

“THINKING WITHIN THE BOX”: HOW PROOF MODELS ARE USED TO LIMIT THE SCOPE OF SEXUAL HARASSMENT LAW

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I. INTRODUCTION

Audrey DeClue brought a sexual harassment claim against her employer arising out of her employer's failure to provide her with private, or any, restroom facilities.¹ She was the only woman working for the power company as a linesperson, and often found herself on worksites with no restroom within walking distance.² Her male counterparts seemingly had little problem with this situation; if nature called, they would simply relieve themselves wherever and whenever they needed.³ They took no pains to seek privacy, and, in fact, seemed to enjoy the discomfort Audrey experienced when they would urinate in her presence.⁴ These male counterparts also enjoyed looking at pornographic materials, which they kept on company trucks and brought onto company property on days the crews could not do site work due to inclement weather.⁵ They teased and harassed Audrey when she complained about the lack of restroom facilities, the unfettered urination, and the pornographic materials.⁶

Audrey alleged that the actions of her co-workers plus the company's failure to provide her with the means to relieve herself in

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1. DeClue v. Cent. Ill. Light Co., 223 F.3d 434, 436 (7th Cir. 2000).

2. *Id.*

3. *Id.*

4. DeClue v. Cent. Ill. Light Co., No. 98-1276, slip op. at 6, 13 (C.D. Ill. Dec. 9, 1999), *aff'd on other grounds*, 223 F.3d 434 (7th Cir. 2000).

5. *Id.* at 7, 13.

6. *Id.* at 6-7, 13.

private amounted to hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964.⁷ The Seventh Circuit rejected her claim, but not because Audrey had not experienced a hostile work environment or because her employer had sufficiently acted to prevent or correct this situation.⁸ Rather, a majority of the court rejected the claim because it did not believe the case was doctrinally appropriate as a claim of hostile work environment sexual harassment.⁹

The Seventh Circuit's decision was an example of a phenomenon popularly known as "thinking within the box." To think within the box is to be constrained by the familiar parameters of a problem.¹⁰ To think outside the box is to be open to ideas and concepts that expand beyond those parameters.¹¹ This difference is often illustrated through use of a puzzle that asks people to use four straight lines to connect a three-by-three array of dots.¹² People who think within the box do not see that the solution to the puzzle requires them to extend their lines beyond the perimeter of the box formed by the array of dots.¹³

Proof models in many respects lend themselves to thinking within the box. Plaintiffs must conform their allegations to a familiarly stated set of elements.¹⁴ This, in turn, may lead courts to think of claims in a categorical fashion. The case "fits" in the box or it does not. The "box" mentality poses a particular challenge for cases that raise issues at the margins of a theory. A good example is the difficulty courts had, until recently, reconciling whether harassment by persons of the same sex was actionable under Title VII.¹⁵ Having come to understand sexual harassment in anti-subordination terms, namely that the discriminatory wrong of sexual harassment was the male exercise of power to extract sex from less powerful females, some courts found same sex harassment

7. *Id.* at 6-8, 11-12.

8. *DeClue*, 223 F.3d at 436-37.

9. *Id.*

10. WAYNE A. WICKELGREN, HOW TO SOLVE PROBLEMS: ELEMENTS OF A THEORY OF PROBLEMS AND PROBLEM SOLVING 64 (1974) (referring to the typical solutions of people in the "nine dot four-line problem" as thinking within the box).

11. *Id.* at 64-65.

12. The nine-dot puzzle is a favorite creativity exercise of corporate trainers. *See, e.g.*, JOHN W. NEWSTROM & EDWARD E. SCANNELL, GAMES TRAINERS PLAY: EXPERIENTIAL LEARNING EXERCISES 269-71 (1980) (stating the objective of the puzzle as "suggest[ing] to trainees that their pre-existing mental set might constrain their capacity to learn new ideas").

13. WICKELGREN, *supra* note 10, at 64-65.

14. *See infra* note 56 and accompanying text (referring to proof models articulated for each type of harassment).

15. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (noting that "the state and federal courts have taken a bewildering variety of stances" on whether same sex sexual harassment is actionable under Title VII).

just did not fit within that box.¹⁶ The Supreme Court ultimately corrected this thinking, finding nothing in the language of Title VII to exclude these claims.¹⁷

The "box" in Audrey DeClue's case was the proof model for hostile environment sexual harassment.¹⁸ In the Seventh Circuit, that proof model has been constructed in such a way as to restrict harassment cases to a very narrow category—cases that involve sexual conduct directed at employees out of sexual desire.¹⁹ While not ruling out liability for harassment based on non-sexual acts, the standards adopted by the Seventh Circuit effectively preclude victims of non-desire based harassment from recovering under hostile environment theory.²⁰ These standards stem from the court's use of a paradigm for harassment that places sexual advances of male superiors toward female subordinates as the core concept for understanding why harassment is sex discrimination.²¹

This article addresses how proof models have been used to think within the box in sexual harassment law. Rather than approaching proof models with an eye toward the nature of the harm experienced by the plaintiff, courts have used them to restrict the application of harassment law. Part II of this article suggests that these restrictions stem in no small part from the incomplete development of sexual harassment law as a matter of doctrine. While the Supreme Court has recently addressed some important issues, and signaled its support for the proposition that harassment does not have to be of a sexual nature to be based on sex,²² it only minimally advanced the doctrinal basis for treating harassment based on sex as discrimination based on sex. The Court has failed to adequately explain what makes harassment a discriminatory wrong,

16. See, e.g., *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (holding that same sex harassment claims are never cognizable under Title VII since it "was not the type of conduct Congress intended to sanction").

17. *Oncale*, 523 U.S. at 79-80 (finding no justification for excluding same sex harassment from coverage of Title VII).

18. "Proof model" refers to the process by which a particular cause of action is litigated. Typically, in discrimination law, the proof model consists of a series of steps, or "prongs," in which the plaintiff establishes a prima facie case, the defendant raises available justification defenses, and the plaintiff must overcome those justifications. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (outlining three-prong approach to proving disparate treatment racial discrimination claims under Title VII). Sexual harassment law has its own set of proof models, which are discussed later in this article. See *infra* notes 58-60 and accompanying text.

19. See discussion *infra* Part III.

20. See discussion *infra* Part III.

21. See discussion *infra* Part III.

22. *Oncale*, 523 U.S. at 80.

leaving courts, like the Seventh Circuit, in a position to continue to justify the narrow construction of harassment law they had previously adopted.

Part III of this article examines hostile environment law in the Seventh Circuit. It demonstrates how that circuit, contrary to Supreme Court precedent, takes a categorical approach to evaluating harassment claims.²³ This approach allows the Seventh Circuit to reject the significance of alleged acts of harassment, especially those acts not involving attempts to extract sexual favors from a plaintiff. This categorical approach also provides the court with a means to refuse to consider cases as sexual harassment cases from the outset. The Seventh Circuit uses harassment proof models to suggest that cases that do not have the right “fit” should be brought under some other discrimination theory.

While this article considers hostile environment law as interpreted and applied by the Seventh Circuit, that circuit is a microcosm of the macrocosm in which plaintiffs are struggling to get courts to recognize harassment claims beyond those involving acts of a sexual nature.²⁴ Much of the Seventh Circuit’s doctrine discussed in Part III of this article was developed by Chief Judge Richard Posner, who has had, and continues to have, significant influence outside of the circuit in which he presides.²⁵

Part IV of the article challenges the Seventh Circuit’s characterization of these cases as not being sexual harassment claims, and establishes why the court’s conclusions are detrimental to a systemic understanding of the harm caused by harassment based on sex.

23. See *infra* Part III.

24. See generally Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277, 307-15 (1999) (discussing restrictive approaches to sexual harassment law in the federal courts of appeal).

25. Judge Posner is the author of RICHARD A. POSNER, *SEX AND REASON* (1992), a well-known book on the subject of sexuality and the law. He has also published law review articles on the subject of sex discrimination law, including one in which he argued that extending discrimination laws is probably unnecessary because the increased presence of women in the workforce will reduce the amount of discrimination they experience. Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1321-23 (1989). In addition to Judge Posner’s influence as an individual, the Seventh Circuit has issued a higher number of sexual harassment decisions than any other circuit, according to a recent empirical survey of all sexual harassment decisions. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 548, 575 tbl.4 (2001) (outlining total number of work place sexual harassment cases decided by each circuit during the period of 1986–1995). The survey also noted that one federal district court within the Seventh Circuit, the Northern District of Illinois, issued more than twice the number of sexual harassment decisions than any other federal district court in the United States. *Id.* at 574-75.

Finally, in Part V, the article concludes with a call to the Seventh Circuit, and others influenced by its reasoning, to recognize that proof models must be used with an eye toward the nature of the harm suffered by victims of harassment, and not simply as rigid boxes within which the plaintiff's claim must fit.

II. THE ROOTS OF THE PROBLEM: CURRENT HARASSMENT DOCTRINE HAS FAILED TO ADEQUATELY ARTICULATE WHY SEXUAL HARASSMENT VIOLATES TITLE VII

A number of prominent legal scholars have focused on the relationship of sexual harassment and sex discrimination.²⁶ In other words, why is it that harassment amounts to discrimination based on sex?²⁷ While it would seem that this should be settled doctrine by now, these scholars recognize that there has been a failure to engage in a critical examination of the issue.²⁸

Sexual harassment is not specifically addressed in Title VII.²⁹ To make sexual harassment a sexually discriminatory wrong "requires an argument."³⁰ The argument courts initially observed was that conduct, such as sexual advances, was not sexually discriminatory.³¹ Instead, the conduct was directed at the plaintiff for personal and private reasons.³² When courts subsequently recognized sexual advances as a form of sex discrimination, they premised it on what Professor Vicki Schultz calls the "sexual desire-dominance paradigm."³³ This paradigm views harassment through the lens of male supervisors who use their power to extract sexual favors from less powerful female employees.³⁴ This conduct discriminated against women because conditioning a job upon

26. See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1172 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 691-92 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1689 (1998).

27. Franke, *supra* note 26, at 691-92.

28. *Id.*; see also Schultz, *supra* note 26, at 1685-88.

29. See generally 42 U.S.C. § 2000e (2001).

30. Franke, *supra* note 26, at 702.

31. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated and remanded by*, 562 F.2d 55 (9th Cir. July 28, 1977) (table decision without reported opinion) (dismissing sexual harassment claim because supervisor's conduct was "nothing more than a personal proclivity, peculiarity or mannerism").

32. *Id.*; see also Franke, *supra* note 26, at 701 (noting early sexual harassment case law reflected a view of the workplace that rendered plaintiffs' claims as nothing more than "private 'gripes' rather than discriminatory 'grievances'").

33. Schultz, *supra* note 26, at 1686.

34. *Id.*

submission to sexual relations was “an exaction which the supervisor would not have sought from any male.”³⁵

While this rationale led courts to recognize sexual harassment as a viable cause of action under Title VII, it also put harassment doctrine into a box. The Title VII argument became a matter of intuition.³⁶ As the Supreme Court characterized the issue when it reached the Court in 1986 in *Meritor Savings Bank, FSB v. Vinson*,³⁷ it was “[w]ithout question, [that] when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”³⁸ Consequently, further discussion of the relationship was minimal. Not surprisingly, substantial doctrinal problems emerged.

A. Distinguishing *Quid Pro Quo* from Hostile Environment Harassment

One problem with reliance on the sexual desire-dominance paradigm is that courts recognized that Title VII provides for two types of sexual harassment, which they treated as distinct discrimination claims.³⁹ *Quid pro quo* claims were generally understood to include situations in which the plaintiff was presented with the sexual advances of a superior, which were refused, resulting in some type of retaliatory conduct by the employer.⁴⁰ Hostile environment claims, by contrast, include situations in which harassment based on sex is so severe or pervasive as to alter the conditions of employment and create an abusive working environment.⁴¹ This type of harassment might include sexual conduct, such as unwelcome sexual touching and sexual innuendoes, or it might include sex-based harassment, such as derogatory comments about a particular sex.⁴² The core concept articulated by courts for finding harassment to be sexually discriminatory conduct, based as it was on male desire to extract sex from females, failed to fully account

35. Barnes v. Costle, 561 F.2d 983, 989 (D.C. Cir. 1977).

36. Franke, *supra* note 26, at 692 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), which held that harassment based on sexual advances is discrimination based on sex).

37. 477 U.S. 57 (1986).

38. *Id.* at 64.

39. See, e.g., Highlander v. K.F.C. Nat’l Mgmt. Co., 805 F.2d 644, 648 (6th Cir. 1986).

40. *Id.* (describing *quid pro quo* harassment as “anchored in” employer compelling employee to choose between acceding to sex demands or suffering some tangible job detriment).

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

42. See, e.g., Williams v. Gen. Motors Corp., 187 F.3d 553, 564-65 (6th Cir. 1999) (recognizing that hostile environment sexual harassment arises out of sexual as well as non-sexual conduct); cf. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (recognizing in same sex sexual harassment cases that liability may arise for use of sex-specific, derogatory comments).

for the hostile environment type of harassment.⁴³ This result was especially true for harassment that was sex-based rather than sexual.⁴⁴

Meritor, for example, was a hostile environment case,⁴⁵ but involved a plaintiff who submitted to her supervisor's advances.⁴⁶ The Court articulated a broad standard: "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."⁴⁷ The Court then quoted the EEOC's guidelines, which provided that sexual harassment included "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."⁴⁸ Unfortunately, the Court did not delve further into the last category in the EEOC guidelines, and thus provided no doctrinal basis to explain how hostile environment that involved acts not based on sexual advances amounted to discrimination based on sex.

When the Court next addressed Title VII hostile environment sexual harassment, in *Harris v. Forklift Systems, Inc.*,⁴⁹ it simply quoted *Meritor*'s "entire spectrum" language.⁵⁰ The facts in *Harris*, however, involved conduct that was considerably more sex-based, rather than the sexual advances that had been involved in *Meritor*. The president of the company with which the plaintiff was employed made various derogatory comments about women and other statements containing sexual innuendoes.⁵¹ In rejecting *Harris*'s claim, the lower court applied

43. Schultz, *supra* note 26, at 1686.

44. *Id.* at 1686-87. Professor Schultz argues that the prevailing sexual desire-dominance paradigm both reaches too far and does not reach far enough:

[T]he paradigm is underinclusive: It omits—and even obscures—many of the most prevalent forms of harassment that make workplaces hostile and alienating to workers based on their gender. Much of what is harmful to women in the workplace is difficult to construe as sexual in design. Similarly, many men are harmed at work by gender-based harassment that fits only uneasily within the parameters of a sexualized paradigm. The prevailing paradigm, however, may also be overinclusive. By emphasizing the protection of women's sexual selves and sensibilities over and above their empowerment as workers, the paradigm permits—or even encourages—companies to construe the law to prohibit some forms of sexual expression that do not promote gender hierarchy at work.

Id. at 1689.

