently agree on little else agree that the present standard of judging hostile environment harassment suffers from an intolerable vagueness.”); Lipman & Cain, *supra* note 62, at 596 (“‘Pervasiveness’ becomes a very subjective element based on the jury or court’s own personal experiences.”); Scheindlin & Eloffson, *supra* note 81, at 835 (“Neither judges, juries, litigants, employees, employers, nor the public at large have definitive guidance as to where the line between acceptable and unacceptable behavior is, or should be, drawn.”); Shannon McAuliffe, Note, *Speak No Evil: The First Amendment Offers No Protection for Sexual Harassers*, 29 SUFFOLK U. L. REV. 233, 245 (1995) (explaining that the Supreme Court has failed to identify how to determine the sufficiency of severity and pervasiveness); Richard Allen Olmstead, Comment, *In Defense of the Indefensible: Title VII Hostile Environment Claims Unconstitutionally Restrict Free Speech*, 27 OHIO N.U. L. REV. 691, 699 (2001) (arguing that hostile environment harassment law offers little guidance to finders of fact and law).

83. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). At the time Justice Stewart wrote, the standard for determining obscenity made the Supreme Court the authority as to what specific speech was properly criminal and what was protected speech, with each Justice employing his own standard. See *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam).

### III. CONDITIONS AND CONDUCT V. WORDS: THE REQUISITE BRIGHT LINE

#### A. Words

Risk-averse employers' natural reaction to the vague limits of hostile environment is to over-compensate by prohibiting words or conduct in the workplace that even come close to bordering on harassment.<sup>84</sup> This reaction could have an adverse effect on protected expression in the workplace.<sup>85</sup> For this reason, it is particularly troubling when courts recognize that words can be primarily responsible for creating a hostile working environment.<sup>86</sup>

Several courts seem willing to permit verbal expression, particularly derogatory epithets and foul language, to state a claim for harassment under federal law.<sup>87</sup> For example, in the context of racial harassment, a state court held that the use of a single racist comment by a supervisor could constitute harassment.<sup>88</sup> Moreover, the California Su-

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84. Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 636 (1997). Even the EEOC suggests that "[p]revention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring . . ." 29 C.F.R. § 1604.11(f) (2003).

85. For a discussion of First Amendment issues with respect to the law of workplace harassment, see *infra* Part IV.

86. For a comprehensive analysis of cases involving verbal harassment, see Jamie Lynn Cook, Comment, *Bitch v. Whore: The Current Trend to Define the Requirements of an Actionable Hostile Environment Claim in Verbal Sexual Harassment Cases*, 33 J. MARSHALL L. REV. 465 (2000). The author finds that courts evaluate the merits of verbal harassment cases by three tests- the gender relation test, the sexual nature test, and the personal animosity test- which results in the dismissal of many meritorious claims. *Id.* at 466.

87. In some cases, employers have been found liable for retaliating against employees in response to their complaints about an environment permeated with racial or religious slurs. See *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358-59 (11th Cir. 1982) (finding employer liable where plaintiff was fired after requesting a transfer because he was the subject of racial slurs); *Weiss v. United States*, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (finding the employer intentionally retaliated against the plaintiff after he objected to the offensive religious slurs used against him). For a discussion of several cases involving the suppression of speech under the law of workplace harassment, see Eugene Volokh, *Freedom of Speech, Cyberspace, and Harassment Law*, 2001 STAN. TECH. L. REV. 3 (2001).

88. *Taylor v. Metzger*, 706 A.2d 685, 699 (N.J. 1998) (stating that "a jury could reasonably find that defendant's conduct [in calling the plaintiff a "jungle bunny"] would have a devastating effect on the average African American"). *But see* *McPhaul v. Bd. of Comm'rs of Madison County*, 226 F.3d 558, 567 (7th Cir. 2000) (holding that racially sensitive and derogatory remarks made in plaintiff's presence but not directed at plaintiff are not actionable); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir. 1981) (requiring a "steady barrage of opprobrious racial comment" as opposed to an infrequent use of racial slurs); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)

preme Court in *Aguilar v. Avis Rent A Car System, Inc.*<sup>89</sup> affirmed a judgment granting an injunction that prevented the use of any “derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis. . . .”<sup>90</sup>

In the context of sex discrimination, the Ninth Circuit concluded in *Steiner v. Showboat Operating Co.*<sup>91</sup> that a plaintiff established a prima facie hostile environment case based upon her supervisor’s repeated use of derogatory terms directed at her, such as “dumb fucking broad,” “cunt,” and “fucking cunt.”<sup>92</sup> Likewise, in *Burns v. McGregor Electronic Industries*,<sup>93</sup> harassment was found based upon the use of words such as “bitch,” “asshole,” “slut,” and “cunt.”<sup>94</sup> Similarly, exhibitions of pornography in some jurisdictions will be deemed culpable for creating a sufficiently hostile working environment.<sup>95</sup> In *Robinson v. Jacksonville*

(holding that the “mere utterance of an . . . epithet which engenders offensive feelings in a[n] employee” is not sufficient to establish a hostile work environment) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

89. 980 P.2d 846 (Cal. 1999).

90. *Id.* at 850. The words the employee had used allegedly included the term “motherfuckers” in addition to other demeaning criticisms of complainant’s race, national origin and lack of English language skills. *Id.* at 849. For an evaluation of the case and its potential ramifications, see Charles R. Calleros, *Aguilar v. Avis Rent A Car System, Inc.: The California Supreme Court Takes a Divided Freeway to Content-Oriented Regulation of Workplace Speech*, 34 U.S.F. L. REV. 237 (2000) (arguing that the effect of *Aguilar* as precedent should be limited to content neutral theory of employment discrimination); Jennie Randall, Comment, “Don’t You Say That!”: *Injunctions Against Speech Found to Violate Title VII Are Not Prior Restraints*, 3 U. PA. J. CONST. L. 990 (2001) (arguing that the injunction against speech found to violate Title VII is not a prior restraint as applied to the facts of the case).

In an earlier case, *Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir. 1986), the court, without discussion, upheld an injunction which required the warden in a correctional facility “to forbid the use of racial epithets; the posting or distribution of derogatory bulletins; mimicking officers in stereotypical fashion and the use of racial, ethnic or religious slurs and humor.” *Id.* at 1100.

91. 25 F.3d 1459 (9th Cir. 1994).

92. *Id.* at 1461; *see also* *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000) (stating that “[r]epeated derogatory or humiliating statements . . . can constitute a hostile work environment”); *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996) (holding that “[u]nfounded accusations that a woman worker is a ‘whore’ . . . are capable of making the workplace unbearable . . .”) (citations omitted).

93. 989 F.2d 959 (8th Cir. 1993).

94. *Id.* at 964; *see also* *EEOC v. A. Sam & Sons Produce Co.*, 872 F. Supp. 29, 35 (W.D.N.Y. 1994) (holding that calling plaintiff a whore and leaving a note on her desk with that word in big, bold print represented a “sufficient quantum of harassment to constitute a hostile work environment”); *Kulp v. Dick Horrigan VW, Inc.*, No. 93-5335, 1994 U.S. Dist. LEXIS 408, at \*6, \*10 (E.D. Pa. Jan. 4, 1994) (finding that use of term “slut” and allegations of the denial of privileges met essential pleading requirements); *Cline v. Gen. Elec. Capital Auto Lease, Inc.*, 757 F. Supp. 923, 926–27, 932 (N.D. Ill. 1991) (holding that references such as “dyke,” “dragon lady” and “syphilis” coupled with physical contact of a non-sexual nature were prima facie evidence of sexual harassment).

95. Pornography, provided that it does not meet the definition of obscenity, is protected expression. *Miller v. California*, 413 U.S. 15, 24 (1973); *Johnson v. County of L.A. Fire Dep’t*, 865



*Shipyards, Inc.*,<sup>96</sup> a federal district court determined that subjecting the plaintiff to pictures of nude and semi-nude women in the workplace, to vulgar comments concerning women in general and her in particular, as well as to sexually offensive jokes,<sup>97</sup> constituted the creation of a hostile working environment.<sup>98</sup> While not all courts recognize this particularly potent effect of words,<sup>99</sup> it does seem somewhat incongruous that, in at least some jurisdictions, as society in general becomes more tolerant of foul language and sexually explicit expression,<sup>100</sup> workplace norms are becoming less tolerant<sup>101</sup> *as a matter of federal law*. Is this the result intended by Congress when it passed Title VII or, more importantly, a result permitted by the Constitution?<sup>102</sup>

### B. Conditions and Conduct

The overarching mandate of Title VII is that covered employers shall not “discriminate against any individual with respect to his compensation,

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F. Supp. 1430, 1438 (C.D. Cal. 1994) (holding that private possession, reading and consensual sharing of Playboy magazine by firemen in living quarters is protected by the First Amendment).

96. 760 F. Supp. 1486 (M.D. Fla. 1991).

97. *Id.* at 1493–1502. For a discussion of *Robinson* and its First Amendment implications, see generally Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991).

98. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1479 (3d Cir. 1990) (finding that sexually derogatory terms and pornographic pictures contributed to a hostile work environment). While a comprehensive study concludes that allegations of harassing posters, pinups and graffiti occur in relatively few cases, when such incidents are directed at the plaintiff specifically or coupled with other conduct, plaintiffs are successful in a substantial percentage of the cases. Juliano & Schwab, *supra* note 56, at 567, 589.

99. See, e.g., *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996) (noting that repeated use of term “sick bitch” was not a reasonable basis for a lawsuit); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 621–22 (6th Cir. 1986) (ruling that pornographic pictures and derogatory comments coupled with allegations of disparate treatment did not sustain plaintiff’s burden in a Title VII claim).

100. Sexually explicit expression is indeed becoming more prolific, particularly with the introduction of the Internet. Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped*, 23 HASTINGS COMM. & ENT. L.J. 507, 524 (2001). Larry Flynt’s recent introduction of “boutique” adult stores/cafes, such as “Hustler Hollywood,” are demonstrative of such mainstreaming. Citysearch: Los Angeles, CA at <http://losangeles.citysearch.com/review/101550/editorial> (last visited Mar. 27, 2004).

101. See Frank, *supra* note 56, at 480 (arguing that harassment should be judged “by the standard of a reasonable person living in the profanity and sex-filled culture of the twenty-first century”).

102. See Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 725 (1995) (“[H]arassment regulations that falsely equate sexual expression with sexist harassment threaten both women’s equality and free speech.”).

terms, conditions, or privileges of employment.”<sup>103</sup> The critical issue is one of *disparate treatment*, that is, whether persons encounter disadvantageous *terms or conditions* of employment because of certain illegal criteria. In other words, “the essence of a Title VII case, including one based upon a claim of . . . harassment, is plaintiff’s proof of actual discrimination.”<sup>104</sup> The first case in which a court recognized a claim of harassment involved an employer’s segregation of Hispanic clientele.<sup>105</sup> The Fifth Circuit concluded such segregation entitled the employee to statutory protection<sup>106</sup> and found that the conduct was a sort of indirect violation of Title VII’s directive not “to limit, segregate, or classify. . . employees or applicants for employment in any way which would. . . adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”<sup>107</sup> Lately, it seems that courts first examine the environment, and if it is sufficiently hostile by whatever subjective criteria they employ, the leap is then made to a presumption that there has been a change in the conditions of employment. While the Supreme Court indeed recognizes that a sufficiently hostile atmosphere can result in a change in the terms and conditions of employment,<sup>108</sup> the change must be based upon disparate treatment. “[T]he test is not whether work has been impaired, but whether working conditions have been discriminatorily altered.”<sup>109</sup> It is not sufficient that the atmospheric conditions are overcast; there must be precipitation.

Plaintiffs should first clearly articulate the change in terms or conditions of employment. For example, in *Meritor Savings Bank v. Vinson*,<sup>110</sup> the plaintiff was allegedly raped by her supervisor on several occasions and fondled by him in the presence of others.<sup>111</sup> It is easy to conclude that being forced to have sexual relations with one’s supervisor over the course of several years inherently affects the conditions of one’s employment.<sup>112</sup> The

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103. 42 U.S.C. § 2000e-2(a) (2000).

104. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1253 (11th Cir. 1999) (Edmondson, J., concurring).

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

106. *Id.* at 237–38.

107. 42 U.S.C. § 2000e-2(a)(2).

108. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); *see also supra* notes 31–41 and accompanying text.

109. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Scalia, J., concurring).

110. 477 U.S. 57 (1986).

111. *Id.* at 60.

