

1-1-2002

Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable under Title VII?

Kelly Cahill Timmons

Georgia State University College of Law, kctimmons@gsu.edu

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Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?

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* Assistant Professor, Georgia State University College of Law. I would like to thank Andrea Curcio, Steven Kaminshine, Mary Radford, Eric Segall, and Rebecca Hanner White for their helpful comments.

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I. INTRODUCTION

A female attorney claimed that the male attorneys with whom she worked regularly talked about their sex lives, told jokes about sex, joked about masturbation in slang terms, and used the word "fuck."¹ These conversations were not directed to the female attorney, but she heard them and found them "acutely offensive to her as a woman."² A female manager of a city's computer department claimed that she regularly observed her supervisor viewing pictures of completely naked women on Internet websites.³ A female firefighter—the first woman assigned to her engine company—saw stacks of pornographic magazines in the company's common living areas, witnessed male

1. *Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser, L.L.P.*, 153 F. Supp. 2d 219, 222 (S.D.N.Y. 2001), *rev'd*, 2002 WL 313225 (2d Cir. Feb. 27, 2002).

2. *Id.*

3. *Coniglio v. City of Berwyn*, No. 99C4475, 2000 WL 967989, at *2 (N.D. Ill. June 15, 2000).

firefighters watching pornographic movies in the company's common sitting area, and heard frequent conversation about whether the male firefighters had gotten "banged" over the weekend.⁴

All three women are complaining about non-targeted sexual conduct in the workplace. Does such conduct violate Title VII's prohibition of sex discrimination in employment? Because the conduct did not result in a tangible employment action, it will be actionable under Title VII only if the plaintiff can prove that it constituted hostile work environment sexual harassment.⁵ The plaintiff must prove that the conduct was sufficiently severe or pervasive to alter the conditions of employment and to create an abusive work environment.⁶ The plaintiff also must have some basis for establishing employer liability for the conduct.⁷ In *Oncale v. Sundowner Offshore Services, Inc.*,⁸ the Supreme Court emphasized an additional requirement in every sexual harassment case: the plaintiff must prove that the conduct constituted sex discrimination. This requirement may be difficult to satisfy when the harassing conduct is not targeted on the basis of sex.

The majority of sexual harassment cases involve conduct that is discriminatory under a disparate treatment theory. In other words, most sexual harassment claims involve harassing conduct that is caused by the sex of the plaintiff, where the harasser would not treat someone of a different sex than the plaintiff in the manner in which he or she is treating the plaintiff. The classic sexual harassment fact pattern—in which a male supervisor tells a female subordinate "sleep with me or I'll fire you"—is an example of disparate treatment; it seems unlikely that the supervisor would have made such a demand of a male subordinate.

Women who complain about non-targeted sexual conduct in the workplace—conduct that was not caused by their sex—cannot establish that the conduct was discriminatory disparate treatment. However, they may be able to satisfy the discrimination requirement for

4. *O'Rourke v. City of Providence*, 235 F.3d 713, 718-19, 722 (1st Cir. 2001).

5. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998) (explaining that sexually discriminatory conduct not involving a tangible employment action is actionable only as hostile work environment sexual harassment); *see also* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1154 (1998) (noting that the *Ellerth* Court "distinguished discrimination resulting in what it termed a 'tangible employment action' from harassment that is severe or pervasive").

6. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The plaintiff must prove both that a reasonable person would have perceived the environment to be abusive and that the plaintiff had such a perception. *Id.* at 21-22; *see also Ellerth*, 524 U.S. at 754 (noting that hostile work environment harassment claims require a showing of severe or pervasive conduct).

7. *See Ellerth*, 524 U.S. at 764-65 (establishing a rule for employer liability for hostile work environments created by a supervisor).