45. *Meritor*, 477 U.S. at 57.

46. *Id.* at 60. The case was not a traditional *quid pro quo* claim because the plaintiff submitted to the sexual advances, rather than refusing them and suffering some sort of job detriment as a result. *Id.*; see also cases cited *infra* note 61 (discussing the distinctions some courts drew as to what was sufficient to state a *quid pro quo* claim).

47. *Meritor*, 477 U.S. at 64 (citations omitted).

48. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)).

49. 510 U.S. 17 (1993).

50. *Id.* at 21 (quoting *Meritor*, 477 U.S. at 64).

51. *Id.* at 19. The harasser's conduct in *Harris* involved insults such as "You're a woman,

a standard that required plaintiffs alleging hostile environments to prove the harassing conduct caused some sort of psychological injury.⁵² The Supreme Court's opinion therefore primarily focused on why the harassment need not be so abusive as to cause psychological harm. The Court spoke in abstract terms about interference with working conditions:

A discriminatory abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.⁵³

The Court then outlined a test for abusiveness that looked at the totality of the circumstances experienced by the plaintiff: "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."⁵⁴ Unfortunately, by focusing on these abstract standards, the Court did not advance the understanding of the discriminatory wrong of hostile environment beyond its sexualized perspective.⁵⁵

Left to their own understanding, courts distinguished between the two forms of harassment in a rather formalistic way that was driven as much by concerns about employer liability as any sense of harassment doctrine. A proof model was articulated for each type of harassment.⁵⁶

what do you know[?]" and "We need a man as the rental manager," which were made in the presence of employees. *Id.* The harasser also referred to the plaintiff as "a dumb ass woman." *Id.* He once suggested in front of others that the plaintiff go with him to a hotel to negotiate a raise. *Id.* He would ask female employees to get coins from his pants pockets, and he would throw things on the ground and ask female employees to pick them up. *Id.* He would also make sexual innuendoes about the clothing they wore. *Id.*

52. *Id.* at 20.

53. *Id.* at 22.

54. *Harris*, 510 U.S. at 23.

55. Schultz, *supra* note 26, at 1711-13 (criticizing the Court's *Harris* decision for not addressing the lower court's application of sexual harassment standards that distinguished between sexual and non-sexual conduct and treated only the sexual conduct as raising hostile environment sexual harassment).

56. The Eleventh Circuit's articulation in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) of the elements of both the *quid pro quo* and hostile environment *prima facie* cases is perhaps

Quid pro quo required, among other things, that the plaintiff prove some tangible aspect of her or his job was affected by a refusal to accede to the sexual demands of a supervisor.⁵⁷ Hostile environment claims required plaintiffs to prove sexual harassment that was sufficiently severe or pervasive as to alter some term or condition of employment.⁵⁸ Litigation centered on attempts by plaintiffs to fit their cases within the rubric of one or both of these proof models. Plaintiffs tended to try to fit within the rubric of a *quid pro quo* claim, because vicarious employer liability would follow.⁵⁹ Courts, however, tended to funnel cases away from *quid pro quo* analysis,⁶⁰ by narrowing the circumstances under which a *quid pro quo* exchange would be found,⁶¹ or by heightening the level of tangible job detriment the plaintiff had to experience.⁶²

the best known. According to the Eleventh Circuit, the elements of a *quid pro quo* claim are: (1) the plaintiff was a member of a protected class; (2) the plaintiff was subjected to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the plaintiff's reaction to the harassment affected some tangible aspect of the terms and conditions of the plaintiff's employment with the defendant; and, (5) the defendant is liable through respondeat superior. *Henson*, 682 F.2d at 908-09. The elements of a hostile environment claim are: (1) the plaintiff was a member of a protected class; (2) the plaintiff was subject to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the harassment affected a "term, condition, or privilege" of employment; and, (5) the defendant is liable through respondeat superior. *Id.* at 903-05.

57. *Id.* at 908-09 (noting an employer cannot "require sexual consideration from an employee as a *quid pro quo* for job benefits") (citations omitted).

58. *Id.* at 904.

59. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998) (suggesting availability of vicarious employer liability encouraged plaintiffs to state their claims as *quid pro quo* claims and put "expansive pressure on the definition" of *quid pro quo*).

60. Marlisa Vinciguerra, Note, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1725-27 (1989).

61. Not all courts recognized unfulfilled threats or submission to threats as *quid pro quo* harassment. See, e.g., *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (rejecting a plaintiff's claim as mere "saber rattling" despite her allegations that she was raped by a supervisor and then threatened with job reprisals if she reported it). The court's decision in *Gary* was influenced by its concern about the scope of employer liability. *Id.* Without fulfillment of a threat, the court was unwilling to consider the supervisor to be acting as an agent of the employer. *Id.* In addition, the Fourth Circuit articulated another narrow view of *quid pro quo* harassment, by requiring that any conditioning of a job detriment on acquiescence to sexual advances must be proven by strong implication. *Spencer v. Gen. Elec. Co.*, 894 F.2d 651, 659 (4th Cir. 1990), *overruled on other grounds by Ellis v. Dir.*, CIA, No. 98-2481, 1999 U.S. App. LEXIS 21638 (4th Cir. Sept. 10, 1999) and *Pesso v. Montgomery Gen. Hosp.*, No. 98-1978, 1999 U.S. App. LEXIS 10207 (4th Cir. May 24, 1999). Cf. *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 649 (6th Cir. 1986) (requiring the plaintiff to prove that she understood the alleged sexual advance to have "serious implications").

62. See, e.g., *Reinhold v. Virginia*, 151 F.3d 172, 175 (4th Cir. 1998) (holding the assigning to plaintiff of extra work, giving her inappropriate work assignments not included in her job description, and denying her the opportunity to attend a professional conference did not amount to "a significant change in employment status") (citation omitted); see also *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 187 (6th Cir. 1992) (remanding case with suggestion that temporary

At the same time, some courts tended to inject *quid pro quo* standards into hostile environment claims.⁶³ For example, when a supervisor was the alleged harasser, the presence of economic detriment to the plaintiff appeared to be a key to a successful hostile environment claim.⁶⁴ Courts also often inadequately recognized the impact of nonsexualized behavior on working conditions and job opportunities.⁶⁵ Rather than follow *Harris*'s direction to consider the totality of the circumstances, these courts tended to disaggregate the alleged acts and treat them discretely, which allowed the courts to characterize the acts as too innocuous or sporadic to support a finding of a hostile environment.⁶⁶

In 1998, *Burlington Industries, Inc. v. Ellerth*⁶⁷ eased the formality. In *Ellerth*, the Court agreed that the distinction between *quid pro quo* and hostile environment was relevant as to the standard of employer liability, but it moved the focal point away from the proof models and over to the consequences suffered by the plaintiff.⁶⁸ If the plaintiff suffered a tangible employment action as a result of the harassment, the employer would be vicariously liable.⁶⁹ Even if the plaintiff did not suffer a tangible employment action, then assuming the conduct was severe or pervasive, the employer would be liable if the employer itself acted negligently in failing to prevent and correct the harassment and the plaintiff unreasonably failed to avail himself or herself of preventative or corrective opportunities made available by the employer, or to otherwise avoid the harm.⁷⁰ After *Ellerth* and its companion case, *Faragher v. City*

transfer may have imposed only a *de minimis* burden that would not support a *quid pro quo* harassment claim).

63. Vinciguerra, *supra* note 60, at 1730-31.

64. *Id.* at 1731 & n.93 (noting cases in which courts integrate *quid pro quo* theory into hostile environment theory by focusing on the existence of economic detriment).

65. See generally Schultz, *supra* note 26, at 1716-20 (discussing treatment by courts of sexual versus nonsexual conduct).

66. *Id.* at 1713-14, 1719-20.

67. 524 U.S. 742 (1998). *Ellerth* involved a plaintiff who alleged comments and gestures of a sexual nature by a supervisory employee but no direct *quid pro quo* proposals. *Id.* at 747-48. The Court noted that *Ellerth*'s case would be classified as a hostile environment claim because it involved only unfulfilled threats. *Id.* at 754. At the same time, however, the Court stated that this categorization was not controlling on whether the employer was vicariously liable for the supervisor's acts. *Id.* What was controlling was whether the harassment resulted in some tangible employment action taken against the complaining employee. *Id.* at 760-61. See generally Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (articulating liability standards for harassment by supervisors that does not result in a tangible employment action).

68. *Ellerth*, 524 U.S. at 751 (reasoning the distinction between *quid pro quo* and hostile environment cases are of "limited utility" beyond indicating "a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether").

69. *Id.* at 764-65.

70. *Id.* at 765.

of *Boca Raton*,⁷¹ the choice between the two theories was simplified to a question of whether tangible job detriment was present or not.⁷² Beyond that, no theoretical distinction as to the two types of sexual harassment was apparent.

B. Recognizing Same Sex Harassment Within Existing Proof Models

Just a couple of months prior to its simplification of the distinctions between types of sexual harassment, the Supreme Court also ruled in *Oncale v. Sundowner Offshore Services, Inc.*⁷³ that harassment by members of the same sex as the plaintiff is actionable under Title VII.⁷⁴ In *Oncale*, the Court had an opportunity to articulate a more complete doctrinal basis for sexual harassment as sex discrimination than it had in *Meritor*,⁷⁵ but it did not do so.

Oncale presented a case in which the lower court categorically rejected the notion that Title VII covered same sex harassment.⁷⁶ The Supreme Court saw "no justification" for this categorical approach.⁷⁷ According to the Court, any harassment based on the sex of the plaintiff violated the statute.⁷⁸ The Court explained its rationale in traditional sex discrimination terms: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."⁷⁹

The Court then offered two ways that same sex harassment might be proven to be based on sex.⁸⁰ The first is clearly rooted in the sexual

71. *Faragher*, 524 U.S. at 775.

72. Of course, what constitutes tangible job detriment is still not entirely clear. *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 Law of Sexual Harassment*, 8 COLUM. J. GENDER & L. 303, 305-14 (1999) (criticizing the restriction of automatic liability to cases in which the plaintiff can prove tangible employment action and noting the impact of the Court's recent decisions on lower courts); *see also* Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*, 36 SAN DIEGO L. REV. 41, 73-77 (1999) (discussing the unanswered questions regarding tangible employment action left by the Supreme Court's most recent rulings in *Faragher* and *Ellerth*).

73. 523 U.S. 75 (1998).

74. *Id.* at 82.

75. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

76. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120 (5th Cir. 1996), *rev'd*, 523 U.S. 75, 76-77 (1998).

77. *Oncale*, 523 U.S. at 79.

78. *Id.* 79-80.

79. *Id.* at 80 (citation omitted).

80. *Id.* at 80-81.

desire-dominance paradigm. According to the Court, if the case involves explicit or implicit proposals of sexual activity and the plaintiff proves the harasser was homosexual, he or she can then invoke an inference that individuals of the opposite sex would not have been treated the same way.⁸¹ The unstated corollary of this is that in cases involving persons of the opposite sex, the inference is present without any more proof required.⁸²

The Court's second way suggested a broader paradigm. The Court noted that "harassing conduct need not be motivated by sexual desire" to be discrimination based on sex.⁸³ It then outlined an alternative evidentiary approach that either inferred harassment if the same sex harassment was "in such sex-specific and derogatory terms . . . as to make it clear that the harass[ment] [was] motivated by [sex-based] hostility,"⁸⁴ or relied on direct comparative evidence that persons of the opposite sex in mixed-sex workplaces were not treated the same way.⁸⁵ As to what was objectively hostile enough to amount to a violation of Title VII, the Supreme Court directed other courts and juries to carefully consider the social context in which the conduct occurred and was experienced by the target.⁸⁶ In the end, the Court asserted that "[c]ommon sense, and an appropriate sensitivity to social context," will distinguish between actionable and non-actionable conduct.⁸⁷ Although placed in the context of a same sex claim, these standards can be readily translated to opposite sex claims.

On one level, the Court in *Oncale* sets out a more inclusive paradigm. As it did in *Meritor*, the Court saw the availability of an inference of discrimination in male-female harassment involving sexual advances, because members of the opposite sex would not be exposed to those conditions of work. Where there are no such sexual advances, and therefore no sexual desire-based inference of differential treatment, the plaintiff can prevail with proof of differential treatment.⁸⁸ In some cases,

81. *Id.* at 80.

82. Franke, *supra* note 26, at 718 (noting that courts traditionally infer that conduct of a sexual nature was based on sex simply from the fact the conduct is of a sexual nature).

83. *Oncale*, 523 U.S. at 80.

84. *Id.*

85. *Id.* at 80-81.

86. *Id.* at 81-82.

87. *Id.* at 82.

88. *Doe v. City of Belleville*, 119 F.3d 563, 566, 575-76, 580, 591, 597 (7th Cir. 1997) (allowing claim of hostile work environment in same sex harassment case where there was no proof of either sexual desire by the harasser or differential treatment of people of the opposite sex), *vacated*, 523 U.S. 1001, 1001 (1998) (vacating and remanding in light of *Oncale*, 523 U.S. 75).

the conduct of the harasser may establish sex-based animus,⁸⁹ which is proof of differential treatment. In other words, anyway you look at it, harassment is simply a form of disparate treatment discrimination, and all forms of disparate treatment based on sex are prohibited.

When you look further into this paradigm, however, problems emerge. It does little to discourage those courts who view all male-female harassment through the lens of the sexual desire-dominance paradigm. The Court again identifies sexual advances as the core concept in harassment law;⁹⁰ it characterizes harassment cases as "typically" involving such conduct.⁹¹ The Court emphasized its prior reasoning in *Harris* and *Meritor* that conduct which merely had "offensive sexual connotations" was not sufficient to make it harassment based on sex.⁹² Presumably, conduct involving sexual advances is not conduct with mere sexual connotations. The Court thus preserved the special status of cases invoking the sexual desire-dominance paradigm.⁹³

Even to the extent that sex-based hostile conduct is recognized as a violation of Title VII, the Court does so in the context of proof of animus. The words and conduct of the harasser must clearly delineate men and women.⁹⁴ "Because of sex" thus has a motivation component in hostile environment cases, just as it does in general disparate treatment cases, and animus can be a hard sell to some courts.⁹⁵ The Court

89. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993) (noting that the alleged harasser made several derogatory comments that suggested he thought women were less intelligent than men and less able to do certain jobs); *see also supra* note 51 and accompanying text.

90. *Oncale*, 523 U.S. at 80 (noting ease of drawing inference of discrimination in male-female harassment because of explicit or implicit proposals of sexual activity); *cf. Schultz, supra* note 26, at 1717-20 (identifying pre-*Oncale* prevailing paradigm as centered on male-female sexual advances).

91. *Oncale*, 523 U.S. at 80.

92. *Id.* at 80-81.

93. *Id.* at 80-82.

94. *Id.* at 80-81.