112. Under French law, sexual harassment is only recognized if a person uses their position of authority to coerce a subordinate to engage in sexual relations; a recognized criminal wrong. Abigail C. Saguy, *Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law*, 34 LAW & SOC’Y REV. 1091, 1092 (2000). While that narrow situation of civil liabil-

Supreme Court recognized the unique role that supervisors play in the workplace and their ability to effectuate a change in the conditions of employment: “As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of [economic harm] injury.”<sup>113</sup> Yet co-workers are sometimes cited as being the more frequent source of workplace harassment claims.<sup>114</sup> While neither economic nor psychological injury is required for a Title VII violation in workplace harassment cases, plaintiffs should start with the proposition that they have been injured by a serious alteration in the terms and conditions of employment.<sup>115</sup> That conclusion is not as self-evident in co-worker harassment cases.<sup>116</sup> The decisions in both *Faragher* and *Ellerth* highlight the critical importance of “tangible employment action”<sup>117</sup> in the context of legal entity liability; the existence of less than tangible employment actions, or changes in other terms or conditions of employment, are no less critical in other cases in which the economic axe has not yet fallen.

The Court in *Faragher* stated, with respect to workplace harassment claims, “We have made it clear that *conduct* must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view.”<sup>118</sup> The two decisions, which Justice Souter cited as support for this proposition, involved situations in which *conduct* allegedly precipitated a change in the conditions of employment. In *Carrero v. New York City Housing Authority*,<sup>119</sup> a co-worker dropped his pants in front of the female plaintiff, a supervisor touched and kissed her without consent, and the district court found quid pro quo harassment based upon the resulting loss of a tangible job benefit.<sup>120</sup> In *Moylan v.*

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ity is not, nor perhaps should be, the limits of actionable conduct under American law, it does illuminate the inherent coerciveness of such actions and the inevitable change in conditions of employment.

113. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)

114. *See Hager, supra* note 42, at 377 n.4 (citing studies that indicate such results); Note, *Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment*, 3 HARV. WOMEN’S L.J. 173, 177 (1980). *But see* Juliano & Schwab, *supra* note 56, at 564 (arguing that most harassers are supervisors in judicial opinions, which could be explained by the plaintiff’s pre-selection assessment of the likelihood of success).

115. *Meritor Sav. Bank*, 477 U.S. at 58, 65; *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

116. *Hager, supra* note 42, at 389 (stating that “the distinction between discriminatory and non-discriminatory harassment gets hopelessly muddled” because motivation for unpleasantness is elusive).

117. *See supra* notes 42–54 and accompanying text.

118. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (emphasis added).

119. 890 F.2d 569 (2d Cir. 1989).

120. *Id.* at 572–74, 579.

*Maries County*,<sup>121</sup> the case in which the Eighth Circuit first recognized the validity of hostile environment claims as a form of discrimination that violates Title VII, the plaintiff alleged that she was forcibly raped.<sup>122</sup>

Assuming that there has been a change in the terms or conditions of employment, the next critical inquiry by the plaintiff should be, "Why me?" To answer this question for the purposes of establishing a Title VII violation, proof of discriminatory animus in the differential treatment is required,<sup>123</sup> where conduct should be the focus of the proof. A review of the workplace harassment claims considered by the Supreme Court highlights the important role of conduct in the evaluation of the abusiveness of a hostile environment claim. While *Meritor* involved forced sexual relations, the harassing conduct of *Oncale v. Sundowner Offshore Services, Inc.*<sup>124</sup> was no less severe. In *Oncale*, the plaintiff was physically assaulted in a sexual manner and threatened with rape.<sup>125</sup> The plaintiff was also forcibly restrained while a co-worker put his penis on the victim's neck and pushed a bar of soap into the victim's anus.<sup>126</sup> Justice Scalia, writing for a unanimous Court stated that Title VII "forbids *only* behavior so objectively offensive as to alter the 'conditions' of the victim's employment."<sup>127</sup> *Behavior*, not words. Likewise, in *Clark County School District v. Breeden*,<sup>128</sup> the court's per curiam opinion noted that "Title VII forbids actions taken on the basis of sex that 'discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.'"<sup>129</sup> *Actions*, not words. In *Meritor*, the Court cautioned that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."<sup>130</sup> *Conduct*, not words.

While the Supreme Court has never passed on the merits of any of the hostile environment cases before it, all of them have involved allegations of offensive conduct, though not necessarily as egregious as the behavior complained of in *Meritor* and *Oncale*. In *Ellerth*, the plaintiff was threat-

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121. 792 F.2d 746 (8th Cir. 1986).

122. *Id.* at 747-48, 749,750 (holding that the case should be remanded for consideration of the hostile environment claim).

123. *See supra* notes 17-30 and accompanying text.

124. 523 U.S. 75 (1998).

125. *Id.* at 77.

126. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

127. *Oncale*, 523 U.S. at 81 (emphasis added).

128. 532 U.S. 268 (2001).

129. *Id.* at 270 (quoting 42 U.S.C. §2000e-2(a)(1) (2000)).

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

ened with the denial of tangible job benefits and was subjected to touching of a sexual nature to which she did not consent.<sup>131</sup> In *Faragher*, the plaintiff was the subject of uninvited and offensive touching, aggressive physical contact, and threats of reprisal such as, “[D]ate me or clean the toilets for a year.”<sup>132</sup> In *Harris v. Forklift Systems, Inc.*,<sup>133</sup> a supervisor suggested that he and the plaintiff go to a hotel to negotiate her raise, asked her to retrieve coins from his front pants pocket, and asked her to pick up objects on the ground in front of her after he threw them there.<sup>134</sup> In a case of racial harassment, *National Railroad Passenger Corp. v. Morgan*,<sup>135</sup> the plaintiff alleged discriminatory acts such as termination for refusing to follow orders, a refusal to permit him to participate in an apprenticeship program, written warnings for absenteeism, and the performance of racially derogatory acts.<sup>136</sup> Additionally, the managers allegedly directed racial epithets, racial jokes, and racially negative comments toward the plaintiff.<sup>137</sup> Nonetheless, Justice Thomas, writing for the majority, specifically noted, “We make no judgment, however, on the merits of Morgan’s claim.”<sup>138</sup>

What place, then, do words have in the overall scheme of hostile environment litigation? Words can explain why certain behavior, conduct or acts occur, and they provide some evidence of discriminatory animus. As plaintiffs question the reasons for discriminatory treatment and changes in the conditions of employment, derogatory references and epithets may help to answer the question, “Why me?” As Justice O’Connor has observed, “[S]tray remarks in the workplace, *while perhaps probative of . . . harassment . . . cannot justify the employer to prove that its hiring or promotion decisions were based on legitimate criteria.*”<sup>139</sup> The primary focus, however, should be upon the actions directed at the plaintiff and whether they have resulted in differential treatment based on illegal criteria. The Supreme Court in both *Ellerth* and *Faragher* keyed employer supervisor liability on tangible employment actions, an endorsement of the importance of disparate *treatment*. While a hostile environment can still be actionable short of tangible employment actions, there should still be evidence of af-

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131. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747–48 (1998).

132. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780–83 (1998).

133. 510 U.S. 17 (1993).

134. *Id.* at 19.

135. 536 U.S. 101 (2002), *aff’g in part, rev’g in part*, 232 F.3d 1008 (9th Cir. 2000). The Ninth Circuit determined that the evidence was sufficient to go to the jury. *Morgan*, 232 F.3d at 1017.

136. 536 U.S. at 105 n.1.

137. *Id.* at 120.

138. *Id.* at 121 n.13.

139. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O’Connor, J., concurring) (emphasis added).

firmative unequal treatment based upon forbidden criteria.<sup>140</sup> But words should only illuminate why such actions were taken, and should not constitute a *substantial factor* in the finding of a hostile working environment. De-emphasizing the role that words play, and emphasizing the role that conduct plays, should serve to preserve hostile working environment claims under Title VII from legitimate constitutional challenges.

#### IV. A FIRST AMENDMENT JUSTIFICATION FOR THE DISTINCTION

Verbal expression has the power to offend, to ridicule, to berate and to denigrate individuals. These unfortunate results attest to the power of speech.<sup>141</sup> Many commentators have addressed the issue of First Amendment violations with the regulation of workplace harassment under Title VII and have discussed either the potential for conflict resulting therefrom<sup>142</sup> or the lack thereof.<sup>143</sup> Because employers may suppress protected

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140. For example, if minority employees are not afforded the same flexibility in scheduling times for vacation or medical appointments as non-minority employees, then there exists evidence of disparate treatment which affects terms and conditions of employment. Such treatment, however, would presumably fall short of a tangible employment action.

141. As the Seventh Circuit observed in evaluating a local ordinance that attempted to suppress violent pornography that objectified and subordinated women: "Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech." *Am. Booksellers Ass'n, Inc., v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985).

142. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 510-12 (1991) (arguing that Title VII verbal harassment regulation is at odds with the First Amendment); Eugene Volokh, *The Constitution Under Clinton: A Critical Assessment: Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 335 (2000) (opining that the harassing speech exception must be properly addressed by the courts "to prevent its unchecked growth"); Olmstead, *supra* note 82, at 692 (arguing that hostile environment harassment law is an unconstitutional application as it "applies solely to speech"); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1863-66, 1871-72 (1992) (noting that actionable speech under harassment law should be limited to expression directed at a specific victim by a harasser).

For an argument that the categories of protected speech and a sufficiently severe and pervasive hostile working environment are mutually exclusive, see John H. Marks, *Title VII's Flight Beyond First Amendment Radar: A Yin-to-Yang Attenuation of "Speech" Incident to Discriminatory "Abuse" in the Workplace*, 9 COLUM. J. GENDER & L. 1, 3-4 (1999) and John H. Marks, *Title VII's Flight Within First Amendment Radar: The Outer Cosmos of Employer Liability for Workplace Harassment Absent a Tangibly Discriminatory Employment Action*, 25 U. DAYTON L. REV. 1, 2-3 (1999). See also Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 693-95 (1997) (characterizing workplace speech as a satellite domain of public discourse that demands a principled compromise between the values served by freedom of expression and those of equality); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment — Avoiding a Collision*, 37 VILL. L. REV. 757, 765-75 (1992) (discussing "the intersection of free speech and equality concerns in the context of workplace sexual harassment . . .").

expression in order to comply with the vague mandates of Title VII harassment law, the statute has a chilling effect on the right to free speech.<sup>144</sup> Such a result is particularly predictable since employers will now attempt to take advantage of the affirmative defense announced in *Ellerth* and *Faragher*.<sup>145</sup> For constitutional purposes, it makes no difference that the result is dictated by the employer, who fears being sued for a Title VII violation, instead of directly through government censorship.<sup>146</sup> While sexually and racially harassing expression can certainly convey political viewpoints,<sup>147</sup> the issue of suppression is exacerbated with respect to cases of religious harassment because the First Amendment guarantee of religious freedom is also implicated.<sup>148</sup> This proposition, of course, presupposes that verbal harassment is, in fact, protected expression.

#### A. Verbal Harassment Under Title VII: Outside the First Amendment?

Certain categories of speech do not enjoy constitutional protection, such as defamatory statements,<sup>149</sup> child pornography,<sup>150</sup> and words that in-

143. See, e.g., J. M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2295, 2298–301 (1999) (arguing that “collateral censorship” under Title VII is constitutionally permissible when there are good grounds for vicarious liability); Mark Oring & S. D. Hampton, *When Rights Collide: Hostile Work Environment vs. First Amendment Free Speech*, 31 UWLA L. REV. 135, 161–62 (2000) (noting that the interest in equality outweighs that of free speech in the context of harassment law); Ellen R. Peirce, *Reconciling Sexual Harassment Sanctions and Free Speech Rights in the Workplace*, 4 VA. J. SOC. POL’Y & L. 127, 144 (1996) (noting that in certain well-defined circumstances, First Amendment rights must bow to the government’s “compelling interest in eradicating discrimination in the workplace”).

144. Frank, *supra* note 56, at 500–03; Scheindlin & Eloffson, *supra* note 80, at 841–42; Volokh, *supra* note 86, at ¶¶ 12, 14, 16, 47, 69; Olmstead, *supra* note 81, at 695. Employers also may terminate an employee for engaging in what would seem to be protected expression. See *Mackenzie v. Miller Brewing Co.*, 608 N.W.2d 331, 336 (Wis. Ct. App. 2000) (noting that plaintiff was terminated for recounting parts of an episode of “Seinfeld”).