8. 523 U.S. 75, 80 (1998).

actionable sexual harassment through the disparate impact theory of discrimination. Disparate impact discrimination occurs when a facially neutral employment practice disproportionately harms members of a protected class and is not job-related or consistent with business necessity.⁹ Should women in workplaces festooned with nude pin-ups, in which vulgar language and discussions of sex are commonplace, be able to sue their employers for sexual harassment, claiming that the work environment disproportionately harms them in violation of Title VII?¹⁰

This Article explores whether non-targeted sexual conduct in the workplace should be actionable under Title VII. Part II describes courts' evolving understanding of sexual harassment as a form of sex discrimination, including their tendency to assume that any sexual conduct in the workplace constituted sex discrimination and the Supreme Court's rejection of that approach in *Oncale*. Part III discusses sexual harassment as a form of disparate treatment discrimination and explains why non-targeted sexual conduct in the workplace cannot be actionable under a disparate treatment theory. Part IV analyzes whether non-targeted workplace sexual conduct can be actionable under the disparate impact theory of discrimination, which requires a plaintiff to prove that a facially neutral employment practice has a disparate impact on persons of one sex. Part V explores potential problems with finding non-targeted workplace sexual conduct actionable. In Part VI, the Article concludes that non-targeted sexual conduct in the workplace should be actionable only if the conduct's disproportionate impact on women is great.

II. THE EVOLVING UNDERSTANDING OF SEXUAL HARASSMENT AS A FORM OF SEX DISCRIMINATION

Courts have struggled to determine whether and under what circumstances sexual conduct in the workplace violates Title VII's prohibition of sex discrimination in employment.¹¹ Courts initially viewed

9. 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

10. This Article generally refers to female plaintiffs because the vast majority of plaintiffs in sexual harassment cases are women. See Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 560 (2001) (noting that, out of nearly 650 federal court cases involving sexual harassment claims, only 5.4% of the cases involved male plaintiffs). In addition, research suggests that non-targeted sexual conduct in the workplace—the harassing conduct focused upon in this Article—is disproportionately harmful to women. See *infra* notes 260-76 and accompanying text. It is possible, however, that under some circumstances a male plaintiff could prove that non-targeted sexual conduct in the workplace had a disparate impact on men. See *infra* note 271.

11. 42 U.S.C. § 2000e-2(a).

workplace sexual conduct, even when a supervisor based employment decisions on a subordinate's willingness to engage in such conduct, as outside the scope of Title VII. After courts recognized that workplace sexual conduct could constitute sexual harassment in violation of Title VII, however, they began ignoring the statutory requirement that such conduct be sexually discriminatory. Instead, courts just looked at whether the challenged conduct was sexual in nature, reasoning that, if it was, it could be the basis of a sexual harassment claim. Under this view, any workplace sexual conduct, even if it was non-targeted, could be the basis of a Title VII claim. In its 1998 decision in *Oncale v. Sundowner Offshore Services, Inc.*,¹² the Supreme Court rejected this view, holding that it was not sufficient for harassing conduct to be sexual in nature. Rather, to be actionable under Title VII, harassing conduct must constitute discrimination because of sex.¹³

A. Recognition of Quid Pro Quo Sexual Harassment as Actionable Under Title VII: The Relevance of Desire

Courts first recognized that sexual conduct in the workplace could violate Title VII in the late 1970s. The first cases involved allegations of what was termed quid pro quo sexual harassment, where supervisors conditioned employment benefits on sexual favors.¹⁴ In the typical case, the female plaintiff alleged that her employment was terminated because she rejected her male supervisor's sexual advances. At first many courts did not view this conduct as violative of Title VII. According to some courts, such conduct reflected the personal and private preferences of the plaintiff's supervisors, not actionable sex discrimination in the workplace.¹⁵

12. 523 U.S. 75, 80 (1998).

13. *Id.*

14. See BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 8 (1992) (describing the essence of a quid pro quo claim as "that the individual has been forced to choose between suffering an economic detriment and submitting to sexual demands," a "put out or get out' bargain").

15. For example, in *Corne v. Bausch & Lomb, Inc.*, the court rejected the plaintiffs' Title VII claim based on their supervisor's repeated sexual conduct on the grounds that the supervisor's conduct "appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, [the supervisor] was satisfying a personal urge." 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977); see also *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (stating that Title VII "is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley"), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

Courts suggested that if such conduct was deemed to create a cause of action, the federal courts would be overrun with frivolous cases. The district court in *Tomkins* stated:

Other courts held that plaintiffs were discriminated against because they refused to provide sexual favors, not because of their gender. In *Barnes v. Train*, for example, the plaintiff alleged that her position was eliminated because she refused her male supervisor's sexual advances. The court rejected the plaintiff's Title VII claim, reasoning that "[t]he substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."¹⁶ Courts refused to equate acts motivated by sexual desire with sex discrimination.¹⁷

In 1977, the Court of Appeals for the District of Columbia Circuit reversed *Barnes* and became the first federal appellate court to hold that quid pro quo sexual harassment could constitute sex discrimination.¹⁸ The court focused on sexual desire, assuming that the plaintiff's supervisor was heterosexual and that his conduct was motivated

If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.