95. *See, e.g., Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1247-48 & n.5 (11th Cir. 1999) (questioning whether conduct including following and staring and comment that supervisor was getting "fired up" when employee came into his office was "based on sex" because it was potentially explainable as not having a sexual connotation); *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1167-68 (7th Cir. 1996) (finding that term "sick bitch" directed at female employee was not motivated by sex where case was lacking further evidence of differential treatment of male and female employees); *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1542-43 (10th Cir. 1995) (finding that statement "sometimes don't you just want to smash a woman in the face" was motivated by frustration with female employee and not by "gender discrimination"). *Cf. Leland Ware, Inferring Intent from Proof of Pretext: Resolving the Summary Judgement Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 37, 39 (2000) (noting a tone of skepticism implicit in recent disparate treatment discrimination decisions that reflects a belief that discrimination is "among the least likely reasons for an employer's actions"). An empirical study of the outcomes in sexual harassment cases recently

reiterated its concern that Title VII not be used to create a “general civility code,”⁹⁶ but rather redress only conduct “severely hostile or abusive.”⁹⁷ This concern simply repeats the standard that courts were applying pre-*Oncale*.⁹⁸ The Court’s suggestion that common sense would make appropriate distinctions does little to change this outcome.⁹⁹ Courts can still characterize non-sexual conduct as too innocuous to be actionable. Alternatively, courts can find it motivated by belligerence toward the plaintiff rather than animus toward one sex or the other.¹⁰⁰ In extending Title VII to the same sex harassment context, the Court may have confirmed that it does not take sexual conduct to violate that statute, but the Court did so by reinforcing the incomplete doctrinal status quo.¹⁰¹

C. Elevating Proof Over Harm

The Supreme Court’s approach in its sexual harassment cases, including its most recent decisions, reflects that it prefers the parameters of sexual harassment law to be fuzzy. In *Oncale*, the Court suggested that whatever the limits of harassment law, those limits were not so

concluded that sexual harassment claims that do not involve sexualized conduct directed at individual victims are much less likely to be successful. See Juliano & Schwab, *supra* note 25, at 581-82, 593.

96. *Oncale*, 523 U.S. at 81.

97. *Id.* at 82.

98. See, e.g., *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996) (asserting that Title VII was not intended “to create a federal remedy for all offensive language and conduct in the workplace”).

99. *Oncale*, 523 U.S. at 82.

100. See, e.g., *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 345-46 (7th Cir.), *cert. denied*, 528 U.S. 874 (1999) (dismissing disparaging comments made to plaintiff and acts of non-verbal harassment as having insufficient overtones of sexual discrimination); see also *Gross*, 53 F.3d at 1542 (characterizing statement about slapping a woman as arising out of frustration and not discrimination).

101. Same sex harassment cases after *Oncale* largely turn on the issue of sexual orientation. If the person being harassed is homosexual, and the harasser(s) heterosexual, the case is likely to be dismissed. For example, the Second Circuit recently rejected a harassment claim by a gay man who did not allege he was subjected to sexual advances or present direct comparative evidence of how the harasser acted toward women. *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000). The court declined to consider the plaintiff’s argument that he was harassed because he failed to conform to accepted male gender norms, and found that the plaintiff had not alleged that he behaved in some stereotypically feminine manner that would support an inference that the harassment was based on non-conformity with any such norms. *Id.* See also Ramona L. Paetzold, *Same-Sex Sexual Harassment, Revisited: The Aftermath of Oncale v. Sundowner Offshore Services, Inc.*, 3 EMPLOYEE RTS. & EMP. POL’Y J. 251, 259-60 (1999) (suggesting that *Oncale* failed to clarify the “because of sex” causation requirement when sexual orientation issues are involved).

confined as to fail to include harassment by persons of the same sex.¹⁰² In *Ellerth* and *Faragher*, while adopting a set of standards for employer liability, the Court also left the specifics of those standards to be developed on a case-by-case basis with an eye toward Title VII's primary policy to encourage prevention of discrimination.¹⁰³

The Court is correct that sexual harassment "cannot be [determined by] a mathematically precise test."¹⁰⁴ The essential criticism is not that the Court has left the parameters of the law open-ended; such flexibility is necessary in order to accommodate the breadth of the harm experienced by victims of hostile environment harassment. Rather, the problem is that the lower courts are essentially left to determine what level of harassment amounts to a violation of Title VII without a fully developed theory of why harassment is discrimination.

At best, the Court has given the lower courts a framework that views harassment through a limited differential treatment lens. According to the examples provided by the Court in cases such as *Oncale*, harassment must emanate from either heterosexual or homosexual desire or sex-based animus.¹⁰⁵ This framework, however, fails to account for the detrimental impact on working opportunities that occurs in workplaces dominated by heterosexual male culture, even without sexual advances directed at a particular plaintiff or explicitly derogatory references to one sex.¹⁰⁶

A more inclusive paradigm of hostile environment harassment utilizes proof models to address the nature of the harm experienced by targets of harassment. For example, Professor Katherine Franke articulates an alternative theory of discrimination in harassment cases that characterizes sexual harassment as a "mechanism" by which a cultural masculine/feminine orthodoxy is "enforced, policed and perpetuated in the workplace."¹⁰⁷ In other words, hostile environment harassment is based on sex because it acts to enforce "hetero-patriarchal

102. *Oncale*, 523 U.S. at 79-80.

103. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (suggesting that proof of the employer's affirmative defense to vicarious liability varies according to the circumstances); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) (same).

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

105. *Oncale*, 523 U.S. at 80-81 (describing when an inference of discrimination arises in sexual harassment cases).

106. *Schultz*, *supra* note 26, at 1687 (noting that the forms by which harassment undermines women's ability or performance are wide-ranging and often have "little or nothing to do with sexuality but everything to do with gender").

107. Franke, *supra* note 26, at 760. Franke calls this process "a technology of gender discrimination," in which sexual harassment is grounded in "hetero-patriarchal gender norms" and is used "as a tool or instrument of gender regulation." *Id.* at 771-72.

norms.”¹⁰⁸ Following Franke’s conceptualization of the discriminatory wrong of sexual harassment, for example, pervasive use of the term “bitch” would be recognized for its gendered effect on the working conditions of female employees, without having to prove other acts of harassment such as unwelcomed touching or sexual propositions.¹⁰⁹

On the other hand, if the nature of the harassment did not invoke the harms of norm-enforcement, it could be addressed through a differential treatment framework. Professor Franke suggests that some same sex harassment cases, namely those involving homosexual desire, might be better considered as simply disparate treatment sex discrimination, rather than as sexual harassment.¹¹⁰ Same sex cases, in which the person acting on actual sexual desire is of the same sex as the target of the harassment, do not invoke norm-enforcement concerns, and inclusion of them within the rubric of sexual harassment perpetuates the notion that harassment is based on desire.¹¹¹ By contrast, the target of the harassment can readily establish that he or she was treated differently from persons of the opposite sex, which is the essence of disparate treatment theory.¹¹²

While the specific theory articulated by Professor Franke has its critics,¹¹³ her approach reflects how proof models can be used in a pragmatic fashion without “thinking within the box” of existing

108. *Id.* at 772.

109. Cases in which the term “bitch” is alleged to have been used to describe female employees have had mixed results, depending on whether other acts of harassment were alleged. Compare *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (finding that use of term “sick bitch” to describe plaintiff was not sexual harassment without additional evidence to establish a hostile work environment), with *Bailey v. Henderson*, 94 F. Supp. 2d 68, 75-76 (D.D.C. 2000) (finding that references to plaintiff as “bitch” and “the bitch in the cage” were sufficient to state a hostile environment claim in conjunction with other evidence including statements implying plaintiff was granting sexual favors).

110. Franke, *supra* note 26, at 767. In a later article, Franke indicates she views this “doctrinal relocation as a matter of second best, not ideal theory.” Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245, 1256 (1998) [hereinafter Franke II] (referring to Abrams, *supra* note 26, at 1217).

111. Franke, *supra* note 26, at 767.

112. *Id.*

113. Professor Kathryn Abrams argues that Franke understates the significance of the context of the workplace: “[P]olicing conformity with gender stereotypes is only one dynamic in the broader pattern of entrenching male control and masculine norms in the workplace.” Abrams, *supra* note 26, at 1227. Professor Abrams would include some same sex sexual advance cases within the rubric of sexual harassment as long as the harasser acted unilaterally and did not take into account the desires of the target of the harassment. *Id.* at 1228. These acts “affirm[] traditional norms regarding male sexual subjectivity and, in the employment context, mark[] these norms as operative in the environment of the workplace.” *Id.* (footnote omitted).

theory.¹¹⁴ Professor Franke focuses the choice of theory on the nature of the harm incurred.¹¹⁵ A better articulation of the nature of the harm (i.e., norm-enforcement) encourages courts to recognize the significance of sex-based conduct, because it no longer places exaction of sexual favors at the core of harassment doctrine.

Unfortunately, the way courts currently approach proof models is less likely to be pragmatic than it is to be dogmatic. The message of Professor Franke's approach is not careful selection of proper proof models as a means to make sure that the right elements of proof are applied. To the contrary, it is that the failure to think about harassment in systemic terms ultimately elevates the method of proof over the nature of the harm itself. Courts, however, tend to use proof models in harassment cases to funnel cases into one or another theory because they elevate proof over harm. The *quid pro quo* and hostile environment distinction is a prime example.

Doctrinal deficiencies may explain the urge to narrowly categorize cases into the law of a certain model of harassment or discrimination law, which remain for some courts even after the Supreme Court's recent decisions. One way courts reluctant to recognize discrimination claims that do not invoke elements of sexual desire can manipulate the law is to funnel such claims away from harassment law altogether. The Seventh Circuit stands as a prime example of this phenomenon,¹¹⁶ as discussed in the next part of this article.

III. SEXUAL DESIRE AS THE PARADIGM FOR SEXUAL HARASSMENT IN THE SEVENTH CIRCUIT

Seventh Circuit case law reflects what happens when courts approach sexual harassment law using the box created by the sexual desire-dominance paradigm. Most notably in the opinions of Chief Justice Richard Posner, the Seventh Circuit created a "yardstick"¹¹⁷ for

114. Franke II, *supra* note 110, at 1256. Professor Franke suggests that rather than "demand[ing] a grand, one-size-fits-all theory of sex discrimination or sexual harassment," the theory should be adjusted "in pragmatic fashion to address the demands of particular circumstances." *Id.*

115. *Id.*

116. Given the Seventh Circuit's apparent status as the most prolific for sexual harassment opinions, the extent to which it has adopted a restrictive interpretation of hostile environment law takes on an added significance. Juliano & Schwab, *supra* note 25, at 574-75 & tbl.4.

117. *See infra* Part III.A.; *see also* Gleason v. Mesirov Fin., Inc., 118 F.3d 1134, 1144 (7th Cir. 1997) (referring to *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995), as a "yardstick").

hostile environment cases that firmly roots the discriminatory wrong of sexual harassment in conduct arising out of sexual desire.¹¹⁸ When confronted with a set of facts that calls for a systemic view of the wrong of harassment, the court's response has frequently been to recharacterize the claim as not being sexual harassment at all.¹¹⁹ Rather, the conduct is either "mildly offensive"¹²⁰ and not actionable under Title VII, or it is actionable under some other theory of discrimination, which may not adequately address the effects of the conduct on the victim of the harassment.¹²¹ This response has been especially true for sex-based harassment claims, although its effects are felt even in cases involving conduct of a sexual nature.

A. *The "Yardstick" for Harassment Is Based on Acts of a Sexual Nature*

The Seventh Circuit has on a number of occasions quoted the Supreme Court's language from *Harris*,¹²² that the objective hostility of the workplace should be determined from the totality of the circumstances.¹²³ In a few notable cases, the Seventh Circuit also recognized that a finding of sexual harassment does not depend on a showing that the defendant's acts are based on sexual desire.¹²⁴ The language in those cases, however, has had little impact on harassment doctrine in the circuit because the court has otherwise created a contradictory standard that dominates its evaluation of sexual harassment claims.

118. See *infra* Part III.A.

119. *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 436 (7th Cir. 2000); see also *infra* Part III.B.

120. *Baskerville*, 50 F.3d at 431 (holding that employer's sexual innuendo and tasteless comments did not cross "the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing") (citation omitted).

121. *DeClue*, 223 F.3d at 436-37 (affirming trial court's grant of summary judgment on basis that the employer's failure to respond to employee's request for restroom facilities was not a form of sexual harassment under a hostile work environment theory but may have been challenged under a disparate impact theory).

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

123. See, e.g., *Smith v. Sheahan*, 189 F.3d 529, 533-34 (7th Cir. 1999) (quoting factors from *Harris*); see also *Wilson v. Chrysler Corp.*, 172 F.3d 500, 510 (7th Cir. 1999) (stating that the "totality of circumstances" must be accounted for in determining whether a person's work environment is hostile).

124. *Sheahan*, 189 F.3d at 533 (noting that it makes no difference that the alleged harassment sounds "more like expressions of sex-based animus rather than misdirected sexual desire"); *Sweeney v. West*, 149 F.3d 550, 555 (7th Cir. 1998) (acknowledging that workplace abuse does not have to be explicitly sexual to violate Title VII); cf. *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) (noting that *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), settled the issue of whether same sex harassment must be motivated by sexual desire).

The contradiction is well illustrated in *Sweeney v. West*,¹²⁵ a case alleging gender-based harassment of a civilian employee of the Department of the Army.¹²⁶ The thrust of Sweeney's claim, to the extent it can be gleaned from the Seventh Circuit's opinion,¹²⁷ was that she was subjected to a hostile work environment, including such acts as searching her private locker, initiation of proceedings against her alleging she made a racist comment about an Army officer, and retaliation for her reports of office misconduct.¹²⁸ The court, in an opinion written by Judge Daniel Manion, found the plaintiff's claim "perplexing", noting "Sweeney appears not to be claiming that she was sexually harassed; indeed, no sexual comments (either overt or covert) were directed at her."¹²⁹ The court in *Sweeney* contrasted that case to *Harris*, noting that the plaintiff in *Harris* was, among other things, the target of unwelcome sexual innuendoes.¹³⁰ The court concluded that the plaintiff's claim was a "far cry" from what the plaintiff in *Harris* encountered because it "involve[d] no sexual remarks or conduct whatsoever."¹³¹

Then, however, the court acknowledged that workplace abuse does not need to be "sexually explicit or suggestive" to give rise to a Title VII claim.¹³² The court characterized Sweeney's claim, not as sexual

125. 149 F.3d 550 (7th Cir. 1998).

126. *Id.* at 552-553.

127. *Id.* at 555 n.3 (suggesting the failings in the specific discussion of facts may have been the fault of both parties, who did not cite critical facts in the record).