145. See *supra* notes 42–54 and accompanying text.

146. “One of our basic constitutional tenets, therefore, forbids the state to punish protected speech, directly or indirectly, whether by criminal penalty or civil liability.” *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1020 (5th Cir. 1987). See Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL’Y 959, 970–71 (1998) (stating that a First Amendment issue arises when a private employer defends restriction on speech as being necessary to avoid Title VII liability). See also Pierce, *supra* note 143, at 131–33; Volokh, *supra* note 84, at 637 n.32; Olmstead, *supra* note 82, at 697.

147. Pierce, *supra* note 143, at 158.

148. Frank, *supra* note 56, at 506–07. Moreover, religious speech is more likely to involve the discussion of provocative ideas as opposed to attacking a person’s characteristics, as is often the case with racist or sexist speech. Berg, *supra* note 146, at 965. For a discussion of religious harassment, see *infra* notes 259–272 and accompanying text.

149. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (justifying a “negligence standard for private defamation actions”); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 134 (1967) (noting

cite imminent lawless activity.<sup>151</sup> Courts in hostile environment cases often refer to the epithets and derogatory statements used as being “obscene,” which is another form of unprotected expression.<sup>152</sup> However, the definition of obscenity in First Amendment law requires an appeal to the prurient interest in sex,<sup>153</sup> so the reference in such a context is a misnomer. The categories of unprotected expression that come closest to being relevant to harassment claims are “threats” and “fighting words.”

“True threats,” objectively viewed in their total context, can be forbidden by statute.<sup>154</sup> Since such threats are usually linked to criminal conduct,<sup>155</sup> not civil liability, the argument that threats are unprotected in the context of harassing speech does not make a perfectly fluid transition.<sup>156</sup> However, in the context of what is referred to as quid pro quo sexual harassment, as distinguished from hostile environment cases, there seems to be merit in the contention that there is no valid First Amendment claim of protection just because words are used to intimidate an employee into succumbing without genuine consent to the sexual overtures.<sup>157</sup> The result would be the same with respect to any “true threats,” whatever the underlying rationale is for making the threat, be it racial hatred or personal animosity.

In the context of hostile environment and verbal expression claims, however, the exclusion of fighting words from First Amendment protec-

that there is a malice requirement for public figures); *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that “[t]he constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ . . .”).

150. *New York v. Ferber*, 458 U.S. 747, 756 (1982) (noting that “the States are entitled to greater leeway in the regulation of pornographic depictions of children”). *Cf.* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002) (distinguishing *Ferber* and striking down a federal law that would expand the category of prohibited expression by including virtual child pornography).

151. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This category of speech, which can be suppressed, seems to embrace situations involving crowd control as opposed to person-to-person breaches of the peace.

152. *Miller v. California*, 413 U.S. 15, 23, 39 (1973) (announcing a three-prong test to determine what is obscene).

153. *Id.* at 39.

154. *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (holding that a statute which makes a form of speech criminal must be interpreted with the First Amendment in mind).

155. A threat to kill the President may be punishable under 18 U.S.C. § 871(a) (2000). *See United States v. Shoulberg*, 895 F.2d 882, 886 (2d Cir. 1990) (“The First Amendment does not guarantee a right to make intimidating threats against government witnesses.”).

156. *See Pierce*, *supra* note 143, at 192 (“This theory does not appear to offer a satisfactory rationale for making harassing speech exempt from the protection of the First Amendment.”).

157. *Strossen*, *supra* note 102, at 704–05 (explaining that punishment of speech in quid pro quo harassment raises no substantial First Amendment concerns).



tion seems to be much more relevant.<sup>158</sup> In *Chaplinsky v. New Hampshire*,<sup>159</sup> Mr. Chaplinsky, a Jehovah's witness, was convicted of violating a law which prohibited persons in public places from addressing other persons lawfully present by an offensive or derisive name with an intent to deride, offend, or annoy.<sup>160</sup> He had been distributing literature on the streets, a growing crowd was becoming restless, and a disturbance occurred.<sup>161</sup> As Mr. Chaplinsky was being escorted to the police station, he saw the city marshal and stated, "You are a God damned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."<sup>162</sup> In upholding Chaplinsky's conviction, the Court stated,

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."<sup>163</sup>

The Court seemed to emphasize the face-to-face context of the exchange as being what the statute prohibited in an effort to prevent a breach of the peace.<sup>164</sup>

It is far from clear whether the interpretation of Title VII has been

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158. For an overview of the "fighting words" doctrine and a justification for the exclusion of such words from the First Amendment based upon their relationship to conduct, see generally Aviva O. Wertheimer, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 *FORDHAM L. REV.* 793 (1994).

159. 315 U.S. 568 (1942).

160. *Id.* at 569.

161. *Id.* at 569–70.

162. *Id.* at 569 (internal quotations omitted). Mr. Chaplinsky admitted that he, in fact, made this statement with the exception of using the name of God. *Id.* at 570.

163. *Id.* at 571–72 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940)).

164. *Id.* at 573; see also *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Chaplinsky*, 315 U.S. 568) ("[P]ersonally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.").

limited to suppressing fighting words in violations based upon verbal expression. However, certainly some terms, such as “nigger” and “cunt,”<sup>165</sup> may constitute fighting words even though that category of unprotected expression seems to suffer from the “But I know it when I hear it” syndrome as well.<sup>166</sup> Nevertheless, assuming that Title VII verbal hostile environment cases are limited to fighting words used in direct confrontations, there still exists a constitutional problem of considerable magnitude.

In *R.A.V. v. City of St. Paul*,<sup>167</sup> the Supreme Court held that a city ordinance, which banned the display of symbols (such a burning cross) that could reasonably be known to arouse anger in others “on the basis of race, color, creed, religion, or gender,” is *facially* invalid under the First Amendment.<sup>168</sup> The Court was bound by the limited interpretation given to the ordinance by the state’s supreme court, an interpretation that narrowed its scope to fighting words.<sup>169</sup> Nevertheless, the Court determined that while certain categories of speech, such as fighting words, “can consistently with the First Amendment, be regulated because of their constitutionally proscribable content. . . they are [not] categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”<sup>170</sup> In other words, the government is not permitted to pick and choose between fighting words, suppressing some but not others depending upon their content; the “government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.”<sup>171</sup> While content-based discrimination is permissible under the exception noted in *R.A.V.*, it must be “based on the very reasons why

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165. Query whether foul names directed at women can constitute fighting words since sexist speech does not usually trigger a violent reaction in most women. *Pierce*, *supra* note 143, at 187.

166. The Court has not illuminated just exactly what words are fighting words; however it discussed a state court interpretation in *Chaplinsky*: “The test is what men of common intelligence would understand would be words . . . and expressions which by general consent are ‘fighting words’ when said without a disarming smile . . . . So are threatening, profane or obscene revilings.” *Chaplinsky*, 315 U.S. at 573 (citations omitted). However, they are not words that merely convey or intend to convey disgrace. *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974) (citing *Gooding v. Wilson*, 405 U.S. 518, 525 (1972)). Nor are they “opprobrious words or abusive language, tending to cause a breach of the peace . . . .” *Gooding*, 405 U.S. at 519–20 (citing GA. CODE ANN. § 26-6303).

167. 505 U.S. 377 (1992).

168. *Id.* at 391, 393.

169. *Id.* at 381, 391.

170. *Id.* at 383–84.

171. *Id.* at 386.

the particular class of speech at issue. . . is proscribable,”<sup>172</sup> which, for fighting words, is the likelihood of a breach of the peace.<sup>173</sup> Most recently the Supreme Court upheld a generic Virginia ban on cross burning, noting that, under the wording of the statute, “it does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s ‘political affiliation, union membership, or homosexuality.’”<sup>174</sup>

In contrast, under Title VII, like the statute at issue in *R.A.V.*, employers must censor only *some* fighting words on the basis of their content in order to avoid hostile environment lawsuits. For example, a supervisor/co-worker could say exactly what Mr. Chaplinsky said (and was convicted for saying) to an employee without fear of censorship because of the lack of discriminatory overtures. However, suppose instead that the supervisor/co-worker said, “You are a God damned rag-head (or camel jockey) and a damned Terrorist and all Muslims are Terrorists or agents of Terrorists,” perhaps with a few twenty-first century expletives neatly inserted. What employer, who is well-advised by counsel, would not take action against the speaker after a couple of such incidents?<sup>175</sup>

Clearly Title VII hostile environment claims, *even if limited to fighting words*, are content-based restrictions on speech<sup>176</sup> and should be subject to strict scrutiny analysis.<sup>177</sup> As such, the classification of speech

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172. *Id.* at 393.

173. *Id.* at 391. This exception has been referred to as the “special virulence exception to the rule barring content-based subclasses of categorically proscribable expression . . . .” *Virginia v. Black*, 123 S. Ct. 1536, 1560 (2003) (Souter, J., concurring in part and dissenting in part). *Black* modifies another categorical exception noted in *R.A.V.* in which there is “no realistic possibility that official suppression of ideas is afoot.” *Id.* at 1561 (citing *R.A.V.*, 505 U.S. at 390).

174. *Black*, 123 S. Ct. at 1540. The Court determined that, factually, not all cross burnings were directed at racial or religious minorities. *Id.* at 1546.

175. In 2003, the EEOC reached a \$1.11 million settlement of a harassment suit in which four plaintiffs claimed they were harassed because of their national origin (Pakistan) and religion (Islam). In addition to being ridiculed for their daily prayer obligations, each was called a “camel jockey” and “raghead.” *Pakistani-American Workers to Share \$1.11 Million in Harassment Settlement with Stockton Steel*, EEOC, at <http://eeoc.gov/press/3-19-03.html> (Mar. 19, 2003).

176. See *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596–97 (5th Cir. 1995) (“[W]hen Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial, or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.”).

177. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 836 (2000) (invalidating a regulation restricting transmission of sexually-explicit cable television programs); *Reno v. ACLU*, 521 U.S. 844, 874, 885 (1997) (holding that provisions of the Communications Decency Act that regulated sexually-oriented materials on the internet, which were indecent but not obscene, were not constitutionally valid); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 117 (1989) (upholding a regulation prohibiting obscene commercial telephone messages); *Boos v. Barry*, 485 U.S. 312, 321, 329 (1988) (holding that a content-based restriction on political speech in a public forum

prohibited under Title VII is underinclusive under First Amendment law because certain fighting words are censored (e.g., “spic”) while others are not (e.g., “fag”).<sup>178</sup> Even supposing that preventing discriminatory verbal harassment constituted a compelling state interest under strict scrutiny analysis,<sup>179</sup> it is still not clear that a ban, even with rather vague parameters, is the least restrictive means of accomplishing this objective, particularly when the cure for offensive speech has traditionally been rebuttal. As referenced in the introduction, successful efforts designed to advance women and minorities into positions of true power in the workplace would tend to alleviate such antics in a more efficient manner than for courts to censor name-calling based upon content. Perhaps Congress could legitimately ban all fighting words as a means of preventing broad intimidation in workplaces that sufficiently trigger the application of the Commerce Clause, similar to Virginia’s general ban on cross burning with an intent to intimidate,<sup>180</sup> but that is not the result Title VII harassment law is intended to accomplish.

Further, verbal hostile environment claims are not usually limited to the recital of fighting words, but often include the expression of opinion concerning the proper place for women, racial, and ethnic minorities in the work force. This, of course, is more than just unflattering.<sup>181</sup> The offensiveness of such speech, which triggers the urge to suppress, is specifically linked to a disdain for the racist or sexist message expressed and as such is a viewpoint-based restriction on expression.<sup>182</sup> Statements of opinion, however, are quintessentially protected speech, no matter how pernicious, no matter how repulsive, no matter how objectionable and no matter how unenlightened.<sup>183</sup> Just ask Jerry Falwell.<sup>184</sup> As Justice

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is inconsistent with the First Amendment).

178. Title VII has not been interpreted as applying to discrimination based upon sexual orientation.

179. See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 134, 172-73 (1982) (arguing that an independent tort action for racial insults is both constitutionally permissible and necessary even though it would be a content regulation subject to exacting scrutiny).

180. Virginia’s “Cross-Burning Statute,” VA. CODE ANN. § 18.2-423 (Michie 1996), criminalizes expression not aimed at a particular group or out of specified prejudicial hatred. The Virginia Supreme Court had struck down the statute as being an unconstitutional restraint on speech. *Black v. Commonwealth*, 553 S.E.2d 738, 746 (Va. 2001), *aff’d in part, vacated in part*, 538 U.S. 343 (2003).

181. The Sixth Circuit has stated that Title VII requires “that an employer take prompt action to prevent such bigots [“Archie Bunkers”] from expressing their opinions in a way that abuses or offends their coworkers.” *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988) (emphasis added).