422 F. Supp. at 557. Similarly, the district court in *Corne* asserted: "[A]n outgrowth of holding such activity [sexual advances by a supervisor to a subordinate] to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual." 390 F. Supp. at 163-64.

16. 13 Fair Empl. Prac. Cas. (BNA) 123, 1974 U.S. Dist. LEXIS 7212 (D.D.C. 1974), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). The defendants in *Williams v. Saxbe* also made this argument:

[S]ince the primary variable in the claimed class is willingness *vel non* to furnish sexual consideration, rather than gender, the sex description proscriptions of the Act are not invoked. Plaintiff was allegedly denied employment enhancement not because she was a woman, but rather because she decided not to furnish the sexual consideration claimed to have been demanded. Therefore, plaintiff is in no different class from other employees, regardless of their gender or sexual orientation, who are made subject to such carnal demands.

413 F. Supp. 654, 657 (D.D.C. 1976). However, the *Williams* court rejected the argument. *Id.* at 657-58.

17. For example, in *Tomkins*, the plaintiff, a former employee of a utility company, alleged that her male supervisor made sexual advances to her and that she was discharged as a result of her complaints about the advances. The district court rejected the plaintiff's claim of sex discrimination in violation of Title VII, reasoning that "[w]hile sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse." 422 F. Supp. at 556. According to the court, although the supervisor was male and the plaintiff was female, "[t]he gender lines might as easily have been reversed, or even not crossed at all." *Id.*

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

by sexual attraction to the plaintiff.¹⁹ In light of that assumption, the court reasoned that male employees would not have been subjected to the conduct that the plaintiff had experienced: "retention of her job was conditioned upon submission to sexual relations—an exaction which the supervisor would not have sought from any male."²⁰ Rejecting the district court's distinction between discrimination against the plaintiff because of her sex and discrimination against the plaintiff because she rejected her supervisor's advances, the court noted that "[b]ut for her womanhood, . . . her participation in sexual activity would never have been solicited."²¹ Under the reasoning of the court of appeals in *Barnes*, sexual harassment in the form of sexual advances—unless there was evidence that the harasser would direct his or her advances to members of both sexes²²—was sex discrimination, and thus was actionable under Title VII.²³ Other courts soon followed this approach.²⁴

As discussed above, *Barnes* and the other early sexual harassment cases involved allegations of quid pro quo sexual harassment, in which employment benefits were conditioned on sexual favors. The next question the courts had to resolve was whether workplace sexual conduct violated Title VII when job benefits were not conditioned upon

19. *Id.* at 989 n.49 (noting that "there is no suggestion that appellant's allegedly amorous supervisor is other than heterosexual").

20. *Id.* at 989.

21. *Id.* at 990.

22. The court based its finding of sex discrimination on the assumption that the harasser would not have made sexual advances to an individual not of the plaintiff's sex; accordingly, the sexual orientation of the harasser is highly relevant to the court's reasoning. The court explained:

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

Id. at 990 n.55.

23. *Id.* at 995. The District of Columbia District Court had reached the same conclusion the previous year. *Williams v. Saxbe*, 413 F. Supp. 654, 657-58 (D.D.C. 1976) (holding that an employer violates Title VII when a supervisor dismisses an employee because she rejected his sexual advances: "the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other"), *rev'd in part, vacated in part, on separate grounds*, 587 F.2d 1240 (D.C. Cir. 1978).

24. *See, e.g., Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 (3d Cir. 1977).

the provision of sexual favors.²⁵ What if the plaintiff was not complaining that a negative employment action was taken after she refused her supervisor's advances, but rather was complaining about the advances occurring at all? Such complaints gave rise to a second type of sexual harassment claim, hostile work environment sexual harassment, which occurs when conduct based on sex creates a hostile environment but does not result in a tangible employment action.²⁶ The majority of sexual harassment cases in the federal courts involve allegations of hostile work environment sexual harassment.²⁷

B. Recognition of Hostile Work Environment Sexual Harassment as a Form of Sex Discrimination: Sexual Desire, Sexual Conduct, and Conduct Based upon Sex