128. *Id.* at 553. The search of the plaintiff's private locker in *Sweeney* was conducted by her male superior. *Id.* The plaintiff filed a charge against him, which was apparently settled. *Id.* Subsequently, a woman was hired who became the plaintiff's supervisor. *Id.* After the new supervisor was hired, the male superior who had previously searched the plaintiff's private locker entered the plaintiff's office while she was on leave. *Id.* The plaintiff complained to "the Major General in command about the incident, and . . . was reprimanded for not going through the proper chain of command." *Id.* The new supervisor then approached the plaintiff and commented about the plaintiff's earlier complaint against her male superior, and told the plaintiff no one liked her. *Id.* Several months later, the plaintiff initiated a complaint alleging her supervisor was committing timecard fraud. *Id.* That same supervisor later issued counseling statements to the plaintiff which were at one point in an Army EEO proceeding found to have been in reprisal for a charge the plaintiff filed against the supervisor. *Id.* After the Army reversed a decision in the plaintiff's favor on the EEO complaint, the plaintiff resigned from her job and initiated the discrimination suit. *Id.*

129. *Id.* at 554.

130. *Sweeney*, 149 F.3d at 555 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993)). The court in *Sweeney* specifically noted incidents of sexual innuendo in *Harris* such as a suggestion that the plaintiff go to a hotel to negotiate a raise and a request that female workers get coins from the front pants pockets of the harasser. *Id.*

131. *Id.* at 555.

132. *Id.*

harassment, but as disparate treatment sex discrimination.¹³³ Forced to proceed under general disparate treatment theory, the plaintiff's claim failed, because the court found nothing in the record to tie her alleged mistreatment to her sex.¹³⁴

Although the facts in *Sweeney* are somewhat sketchy, and the factual parameters of the hostility alleged by the plaintiff are unclear, the panel's response is indicative of the difficulty judges have when claims do not include clearly sexual behavior. In other decisions, the Seventh Circuit has stated that claims cannot be construed as sexual harassment because the acts the plaintiff alleges were not sufficiently sexual in nature.¹³⁵ These decisions include a case in which the court rejected a claim in which the plaintiff alleged, among other things, that her employer put his arms around the plaintiff, kissed and squeezed her, and asked, "Now, is this sexual harassment?"¹³⁶ because the court found it "humorously rather than erotically intended."¹³⁷ The Seventh Circuit has also rejected cases alleging language that has some sexual connotation,

133. *Id.*

134. *Id.* (quoting *Oncale's* differential treatment language). The court in *Sweeney* concluded that any hostility the plaintiff experienced was not based on the fact that she was a woman, but on her having gone over her superior's head to complain about acts she considered harassment. *Id.*

135. *Schmitz v. ING Sec., Futures & Options, Inc.*, No. 98-3007, 1999 WL 528024, at *3 (7th Cir. July 20, 1999) (finding plaintiff failed to prove prima facie case of hostile environment sexual harassment because there was no evidence of sexual advances or requests for sexual favors); *see also Brill v. Lante Corp.*, 119 F.3d 1266, 1274 (7th Cir. 1997) (characterizing the plaintiff as attempting to "buttress" her sexual harassment claim with acts that "are not particularly sexual in nature"). When plaintiffs have alleged a combination of sexual and non-sexual conduct, the non-sexual aspects have been rejected as either irrelevant or improper attempts to "buttress" their harassment claims. *Cowan v. Prudential Ins. Co.*, 141 F.3d 751, 758-59 (7th Cir. 1998) (concluding supervisors who worked more intensively with new male employees was not relevant to hostile environment claim despite conduct that suggested a male-dominated culture permeated the workplace); *see also Brill*, 119 F.3d at 1274 (rejecting plaintiff's "attempts to buttress" a hostile environment claim that alleged a "locker room atmosphere" created by male employees with evidence that one manager lectured her on his disapproval of premarital sex after learning she was pregnant and another manager yelled at her while towering over her).

136. *Minor v. Ivy Tech State Coll.*, 174 F.3d 855, 857 (7th Cir. 1999).

137. *Id.* at 858. The other acts alleged included receiving calls from the employer every day that were not business-oriented and often conducted with a "sexy voice," and "stalker like" behavior such as comments about watching the plaintiff through a window and calling her at home. *Id.* at 856, 858. The court rejected the significance of the latter behavior in large part because there was no conversation about sex or love. *Id.* at 858. The court further rejected the plaintiff's characterization of "sexual overtones" in the employer's actions because it found them too subjective; the court was worried about subjecting employers to "the legal risk" of Title VII liability if body language, tone of voice, and other non-verbal aspects of communication were considered. *Id.*

such as use of the term "bitch"¹³⁸ and a discussion of nudism,¹³⁹ because it found them insufficiently tied to sex.¹⁴⁰

Much of the circuit's current doctrine on what amounts to sexual harassment can be traced to a 1995 opinion authored by Chief Judge Posner. In *Baskerville v. Culligan International Co.*,¹⁴¹ the Seventh Circuit overturned a jury verdict in favor of a woman who alleged several acts of verbal sexual harassment over a seven-month period.¹⁴² Among other things, the plaintiff alleged that the manager for whom she worked as a secretary called her "pretty girl," as in "[t]here's always a pretty girl giving me something to sign off on" and referred to the room as getting hot when she walked in.¹⁴³ After a public-address broadcast announcement that said "May I have your attention, please," the manager stopped by the plaintiff's desk and said, "You know what that means, don't you? All pretty girls run around naked."¹⁴⁴ On an occasion when the plaintiff wore a leather skirt, the manager made grunting noises that sounded like "um um um" when the plaintiff turned to leave the manager's office.¹⁴⁵ He told her that his wife had told him to clean up his act and think of her, the plaintiff, as Ms. Anita Hill.¹⁴⁶ Before his wife moved to town, when the plaintiff asked if he had purchased a Valentine's card for his wife, the manager said he had not but should because it was lonely in his hotel room with only his pillow for company, and then he made a gesture that suggested masturbation.¹⁴⁷

138. *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1656 (2001) (finding sexually explicit insults, such as use of term "bitch," that arise from work-related altercations do not violate Title VII); *see also* *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (finding that use of term "sick bitch" does not necessarily connote anything to do with any "specific female characteristic").

139. *Gleason v. Mesirov Fin., Inc.*, 118 F.3d 1134, 1145 (7th Cir. 1997) (rejecting evidence of sexual harassment that included discussion of nudism because it was "not sexual *per se*").

140. *See* cases cited *supra* notes 138-39.

141. 50 F.3d 428 (7th Cir. 1995).

142. *Id.* at 430. The jury returned a verdict in the plaintiff's favor for \$25,000. *Id.* The amount of the verdict may have been influenced at least in part by the fact that the employer disciplined the offending employee after the plaintiff complained to the human resources department. *Id.* at 432 (discussing plaintiff's complaints and the company's response). The plaintiff previously complained to the manager's supervisor, who spoke with the manager, but the incidents continued until the human resources complaint was made. *Id.*

143. *Id.* at 430.

144. *Id.*

145. *Id.*

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

147. *Id.*

From the outset, the court's reasoning reflects the sexual desire-dominance paradigm.¹⁴⁸ Judge Posner begins his analysis by indicating that sexual harassment law was "designed to protect working women from the kind of male attentions that can make the workplace hellish for women."¹⁴⁹ He drew a line between vulgarity that creates a "merely unpleasant working environment . . . and [acts that create] a hostile or deeply repugnant" environment.¹⁵⁰ Posner described the latter category in terms potentially including some non-sexual acts: "sexual assaults; *other [unconsented] physical contact*, whether amorous or hostile, . . . uninvited sexual solicitations; *intimidating words or acts*; obscene language or gestures; pornographic pictures."¹⁵¹ However, his reasoning soon returned to its original paradigm in explaining why the plaintiff's claim failed:

[The manager] never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him, or to go out on a date with him. He made no threats. He did not expose himself, or show her dirty pictures. He never said anything to her that could not be repeated on primetime television. . . . It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the manager's] patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain.¹⁵²

Baskerville became, in the Seventh Circuit's own words, the "yardstick" by which subsequent hostile environment claims were measured in that circuit.¹⁵³ In later cases, the court characterized *Baskerville* as creating a "safe harbor" within which employers are protected from accusations that they failed to prevent "low-level

148. Schultz, *supra* note 26, at 1686-87; *see also supra* text accompanying note 33 (discussing the paradigm).

149. *Baskerville*, 50 F.3d at 430 (noting he was not excluding the possibility of actionable sexual harassment of men by women, or men by other men, or women by other women, only that harassment of women by men was the most common kind).

150. *Id.* at 430-31.

151. *Id.* at 430 (emphasis added).

152. *Id.* at 431 (finding it significant that the plaintiff and her manager were never alone outside the office).

153. Gleason v. Mesirov Fin., Inc., 118 F.3d 1134, 1144 (7th Cir. 1997) (concluding the trial judge "properly used *Baskerville* as a yardstick for determining whether the [defendant's] conduct amounted to actionable sexual harassment").

harassment."¹⁵⁴ This "low-level harassment" includes acts that are "too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex."¹⁵⁵ Courts within the Seventh Circuit have been fond of quoting *Baskerville*'s language to the effect that the alleged harasser never touched the plaintiff, never asked her on a date, and so on.¹⁵⁶ When similar conduct is absent, courts find the alleged harassment to be too tepid and innocuous to be actionable.¹⁵⁷ When touching, sexual propositions, displays of

154. *Adusumilli v. City of Chicago*, 164 F.3d 353, 362 (7th Cir. 1998), *cert. denied*, 528 U.S. 988 (1999) (stating that "[i]t is well established in th[at] Circuit that there is a 'safe harbor'" from accusations of harassment that are "too tepid or intermittent or equivocal" to constitute actionable harassment); *see also* *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1166 (7th Cir. 1996) (describing *Baskerville* as having created a safe harbor from accusations of low-level harassment); *see also* *Schnapper*, *supra* note 24, at 285-88 (discussing the Seventh Circuit's articulation of the safe harbor doctrine).

155. *Adusumilli*, 164 F.3d at 362. Although framed as a standard for measuring whether the harassment was objectively hostile, the Seventh Circuit has repeatedly indicated the safe harbor is for employers. *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 346 (7th Cir.), *cert. denied*, 528 U.S. 874 (1999); *see also* *Adusumilli*, 164 F.3d at 362 (noting the safe harbor is for employers); *Galloway*, 78 F.3d at 1166 (same). The safe harbor protects employers when they fail to prevent or remediate conduct that is merely offensive. *Schnapper*, *supra* note 24, at 310-11. When the court in *Baskerville* created the safe harbor, its implicit concern was the potential breadth of employer negligence liability. *Baskerville*, 50 F.3d at 432. In the part of the opinion addressing whether the employer had taken sufficient remedial action, assuming the acts alleged did in fact amount to actionable sexual harassment, the court in *Baskerville* compared the obligation of the employer to respond to sexual harassment to the duty of care in "conventional tort law." *Id.* The court reasoned that as "a potential injurer is required to take more care, other things being equal, to prevent catastrophic accidents than to prevent minor ones, . . . so an employer is required to take more care . . . to protect its female employees from serious sexual harassment than to protect them from trivial harassment." *Id.* (citations omitted).

156. *See, e.g.*, *Wolf v. N.W. Ind. Symphony Soc'y*, 250 F.3d 1136, 1144 (7th Cir. 2001) (noting absence of touching and similar conduct and concluding that facts were less egregious than those in *Baskerville*); *see also* *Gleason*, 118 F.3d at 1145 (noting it important to consider what the alleged harasser did not do by comparing it to what the alleged harasser in *Baskerville* also did not do). The "did not touch" reasoning from *Baskerville* has also shown up in decisions of district courts. *See, e.g.*, *Rizzo v. Sheahan*, No. 97 C 3995, 2000 U.S. Dist. LEXIS 7159, at *22-*25 (N.D. Ill. May 22, 2000), *aff'd*, 2001 U.S. App. LEXIS 20633 (7th Cir. Sept. 20, 2001) (concluding the facts alleged also did not contain the types of actions outlined in *Baskerville*). It appears that the Seventh Circuit interprets the "touching" part of *Baskerville* to require more than mere physical contact with the plaintiff, even when the plaintiff is touched on a part of the body that carries some sexual implications. The Seventh Circuit has dismissed certain acts of touching as being too tepid or innocuous and thus within the safe harbor. *Adusumilli*, 164 F.3d at 362. For example, the court characterized an unwanted touching of the plaintiff's buttocks as "tak[ing] the relatively mild form of a poke [which] occurred only once," and concluded that the safe harbor applied. *Id.*

157. *Hardin*, 167 F.3d at 346 (finding acts of non-verbal harassment that did not involve acts described by *Baskerville*, to fall within the safe harbor of tepid, intermittent, or equivocal acts); *see also* *supra* note 156 and accompanying text. In one interesting district court proceeding, the absence of the factors listed in *Baskerville* lead the court to not only dismiss the plaintiff's harassment

pornography, or other conduct described by Posner in *Baskerville* is involved, its presence is given special note as being within the recognized categories of harassing behavior.¹⁵⁸

As interpreted and applied in subsequent cases, *Baskerville* now essentially stands for the proposition that “offensive conduct” cannot support a Title VII claim unless accompanied by other forms of harassing conduct.¹⁵⁹ At least one decision in the Seventh Circuit suggests that *Baskerville* created a two-tier inquiry; first, the plaintiff has to allege conduct that the court is even willing to consider as potentially harassing, based on the *Baskerville* standard; and, second, the plaintiff has to prove that the harassing conduct was severe or pervasive.¹⁶⁰ In that case, the court found that a plaintiff who alleged that a co-worker on one occasion kissed her and “stuck his tongue down her throat,”¹⁶¹ and on a second occasion, attempted to undo her bra after she turned away to avoid being kissed again,¹⁶² had alleged acts of harassment that “place[d] [the case] within the realm of conduct that unquestionably is harassing; [t]he sole question [was] whether th[e] acts [were] severe enough” to allow the plaintiff to proceed with her Title VII claim.¹⁶³ In other words, the acts fell into the right category, the one based on notions of sexual desire. On these facts, the plaintiff would be allowed to have the conduct’s severity considered.¹⁶⁴

Baskerville and the Seventh Circuit cases relying on it have accordingly created a tight “box” for what is harassment. Rather than take the full context of the employee’s workplace into account and evaluate it for the severity or pervasiveness of the alleged conduct, as *Harris* directs,¹⁶⁵ the court focuses on acts in a categorical fashion. If the acts lack sufficient overtones of sexual desire directed toward the

complaint, but also to grant a defense motion for Rule 11 sanctions. *Lamanna-Berman v. Names & Addresses, Inc.*, No. 96 C 5269, 1998 WL 214685, at *2-*3 (N.D. Ill. Apr. 22, 1998).

158. *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) (describing the physical acts of harassment alleged as “plac[ing this case] within the realm of conduct that unquestionably is harassing”).

159. Schnapper, *supra* note 24, at 310-12.

160. *Hostetler*, 218 F.3d at 807, 808.

161. *Id.* at 801.

162. *Id.* at 801.