182. See Browne, *supra* note 142, at 491-501.

183. The Supreme Court recently reiterated the concept that ideas, however repulsive, are pro-

Holmes once stated, “[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”<sup>185</sup> Similarly, Justice Thomas asserted in his dissent from the denial of certiorari in *Avis Rent A Car Sys., Inc. v. Aguilar*,

[A]ttaching liability to the utterance of words in the workplace is likely invalid for the simple reason that this speech is fully protected speech. No one claims that the words on the “exemplary list” . . . qualify as fighting words, . . . obscenity, . . . or some other category of speech recognized as outside the scope of the First Amendment protection. Even if these words do constitute so-called “low-value speech,” the content-based nature of [the] restriction. . . renders it invalid under our current jurisprudence. To uphold the application of a content based anti-discrimination law. . . to pure speech in the workplace, then, we would have to substantially modify our First Amendment jurisprudence.<sup>186</sup>

Yet some might argue that Title VII’s effect on workplace speech is content neutral in targeted verbal abuse cases<sup>187</sup> or alternatively, no more than a content neutral time, place, or manner restriction,<sup>188</sup> focusing on

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tected when it determined that the Child Pornography Prevention Act of 1996 was unconstitutional as applied to non-obscene child pornography that did not use real children. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240–58 (2002). *See also* *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 327–28, 330 (7th Cir. 1985) (holding that speech depicting the subordination of women is constitutionally protected), *aff’d without opinion*, 475 U.S. 1001 (1986).

184. *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) (holding that the tort of outrageous conduct is unavailable in a First Amendment context where the conduct was directed toward a public figure and the press).

185. *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

186. *Avis Rent –A Car Sys., Inc. v. Aguilar*, 529 U.S. 1138, 1140–41 (2000) (Thomas, J., dissenting) (citations omitted).

187. Charles R. Calleros, *Title VII and Free Speech: The First Amendment Is Not Hostile to a Content-Neutral Hostile-Environment Theory*, 1996 UTAH L. REV. 227, 259 (1996); *see also* Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 292–306 (1990) (supporting regulation of insults and epithets in face-to-face encounters even though they are not content-neutral); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 5, 49 (1990) (arguing that sexist speech can be regulated under federal statutes if it is made with discriminatory intent, causes a direct discriminatory effect, or in situations wherein the listener constitutes a captive audience); Volokh, *supra* note 142, at 1871 (drawing the permissible line for regulating speech between that which is directed at a particular individual because of race, religion, sex, or national origin, and undirected speech which indirectly offends). *But see* Browne, *supra* note 142, at 532 (creating a workable definition of targeted vilification is difficult).

188. Content neutral regulations attempt to direct the *manner* in which the speech is expressed, and not judge its content. *United States v. Kokinda*, 497 U.S. 720, 736, 738 (1990) (ruling that regulation prohibiting solicitation on postal property passes constitutional muster). Some zoning ordi-

workplace speech.<sup>189</sup> In other words, since the intrusion is limited to workplace speech, since employees have other outlets for expression, since employees might be considered a “captive audience” for verbal invectives, or since speech in general may be regulated more for various reasons in the workplace, regulation is permissible.<sup>190</sup> Yet such excuses ignore the reality that if one works forty hours a week and sleeps eight hours a night, then over one-third of one’s waking hours are spent at work.<sup>191</sup> To limit the exercise of First Amendment rights of free speech to the remaining two-thirds *as a matter of federal law* seems contrary to the principles of democracy.<sup>192</sup> Moreover, time, place, and manner restrictions must be content-neutral in order to be subjected to the less-exacting constitutional test,<sup>193</sup> and harassing speech is subject to sup-

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nances, which address the secondary effects of sexually explicit speech or expression, fall into this category. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 429–30 (2002) (holding that an ordinance prohibiting the operation of more than one adult entertainment business in the same building survives summary judgment); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986) (upholding ordinance prohibiting adult motion picture theatres from locating within one thousand feet of any residential zone). An intermediate level of scrutiny is applied to content neutral regulations that incidentally burden speech. The regulation is deemed constitutional if its requirements are narrowly tailored to serve a significant governmental interest, leaving ample alternatives for alternate means of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). To be sufficiently tailored the regulation must not burden substantially more speech than is necessary to further the legitimate governmental interest, although the means chosen need not be the least restrictive ones available. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

189. *See Volokh, supra* note 142, at 1819–43 (rejecting a broad workplace speech exception that permits regulation under current constitutional jurisprudence). *But see Oring & Hampton, supra* note 141, at 143 (stating that classification as such is problematic since harassment law is plainly not content neutral).

190. *See, e.g., Horton, supra* note 97, at 418–23 (concluding that employees, for all practical purposes, enjoy few speech rights in the workplace under state and federal law); McAuliffe, *supra* note 82, at 254–55 (discussing cases noting the importance of the distinction); Cecilee Price-Huish, “*Because the Constitution Requires It and Because Justice Demands It*”: *Specific Speech Injunctive Relief for Title VII Hostile Work Environment Claims*, 7 WM. & MARY BILL RTS. J. 193, 199–200 (1998) (arguing that the workplace warrants special protection for the victims of verbal harassment); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 197 (1990) (concluding that racist and sexist speech in a transactional setting, such as the workplace, can be regulated).

191. *See O’Connor v. Ortega*, 480 U.S. 709, 739 (1987) (Blackmun, J., dissenting) (“Many employees spend the better part of their days and much of their evenings at work.”).

192. The National Labor Relations Act recognizes the importance of free speech rights in the workplace. *See Eastex v. NLRB*, 437 U.S. 556, 556–57 (1978) (holding that communications between union and employees are protected).

193. “[R]easonable ‘time, place and manner’ regulations may be necessary to further significant governmental interests, and are permitted.” *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (holding that an anti-noise ordinance concerned with actual disruption of public schools is permissible if it furthers the state’s legitimate interest).

pression specifically for its content, that is, the ideas it expresses.<sup>194</sup> Further, whether the “captive audience” doctrine<sup>195</sup> is applicable to the workplace is seemingly a fact-intensive inquiry.<sup>196</sup> Certainly some offended employees could avert their eyes or walk away.<sup>197</sup> Furthermore, the captive audience doctrine has been applied to situations where there is little opportunity for retort,<sup>198</sup> but that is not necessarily the case with workplace harassers. Admittedly, employers can regulate workplace speech; but what Title VII achieves is not just the regulation of employee speech, but employer speech as well, at least with respect to sexist and racist employers. Thus, it is not necessarily just the employees’ viewpoints which are censored, but potentially the employer’s viewpoints as well. However, being bigoted and biased is permissible, so long as those prejudices are not *played out* in the workplace.

### B. Speech Incidental to Conduct

First Amendment jurisprudence recognizes a speech/conduct dichotomy with respect to communication, particularly symbolic

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194. Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of “Political Correctness”: First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789, 803–04 (1995) (arguing that the use of Title VII to proscribe speech on matters of public concern in hostile environment cases is an unconstitutional content-based restriction).

195. The captive audience doctrine may serve to limit free speech rights when the intended recipients of the message do not wish to receive it, and yet lack the freedom to avoid it. *See, e.g.*, *Kovacs v. Cooper*, 336 U.S. 77, 86–89 (1949) (upholding a restriction on loud and raucous sound trucks); *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 737–38 (1970) (upholding a statute which allowed recipient of advertisements believed to be sexually provocative to instruct the Post Office to direct the mailer to cease sending such advertisements).

196. *See Balkin, supra* note 143, at 2313 (stating that even if the realities of the workplace may create captive-audience situations, that does not mean that the workplace should be a First Amendment-free zone); *Berg, supra* note 146, at 971–72 (opining that the captive audience doctrine alone cannot justify restriction on speech unless it intrudes into a person’s home); *Browne, supra* note 142, at 517–19 (arguing that the captive audience doctrine cannot justify Title VII’s regulation of workplace speech); *Oring & Hampton, supra* note 143, at 142–43 (stating that an extension of the captive audience doctrine, which has largely been confined to one’s home, to the workplace would represent a vast expansion); *Robbins, supra* note 194, at 798 (arguing that the captive audience doctrine may be inapplicable to the workplace since the majority of Supreme Court justices have never applied the theory outside the home environment).

197. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (invalidating an ordinance that prohibited the showing of nudity in certain drive-in movies); *Cohen v. California*, 403 U.S. 15, 20–21 (1971) (reversing a conviction for wearing a jacket in a courthouse with the words “fuck the draft”).

198. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding an ordinance which banned political advertising in public transit busses).

speech.<sup>199</sup> The Supreme Court held in *United States v. O'Brien*<sup>200</sup> that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”<sup>201</sup> Therefore, as long as Title VII hostile environment cases incidentally burden speech and are primarily aimed at curbing discriminatory situations involving conduct, there should be no constitutional problem.<sup>202</sup> By the same token, if Title VII liability attaches primarily because of verbal expression, the regulation can hardly be said to be “incidental” under *O'Brien*.<sup>203</sup> In *R.A.V.*, Justice Scalia, writing for the majority, stated that

since words can in some circumstances violate laws directed not against speech but against conduct . . . , a particular content-based subcategory of proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech . . . Thus, for example, sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices . . . .<sup>204</sup>

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199. While the distinction between speech and conduct is not of bold contrasts, it is arguably clearer than what currently may be considered actionable harassment. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 402–03, 420 (1989) (holding that burning the flag is protected); *Spence v. Washington*, 418 U.S. 405, 409–10, 414 (1974) (ruling that affixing peace symbol to American flag is protected activity); *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 505, 514 (1969) (holding that wearing black arm bands in protest to the Vietnam war is protected).

200. 391 U.S. 367 (1968).

201. *Id.* at 376. *See* Randall, *supra* note 90, at 1000–02 (arguing that the *O'Brien* test justifies restriction on speech in hostile environment cases).

202. Randall, *supra* note 90, at 1000–01. In reality this result seems the norm, since a study of Title VII sexual harassment cases revealed that “[s]uccessful cases are likely to involve sexualized conduct directed at individual victims.” Juliano & Schwab, *supra* note 56, at 549 (emphasis added).

203. Jeffrey A. Steele, Comment, *Fighting the Devil with a Double-Edged Sword: Is the Speech-Invoked Hostile Work Environment Hostile to O'Brien?*, 72 U. DET. MERCY L. REV. 83, 139 (1994). *See also* Wertheimer, *supra* note 158, at 798 (discussing the speech/conduct distinction in the context of the “fighting words” doctrine). *But see* O. Lee Reed, *The State Is Strong but I Am Weak: Why the “Imminent Lawless Action” Standard Should Not Apply to Targeted Speech That Threatens Individuals with Violence*, 38 AM. BUS. L.J. 177, 196–97 (2000) (arguing that targeted and threatening intimidations may be “‘brigaded’ with conduct to such an extent that they are no longer the ‘pure speech’ that the First Amendment protects”).

204. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (citations omitted). *See also* DeAngelis v. El Paso Mun. Police Officers Ass’n, 51 F.3d 591, 597 n.7 (5th Cir. 1995) (holding that conduct not targeted on the basis of its expressive content may be regulated with respect to sexually derogatory “fighting words,” but that does not mean that Title VII trumps First Amendment speech rights).



Likewise in *Wisconsin v. Mitchell*,<sup>205</sup> the Court asserted by way of example that Title VII was a content-neutral regulation of *conduct*.<sup>206</sup>

This distinction, however, should not be a global one but rather a fact-specific one.<sup>207</sup> In other words, just because Title VII in general is aimed at discriminatory conduct, it does not mean that it is permissible for violations to embrace situations which substantially involve speech. That is, in order to violate Title VII, *each* alleged hostile environment case should involve discriminatory conduct or treatment as the *substantial* factor. A permissible result for protected expression in such circumstances would be to provide evidence of discriminatory animus, and to be persuasive in a finding of disparate treatment as well. It is not sufficient that Title VII is facially valid; it must be valid *as applied* as well. As the Third Circuit stated in striking down a school district's anti-harassment policy as being facially invalid in violation of the First Amendment,

There is . . . no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications.<sup>208</sup>

By regarding actionable conduct as the substantial factor in determining the severity and pervasiveness of the hostile environment, and by requiring conduct rather than speech to be of primary importance in evaluating the harassment, Title VII is properly aimed at discriminatory *treatment*, and First Amendment values are preserved.<sup>209</sup>

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205. 508 U.S. 476 (1993). *Mitchell* involved a state statute that enhanced penalties for hate crimes, which the Court characterized as being aimed at "conduct unprotected by the First Amendment." *Id.* at 487.

206. *Id.*

207. The test for determining whether conduct was sufficiently communicative is fact-specific, based upon the actor's intent to convey a message and the likelihood that it would be understood by those who viewed it. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

208. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (citations omitted).