Courts were initially reluctant to recognize hostile work environment sexual harassment as a violation of Title VII, but their reluctance was not due to an inability to understand such harassment as constituting discrimination based on sex. Rather, courts held that sexual harassment alone—not connected with the denial of any tangible job benefit—was not discrimination with respect to the “terms, conditions, or privileges of employment” within the meaning of Title VII.²⁸

In *Bundy v. Jackson*,²⁹ the Court of Appeals for the District of Columbia Circuit became the first appellate court to hold that hostile work environment sexual harassment violated Title VII. The court relied upon the Fifth Circuit's opinion in *Rogers v. EEOC*,³⁰ which held that an employer's practice of providing discriminatory service to its Hispanic clients created a hostile work environment for its Hispanic

25. The *Tomkins* court expressly left that question open. See 568 F.2d at 1046 n.1.

26. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998) (explaining that sexually discriminatory conduct not involving a tangible employment action is actionable only as hostile work environment sexual harassment); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (holding that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment”).

27. See *Juliano & Schwab*, *supra* note 10, at 565 (noting that, out of nearly 650 federal court cases involving sexual harassment claims, almost 70% of the cases included only a hostile environment claim, and an additional 22.5% included both a hostile environment and a quid pro quo claim).

28. See *Henson v. City of Dundee*, 682 F.2d 897, 900-01 (11th Cir. 1982) (discussing district court's conclusion that there was no violation of Title VII unless the plaintiff's supervisor's conduct inflicted upon her “some tangible job detriment”); *Bundy v. Jackson*, 641 F.2d 934, 939 (D.C. Cir. 1981) (discussing the district court's rationale for refusing to grant the plaintiff any declaratory or injunctive relief).

29. 641 F.2d 934, 946 (D.C. Cir. 1977).

30. 454 F.2d 234 (5th Cir. 1971).

employees, in violation of Title VII.³¹ In his opinion in *Rogers*, Judge Goldberg stated that "the phrase 'terms, conditions, or privileges of employment' in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination," protecting employees' psychological as well as economic fringe benefits from discriminatory abuse by employers.³² The *Bundy* court found Judge Goldberg's reasoning persuasive and noted, moreover, that unless it held that hostile work environment sexual harassment was actionable, "an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance."³³

In contrast to its detailed analysis of how a hostile work environment could constitute "a term, condition, or privilege of employment," the *Bundy* court dealt very briefly with the issue of whether the conduct at issue in the case was sexually discriminatory. The court stated that it "ha[d] no difficulty inferring that Bundy suffered discrimination on the basis of sex."³⁴ The conduct at issue in that case, as in the quid pro quo cases, was sexual advances; as in those cases, the plaintiff's supervisors made sexual demands of her that they would not have made of male employees.³⁵

In the next appellate case to discuss hostile work environment sexual harassment, *Henson v. City of Dundee*,³⁶ the court expressly laid out what it considered the elements of a hostile environment cause of action, including the requirement that "[t]he harassment complained of was based upon sex."³⁷ The court explained that to satisfy this "based upon sex" requirement, "the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment."³⁸ According to the court, the plaintiff can easily make such a showing "[i]n the typical case in which a male supervisor makes sexual overtures to a female worker."³⁹ The plaintiff will have difficulty proving sex discrimination only in "cases in which a supervisor makes

31. *Id.* at 944 (citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971)).

32. 454 F.2d 234, 238 (5th Cir. 1971).

33. 641 F.2d at 945.

34. *Id.* at 943.

35. *See id.* at 942; *see also* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1199 (1989) (noting that demands for sexual contact "were among the first offenses that women targeted in hostile environment actions").

36. 682 F.2d 897, 903 (11th Cir. 1982).

37. The other elements were as follows: the employee belongs to a protected class; the employee was subjected to unwelcome sexual harassment; the harassment affected a term, condition, or privilege of employment; and respondeat superior. *Id.* at 903-05.

38. *Id.* at 904.