163. *Id.* at 808 (citation omitted); *see also* Schnapper, *supra* note 24, at 312-15 (describing the Seventh Circuit as among those five circuits that find certain types of remarks and conduct immune from attack under Title VII harassment law because the acts do not reach a required level of offensiveness).

164. *Hostetler*, 218 F.3d at 805-06, 808 (reversing summary judgment entered for the employer by a district court, which found the number of acts too small and the time frame over which they occurred, a few days, too short).

165. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 24 (1993).

plaintiff, they are likely to be categorized as merely offensive, which cannot support a Title VII claim. Under this regime, it is easy for the court to dismiss the significance of acts that create a sex-based hostile, rather than a sexually hostile, environment.¹⁶⁶ It is also easy for the court to discount acts that on the surface may appear sexual in nature, but not after the court parses them for evidence of their "true" intent.¹⁶⁷

The box the Seventh Circuit creates for hostile environment law is in tension with the Supreme Court's holding in *Oncale*.¹⁶⁸ *Oncale* rejected categorical exclusions (e.g., "same sex harassment") and allowed the possibility that a claim might be based on jokes and roughhousing directed at an individual because of his or her sex.¹⁶⁹ Seventh Circuit case law, to the contrary, focuses on categorical

166. In one case, the Seventh Circuit lent no significance to allegations that a co-worker had engaged in non-verbal forms of harassment, such as slamming a door in the plaintiff's face, cutting her off in the parking lot, and using an electric cart to sneak up and startle her, despite the fact that these acts occurred in a context in which the co-worker repeatedly referred to the plaintiff as a "stupid black bitch" and a "black cunt." *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 345-46 (7th Cir.), *cert. denied*, 528 U.S. 874 (1999). To the court, the acts had no racial or gender overtones and fell into the safe harbor as less severe and pervasive than those in *Baskerville*. *Id.* at 446. A secondary effect of *Baskerville*, in cases alleging conduct that should meet the sexual desire threshold, is that the court nonetheless rejects the case as not severe or pervasive, finding the acts among those to be tolerated as commonplace in modern society. *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976, 977-78 (7th Cir. 2000) (finding comments directed at the plaintiff about what she was wearing and asking to see photographs of her in clothing from a Frederick's of Hollywood catalog to be "innocuous," "mildly flirtatious," and "possibly suggestive or even offensive," but not so offensive as to support a harassment claim); *see also Savino v. C.P. Hall Co.*, 199 F.3d 925, 933 (7th Cir. 1999) (finding sporadic use of abusive language, gender-related jokes, and occasional teasing "commonplace in some employment settings" and not the basis for finding a hostile environment). Another case suggests that the standard in the Seventh Circuit has become almost like a mathematical formula. *Skouby v. Prudential Ins. Co. of Am.*, 130 F.3d 794, 797 (7th Cir. 1997). In *Skouby*, in an opinion written by Judge Terrance Evans and joined by Judge Posner, the plaintiff's hostile environment claim included allegations that her co-workers gave her offensive cartoons that made reference to love and marriage, that they made offensive sexual references around her and about her, and that they kept football brochures that featured provocatively dressed women on the covers. *Id.* at 795-96. She also alleged her male co-workers were given information and assistance with planning their insurance sales calls and were given regular assistance from their managers, and she was not. *Id.* After rather prudishly protesting whether the court should recite the specific facts in cases like this, Judge Evans then rejected the plaintiff's claim because there was no physical contact, and because in *Baskerville*, "we found that eight offensive comments did not add up to harassment . . . [I]kewise, Skouby's examples are not 'sufficiently severe or pervasive to . . . create an abusive work environment.'" *Id.* at 797 (alteration in original).

167. *Minor v. Ivy Tech State Coll.*, 174 F.3d 855, 858 (7th Cir. 1999) (dismissing acts of grabbing, kissing, and asking plaintiff if that was sexual harassment as a mere joke); *see also Adusumilli v. City of Chicago*, 164 F.3d 353, 362 (7th Cir. 1998), *cert. denied*, 528 U.S. 988 (1999) (dismissing act of touching plaintiff on buttocks as a meaningless "poke").

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

169. *Id.* at 78, 82.

exclusions (e.g., “merely offensive comments,”¹⁷⁰ “sexual insults like ‘bitch’ that arise out of workplace altercations”¹⁷¹) and in some cases appears to require proof of acts that amount to actual sexual advances.¹⁷²

One obvious consequence of this approach to hostile environment doctrine is that it substantially limits the cases that will be found factually sufficient to state a claim. As the next section demonstrates, it also provides the court with the means to control how cases are presented from the outset. Plaintiffs are denied the opportunity to proceed under the model of discrimination that is most likely to address the nature of the harm they have suffered.

B. Refusing to Recognize Hostile Environment Claims as a Matter of Doctrine

Having created a tight box within which hostile environment harassment claims must fit, the Seventh Circuit effectively prevents plaintiffs from using that doctrine to address workplace abuses. The doctrinal approach reflected by *Baskerville*, and its progeny, allows the Seventh Circuit to reject the significance of the impact of sex-based incidents on employment opportunities.¹⁷³ This approach makes it much less likely that the court will take sex-based harassment claims seriously.¹⁷⁴

170. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995).

171. *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1656 (2001).

172. *Minor*, 174 F.3d at 858. This would appear to explain why the Court rejected the plaintiff's claim in *Minor*; the employer was only joking, and not making an actual sexual advance. *Id.*; see also *supra* note 167 and accompanying text.

173. See *supra* Part III.A.

174. Two cases against Prudential Insurance present an interesting example of how difficult it is to get the Seventh Circuit to recognize the harassing nature of non-sexual as well as sexual conduct short of actual sexual advances. *Cowan v. Prudential Ins. Co. of Am.*, 141 F.3d 751, 757-59 (7th Cir. 1998); *Skouby v. Prudential Ins. Co. of Am.*, 130 F.3d 794, 795-97 (7th Cir. 1997). Both cases had their origins in the Prudential office in Belleville, Illinois. *Cowan*, 141 F.3d at 755; *Skouby*, 130 F.3d at 795. Both plaintiffs alleged a myriad of harassing conduct, including sexually explicit cartoons, sexually explicit conversations about attendance at strip clubs, sexual joking, crude language derogatory to women, and use of a brochure with a provocatively dressed woman on the cover. *Cowan*, 141 F.3d at 756; *Skouby*, 130 F.3d at 795-96. The plaintiffs also alleged non-sexual conduct, including giving male employees more assistance with planning sales calls, and engaging in golf and fishing outings to which female employees were not invited. *Cowan*, 141 F.3d at 756; *Skouby*, 130 F.3d at 796. One plaintiff also alleged that her supervisor refused to speak to her directly, and that he greeted other sales representatives by name, but not her. *Cowan*, 141 F.3d at 756. The Seventh Circuit was not convinced that either case alleged acts sufficiently severe or pervasive to pass the threshold it had created in cases like *Baskerville*, or that it should even consider the non-sexual acts. *Cowan*, 141 F.3d at 757-59; *Skouby*, 130 F.3d at 797; see also cases

Interestingly, despite the dismissal-favorable standards it has articulated for hostile environment claims, the Seventh Circuit has not always turned to those standards as the basis for denying the plaintiff's claim.¹⁷⁵ In some cases, the court instead attacks the plaintiff's choice of theory. It refuses to consider the claims under hostile environment law as a matter of doctrine. In one case, the court suggested that the plaintiff should have framed her case as a disparate impact claim rather than as a hostile environment claim.¹⁷⁶ In another, the court characterized what was at least arguably sex-based behavior as raising retaliation claims rather than harassment claims.¹⁷⁷

One possible reason for the court's action is that by funneling such cases away from harassment theory altogether, the court is not put in the position of having to reevaluate its harassment standards. The *Baskerville* standards are inherently inconsistent with what the Supreme Court has held in its recent rejection of categorical approaches to harassment law.¹⁷⁸ To the extent that sex-based hostile environment cases are viewed by courts like the Seventh Circuit as at the margins of harassment law,¹⁷⁹ because the cases do not involve the core notions of sexual desire,¹⁸⁰ the courts may prefer not to address the claims under harassment doctrine at all. The end result, however, is that plaintiffs are forced to litigate their claims in less favorable territory.

1. *DeClue v. Central Illinois Light Co.*: Gender Hostile Behavior Raises Only Disparate Impact Claim

In *DeClue v. Central Illinois Light Company*,¹⁸¹ in a two-to-one decision authored by Chief Judge Posner, the Seventh Circuit held that the plaintiff did not state a claim for hostile environment sexual

cited *supra* note 135 and accompanying text (discussing the court's treatment of the non-sexual acts alleged in *Cowan*). As noted, Judge Evans complained in *Skouby* about even having to write an opinion in the case. *Skouby*, 130 F.3d at 795.

175. *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 435 (7th Cir. 2000); *see also* *Heuer v. Weil-McLain*, 203 F.3d 1021, 1024 (7th Cir. 2000).

176. *DeClue*, 223 F.3d at 436-37.

177. *Heuer*, 203 F.3d at 1024.

178. *See supra* Part II.A.-B.

179. *Cf.* Franke, *supra* note 26, at 694 (discussing the challenge of addressing same sex harassment "at the margins" of sexual harassment law).

180. *See supra* Part III.A.

181. 223 F.3d 434 (7th Cir. 2000).

harassment.¹⁸² Rather than basing it's opinion on a thorough evaluation of whether the facts DeClue alleged were sufficient to state that severe or pervasive harassment occurred in her workplace, the majority chastised the plaintiff for not pursuing her claim under disparate impact theory.¹⁸³ According to the majority, DeClue's decision to base her claim on hostile environment theory denied her employer the right kind of defense.¹⁸⁴

The plaintiff in *DeClue* alleged facts that reflected a sex-based hostile environment at her workplace. Audrey DeClue was the first and only female journeyman lineman with Central Illinois Light Company (CILCO).¹⁸⁵ Her job entailed work in the field that frequently put her beyond close proximity to bathroom facilities.¹⁸⁶ Despite assurances that she would be able to "shut down" her crew and take a vehicle to find restroom facilities when needed, she was subjected to severe ridicule and harassment for making such requests, and ultimately was denied permission to use an off-site bathroom facility.¹⁸⁷ DeClue was forced on several occasions to relieve herself in places with limited privacy, including one time behind a bulldozer that hid her from crew members, but not from the view of a neighboring homeowner.¹⁸⁸ In a performance evaluation, her crew leader wrote that "[w]ith a woman on the job of this type[,] [it] makes it hard with restroom facilities."¹⁸⁹

DeClue's male counterparts had less difficulty with the lack of restroom facilities; in fact, they regularly relieved themselves in her presence.¹⁹⁰ These male co-workers appeared to go out of their way to make her feel uncomfortable in this regard.¹⁹¹ When she complained

182. *Id.* at 436-37. Judge Ilana Diamond Rovner filed a dissenting opinion in *DeClue*. *Id.* at 437 (Rovner, J. dissenting). She would have found that the plaintiff stated a claim for relief from hostile work environment sexual harassment. *Id.* at 440 (Rovner, J. dissenting).

183. *Id.* at 437 (characterizing plaintiff as "insisting on litigating her case under a hostile environment case").

184. *Id.*

185. *DeClue v. Cent. Ill. Light Co.*, No. 98-1276, slip op. at 1-2. (C.D. Ill. Dec. 9, 1999), *aff'd on other grounds*, 223 F.3d 434 (7th Cir. 2000); *see also DeClue*, 223 F.3d at 436.

186. *DeClue*, No. 98-1276, slip op. at 7.

187. *Id.* at 6.

188. *DeClue*, 223 F.3d at 439 (Rovner, J., dissenting).

189. *DeClue*, No. 98-1276, slip op. at 7.

190. *DeClue*, 223 F.3d at 439 (Rovner, J., dissenting).

191. *DeClue*, No. 98-1276, slip op. at 13. DeClue alleged one incident early in her tenure at the company when a co-worker deliberately urinated on the floor next to her feet. *Id.* at 6. The trial court found this incident to be outside the statute of limitations. *Id.* at 8-9. Besides the public urination, there were allegations that the male co-workers frequently grabbed their crotches in her presence, which the trial court did consider. *Id.* at 11.

about the situation, she was subjected to teasing and juvenile pranks.¹⁹² These same male co-workers made a habit of keeping pornographic materials in company trucks and in areas where the crew assembled on days of inclement weather.¹⁹³

DeClue filed suit after several years of enduring the behavior of her co-workers and the company's refusal to provide adequate restroom facilities.¹⁹⁴ She alleged that she had been the victim of hostile work environment sexual harassment.¹⁹⁵ The United States District Court for the Central District of Illinois found that DeClue had alleged sufficient facts to state a claim for hostile environment sexual harassment,¹⁹⁶ but nonetheless granted CILCO summary judgment on its affirmative defense that the plaintiff failed to reasonably avail herself of the company's anti-harassment policies.¹⁹⁷

Chief Judge Posner's opinion for the Seventh Circuit did not address the lower court's finding of sufficient facts to allege a prima facie case of hostile work environment harassment and its reliance on the company's assertion of an affirmative defense.¹⁹⁸ He quickly dismissed the significance of any of the facts regarding the hostile working conditions, with the exception of the lack of restroom facilities, which he characterized as an "omission."¹⁹⁹ Having limited the facts to this narrow issue, Judge Posner then reasoned that denial of DeClue's

192. *Id.* DeClue's co-workers stranded her after a lunchbreak by driving off in the truck, and then, bragged about it. *Id.* On another occasion, they moved the truck she was supposed to be using "a great distance away from the garage area for no apparent reason other than to harass her." *Id.* at 7-8.

193. *Id.* at 7.

194. *DeClue*, 223 F.3d at 439 (Rovner, J., dissenting).

195. *Id.* at 437. After DeClue filed suit, her employer apparently began to provide some sort of remote relief facilities to linemen. *Id.* at 438 (Rovner, J., dissenting).

196. *DeClue*, No. 98-1276, slip op. at 11-12. The district court found that "DeClue [was] legitimately dissatisfied with her co-workers' conduct toward her in the workplace." *Id.* at 13. While characterizing DeClue's claim as "not . . . the strongest case of sexual harassment encountered by the Court," it nonetheless found that the conduct "surpasse[d] the expressions of juvenile provocation and other ordinary tribulations of the workplace that have been held to fall on the nonactionable side of the line." *Id.* (citations omitted).

197. *Id.* at 21-22. The affirmative defense relied upon by CILCO was articulated by the Supreme Court in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

198. *DeClue*, 223 F.3d at 437.