209. As Justice Douglas, a First Amendment absolutist, once noted, "Life in this crowded modern technological world creates many offensive statements and many offensive deeds. There is no protection against offensive ideas, only against offensive conduct." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 71 (1973) (Douglas, J., dissenting).

Of course, it is permissible and preferable for employers to prohibit the use of pejorative language, repulsive expletives, or hurtful epithets on their own initiatives.<sup>210</sup> It is certainly desirable for employers to curb harassing behavior *and words* in the workplace, even derogatory verbiage that is critical of sexual orientation, which currently is not embraced by Title VII. But an employer policy establishing even a general civility code is far different from federal law imposing a less exacting, but still intolerably ambiguous, standard. Given the ambiguity that currently exists in what are perceived to be the parameters of actionable harassment cases, it is critical that the Court etch a bright line, which hopefully will center upon actionable conduct as being a *substantial factor* in the creation of the hostile environment, with a keen eye to the resulting change in conditions of employment. Such clarity is crucial because of the substantial resources being committed to the litigation of such claims<sup>211</sup> and the need for effective summary judgment filtering, particularly as this theory of discrimination spreads to other statutes.

#### V. THE STANDARD AS APPLIED TO NON-SEX BASED DISCRIMINATION

The same standard, which has been developed in sexual harassment cases, should translate into other Title VII harassment claims,<sup>212</sup> including the entity liability standards announced in *Ellerth* and *Faragher*.<sup>213</sup> Recently, however, courts have also extended the law of hostile environment discrimination to other statutes such as the ADEA and the ADA. Yet, would there be more or less likelihood of success in a hostile environment case based upon age, disability, religion, national origin, or race, as opposed to sex, if the standard focused in *substantial* part on conduct rather than verbal expression? In other words, notwithstanding the potential for soured romantic relationships between co-workers<sup>214</sup> and perhaps the “greater potential for misunderstandings between men and women,”<sup>215</sup> is conduct more likely to be an inherent component of sexual hostile environment cases than in other types which may be created primarily through verbal harassment? Is sexual touching and intimidation, though actionable,

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210. Employers have the right to impose their own anti-harassment policies. Peirce, *supra* note 143, at 131 n.21. Cf. Volokh, *supra* note 84, at 637 (stating that employers may, out of ignorance, refuse to suppress harassing conduct leading to under-enforcement of Title VII cases). Such a policy choice would doubtless make the workplace more civilized and professional, and likely more productive. Beiner, *supra* note 12, at 134.

211. One study found that almost seventy percent of sexual harassment claims “only include a hostile environment claim, while another 22.5% combine a hostile environment claim with a *quid pro quo* claim.” Juliano & Schwab, *supra* note 56, at 565.

sufficiently subtle such that it is able to covertly exist in a workplace, whereas conduct directed at other forms of discrimination is more overt and less likely to be tolerated?<sup>216</sup> The next section will provide an overview of other types of harassment cases by examining some illustrative examples.

### A. ADEA Harassment

Some courts recognize hostile environment claims under the ADEA,<sup>217</sup> even though the 1993 proposed EEOC guidelines, which included not only the Title VII protected classes but age and disability as well, were withdrawn and never formally adopted.<sup>218</sup> In *Crawford v. Medina General Hospital*,<sup>219</sup> the Sixth Circuit was the first federal appeals court to give approval to such claims of discrimination based upon

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212. *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 436 n.2 (2d Cir. 1999) (noting that the same standards apply to both race-based and sex-based hostile environment claims). Likewise, courts in sexual harassment cases have drawn upon standards developed in cases involving racial harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998). See generally L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819 (1997) (recognizing legitimacy in drawing analogies between race and sex hostile environment cases). Cf. Robert J. Gregory, *You Can Call Me "Bitch" Just Don't Use the "N-Word": Some Thoughts on Galloway v. General Motors Service Parts Operations and Rogers v. Western-Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741 (1997) (arguing that courts tend to resolve ambiguities in favor of the claimant more in hostile environment cases involving race than those involving sex).

213. Wright, *supra* note 62, at 17, 22 (explaining that the decisions of *Ellerth* and *Faragher* have been applied to racial discrimination cases as well as sexual harassment claims).

214. Hager, *supra* note 42, at 380; see also DENNIS M. POWERS, *THE OFFICE ROMANCE* 40 (1999) (examining in part the coalescence of the law of romance and the law of harassment).

215. Wright, *supra* note 62, at 30.

216. Judge Posner characterized sexual harassment as being largely "invisible" to persons other than the victim and harasser. *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 509 (7th Cir. 1997) (Posner, J., dissenting). Judge Posner also noted that romantic encounters in the workplace often begin well and then turn ugly. *Id.* at 513. Detecting the dynamics and nuances of such relationships, which the parties desire to keep personal in some instances, is not easy, and, even in cases of rebuffed advances, not as obvious as racial and religious hostility.

217. For an overview of the statute's applicability to age discrimination claims, see Julie Vigil, *Expanding the Hostile Environment Theory to Cover Age Discrimination: How Far Is Too Far?*, 23 PEPP. L. REV. 565 (1996). See also Margaret M. Gembala, Note, *ADEA and the Hostile Work Environment Claim: Are the Circuit Courts Dragging Their Feet at the Expense of the Harassed Older Worker?*, 7 ELDER L.J. 341, 345 (1999) (advocating universal acceptance of hostile environment claims under the ADEA).

218. To examine the proposed guidelines, see Gembala, *supra* note 217, at 358-60. The potential effect on religious expression if the proposed guidelines were adopted proved to be the most controversial. *Id.* at 359-60. For an overview of the debate, see Russell S. Post, Note, *The Serpentine Wall and the Serpent's Tongue: Rethinking the Religious Harassment Debate*, 83 VA. L. REV. 177 (1997).

219. 96 F.3d 830 (6th Cir. 1996).

age, although some district courts had previously adopted the theory in age-based claims.<sup>220</sup> In affirming the district court's grant of summary judgment for the defendant, the court held that "in light of the ADEA's employment of the 'terms, conditions, or privileges of employment' language, we have no doubt that a hostile work environment claim may be stated."<sup>221</sup> Other circuits, such as the Second,<sup>222</sup> Seventh,<sup>223</sup> Ninth,<sup>224</sup> and Tenth<sup>225</sup> have hinted that such claims are cognizable under the ADEA.

Courts that recognize the viability of such claims tend to follow the precedent established under Title VII. For example, in *Burns v. AAF-McQuay, Inc.*,<sup>226</sup> the Fourth Circuit echoed what the Sixth Circuit announced in *Crawford* as the appropriate prima facie case:

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220. *Id.* at 833–34. For some examples of district courts that have previously adopted this theory, see *Eggleston v. S. Bend Cmty. Sch. Corp.*, 858 F. Supp. 841, 847 (N.D. Ind. 1994) (supporting the viability of a hostile environment claim under the ADEA); *Spence v. Md. Cas. Co.*, 803 F. Supp. 649, 671–72 (W.D.N.Y. 1992), *aff'd*, 995 F.2d 1147 (2d Cir. 1993) (assuming that a claim is available under the ADEA but not supportable on facts for respondeat superior liability); *Drez v. E.R. Squibb & Sons, Inc.*, 674 F. Supp. 1432, 1436 (D. Kan. 1987) (holding that the statutory language of the ADEA supports a hostile environment theory).

Some courts, in interpreting state or local civil rights acts in accordance with Title VII, have recognized such claims as well. *See, e.g., Daka, Inc., v. Breiner*, 711 A.2d 86, 88 (D.C. 1998) (upholding the jury's finding that an age-related hostile work environment existed under the D.C. Human Rights Act); *Kelly v. Bally's Grand, Inc.*, 667 A.2d 355, 359 (N.J. Super. Ct. App. Div. 1995) (adapting New Jersey's sexual harassment analysis to fit an age discrimination claim).

221. *Crawford*, 96 F.3d at 834.

222. *Brennan v. Metro. Opera Ass'n*, 192 F.3d 310, 318 (2d Cir. 1999) (holding that the analysis for hostile environment is the same under Title VII and the ADEA); *Hatter v. N.Y. Hous. Auth.*, 165 F.3d 14, No. 97-9351, 1998 U.S. App. LEXIS 27571, at \*4 (2d Cir. Oct. 22 1998) (unpublished opinion) (stating that damages are not recoverable under the ADEA even if plaintiff could establish a hostile environment); *Spence*, 995 F.2d at 1158 (holding that because plaintiff could not point to any evidence of harassment and the company tried to accommodate his disability, summary judgment dismissing his ADEA claim was proper).

223. *Young v. Will County Dep't of Public Aid*, 882 F.2d 290, 294 (7th Cir. 1989) (affirming summary judgment for defendant by applying *Meritor*). The appeals court stated that, while viable, hostile work environment claims applied in the context of age discrimination are rare. *Id.*; *see also Bennington v. Caterpillar Inc.*, 275 F.3d 654, 660 (7th Cir. 2001) (assuming that a hostile environment claim is viable under the ADEA, but finding no proof that alleged offensive conduct was discriminatory); *Halloway v. Milwaukee County*, 180 F.3d 820, 827–28 (7th Cir. 1999) (holding that there was insufficient evidence that alleged harassment was based upon age).

224. *Sischo-Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991) (stating that violations of Title VII and the ADEA may be shown by proof of a hostile environment).

225. *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998) (holding that age-related comments were merely stray remarks insufficient to establish pretext); *see also Holmes v. Regents of the Univ. of Colo.*, No. 98-1172, 1999 U.S. App. LEXIS 8710, at \*21–\*22 n.6 (10th Cir. May 7, 1999) (assuming without deciding that a hostile environment claim could be advanced under the ADEA).

226. 166 F.3d 292 (4th Cir. 1999).

In order to make out a claim for hostile environment under the ADEA, Burns would be required to show (1) that she is at least 40 years old; (2) that she was harassed based on her age; (3) that the harassment had the effect of unreasonably interfering with her work, creating an environment that was both objectively and subjectively hostile or offensive; and (4) that she has some basis for imputing liability to her employer.<sup>227</sup>

The court concluded, however, that since the only comments attributed to the plaintiff's age were inquiries concerning her plans for retirement, a reference to her acting like a child, and perhaps a comment that she did not fit in, she failed to provide sufficient evidence of a hostile environment.<sup>228</sup>

Unfortunately, it seems that, like the Fourth Circuit, appeals courts that have considered ADEA harassment claims have focused in substantial part on words being a pattern of conduct rather than the defendant's actions, even though some claims have included allegations of disparate treatment. For example, in *Breeding v. Arthur J. Gallagher & Co.*,<sup>229</sup> the Eighth Circuit concluded that there was insufficient harassment on the basis of age because there were only two specific comments made by supervisors that related to her age which were not sufficiently derogatory or demeaning.<sup>230</sup> In *Rivera-Rodriguez v. Frito Lay Snacks Caribbean, Inc.*,<sup>231</sup> the First Circuit concluded that a reasonable jury could find that the plaintiff was subjected to a hostile working environment:

On six separate occasions, Frito Lay's president, its Latin American Region President, and/or the Director Human Resources [sic] for the Caribbean made seemingly derogatory, age-related statements about Rivera. Because a question of fact exists over whether these comments created a hostile work environment, the district court erred in granting Summary Judgment on Rivera's age-based, hostile-work-environment claim.<sup>232</sup>

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227. *Id.* at 294.

228. *Id.* at 295.

229. 164 F.3d 1151 (8th Cir. 1999).

230. *Id.* at 1159. A supervisor allegedly inquired, "How much longer do you want to work? . . . [W]e know you are old and you are not going to be here that much longer." *Id.* at 1155. Also, the plaintiff claimed that she was called old enough to be someone's mother, that she was constantly badgered about errors, inadequately trained, provided out-dated equipment, and improperly denied a raise. *Id.*

231. 265 F.3d 15 (1st Cir. 2001).

232. *Id.* at 25.