199. *Id.* at 436 (finding that the only significant act of alleged sexual harassment that occurred within the statute of limitations was the continued failure to provide restroom facilities). Judge Posner characterized the incidents of crotch grabbing, urination, and so forth, found by the district court to have occurred within the three hundred day period, as "just more of the same" as had happened before that 300 day cut-off period. *Id.* at 435-36.

request for “civilized bathroom facilities” could not be thought of as a form of sexual harassment:²⁰⁰

This is not because no reasonable person could think an absence of bathroom facilities an intolerable working condition; in most workplaces, such an absence would clearly be thought that. And it is not because Title VII creates remedies only against intentional discrimination. An employee may also complain about an employment practice if while not deliberately discriminatory it bears harder on the members of a protected group, that is, in the jargon of discrimination law, has a “disparate impact” on that group, and the employer “fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” Therefore, insofar as absence of restroom facilities deters women (normal women, not merely women who are abnormally sensitive) but not men from seeking or holding a particular type of job, and insofar as those facilities can be made available to the employees without undue burden to the employer, the absence may violate Title VII.²⁰¹

In other words, the case was properly thought of as a debate over the practice of providing toilets for employees, rather than as a claim that male culture was allowed to dominate this workplace and create hostile and abusive working conditions for the only woman the company ever had working in that position.²⁰² Interestingly, Judge Posner agreed that women are not unreasonable to be more concerned about urinating in public,²⁰³ thereby apparently taking the case out of the realm of the “woman of Victorian delicacy”²⁰⁴ he dismissively described in

200. *Id.* at 436.

201. *Id.* (citations omitted).

202. In support of its characterization of the claim as raising only disparate impact issues, the court in *DeClue* cites without discussion *Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987). *DeClue*, 223 F.3d at 436. In *Lynch*, the plaintiff, a construction worker, alleged that the employer committed unlawful sex discrimination because it failed to maintain the toilets it provided in a sanitary condition. *Lynch*, 817 F.2d at 381. In contrast to *DeClue*, the plaintiff in *Lynch* alleged both a disparate treatment and disparate impact claim. *Id.* at 382-83. However, her disparate treatment claim revolved mainly around disparate enforcement of a rule that prohibited employees from using a restroom facility in a nearby building that was not part of the construction site. *Id.* at 383. The Sixth Circuit upheld dismissal of the disparate treatment claim, but reversed dismissal of the disparate impact claim. *Id.* at 386, 389. The court found that because women’s anatomy required them to use facilities in a manner that made physical contact with unsanitary surfaces more likely, the condition of these toilets had an adverse effect on the work status of female employees because of their sex. *Id.* at 388.

203. *DeClue*, 223 F.3d at 436.

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

Baskerville.²⁰⁵ Nonetheless, Judge Posner then described sexual harassment as including efforts of co-workers or superiors to make the workplace "intolerable or at least severely and discriminatorily uncongenial to women," without any recognition of his description of the uncongeniality of public urination to female workers.²⁰⁶

The decision in *DeClue* is explicitly driven by a desire to keep sexual harassment doctrine a distinct and narrow theory. Judge Posner argued that the case is not properly viewed as a sexual harassment claim because that type of claim did not allow DeClue's employer to raise the defense he thought it should have.²⁰⁷ In hostile environment cases not involving tangible employment action, once the plaintiff proves a prima facie case, the focus is on whether the employer did enough to prevent and correct the harassment.²⁰⁸ Disparate impact cases, by contrast, focus on the burden to the employer in removing the disparity.²⁰⁹ Judge Posner clearly views that distinction as affected by the Supreme Court's ruling in *Ellerth*, characterizing that case as requiring an employer faced with hostile environment charges to have done "all he could to prevent the harassment."²¹⁰ He contrasts this to a disparate impact defense, which he says would give the employer a chance to show that providing private toilet facilities would be justified: "[b]y failing to present her case as one of disparate impact, the plaintiff [in *DeClue*] prevented the defendant from trying to show that it would be infeasible or unduly burdensome to equip its linemen's trucks with toilet facilities sufficiently private to meet the plaintiff's needs."²¹¹

There are several glaring errors in the court's explanation. *Ellerth* established a duty of reasonable care to prevent and correct harassment, not a duty to do "all he could."²¹² Prior to *DeClue*, Judge Posner himself joined in an opinion that recognized this and let an employer off the hook under the *Ellerth* defense who certainly did not do all it could to

205. *Id.*; see also *supra* note 152 and accompanying text.

206. *DeClue*, 223 F.3d at 437.

207. *Id.*

208. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (outlining the employer's reasonable care affirmative defense to sexual harassment claims where no tangible job action is taken against the employee).

209. *DeClue*, 223 F.3d at 437.

210. *Id.*

211. *Id.*

212. *Ellerth*, 524 U.S. at 765 (holding that an "employer [must have] exercised reasonable care to prevent and correct promptly any sexually harassing behavior"). The Court implicitly disagreed with the notion that an employer must do all it can to prevent harassment by suggesting that, in some cases, an employer might not even need to have promulgated an anti-harassment policy in order to invoke the affirmative defense. *Id.*

communicate its anti-harassment policies.²¹³ Under a reasonable care doctrine, an employer would have the opportunity to establish that it was not required to take any further steps to prevent the type of harassment that was occurring in DeClue's workplace.²¹⁴ The duty to prevent and correct does not require the highest and best response, it requires only a response that is reasonably calculated to stop the harassment.²¹⁵ In *DeClue*, that duty might have included adopting reasonable policies that allowed the plaintiff access to the nearest restroom facilities, and prohibiting other employees' indiscriminate (and sometimes retaliatory) habits of public urination.²¹⁶

More to the point, the *DeClue* decision reflects a court that is thinking "within the box." Judge Posner reduces the hostile work environment argument in *DeClue* to something that was "a purely semantic matter," and one that "would make disparate impact synonymous with hostile work environment."²¹⁷ The majority was unwilling to consider a case that might blur the margins of the "doctrinal

213. *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 643-44 (7th Cir. 2000). In *Hill*, a majority of the panel concluded that an employer was entitled to judgment as a matter of law under the *Ellerth* affirmative defense despite the fact that the employer failed to effectively distribute its sexual harassment policy to its employees. *Id.* at 644. The employer simply put the policies in a set of notebooks kept in "a public access type place" in each of its branch offices. *Id.* There was no evidence that the employer made any effort to communicate those policies to its employees, and the plaintiff testified she never received them. *Id.* at 644, 647.

214. *Landgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992), *aff'd on other grounds*, 511 U.S. 244 (1994).

215. *See, e.g., id.* at 430 (reasoning that an employer is required only to take steps reasonably calculated to end the harassment and is not required to "use the most serious sanction available to punish an offender"); *see also* *Dudley v. Metro-Dade County*, 989 F. Supp. 1192, 1202-03 (S.D. Fla. 1997) (rejecting plaintiff's claim that an employer should have taken measures more extreme than removing the harasser as plaintiff's supervisor where there was no evidence of any further harassment after the plaintiff reported the harasser).

216. The lower court found that the company had a sexual harassment policy in place and had conducted seminars on the topic. *DeClue*, No. 98-1276, slip op. at 16.

217. *DeClue*, 223 F.3d at 437. The decision may be a bit disingenuous in suggesting that the case would have made an appropriate disparate impact claim. *Id.* There is a substantial question whether DeClue would have survived summary judgment in the Seventh Circuit had she picked that theory. She would have to establish as part of her prima facie case a specific employment practice that had a disparate impact on employees because of sex. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2001) (requiring proof of a "particular employment practice" that discriminates based on a protected characteristic); *see also* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989). Presumably, she would have identified failure to provide restroom facilities as that employment practice. In prior cases, Judge Posner found that failure of an employer to take some action is not an employment practice for purposes of disparate impact law. *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 305 (7th Cir. 1991) (requiring "a more affirmative act by the employer" to establish an employment practice). Having characterized DeClue's allegation as one of omission, rather than an affirmative act, *DeClue*, 223 F.3d at 436, Judge Posner may have rejected the claim even if brought under what he deemed the proper theory.

box" it had created for hostile work environment claims. The court's decision avoids having to follow *Ellerth* and evaluate whether the employer's actions were reasonable. *DeClue* also avoids considering whether recent Supreme Court decisions challenge the circuit's categorical "safe harbor" approach for "low level harassment," which puts too much reliance on the sexual desire-dominance paradigm.

As Judge Ilana Diamond Rovner aptly recognized in her dissenting opinion in *DeClue*, "[d]iscrimination in the real world many times does not fit neatly into the legal models [courts] have constructed. . . . Because prejudice and ignorance have a way of defying formulaic constructs, the lines with which we attempt to divide the various categories of discrimination cannot be rigid."²¹⁸ This is the lesson that *Ellerth*²¹⁹ and *Faragher*²²⁰ teach in their rejection of the rigid distinction between *quid pro quo* and hostile environment claims. It is also the lesson *Oncale* teaches in its inclusion of same sex harassment as harassment "because of sex."²²¹ While the standard of employer liability may vary based on the consequences experienced by the plaintiff, the plaintiff is not limited in pursuing a harassment claim by having to fit the claim within one particular theory. It has long been recognized that one set of facts can support multiple theories of discrimination.²²² That a case might fit better within one proof model is not a basis for rejecting that claim as a matter of law under another proof model.

The *DeClue* majority's fundamental error is that which Professor Franke warns against—elevating a method of proof over the nature of the harm itself.²²³ Disparate impact theory is inadequate to address the harm experienced by the plaintiff in *DeClue*. She was marginalized and subjected to torment because she was a woman blazing a trail into a workplace previously exclusively occupied by men. Disparate impact theory is clinical—it focuses on a discrete employment practice and the employer's justifications for that practice.²²⁴ Even assuming a plaintiff

218. *DeClue*, 223 F.3d at 439-40 (Rovner, J., dissenting) (citations omitted). It was surely no coincidence that Judge Rovner was able to conceptualize the workplace as hostile because of her own experience as the first woman appointed to the bench in the Seventh Circuit. She recounted the congratulations she received from another member of the Court of Appeals that now the women's bathroom off the judge's conference room would finally be used. *Id.* at 437.

219. 524 U.S. at 743.

220. 524 U.S. at 775.

221. *Oncale*, 523 U.S. at 82.

222. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (noting that the same case may raise both disparate treatment and disparate impact discrimination claims); see also *DeClue*, 223 F.3d at 439-40 (Rovner, J., dissenting).

223. Franke, *supra* note 26, at 772.

224. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), is a good demonstration of how

wins such a case, there is no compensation for the hostile environment in which she suffered.²²⁵ The employer may be required to provide her with toilet facilities, but that does little to address the totality of the hostile workplace.

2. *Heuer v. Weil-McLain*: Hostile Work Environment Claims Cannot Be Based on Acts that Could Support a Cause of Action for Retaliation

A second area where the Seventh Circuit uses proof models to think within the box is its distinction between hostile environment and retaliation claims. Title VII makes unlawful not only discrimination “because of sex,” but also because the plaintiff opposed a practice unlawful under the statute or filed a charge alleging such a practice.²²⁶ As in other areas of discrimination law, courts have outlined a set of elements that a plaintiff must allege to state a prima facie case of

clinical disparate impact theory works. In *Wards Cove*, the employer, a fishing cannery, had a workplace that was almost completely segregated. *Id.* at 647. Unskilled cannery positions were predominately held by persons of a racial or ethnic minority; skilled non-cannery positions were predominately held by non-minorities. *Id.* The segregation was so complete that while the cannery was in operation, the workers slept in separate dormitories and ate in separate mess halls. *Id.* Justice Stevens, in a dissenting opinion, indicated the whole situation “[bore] an unsettling resemblance to aspects of a plantation economy.” *Id.* at 663-64 n.4 (Stevens, J., dissenting). The majority opinion explained that it was not taking that fact into account because the plaintiffs were not arguing intentional discrimination upon appeal. *Id.* at 649 n.4. The majority was not willing to accept the presence of any disparate impact on minorities in hiring for the non-cannery positions based on the stratification of the workforce. *Id.* at 651. Instead, the plaintiffs had to prove a disparate impact through evidence of the statistical makeup of the potential workforce for non-cannery positions and then prove a specific employment practice that caused that disparity. *Id.* at 651-53 & n.8, 654-55, 657-58. Assuming the plaintiffs could get that far, the remainder of the case would focus on the employer’s justifications for the employment practices at issue. *Id.* at 658.

225. Remedies for disparate impact discrimination are limited to the equitable relief provided in 42 U.S.C. § 2000e-5(g) (2001). The statute authorizes injunctive relief, but reinstatement and back pay are generally not relevant to disparate impact claims. *Id.* at § 2000e-5(g)(2)(A) (2001). In contrast, under the Civil Rights Act of 1964, as amended, plaintiffs are entitled “to recover compensatory and punitive damages” for “unlawful intentional discrimination.” 42 U.S.C. § 1981a(a)(1) (2001). There appears to be little question that plaintiffs who prevail in sexual harassment cases are entitled to the expanded remedies under the Civil Rights Act. *See, e.g.*, *Smith v. N.W. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1416 (10th Cir. 1997) (applying standards for compensatory damages under 42 U.S.C. § 1981(a)(b)(3) (1997) in a sexual harassment case without questioning their applicability to such claims).

226. 42 U.S.C. § 2000e-3(a) (2001). Section 2000e-3(a) provides that it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id.

retaliation.²²⁷ The plaintiff must show that he or she engaged in some protected activity, that he or she suffered some adverse employment action, and that there is a causal link between the two.²²⁸ In a recent decision, *Heuer v. Weil-McLain*,²²⁹ again drafted by Chief Judge Posner, the Seventh Circuit rejected a plaintiff's hostile environment claim because it believed the case should have been framed as a retaliation claim.²³⁰

Heuer involved a stockroom attendant, Mary Heuer, who alleged she had been subjected to sexual advances, including groping and kisses, from a foreman in her workplace.²³¹ This continued until Heuer and the foreman were placed on different shifts.²³² About a year later, the foreman surprised Heuer late one night in an empty stockroom by grabbing her in a bear hug.²³³ Two months prior, Heuer had filed a charge of sexual harassment against the foreman.²³⁴ Heuer told the foreman if he let her go, no one would hear about this incident and she would back off her charges.²³⁵ The foreman said if Heuer would not "press any more charges, [he would not] press any more charges."²³⁶ There were no charges pending by the foreman.²³⁷

The case was problematic from the start because the initial incidents of harassment occurred more than three hundred days before the plaintiff filed her discrimination charge and were outside the statute of limitations.²³⁸ The Seventh Circuit viewed only the grabbing incident as within the limitations period.²³⁹ Based on its well-established precedent, it could have rejected this one incident as not sufficiently

227. *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1457 (7th Cir. 1994).

228. *Id.* If the plaintiff proves this prima facie case, the defendant has only a minimal burden to produce evidence of a legitimate, non-discriminatory reason for its actions. *Id.* The plaintiff must then prove that the reason advanced was pretext for intentional retaliation based on his or her protected conduct. *Id.*

229. 203 F.3d 1021 (7th Cir. 2000).

230. *Id.* at 1024.

231. *Id.* at 1022.