Likewise, in *EEOC v. Massey Yardley Chrysler Plymouth*,<sup>233</sup> the Eleventh Circuit denied the defendant's appeal from a jury verdict on the grounds that the evidence presented was insufficient as a matter of law.<sup>234</sup> In that case the plaintiff was regularly called, inter alia, "an old fat bag," was told that she had "saggy, baggy boobs," and was asked whether she was "having any hot-flashes."<sup>235</sup> While the verbal abuse was arguably substantial, the only attendant conduct of which the plaintiff complained was that her office was in a mess upon her return from vacation "with new files and mail strewn around, instead of stacked neatly on her desk."<sup>236</sup>

On the other hand, in *Crawford*, plaintiff alleged that several "old age remarks" had been made by her supervisor and co-workers, including that "women over 55 should [not] be working," and that "old people should be seen and not heard."<sup>237</sup> She further alleged that the office was divided by age and that she had been excluded from certain functions.<sup>238</sup> The appeals court determined that summary judgment for defendant was appropriate because, aside from those remarks, there was little evidence to suggest that hostility in the workplace was the product of age-based bias.<sup>239</sup> More importantly, the court specifically noted that "Crawford's complaints are of 'mere offensive utterance[s],' as opposed to physically threatening or humiliating conduct."<sup>240</sup> If a bright line test established liability for harassment based substantially upon conduct, with comments supplying the context for the behavior, none of these claims should have succeeded. That is not to say that hostile behavior in the workplace, which is directed at older workers because of their age, cannot occur. Indeed, that is precisely what the ADEA, if it is construed as embracing harassment claims, should embrace. It should embrace disparaging remarks, however frequently they are uttered, and however repugnant they are to reasonable persons.

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233. 117 F.3d 1244 (11th Cir. 1997).

234. *Id.* at 1249.

235. *Id.* at 1247 n.2.

236. *Id.* at 1247-48.

237. *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 832, 836 (6th Cir. 1996).

238. *Id.* at 832-33.

239. *Id.* at 836.

240. *Id.* (alterations in original). The court also concluded that the social function from which Crawford was excluded was not a term or condition of employment, and that she failed to show that the alleged harassment impeded her work performance. *Id.*

### B. ADA Harassment

Courts are also recognizing the viability of hostile environment claims under the ADA.<sup>241</sup> The same analysis as that employed in Title VII claims is utilized,<sup>242</sup> although ADA causes of action exceed the aim of Title VII by requiring a reasonable accommodation in certain situations, not just equal treatment.<sup>243</sup> Although only two circuit courts of appeals have expressly recognized the existence of such a claim,<sup>244</sup> several district courts either presume it exists or recognize its existence.<sup>245</sup> Most of the circuit courts have assumed without deciding that the ADA makes hostile working environments actionable.<sup>246</sup>

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241. See Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475, 1482–98 (1994). Congress has instructed that Rehabilitation Act analysis be applied to ADA claims, and that courts have analyzed Rehabilitation Act employment discrimination claims using Title VII tests. *Id.* at 1491.

242. For example, in *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999) the court examined threats of physical violence and verbal harassment directed at a police sergeant with sleep apnea. *Id.* In following the framework announced in *Ellerth* and *Faragher*, the court concluded that no tangible employment action had occurred to trigger the employer's liability for the harassment by a supervisor. *Id.* at 805–06. Further, in judging the totality of the circumstances the court concluded that there had not been a change in employment conditions as a result of a severe and pervasive hostile environment, relying in part on the responsiveness of the employer to complaints of co-worker harassment. *Id.* at 806–07.

243. For a discussion of the trend and an examination of the cases addressing the issue, see Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575 (2002) (recognizing that this distinction may have ramifications for ADA hostile environment claims); see also S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603 (2001) (arguing that some transmutation of Title VII analogy proves useful in ADA cases, but courts must also appreciate the subtle differences between the types of discrimination).

244. See Marcia Coyle, *New Tool for Job Bias Suits: Two Circuits Say the ADA Covers Hostile Work Environments*, NAT'L L.J., May 14, 2001, at A1.

245. See, e.g., *Hiller v. Runyon*, 95 F. Supp. 2d 1016, 1023 (S.D. Iowa 2000); *Johnson v. City of Mason*, 101 F. Supp. 2d 566, 577 (S.D. Ohio 2000); *Vendetta v. Bell Atl. Corp.*, No. 97-4838, 1998 U.S. Dist. LEXIS 14014, at \*27–\*28 (E.D. Pa. Sept. 8, 1998); *Rodriguez v. Loctite P.R., Inc.*, 967 F. Supp. 653, 662–63 (P.R. 1997); *Hendler v. Intelcom U.S.A., Inc.*, 963 F. Supp. 200, 208 (E.D.N.Y. 1997); *Hudson v. Loretex Corp.*, No. 95-CV-844, 1997 U.S. Dist. LEXIS 4320, at \*6–\*7 (N.D.N.Y. Apr. 2, 1997); *Gray v. Ameritech Corp.*, 937 F. Supp. 762, 771 (N.D. Ill. 1996); *McClain v. Southwest Steel Co.*, 940 F. Supp. 295, 301 (N.D. Okla. 1996); *Fritz v. Mascotech Auto. Sys. Group*, 914 F. Supp. 1481, 1492 & n.6 (E.D. Mich. 1996); *Henry v. Guest Servs., Inc.*, 902 F. Supp. 245, 252 n.9 (D.C. 1995), *aff'd*, 98 F.3d 646 (D.C. Cir. 1996); *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1106 (S.D. Ga. 1995); *Mannell v. Am. Tobacco Co.*, 871 F. Supp. 854, 860–861 (E.D. Va. 1994).

246. See, e.g., *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1252, 1256 (10th Cir. 2001) (finding insufficient evidence of disability); *Casper v. Gunitite Corp.*, No. 99-3215, 2000 U.S. App. LEXIS 16241, at \*12–\*13 (7th Cir. July 11, 2000) (finding no evidence that alleged harassment was disability-based while noting that the cause of action nonetheless “appears” to exist); *Conley v. Vill. of*

In *Flowers v. Southern Regional Physician Services, Inc.*,<sup>247</sup> the Fifth Circuit concluded that a claim for disability-based harassment is cognizable under the ADA.<sup>248</sup> The court further concluded that the plaintiff, who was HIV-positive, had presented sufficient evidence to support the jury's finding of hostile environment harassment.<sup>249</sup> In order to succeed on a disability-based harassment claim, the appeals court determined that the plaintiff must prove:

- (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action.<sup>250</sup>

Instead of proffering verbal abuse as evidence, the plaintiff, who was discharged, relied primarily on claims of disparate treatment and changes in her supervisor's attitude once she discovered that the plaintiff was HIV-positive.<sup>251</sup>

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Bedford Park, 215 F.3d 703, 712–13 (7th Cir. 2000) (noting that the actions taken were neither severe, pervasive, nor abusive); *Walton v. Mental Health Ass'n*, 168 F.3d 661, 666–67 (3d Cir. 1999) (asserting that the comments and actions complained of were not sufficiently severe or pervasive); *Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 725, 728 (8th Cir. 1999) (stressing that the obligation to make a reasonable accommodation does not extend to providing an aggravation-free environment, but declining to decide the cause of action question); *Vollmert v. Wis. Dep't of Transp.*, 197 F.3d 293, 297 (7th Cir. 1999) (holding that allegations of being berated and criticized fell well below the requirements for a hostile environment); *Wallin v. Minn. Dep't of Corr.*, 153 F.3d 681, 688 (8th Cir. 1998) (holding that alleged incidents were not sufficiently severe or pervasive); *Keever v. City of Middletown*, 145 F.3d 809, 813 (6th Cir. 1998) (affirming the decision that the facts failed to establish severe hostile environment); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998) (finding that the harassment argument was without merit while commenting about whether the cause of action applies).

247. 247 F.3d 229 (5th Cir. 2001). For an examination of the case, see Melinda Slusser, Note, *Flowers v. Southern Regional Physician Services: A Step in the Right Direction*, 33 U. TOL. L. REV. 713 (2002).

248. *Flowers*, 247 F.3d at 235. Previously, in *McConathy v. Dr. Pepper/Seven-Up Corp.*, 131 F.3d 558 (5th Cir. 1998), the Fifth Circuit declined to recognize or reject an ADA cause of action based on hostile environment. *Id.* at 563. However, the court stated that if it did recognize one, it would be modeled after a Title VII harassment claim. *Id.* It thereby concluded that the plaintiff failed to state a cause of action because the plaintiff only alleged remarks which were merely insensitive and rude, and not sufficiently hostile. *Id.* at 563–64.

249. *Flowers*, 247 F.3d at 236.

250. *Id.* at 235–36.

251. For example, after her status was discovered, she was subjected to increased random drug tests, was written up repeatedly, and was twice placed on a 90-day probation. *Id.* at 237.



In contrast, the Fourth Circuit in *Fox v. General Motors Corp.*<sup>252</sup> recognized the availability of a cause of action under the ADA for a hostile working environment<sup>253</sup> and placed more weight on plaintiff's evidence of verbal harassment.<sup>254</sup> The plaintiff, who had requested an accommodation for his limited physical abilities, was often berated with coarse language by his supervisors, such as being called "handicapped MFs," being asked "[h]ow in the F— do you take a S-H-I-T with these restrictions?," and being referred to as one of the "911 hospital people."<sup>255</sup> More importantly, however, he was ostracized and segregated with other disabled employees at the "light-duty table," placed at a table that aggravated his back injury, and repeatedly requested to perform tasks that he could not accomplish because of his injury.<sup>256</sup> The court upheld the jury's finding of a sufficiently severe and pervasive hostile working environment, concluding that the evidence was "not of a few isolated incidents of harsh language, teasing, or insensitivity, but rather of regular verbal harassment and occasional physical harassment over a period of nearly ten months directed at Fox because of his disability."<sup>257</sup> While the court characterized the conduct as merely "occasional,"<sup>258</sup> the conduct element of this case could nevertheless be characterized as "substantial" because of the physical harm thereby caused.

### C. Religious Harassment

Like the ADA, Title VII has been interpreted to require employers to refrain from discriminating on the basis of religion, and also to provide reasonable accommodation in certain circumstances for the practice of religious observances.<sup>259</sup> There are two potential ways in which a hos-

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252. 247 F.3d 169 (4th Cir. 2001).

253. *Id.* at 176.

254. *Id.* at 179–80.

255. *Id.* at 173–74 (alteration in original).

256. *Id.* at 173. Such conduct, which partially resulted in physical harm, is akin to touching of an offensive nature where consent has not been validly obtained.

257. *Id.* at 179.

258. *Id.*

259. However, the burden on employers is less under Title VII than in ADA cases. The employer is required to make an accommodation so long as it does not result in undue hardship, defined as imposing no more than a de minimis cost. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 77 (1977) (holding that the employer made reasonable accommodations to the employee's religious needs and that other alternatives amounted to undue hardship); *see also Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68–69 (1986) (holding that an employer does not have a duty to accept an employee's suggestion for accommodation as long as it provides other reasonable means). The EEOC Guidelines provide specific examples of accommodations in this context. 29 C.F.R. §

tile environment can arise in discrimination cases based upon religion: 1) by the same manner in which other such cases arise, that is, by creating an abusive environment through pervasive ridicule and intimidation based upon the religion of an employee<sup>260</sup> and/or 2) by a supervisor or co-worker attempting to intimidate an employee into accepting religious practices, that is, by overly-aggressive proselytizing.<sup>261</sup> In order to establish a hostile environment claim, a plaintiff must show that s/he was subjected to harassment based upon religion, that the harassment was subjectively and objectively severe or pervasive enough to alter the conditions of employment and create an abusive working environment, and that the employer knew of the harassment.<sup>262</sup>

With respect to the first category of hostile environments, some courts have focused on the importance of verbal harassment in finding a sufficiently abusive environment.<sup>263</sup> For example, in *Shanoff v. Illinois Department of Human Services*,<sup>264</sup> the Seventh Circuit concluded that the plaintiff was subjected to six rather severe instances of harassment by his supervisor over a four-month period, including anti-Semitic remarks and references to his ethnicity and religion made in an intimidat-

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1605.2 (2003) (suggesting voluntary substitutes, flexible scheduling, and lateral transfers as options).

260. Often courts hold that the language does not rise to a pervasive level. See *Freedman v. MCI Telecomm. Corp.*, 255 F.3d 840, 848 (D.C. Cir. 2001) (holding that an alleged nasty attitude by the supervisor coupled with a comment about a yarmulka is insufficient to establish an atmosphere of hostility); *Hafford v. Seidner*, 183 F.3d 506, 514 (6th Cir. 1999) (stating that the alleged mocking of a Muslim greeting and contemptuous comments regarding plaintiff's faith did not amount to discriminatory changes in employment, but rather were a form of simple teasing); *Ngeun-juntr v. Metro. Life Ins. Co.*, 146 F.3d 464, 467 (7th Cir. 1998) (declining to find discrimination where alleged offensive comments about Buddhists were found to be isolated); *Shabat v. Blue Cross Blue Shield*, No. 96-7638, 1997 U.S. App. LEXIS 5133, at \* 3-4 (2d Cir. Mar. 18, 1997) (finding that anti-Semitic incidents were relatively few and not objectively hostile); see also *Theresa M. Beinert & John M. A. DiPippa, Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577, 594-628 (1997) (discussing three potential types of hostile environment claims involving religion).