232. *Id.*

233. *Id.*

234. *Heuer*, 203 F.3d at 1022. Although not explicitly stated, it appears the charge in *Heuer* was a formal charge filed with either the EEOC or a state agency, given the court's use of the charge as the relevant date for calculating the three hundred day limitations period. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* The plaintiff in *Heuer* apparently did not attempt to argue that the later incident was part of a continuing violation by the defendant, which would have allowed her to reach back and include the earlier incidents.

239. *Heuer*, 203 F.3d at 1022.

severe or pervasive to support a hostile environment claim.²⁴⁰ Instead, however, the court rejected the incident as having nothing to do “directly or immediately” with the plaintiff’s sex.²⁴¹ Its reasoning reflects a concern similar to that in *DeClue*, that distinctions between proof models be rigidly maintained:

The [harassment] charge arose out of [the foreman’s] earlier creation of a hostile working environment motivated by Heuer’s sex, but that is too remote a connection, for otherwise every claim of retaliation for filing charges of discrimination would be a claim of discrimination, even though Title VII makes discrimination and retaliation separate wrongs. . . . [A] complaint that charges discrimination is deemed not to place the employer on notice that he is being charged with retaliation.²⁴²

The plaintiff in *Heuer* was not alleging a retaliation claim in the underlying litigation, so the court was not concerned that it was being asked to apply the elements of the cause of action to an unsuspecting defendant.²⁴³ The case is another in which the court decides the plaintiff loses because she picked the wrong “box” for her claim. The court could not see a connection to sex in the acts of the foreman:

The argument is that a course of conduct which includes sexual advances topped off as it were with an effort to intimidate the victim can create a hostile working environment. And this is true. But Title VII does not impose liability on an employer for creating or condoning a hostile working environment unless the hostility is motivated by race, gender, or some other status that the statute protects. When the only conduct so motivated occurs more than the maximum permitted time before the charge is filed, the suit is barred. The statute may well impose liability . . . for the creation of a hostile working environment

240. See *supra* Part III.A.

241. *Heuer*, 203 F.3d at 1022 (finding it “evident” that the grabbing incident had “nothing directly or immediately to do with [the plaintiff’s] being a woman”).

242. *Id.* at 1022-23 (citations omitted).

243. *Id.* at 1023. The Seventh Circuit ruled in other cases that a plaintiff who files an EEOC charge alleging discrimination is not required to file another charge alleging retaliation that occurs because of the filing of the original charge. See, e.g., *McKenzie v. Ill. Dep’t of Transp.*, 92 F.3d 473, 481 (7th Cir. 1996) (holding that acts of retaliation that occurred subsequent to filing of charge were reasonably related to the original charge and may be considered). The plaintiff in *Heuer* was not attempting to take advantage of this rule; she apparently only framed it as a sexual harassment claim. Judge Posner, as he did in the *DeClue* decision, characterizes the plaintiff as “insist[ing] on characterizing” the facts as sexual harassment rather than retaliation. *Heuer*, 203 F.3d at 1023. As a result, he found the plaintiff to have waived a retaliation claim. *Id.*

motivated not by sex but by the filing of a complaint, but if so this is a form of retaliation and must be argued as such; it is not a form of sexual harassment.²⁴⁴

While some retaliation may be motivated solely by the filing of charges and not amount to harassment because of sex,²⁴⁵ there is no requirement in Title VII that anything that could be construed as retaliation must be brought under that section of the statute.²⁴⁶ Indeed, such a rule would muddy the waters more than clarify them. Both protected activity and adverse employment action have been given fairly

244. *Heuer*, 203 F.3d at 1024.

245. Another decision by Judge Posner, *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), poses an interesting scenario that might reflect retaliation not based on sex. In that case, two individuals who worked in the Chicago office of the Department of Housing and Urban Development, one of whom was the other's supervisor, became the subject of rumors regarding a sexual relationship in which one of them was getting promotions for giving sexual favors to the other. *Id.* at 257. They were cleared of the charges but nonetheless advised to do what they could to avoid creating a "'perception' of sexual activity," including not meeting alone behind closed doors. *Id.* at 258. The supervisor was reassigned to the Washington office for ninety days. *Id.* After both employees filed a formal complaint about the way the two of them had been treated in the investigation, the supervisor was told that he was being permanently reassigned to Washington as punishment for failing to control his subordinate—"that is, to get [the subordinate] to drop her complaints." *Id.* Both individuals filed harassment and retaliation complaints. *Id.* at 257. The Seventh Circuit upheld dismissal of the employee's retaliation complaint, finding that her claims that she was ostracized, disdained, and ridiculed by her fellow employees were not causally connected to her filing of a charge; instead that treatment was a continuation of the treatment she had received prior to filing the charge, when the employees thought she was having an affair with her supervisor. *Id.* at 259. On the supervisor's claim, however, the Seventh Circuit concluded that he could state a claim for retaliation. *Id.* at 262-63. His claim, arguably, reflects retaliation not based on sex, but based on a bureaucratic response to the administrative inconvenience of dealing with complaints.

246. *Cf. Gonzalez v. Bratton*, No. 96 CIV. 6330 (VM), 97 CIV. 2264 (VM), 2000 WL 1191558 (S.D.N.Y. Aug. 22, 2000). The *Gonzalez* court suggested a theory by which the reprisals the plaintiff suffered in that case could be considered hostile environment sexual harassment. *Id.* at *16. The court noted that a harasser, after being formally charged with harassment, might set out on a "campaign of calculated reprisals intended to further harass the victim but by other methods, by segmented measures, none of which could cross the threshold of a significant change in employment status constituting a tangible employment action." *Id.* The court reasoned that when such acts are taken as a whole, they may be as severe or pervasive and alter the terms and conditions of employment just as much as explicitly sexual harassment occurring prior to the plaintiff's complaint. *Id.* Unlike the Seventh Circuit, the district court in *Gonzalez* considered the validity of the theory by taking the nature of the harm into account: "From the perspective of the psychological toll on the victim and her ability to perform effectively on the job, as well as from the Title VII objective of workplace equality, the consequent unreasonable interference may be no different." *Id.* Because the case was before the court on a motion to dismiss based on the statute of limitations, the court did not ultimately decide whether either a harassment claim or retaliation claim, or both, was proven. *Id.* at *17 (concluding that "either approach would yield the same result on the evidence presented").

broad interpretation by the Seventh Circuit.²⁴⁷ After *Heuer*, it could be argued that a plaintiff who alleges sexual harassment because he or she experienced a tangible job action (e.g., firing), after refusing the advances of a supervisor, is actually alleging retaliation for opposing an unlawful act and not harassment.²⁴⁸ The advances may have been because of sex, but was the firing? Obviously cases like *Ellerth*, which characterize adverse employment action cases as harassment cases, contradict this. By parsing “because of sex” the way the Seventh Circuit does, however, the distinction is arguably valid.²⁴⁹

In *Heuer*, the acts of the foreman are ambiguous. Did he grab the plaintiff to threaten her for filing charges, or did he grab her because the opportunity presented itself to harass her again, thwarted only by the plaintiff offering him an incentive to let her go? The foreman’s act of grabbing the plaintiff may have been motivated at least in part by her sex, especially given his prior acts of groping and kissing her. A hostile environment claim would allow the plaintiff to address the totality of her workplace conditions that, echoing the words of Justice Ginsburg’s concurring opinion in *Harris*, “ma[k]e it more difficult to do the job” because of her sex.²⁵⁰ Of course, she may not convince the trier of fact, but as a matter of doctrine, there is no substantial basis for refusing her

247. For example, the Seventh Circuit has held that informal complaints raised in conversation with a supervisor is sufficient protected activity to invoke the protections of 42 U.S.C. § 2000e-3(a). *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045-46 (7th Cir. 1980) (finding plaintiff’s expression of opinion that company should not deny benefit coverage to pregnant employees “opposition” to a practice she in good faith believed unlawful). The court has also been willing to expand the statute’s coverage to cover forms of retaliation not contemplated by the literal language of the statute. In a decision authored by Judge Posner, the court extended 42 U.S.C. § 2000e-3(a) to reach a claim by an employee who claimed he was retaliated against because he failed to prevent someone from filing a complaint. *McDonnell*, 84 F.3d at 262. The Seventh Circuit has taken a similarly broad view of what can be considered adverse employment action. *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (noting that there is nothing in the law that restricts the type of retaliatory act that might be taken against employees and that adverse actions come in all shapes and sizes).

248. Compare *Fleming v. S.C. Dept. of Corr.*, 952 F. Supp. 283, 287-88 (D.S.C. 1996) (finding plaintiff’s refusal to submit to her supervisor’s advances was opposition under 42 U.S.C. § 2000e-3(a)), with *Del Castillo v. Pathmark Stores, Inc.*, 941 F. Supp. 437, 438-39 (S.D.N.Y. 1996) (finding that employee’s refusal to submit to supervisor’s sexual advances cannot be considered protected activity).

249. Interestingly, Judge Posner rejected a claim brought under a retaliation theory, because he found that the acts alleged to be retaliatory were really just a continuation of acts that occurred prior to the plaintiff’s filing of a complaint of harassment. *McDonnell*, 84 F.3d at 259 (finding the post-complaint harassment to be a mere continuation of the pre-complaint harassment and that “[t]here was no ratcheting up of the harassment” after the complaint was filed).

250. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988)).

the opportunity to frame the case this way. What the Seventh Circuit decided, however, is that the model of proof is more important than the underlying harm. The decision has its roots in the circuit's failure to appreciate the significance of acts that are not sexual when defining "because of sex."

IV. THINKING OUTSIDE THE BOX AND EMPHASIZING THE HARM, NOT THE PROOF MODEL

What would be the effect of recognizing cases like *DeClue* and *Heuer* as sexual harassment cases? The answer has two interrelated parts. First, there is the question of impact on doctrine. Would recognizing these claims create incoherence within the law of sex discrimination, and violate some legitimate need to keep separate wrongs separate? Second, there is the question of impact on the ability to redress the harms suffered if the claims are recognized as harassment claims. Does Title VII adequately protect against sexual and sex-based harassment if plaintiffs can bring sexual harassment claims in only narrowly constructed contexts? As this Part demonstrates, the answer to each of these questions is "no."

A. *What Is the Impact on Sex Discrimination Doctrine if These Cases Are Recognized as Sexual Harassment Claims?*

As noted in Part II, legal scholars debate the "why" of sexual harassment law: why is harassment discrimination based on sex?²⁵¹ While the exact parameters of their answers may vary, they essentially agree that sex or gender based harassment must be fully accounted for in that answer.²⁵² The aspects of work that make it hostile to one sex must move beyond the sexual desire-dominance paradigm that currently limits

251. See *supra* note 27-38 and accompanying text.

252. Abrams, *supra* note 26, at 1223-25 (arguing that sexual harassment doctrine should be based on a subordination theory that reflects enforcement of sex and gender hierarchy in the workplace); see also Franke, *supra* note 26, at 696, 732-35 (arguing for an understanding of sexual harassment that reflects its basis in gender norms rather than female subordination); Schultz, *supra* note 26, at 1748-49 (arguing that courts' emphasis on sexual conduct as the core of sex-based harassment fails to account for the systematic disadvantaging of women through sexist, gender-based conduct). Cf. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 465, 482-83 (1997) (arguing that a respectful person standard should be substituted for the reasonable person standard, in part because the latter fails to fully account for the way that gender affects perceptions of sex related behavior in the workplace).

the courts' understanding.²⁵³ Failure to move beyond that paradigm can account for much of the Seventh Circuit's doctrine, particularly its tendency to disaggregate sexual from non-sexual acts and then treat them in a categorical fashion.²⁵⁴

Is *DeClue* properly conceived of as a hostile environment claim? Yes, if hostile environment law fully accounts for how male dominated culture defines a workplace and keeps female workers as outsiders. Audrey DeClue's complaint was not that of a "woman of Victorian delicacy."²⁵⁵ She was not prudishly protesting the juvenile behavior of her co-workers. She was not insisting on a private bathroom to protect her delicate sensibilities. She was saying that in this workplace, defined as it was for the comfort of males, she was not able to be an equal participant in ways that mattered. Casual and indiscriminate urination by the male linesmen was a mechanism by which they established their entitlement to that job.²⁵⁶ It bonded them, and excluded women, who could never be "one of the boys." Moreover, the male workers knew this, as shown by the escalation of their behavior in response to her complaints.²⁵⁷ Once the case is understood in this fashion, what Audrey DeClue alleged was harassment based on sex; it was certainly pervasive if not severe, and it altered the terms and conditions of her employment.

A better reasoned view of "because of sex"²⁵⁸ also explains why *Heuer* was a hostile environment claim. If the court had not been thinking within the box, it might have recognized how intertwined were the actions of Mary Heuer's alleged harasser. Instead of scrutinizing the

253. Schultz, *supra* note 26, at 1796.

254. Professor Schultz suggests that as a first step to a better concept of sexual harassment, courts need to cease disaggregating hostile work environment and other forms of discrimination along sexual lines. *Id.* at 1798.

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

256. As noted above, in arguing for a gendered view of sexual harassment doctrine, Professor Franke coins the term the "technology of sexism" to describe how harassment acts to enforce fundamental gender stereotypes for men as well as women. Franke, *supra* note 26, at 693. "If a 'technology' is a manner of accomplishing a task, or the specialized aspect of a particular field, then sexual harassment is both the manner of accomplishing sexist goals, and the specialized instantiation of a sexist ideology." *Id.* (footnotes omitted). Viewed in this sense, harassment serves to regulate and discipline the workplace, and punish non-conformers. *Id.* at 765-66. This is a particularly useful explanation of what occurs in workplaces in which women fill positions previously held exclusively by men. *Id.* at 763-66 (discussing women harassed in order to place them in their "proper place").

257. DeClue's co-workers teased her about her bathroom needs, urinated in her presence, made inappropriate sexual gestures, and played pranks on her after she expressed her concerns about the restroom situation. *DeClue*, No. 98-1276, slip op. at 6-8 (setting out timeline of harassing conduct alleged in the case).

258. *Oncala*, 523 U.S. at 79.

bear hug incident in isolation, the court should have placed it in context with the other acts of harassment. The court ostensibly did not do so because it concluded the prior acts of harassment Heuer alleged were outside of the statute of limitations.²⁵⁹ Thus, the only relevant context the court acknowledged was the filing of a sexual harassment charge.²⁶⁰ The time limitations issue was, however, only a convenient device. This was a court inclined to find that there was no sex-based component to the conduct in the first place. The court's parsing of the incidents stems from its inability to see the conduct as anything other than that which would have occurred in any case in which a complaint of any kind had been filed against this individual. But, of course, there was a sex-based component to it. The act was part of the same male cultural domination that the plaintiff experienced when the earlier acts of harassment occurred. The fact that this last incident happened after she filed a complaint only served to heighten the message inherent in the earlier acts that the proper role of women in the workplace was as submissive sexual objects.²⁶¹ Because the court lacked an adequate view of the

259. *Heuer*, 203 F.3d at 1022. It is beyond the scope of this article, but there is an interesting question regarding what impact a reconceptualization of hostile environment harassment might have in cases in which plaintiffs assert continuing violation theory as a defense to the statute of limitations defense. See generally Lisa S. Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531, 532-33 (2000) (evaluating the difficulty of applying continuing violation theory to sexual harassment claims because such claims by nature involve cumulative discriminatory acts). In cases like *Heuer*, the plaintiff had no real chance to succeed on her continuing violation claim because the Seventh Circuit did not consider the acts after her complaint to be sexual harassment; but rather, the court considered these acts to be retaliation. *Heuer*, 203 F.3d at 1024.