261. Examples include the daily broadcast of prayers over an intercom system and the placement of religious articles or verses in work-related documents, along with religiously-themed comments and criticisms of others not of the same persuasion. *Volokh, supra* note 84, at 630-31.

262. *Featherstone v. United Parcel Servs., Inc.*, No. 94-2331, 1995 U.S. App. LEXIS 12518, at \*15 (4th Cir. May 23, 1995), *accord* *Risinger v. Ohio Bureau of Workers' Comp.* 883 F.2d 475, 484 (6th Cir. 1990). However, some courts require that the harassment be pervasive and regular for religious discrimination rather than severe and pervasive. *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 293 (3d Cir. 1999).

263. See *Weiss v. United States*, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (finding that continuous anti-Semitic remarks and threats violated plaintiff's right to non-discriminatory terms and conditions of employment); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (finding that anti-Semitic verbal harassment and discharge is discriminatory based on religion).

264. 258 F.3d 696 (7th Cir. 2001).

ing manner, in addition to allegations of disparate treatment based on the same criteria, which were designed to hinder his career.<sup>265</sup> However, verbal abuse is not always necessary for a finding of a hostile environment. In *Abramson v. William Paterson College of New Jersey*,<sup>266</sup> the plaintiff primarily alleged changes in the terms of her employment status based on differential treatment because of her adherence to the tenets of Orthodox Judaism, the totality of which resulted in a hostile working environment.<sup>267</sup>

The second category of hostile working environments poses the greater threat of a constitutional conflict because an employer may not only censor the speech of an employee but also restrict an employee's free exercise of religion.<sup>268</sup> In *Venters v. City of Delphi*,<sup>269</sup> the plaintiff complained that her born-again supervisor, the police chief, continually chastised her about repenting and abandoning an immoral lifestyle.<sup>270</sup> He also threatened her with discharge if she did not mend what the chief considered to be her sinful ways.<sup>271</sup> The Seventh Circuit concluded that unabated lectures at work about her prospects for salvation, invasive inquiries into her personal life, and suggestions that she had sex with family members and animals, all delivered in an intimidating manner, could

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265. *Id.* at 705–06. For example, the plaintiff was referred to as a “haughty Jew” and told by his supervisor that she knew “how to put you Jews in your place.” *Id.* at 698–99.

266. 260 F.3d 265 (3d Cir. 2001).

267. *Id.* at 267, 279 (reversing summary judgment for the defendant on the religious harassment claim).

268. See Kimball E. Gilmer & Jeffrey M. Anderson, *Zero Tolerance for God?: Religious Expression in the Workplace After Ellerth and Faragher*, 42 HOW. L.J. 327, 339–40, 341–45 (1999) (discussing the tension between Title VII's anti-harassment protection and the constitutional guarantee of the free exercise of religion); Josh Schopf, *Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment*, 31 COLUM. J.L. & SOC. PROBS. 39, 40, 49, 52 (1997) (examining the tension between freedom of speech and religion, the right to be free from harassment with respect to proselytizing, and the need for legislative clarification).

Employers, out of fear of Title VII litigation, may suppress the expression of religious viewpoints in addition to other messages that might be suggestive of verbal harassment in violation of First Amendment rights. Debbie N. Kaminer, *When Religious Expression Creates a Hostile Work Environment: The Challenge of Balancing Competing Fundamental Rights*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 81, 85, 102–03, 106–07 (2000–2001) (examining the conflict between the right to religious expression and the right to be free from workplace harassment). In cases that involve a governmental employer, the clash is indeed heightened. See, e.g., *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1209–1211 (9th Cir. 1996) (invalidating an order banning religious advocacy in the workplace as unconstitutionally broad); *Brown v. Polk County*, 61 F.3d 650, 658–59 (8th Cir. 1995) (stating that an employer's directives to cease religious activities, such as morning prayer, and to remove a Bible from an employee's desk are discriminatory unless it can be shown that the activities caused disruption or interference of the work environment).

269. 123 F.3d 956 (7th Cir. 1997).

270. *Id.* at 962–63.

271. *Id.* The plaintiff was ultimately discharged. *Id.*

constitute a type of quid pro quo harassment in which employees are forced to adhere to a set of religious values or otherwise face termination.<sup>272</sup> Interestingly, the quid pro quo situation did not seem to embrace discrimination *because of* the complaining employee's religion (none was ever mentioned) in the same manner that quid pro quo harassment occurs because of sex; thus, it is not clear how this same principle translates into alleged harassment resulting from proselytizing. At any rate, while disparate treatment can certainly occur because of religion, and supposedly hostile conduct can be directed at employees because of their religion, it is likely that words will be used to establish the connection. To the extent that verbal expression explains anti-religious animus, there should be no problem. However, to establish liability based upon prolific insults and remarks about an employee's religious preferences, instead of conduct, is problematic.

#### *D. National Origin Harassment*

Discrimination based upon national origin is actionable under Title VII, and the creation of a hostile working environment is clearly recognized as a form of discrimination.<sup>273</sup> The EEOC Guidelines specify that "employers have an affirmative duty to maintain a working environment free of harassment on the basis of national origin."<sup>274</sup> They further provide,

Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.<sup>275</sup>

Since harassment is constituted by either verbal *or* physical conduct, the guidelines permit the finding of a hostile environment based

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272. *Id.* at 976. *Cf.* *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1337-39, 1341-42 (8th Cir. 1995) (stating that the termination of an employee for refusing to cover a graphic anti-abortion button during work did not violate Title VII because the employer offered a reasonable accommodation).

273. Oftentimes hostile environment claims based upon national origin will overlap race-based claims as well.

274. 29 C.F.R. § 1606.8(a) (2003).

275. *Id.* § 1606.8(b). The guidelines further specify that the employer can be responsible for the harassment of co-workers and non-employees if they knew or should have known of the harassment and failed to take immediate and appropriate corrective action. *Id.* § 1606.8(d), (e).

upon verbal expression, which has been validated in court decisions.<sup>276</sup> For example, in affirming a jury award of compensatory and punitive damages in *Miller v. Kenworth of Dothan, Inc.*,<sup>277</sup> the Eleventh Circuit concluded that a jury could reasonably find that frequent name-calling and hurling of ethnic slurs, coupled with the use of derogatory names in an intimidating manner, could have interfered with the plaintiff's job performance.<sup>278</sup> Similarly, in *McCowan v. All-Star Maintenance, Inc.*,<sup>279</sup> the Tenth Circuit reversed the district court's grant of summary judgment for the defendant based upon the repeated use of slurs and verbal abuse, some with racial and ethnic overtures, over a three-week period of employment.<sup>280</sup> However, for the environment to be actionable, the incidents of national origin slurs should be more than occasional or sporadic.<sup>281</sup>

Of course, not all national origin harassment cases focus on verbal abuse. In *Kang v. U. Lim America, Inc.*,<sup>282</sup> a Korean-American was subjected to constant tongue-lashings in addition to physical abuse.<sup>283</sup> The employer allegedly kicked the plaintiff, made him do jumping jacks, and threw a variety of objects at him, including metal ashtrays, calculators, water bottles, and files.<sup>284</sup> Likewise in *Cerros v. Steel Technologies*,<sup>285</sup> the plaintiff's tires were slashed while he was at work, he was allegedly

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276. *Ziv v. Valley Beth Shalom*, No. 97-55357, 1998 U.S. App. LEXIS 18847, at \*4 (9th Cir. Aug. 11, 1998) (finding that the use of slurs is sufficient to state a claim of hostile environment). *But see* *Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 398 (7th Cir. 1999) (determining that four ethnic slurs made over the course of a year were part of the normal dock environment and insufficient to constitute a hostile environment).

277. 277 F.3d 1269 (11th Cir. 2002).

278. *Id.* at 1276-77. The plaintiff was given several nicknames including "Julio," "Chico," and "Taco," in addition to being called "Wetback," "Spic," and "Mexican Mother F—." *Id.* at 1273.

279. 273 F.3d 917 (10th Cir. 2001).

280. *Id.* at 923-24, 927. Crew leaders referred to the plaintiffs collectively and individually by a litany of offensive terms, including "cholo-attitude motherfuckers," "nigger," "spik," "a bunch of burrito-eating motherfuckers," and "stupid, fucking Mexican." *Id.* at 923-24.

281. *See* *Torres v. County of Oakland*, 758 F.2d 147, 152 (6th Cir. 1985) (holding that one incident involving the use of derogatory language, which that was not racially charged, did not constitute discrimination, though the plaintiff was allowed to use it as evidence of discriminatory intent).

282. 296 F.3d 810 (9th Cir. 2002).

283. *Id.* at 814. The defendant, who was also Korean, called the plaintiff "stupid," "jerk," "son of a bitch," and "asshole." *Id.*

284. *Id.* The Korean employer singled out Korean workers for such relentless abuse because he expected them to work harder as Koreans, unlike the Mexicans and Americans, who the employer claimed were not hard-workers. *Id.* at 817. The court ruled that, under these facts, the case was precluded from summary judgment. *Id.* at 820.

285. 288 F.3d 1040 (7th Cir. 2001).

provided training inferior to that given to white employees, and was referred to as “brown boy,” “spic,” “wetback,” “Julio,” and “Javier.”<sup>286</sup>

Yet conduct, or disparate treatment, plus verbal abuse are not necessarily sufficient to state a cause of action for a hostile working environment in all circumstances. In one case involving a mixture of racially offensive slurs, an offensive cartoon, and allegations of disparate treatment, the Ninth Circuit held as a matter of law that there was no hostile environment.<sup>287</sup> While national origin harassment cases, like others, still seem to be a question of degree, it is clear that abusive environments caused by intimidating conduct can occur in these cases. Unfortunately, it is also clear that verbal abuse alone sometimes suffices.

### E. Racial Harassment

There is much more case law on racial harassment than the other non-sex based forms of harassment, and it is fairly clear that hostile work environment claims based upon racial harassment should be reviewed by the same standard as those based on sexual harassment.<sup>288</sup> It is also clear that verbal abuse is sufficient for a finding of harassment in many jurisdictions, and that egregious conduct often times accompanies verbal assaults, as do intimidating threats of violence and allegations of disparate treatment. In cases of verbal harassment, many jurisdictions require something akin to a “steady barrage of opprobrious racial comment”<sup>289</sup> or a working environment dominated by racial slurs, jokes, and

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286. *Id.* at 1042–43. Racist graffiti proclaiming “KKK” and “White Power” was scrawled on the bathroom wall as well, along with a suggestion that the plaintiff go back to Mexico. *Id.*; see also *Jeremiah v. Yankee Machine Shop, Inc.*, 953 P.2d 992, 994–95, 998 (Idaho 1998) (affirming the jury verdict for the Romanian plaintiff on his hostile environment claim, where he had been subjected to name-calling and physical threats, had his truck scratched, his tires deflated, and was locked in the phone cabin).

287. *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1031, 1034, 1036–37 (9th Cir. 1990); see also *Vasquez v. County of Los Angeles*, 349 F.3d 634, 644 (9th Cir. 2003) (holding that allegedly harassing incidents, only two of which contained racially-related epithets, along with some complaints of disparate treatment, are insufficient as a matter of law to create a hostile environment); *Daemi v. Church’s Fried Chicken*, 931 F.2d 1379, 1385 (10th Cir. 1991) (affirming the lower court’s conclusion that complaints of disparate treatment coupled with derogatory comments were insufficient to establish a hostile environment).

288. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67 (1986); see also *Wright-Simmons v. City of Okla. City*, 155 F.3d 1264 (10th Cir. 1998) (applying *Faragher* and *Ellerth* to a racial harassment claim). For an argument that *Faragher* and *Ellerth* should apply to non-sexual harassment Title VII claims as well, see Debra Domenick, Comment, *Title VII: How Recent Developments in the Law of Sexual Harassment Apply with Equal Force to Claims of Racial Harassment*, 103 DICK. L. REV. 765 (1999).