260. *Heuer*, 203 F.3d at 1022.

261. It is probably no coincidence that the only recent substantial insight into how sex and gender informs the way that people experience sexual harassment comes from one of the few female judges on the Seventh Circuit panel, Judge Ilana Diamond Rovner. *DeClue*, 223 F.3d at 437 (Rovner, J., dissenting). In addition to her dissenting opinion in *DeClue*, Judge Rovner wrote the majority opinion in *Doe v. City of Belleville*, which was vacated by the Supreme Court after *Oncale*. *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998). In *Doe*, Judge Rovner articulated how the nature of harassing conduct is inextricably intertwined with the sex of the victim, from the victim's perspective:

It would not seem to matter that the harasser might simultaneously be harassing a male co-worker with comparable epithets and comparable physical molestation. When a male employee's testicles are grabbed, his torment might be comparable, but the point is that he experiences that harassment as a man, not just as a worker, and [in situations involving harassment directed at women,] she as a woman. In each case, the victim's gender not only supplies the lexicon of the harassment, it affects how he or she will experience that harassment; and in anything short of a truly unisex society, men's and women's experiences will be different.

Doe, 119 F.3d at 578.

systemic harm of sexual harassment, it elevated its concern for keeping separate wrongs separate over the nature of the harm actually suffered.

Is it necessary to “keep separate wrongs separate?” This argument puts the cart before the horse. It is one thing to say that distinctions must be maintained when evaluating the sufficiency of the plaintiff’s proof. It is another to say that these distinctions limit the plaintiff’s ability to assert a claim in the first place.

The proof models for disparate treatment and disparate impact discrimination were developed separately because the conduct that supported each claim was viewed as distinct.²⁶² The distinction is well worn; disparate treatment discrimination focuses on the employer’s differential treatment of employees based on a protected characteristic and disparate impact discrimination focuses on employer practices that are facially neutral in their treatment of employees, but the effect of which falls more harshly on one group than another.²⁶³ At the same time, however, courts have recognized that the same set of facts could support both theories.²⁶⁴ The Seventh Circuit itself has characterized them as “not inherently contradictory.”²⁶⁵ The plaintiff can assert that a policy is facially neutral but has an adverse impact on a protected group, and at the same time assert that the same policy was used as a proxy for intentional discrimination.²⁶⁶ Whether either or both theories prevail becomes a matter of proof—was there an intentional act; was there a disparate effect?²⁶⁷ The proof models are a means to an end, not an end in and of themselves.²⁶⁸

262. Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV., 1591, 1591 (2000).

263. See e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (noting the distinction between the two theories).

264. *Id.* at 336 n.15 (“Either theory may, of course, be applied to a particular set of facts.”).

265. *Reidt v. County of Trempealeau*, 975 F.2d 1336, 1340 n.4 (citing *Int’l Bhd. of Teamsters*, 431 U.S. at 335-36 n.15).

266. See e.g., *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (describing disparate treatment and disparate impact as “fuzzy at the border”).

267. See e.g., *Council 31, Am. Fed’n of State, County & Mun. Employees v. Doherty*, 169 F.3d 1068, 1068, 1072, 1074 (7th Cir. 1999) (upholding rejection of both disparate treatment and disparate impact claims). In *Doherty*, a race discrimination case involving a reduction in force, the court agreed with the lower court’s rejection of the disparate treatment claim because there was no evidence that the criteria used by the employer to determine who would be laid off was selected out of an intent to discriminate based on race. *Id.* at 1072. It also upheld rejection of the disparate impact claim, finding the lower court properly gave credence to the employer’s expert who claimed the layoff did not have a disparate effect on black employees. *Id.* at 1074.

268. There is an analogy to the elements of proof for general disparate treatment discrimination. The prima facie case for disparate treatment claims was first outlined in a hiring discrimination case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the context of hiring, the Court stated that the plaintiff must show he applied for a job for which he was qualified,

The same is true for discrimination versus retaliation. While to discriminate and to retaliate may be different wrongs, if the facts support both claims, both should then be available to the plaintiff. It certainly does not undermine the anti-discrimination provisions of Title VII to recognize a discrimination claim that includes retaliation, nor vice versa.²⁶⁹

In its recent sexual harassment rulings, the Supreme Court seems to recognize the basic principle involved here. In *Oncale*, the Court suggested that harassment cases are simply one form of disparate treatment.²⁷⁰ This follows from *Meritor's* recognition of hostile environment claims as part of the broad spectrum of disparate treatment Title VII was intended to address.²⁷¹ In *Ellerth* and *Faragher*, the Court rejected the rigid distinction between *quid pro quo* and hostile environment harassment.²⁷² It is not necessary or proper to think of these claims in narrowly confined terms.

In both *DeClue* and *Heuer*, Judge Posner articulated an argument that would have construed the claims as hostile environment cases, but then refused to give them credence.²⁷³ In other words, the cases were not

was rejected, and after the rejection, the position remained open and the employer continued to seek applicants with similar qualifications to those of the plaintiff. *Id.* at 802. The Court also noted the need for flexibility in other discrimination cases: "The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13. In subsequent cases, courts recognized that these elements had to be adjusted to reflect other types of disparate treatment discrimination, such as individual firings or reductions in force. *See, e.g.*, *EEOC v. W. Elec. Co.*, 713 F.2d 1011, 1014-15 (4th Cir. 1983) (noting that the Supreme Court, in *McDonnell Douglas v. Green*, never intended the prima facie elements to be established "mechanically" and adjusting the elements to address a reduction-in-force age discrimination claim). Courts have been criticized, however, for being too formalistic in their application of the *McDonnell Douglas* framework. Kenneth R. Davis, *The Stumbling Three-Step, Burden Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 753 (1995) (suggesting that valid discrimination cases have been doomed by the requirement they establish a prima facie case under the *McDonnell Douglas* framework).

269. The Seventh Circuit's concern, particularly that of Judge Posner, about maintaining the theoretical integrity of retaliation claims, is interesting in light of the court's decision in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), to allow a retaliation claim by someone who failed to prevent a subordinate from filing a harassment charge. Judge Posner reasoned that although the language of the statute prohibited retaliation for "hav[ing] made a charge," "[i]t does no great violence to the statutory language to construe" it to include allowing a charge to be filed by someone else. *Id.* at 262. In that context, Judge Posner was willing to consider the harm to be addressed by the statute rather than a mechanical application of the law.

270. *Oncale*, 523 U.S. at 78.

271. *Meritor*, 477 U.S. at 64-65.

272. *See* cases cited *supra* notes 67-72 and accompanying text.

273. In *DeClue*, Judge Posner acknowledged the argument that failing to correct a work condition that creates a disparate effect on one class of workers, which the employer knew or should have known about, did constitute a claim of a hostile work environment. *DeClue*, 223 F.3d at 437.

about distinctions in fact or proof, but in theory. The Seventh Circuit did not want to see those cases, or future cases like them, litigated under harassment theory.²⁷⁴ Suspicion is raised: the reason is not so much a concern for keeping separate wrongs separate as it is for keeping sexual harassment law narrowly confined in the face of Supreme Court precedent that could let it loose.

B. What Is the Impact on the Right to Be Free from Sexual Harassment if These Cases Are Not Recognized as Sexual Harassment?

On some level, the overall significance of a case like *DeClue* might be easy to dismiss. How often will a case involve a discrete practice like the provision of restroom facilities that will lead a court to view the case as raising only a disparate impact claim? In most cases, it will be difficult to fit the facts within the proof model articulated for disparate impact claims. So, one could easily say that the case was simply an oddity in sexual harassment law.

At minimum, *DeClue* has already influenced the litigation of other cases. A construction site case pending in the Seventh Circuit is proceeding as a disparate impact claim after the district court dismissed the plaintiff's hostile environment claim.²⁷⁵ *DeClue*, however, is bigger than the porta-potty issue. The real impact of *DeClue* lies in what it adds to the Seventh Circuit's ongoing attack on hostile environment sexual harassment doctrine.

Before, plaintiffs were concerned about pleading the case to avoid the circuit's safe harbor rationale. Now, plaintiffs have to confront the possibility the court will deny any consideration of their claim because the court does not feel the "fit" is right as a matter of doctrine. This "fit" is based on a misplaced desire to keep separate wrongs separate, and to give employers an opportunity to put on the "right" kind of defense.²⁷⁶ In

He then dismissed the argument because if accepted, it would render disparate impact synonymous with hostile work environment. *Id.* In *Heuer*, Judge Posner acknowledged that a hostile working environment can be created through a course of sexual advances in addition to an attempt to intimidate the victim. *Heuer*, 203 F.3d at 1024. He dismissed this argument in *Heuer*, however, by finding no evidence to support a claim that the intimidation in that case was motivated by the plaintiff's sex. *Id.*

274. The influence of the court's approach is already manifesting itself. Terry Carter, *Spelling Out Relief: Female Workers Argue Lack of Job-Site Toilet Facilities Is Unfair*, A.B.A. J., Nov. 2000, at 23, 24 (describing a pending case in which plaintiff's hostile environment claim was dismissed, but disparate impact claim allowed to proceed).

275. *Id.*

276. *DeClue*, 233 F.3d at 437.

other words, the court wants to control the dialogue in these cases away from a consideration of the totality of the effect on the plaintiff's working conditions to a narrow focus on discrete acts. If the acts are not implicitly unjustified (e.g., sexual advances), the employer should, if possible, be given an opportunity to assert business justification for its actions or inactions (e.g., failure to provide appropriate measures for employees to relieve themselves).

The Seventh Circuit's approach emphasizes this area of the law as a pleading game. Plaintiffs' attorneys are advised to allege intentional discrimination, disparate impact discrimination, and retaliation in every case, lest they choose the wrong one and be deemed to have waived the right one. While that is true to some extent already in discrimination litigation, the stakes are raised if the court will not even analyze the factual claim a plaintiff makes, choosing instead to rest on its doctrinal sense of what proof model should be applied.

Then, there is the issue of filing a charge with the EEOC. The Seventh Circuit has held that plaintiffs who file discrimination charges with that agency do not need to file further charges alleging retaliation (although it is supposedly a separate wrong) when that retaliation is reasonably related to the filing of the first charge.²⁷⁷ It has, however, distinguished between cases where the alleged retaliation occurred before formal charges were filed and after.²⁷⁸ This distinction may pose a particular problem for plaintiffs who lodge informal complaints about being harassed and who, then, find themselves facing a court that does not see acts subsequent to the complaint as "because of sex." An EEOC charge alleging harassment may not be enough to protect the plaintiff's claim once the case is filed in federal court.

All of this is ironic, given that the Supreme Court in *Ellerth* and *Faragher* ostensibly made it easier to plead harassment cases.²⁷⁹ The Court's rejection of rigid proof models has apparently been lost in the

277. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) (adopting rule that a separate administrative filing is not required in order to raise a claim of retaliation in response to a previous charge alleging discrimination).

278. *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 482-83 (7th Cir. 1996) (holding that plaintiff cannot proceed on retaliation claim when the acts of retaliation could have been included in administrative charges actually filed and were not).

279. Plaintiffs do not have to worry whether the harassing conduct is the "right kind" to support a *quid pro quo* claim—they need only determine if a tangible job detriment resulted. *See* cases cited *supra* notes 67-72 and accompanying text. If it did, any conduct amounting to harassment based on sex should suffice. *Ellerth*, 524 U.S. 742, 764-65 (1998). If it did not, then the conduct must be shown to be severe or pervasive enough to itself alter the terms and conditions of the plaintiff's employment. *Id.* at 765.

mix. The ability of plaintiffs to adequately address sex-based hostility that affects their equal participation in the workforce continues in courts, like the Seventh Circuit, to be diminished by using proof models to “think within the box.” The “box” is being used to hide the ball in some sort of doctrinal slight of hand.

V. CONCLUSION

This article should not be understood as a call to abandon proof models for sexual harassment law. Proof models serve a purpose in the law. They make cases predictable. They make cases consistent. Pleading or responding to a complaint in discrimination law without a proof model for hostile environment harassment would be next to impossible. Nonetheless, proof models need to be applied pragmatically rather than formalistically, in order to accomplish the purposes of anti-discrimination laws. The proof models are guidelines, not rigid walls.

Fundamentally, the problem is in the failure of courts to adopt an adequate paradigm for hostile environment sexual harassment that guides them in how to apply those proof models. Perhaps courts have been so intent on creating distinct proof models in sexual harassment law because that law itself is viewed as being amorphous. When courts are exhorted to avoid making Title VII into a “general civility code,”²⁸⁰ it encourages them to seek categorical approaches to what is and what is not harassment. The Seventh Circuit seems to approach proof models from the perspective that they are necessary to protect employers from harassment claims. In its mindset, harassment claims should be limited to a subset of cases in which plaintiffs are subjected to unwelcome sexual advances or unambiguous and excessive expressions of animus toward their sex. Outside of those contexts, cases should either fall into a safe harbor from liability for low-level harassment or be litigated, if at all, under some other theory.

Courts like the Seventh Circuit need to recognize the nature of the harm experienced by employees like Audrey DeClue who experience sex-based rather than sexual harassment. The nature of the harm should be the starting point in the analysis. Courts need to put aside the way they have approached proof models in discrimination law and come back to the issue with fresher thinking.²⁸¹ This approach does not require them

280. *Oncala*, 523 U.S. at 80.

281. In problem solving theory, this may be called a period of incubation. WICKELGREN, *supra* note 10, at 65.

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to reformulate the basic elements of hostile environment harassment claims. Courts should instead consider how each of those elements have been interpreted.

When thinking about “because of sex,” for example, courts should not get into the loop created by the sexual desire-dominance paradigm, which interprets differential treatment to mean either unambiguous sexual advances or explicitly derogatory treatment of female employees versus male employees. This kind of thinking leads to the “box” that looks to categorize and dismiss acts as “low-level” or “merely offensive.” Here, thinking beyond the box recognizes the broad range of behaviors that make it harder for women to do the job because they are women. It recognizes the hostility in the workplace experienced by someone like Audrey DeClue, which was much more than a question of whether the employer should have provided portable toilet facilities. The question was whether she was entitled to participate in the workplace without being perpetually branded as an “outsider,” someone who did not belong. Until courts like the Seventh Circuit can recognize the significance of this dynamic, Title VII will fail to adequately provide equal opportunity in the workplace.