289. *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir. 1981).

innuendo.<sup>290</sup> For example, in *Rodgers v. Western-Southern Life Insurance Co.*,<sup>291</sup> the Seventh Circuit affirmed a back-pay award for the plaintiff who had been regularly exposed to insults and racial epithets at the hand of his supervisor, and on one occasion was told, “You black guys are too fucking dumb to be insurance agents.”<sup>292</sup> The court of appeals observed,

Perhaps no single act can more quickly “alter the conditions of employment and create an abusive working environment,” than the use of an unambiguously racial epithet such as “nigger” by a supervisor in the presence of his subordinates. The fact that black employees also may have spoken the term “nigger” does not mitigate the harm . . . a supervisor’s use of the term impacts the work environment far more severely than use by co-equals.<sup>293</sup>

More recently, in *Swinton v. Potomac Corp.*,<sup>294</sup> the Ninth Circuit upheld a one-million dollar punitive damage award; the court determined that the plaintiff, who was subjected to repeated jokes by co-workers using the word “nigger,” “Zulu Warrior,” and other snide, racially-biased comments, was the victim of a hostile working environment.<sup>295</sup> Similarly, the Fourth Circuit concluded that summary judgment was inappropriate in a case in which the plaintiff alleged that he had

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290. *Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d Cir. 1997) (holding that ten racially hostile incidents over a twenty-month period were sufficient to sustain a claim of hostile work environment); *see also Walker v. Thompson*, 214 F.3d 615, 626 (5th Cir. 2000) (reversing summary judgment for the employer and concluding that references to plaintiffs as slaves and monkeys, derisive remarks concerning their African heritage, offensive references to their hair, and the use of the term “nigger” created questions of fact regarding the existence of a hostile working environment). *But see Bolden v. PRC, Inc.*, 43 F.3d 545, 549–51 (10th Cir. 1994) (explaining that racial slurs and jokes along with expelled flatus were insufficient absent more proof of racial animus).

291. 12 F.3d 668 (7th Cir. 1993).

292. *Id.* at 671. The plaintiff was only subjected to one objectionable act in addition to the verbal abuse: the supervisor emptied the contents of his desk drawers onto the desktop when searching for something. *Id.*

293. *Id.* at 675 (citations omitted) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)). The supervisor also called the plaintiff “Rabbit,” short for “jackrabbit,” an apparent reference to his Black Southern heritage. *Id.* at 676.

294. 270 F.3d 794 (9th Cir. 2001).

295. *Id.* at 799–800, 819–20. Likewise, in *EEOC v. Beverage Canners, Inc.*, 897 F.2d 1067 (11th Cir. 1990), the appeals court affirmed the trial court’s conclusion that the managers’ racially hostile remarks were sufficiently frequent and denigrating to be actionable. *Id.* at 1070. The racial insults consisted of terms such as “ignorant niggers” and “Swahilis,” along with assertions that “blacks were meant to be slaves” and were of inferior intelligence. *Id.* at 1068 n.3. *See also Richardson v. N.Y. State Dep’t of Corr. Serv.*, 180 F.3d 426, 433, 439 (2d Cir. 1999) (holding that summary judgment was inappropriate where the supervisor referred to African-Americans as “apes or baboons,” “niggers,” “spooks,” and “Buckwheats”).

been subjected to incessant racial slurs, insults, and epithets by his employer, as had been his employer's wife, who, oddly enough, was also African-American.<sup>296</sup> While a single incident or remark will not usually trigger liability,<sup>297</sup> in some cases, an isolated occurrence, if severe, will suffice.<sup>298</sup>

More often than not, however, racial harassment claims will allege the coalescence of a pattern of racist conduct, including verbal insults, threats and discriminatory treatment. Often times, intimidating symbolic expression can set the tone for the harassing environment.<sup>299</sup> For example, in *Daniels v. Essex Group, Inc.*,<sup>300</sup> in addition to being called "Buckwheat" and having to endure racist jokes, the plaintiff was also the subject of intimidating threats and harassing conduct.<sup>301</sup> Additionally, a co-worker threatened to injure his young son, and a human-size dummy with a black head was hung in the doorway with what appeared to be blood dripping on it.<sup>302</sup>

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296. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182, 191 (4th Cir. 2001).

297. *Ross v. Kan. City Power & Light Co.*, 293 F.3d 1041, 1050-51 (8th Cir. 2002) (holding that a "one-time incident, while offensive, does not rise to the level of harassment necessary to prove a hostile environment"); *Butler v. Fed. Whalen Moving & Storage, L.L.C.*, No. 00-2876, 2001 U.S. App. LEXIS 302, at \*5, \*6 (7th Cir. Jan. 4, 2001) (holding that "a single isolated remark normally does not create a hostile work environment"); *Blocker v. Avondale Mills, Inc.*, No. 98-2582, 2000 U.S. App. LEXIS 18663 at \*6, \*7 (4th Cir. Aug. 3, 2000) (holding that a jury could have reasonably found that "racially-charged language" including "notes carrying such messages as 'N—, go home,' and 'We don't like your kind'" did not create a hostile work environment); *Clayton v. White Hall Sch. Dist.*, 875 F.2d 676, 680 (8th Cir. 1989) (holding that a "single incident" is insufficient as a matter of law to establish a Title VII violation); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1412-13 (10th Cir. 1987) (holding that "incidents that were essentially occasional and incidental" were insufficient to maintain a Title VII claim).

298. See *supra* notes 65-66, and accompanying text.

299. See *EEOC Chairwoman Responds to Surge of Workplace Noose Incidents at NAACP Annual Convention*, EEOC, at <http://eoc.gov/press/7-13-00-b.html> (July 13, 2000) (stating that the incidents of nooses being hung in the workplace increased in the late 1990s).

300. 937 F.2d 1264 (7th Cir. 1991).

301. *Id.* at 1266-67. Graffiti with the initials "KKK" and the slogan "all niggers must die" were scrawled on the bathroom walls. *Id.* at 1266. A bullet was shot into his home, although he could not prove that a co-worker had fired it. *Id.* at 1267.

302. *Id.* at 1266, 1267. The backpay award and award of attorneys' fees was affirmed by the Seventh Circuit. *Id.* at 1266. See *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 343, 345-46 (7th Cir. 1999) (holding that there was insufficient proof of discriminatory motivation even where the employer referred to plaintiff and others as "stupid black bitches," "stupid niggers," and "black cunts"); *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1506, 1511, 1515 (11th Cir. 1989) (confirming that a noose found hanging from the light fixture above plaintiff's work station on two occasions provided sufficient evidence to support jury's verdict for plaintiff); *Snell v. Suffolk County*, 782 F.2d 1094, 1096, 1098, 1103 (2d Cir. 1986) (affirming that racial epithets, slurs, derogatory literature, and harassing conduct deprived appellees of their Title VII rights). However, it is not always clear where the line should be drawn. See *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924-25 (5th Cir. 1982) (finding rather extreme pranks and epithets insufficient to show Title VII viola-



It is also not uncommon for allegations of disparate treatment to accompany verbal abuse in an alleged hostile environment based upon race. For example, the Eighth Circuit upheld a punitive damages award of \$50,000 in a case where an African-American was treated differently than similarly situated white employees, and was also called racist names and subjected to racist comments.<sup>303</sup> In a case of reverse racial harassment, the only white officer in a precinct successfully survived a motion for summary judgment for his claim that he was the victim of a hostile environment because he faced ridicule, was called “honkey,” and was unfairly treated with respect to promotion and work requirements.<sup>304</sup> Unfortunately, it sometimes seems that courts almost view the instances of disparate treatment as being distinct from the claim of a hostile environment, when all claims of unequal treatment and harassing conduct should be considered in determining whether Title VII has been violated.<sup>305</sup>

Such a coalescence of proof is exhibited by *Jackson v. Quanex Corp.*,<sup>306</sup> a case in which the plaintiff was subjected to racial slurs, racist graffiti, offensive conduct (such as the hanging of a “Black-O’ Lantern” near his work station), and different treatment with respect to the enforcement of company rules and the availability of training opportunities.<sup>307</sup> In another case described as “not a case on the cusp” but “well over the edge,” the hospital staff plaintiffs endured dozens of derogatory

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303. *Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349, 352–53, 356–57, 359 (8th Cir. 1997); *see also Allen v. Mich. Dep’t of Corr.*, 165 F.3d 405, 410–13 (6th Cir. 1999) (reversing summary judgment for defendant in a case involving racial slurs and insults, a harassing note, claims of unwarranted disciplinary action, and unusual monitoring); *Gachot v. Pulaski County Sheriff Dep’t*, No. 94-2020, 1995 U.S. App. LEXIS 2275 at \*2, \*3, \*6 (8th Cir. Feb. 8, 1995) (affirming jury award in case involving racial epithets and jokes coupled with evidence of being treated differently with respect to working conditions).

304. *Huckabay v. Moore*, 142 F.3d 233, 237, 242 (5th Cir. 1998).

305. For example, in *Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996) the appeals court cryptically announced,

Hostile environment harassment is readily distinguishable from “job status” discrimination, another type of employment discrimination that occurs when action is taken that adversely affects an employee’s job status, remuneration or benefits and it is based upon the employee’s membership in a protected class. Thus, when both harassment and “job status” discrimination claims are made, they are analyzed separately. A job status discrimination claim is not converted into a harassment claim simply because it is labeled as such.

*Id.* at 463 (citations omitted). Seemingly, hostile environment cases represent examples of disparate treatment; therefore, all instances of disparate treatment should be probative as to the ultimate issue.

306. 191 F.3d 647 (6th Cir. 1999).

307. *Id.* at 651–54. In *Jackson*, the court reversed the district court’s grant of summary judgment for the defendant. *Id.* at 659.

statements by the head of their department, who would also push and pull the plaintiffs down hallways and throw objects at them.<sup>308</sup> In the presence of the plaintiffs, the doctor would not touch Latino patients without gloves and would not touch African-American patients at all.<sup>309</sup> In these latter two cases it seems clear that the harassing conduct was a substantial factor in the creation of a hostile working environment, there was evidence that conditions of employment were affected, and the verbal abuse explains why the plaintiffs were treated in such a manner. Cases of racial harassment seem to involve conduct as a substantial factor in the creation of a hostile working environment more so than other non-sex-based claims. Unfortunately, they also seem to be more likely to succeed in those cases involving only verbal abuse.<sup>310</sup>

## VI. CONCLUSION

In sum, it seems more than odd that federal appeals courts concentrate so hard on how many times and over how long a time period an employee might be called a nasty name before upholding a substantial award of punitive damages. What happened to the old saying, "Sticks and stones may break my bones, but words can never hurt me?" It is apparently inapplicable in many jurisdictions to civil rights litigation, where instead the saying should be revised to proclaim, "Sticks and stones may break my bones, but words can get me a fairly sizeable damage award, too." The threat of a million-dollar damage award, coupled with the affirmative defense provided under *Faragher* and *Ellerth*, will inspire many employers to censor workplace speech, and that is simply not permissible under the Constitution. It often defies reason that unenlightened persons say what they do to others in the workplace; they are certainly rude, obnoxious and absolutely not politically correct. But it has not been politically correct to censor speech for over two hundred years, either. Let the employer regulate such offensive utterances, and let the offended respond as well. Alternatively, let legislators prohibit all fighting words and intimidating threats, and not just the categories targeted by civil rights legislation, should the electorate so desire.

Currently, however, as complaints of workplace harassment con-

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308. *Nieto v. Kapoor*, 268 F.3d 1208, 1212–14, 1217 (10th Cir. 2001) (affirming \$3.75 million damage award).

309. *Id.* at 1213.

310. *See Gregory*, *supra* note 210, at 748–50 (stating that while courts assert that racial epithets used in a few occasions can be found actionable, the courts seem to be less generous with such assertions in sex cases).

tinue to provide fertile ground for civil rights litigation, it seems hopelessly unclear how hostile is hostile in harassment cases. Conduct can be more intimidating, threatening and offensive than words; moreover, conduct as a form of expression is less protected than pure speech under the First Amendment and can also form the basis of an action in tort or under criminal law. If courts applied a test for hostile environment complaints, which focused on conduct as the substantial factor in finding an actionable environment with verbal expression providing the evidence of discriminatory bias, results would be more predictable and less protected expression would be censored.

While the hallmark offensive element of sexual harassment cases is often touching of a sexual nature to which consent has not been given, other forms of harassment can also involve sufficiently offensive conduct coupled with verbal expression. In workplace harassment cases, intimidating threats and sustainable allegations of disparate treatment usually accompany verbal harassment as well. It is the threats, the specific proof of situations involving disparate treatment, and the severity and pervasiveness of the abusive conduct that should be evaluated for employer liability, not just what epithets are spoken, what jokes are told, or what derogatory phrases are uttered. Ultimately, if such a bright-line test is applied, even though hostile environments involving conduct plus words exist in non-sex-based harassment claims, it seems plausible that more non-sex-based claims would be filtered out than sex-based claims because of the almost inherent compliment between touching and words in such cases (though not the non-sexual gender-based claims of harassment). But that hypothesis will remain untested as long as courts continue to count words (literally) as a critical component in the finding of workplace harassment.