39. *Id.*

sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers.”⁴⁰

The *Henson* court concluded—with no analysis of the plaintiff’s allegations—that the harassing conduct alleged by the plaintiff occurred because of the plaintiff’s sex.⁴¹ To some extent, this lack of analysis is not surprising. The harassment alleged by the female police dispatcher consisted in part of the male chief of police’s repeated requests that the plaintiff have sexual relations with him.⁴² As in the quid pro quo cases of *Barnes* and *Bundy*, the court likely concluded that the police chief made these requests out of sexual desire for the plaintiff and that he would not have made such requests to male employees. The *Henson* plaintiff complained about more than requests for sexual relations, however. She also alleged that the police chief subjected her and the only other female employee “to numerous harangues of demeaning sexual inquiries and vulgarities.”⁴³

Why did the *Henson* court feel no need to examine or even discuss whether the police chief’s “sexual inquiries and vulgarities” occurred because of the plaintiff’s sex? The court stated in a footnote that, unlike in disparate treatment sex discrimination cases, “the case of sexual harassment that creates an offensive environment does not present a factual question of intentional discrimination which is at all elusive. Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex.”⁴⁴ The court’s reference to a “bisexual supervisor” indicates the court’s belief that whether harassment is because of sex depends upon whether it arises out of the harasser’s sexual desire for the target of the harassment. The court apparently assumed that because the police chief’s “inquiries and vulgarities” were sexual in nature, they were motivated by his desire for the plaintiff, and the police chief would not have directed such “inquiries and vulgarities” to male employees.

The Equal Employment Opportunity Commission’s (EEOC’s) Guidelines on sexual harassment may have helped the *Henson* court equate sexual conduct with the requirement that harassing conduct occurs because of the plaintiff’s sex. In 1980, the EEOC issued Guidelines providing that “[h]arassment on the basis of sex” violates Title

40. *Id.*

41. After describing the five elements for a hostile work environment sexual harassment claim, the court stated simply: “In this case, Henson has made a prima facie showing of all elements necessary to establish a violation of Title VII.” *Id.* at 905.

42. *Id.* at 899.

43. *Id.* The court later referred to the police chief’s subjecting the plaintiff and her female coworker to “crude and vulgar language, almost daily inquiring of these two women employees as to their sexual habits and proclivities.” *Id.* at 900-01.

44. *Id.* at 905 n.11.

VII.⁴⁵ The Guidelines then state that “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment”⁴⁶ The *Henson* court cited this provision of the Guidelines as “helpfully defin[ing] the type of conduct that may constitute sexual harassment.”⁴⁷ The *Henson* court may have interpreted the Guidelines as indicating that unwelcome sexual conduct in the workplace *is always* harassment on the basis of sex, rather than as providing one example of the kind of conduct that may constitute sexual harassment *if* it occurs because of the plaintiff’s sex. In other words, if the alleged harassing conduct is sexual in nature, there is sex discrimination, except in the rare case of the bisexual harasser.⁴⁸

In the vast majority of hostile work environment sexual harassment cases after *Henson*, courts held with little analysis that if the alleged harassing conduct was sexual in nature, it was based upon the plaintiff’s sex. The Ninth Circuit did not even include conduct based upon sex as an element of a cause of action for sexual harassment, requiring only that the harassing conduct be “of a sexual nature.”⁴⁹ Other courts listed “conduct based upon sex” as one of the elements of a hostile environment cause of action but never discussed whether the plaintiff satisfied this element.⁵⁰ In fact, in *Meritor Savings Bank v. Vinson*,⁵¹ its decision holding that hostile work environment sexual harassment violated Title VII, the Supreme Court addressed the re-

45. 29 C.F.R. § 1604.11(a) (2001).

46. *Id.*

47. 682 F.2d at 903.

48. In her article *What’s Wrong with Sexual Harassment*, Katherine Franke criticizes courts’ misreading of the EEOC Guidelines to equate sexual conduct with discrimination because of sex: “The EEOC Guidelines on sexual harassment seek to define only part of the Title VII prima facie case. They do not address the entirety of the plaintiff’s case.” 49 STAN. L. REV. 691, 719 (1997); *see also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 n.6 (3d Cir. 1990) (explaining that the district court’s holding that sexual advances, innuendo, or contact were necessary to establish a hostile work environment may have resulted from that court’s misreading of the EEOC Guidelines on sexual harassment).

49. *See, e.g.*, Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995). One Ninth Circuit judge expressly rejected including conduct based upon sex as an element of a sexual harassment cause of action, stating that “sexual harassment is *ordinarily* based on sex. What else could it be based on?” Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) (Reinhardt, J., not joined by other two judges as to this part). While the judge was addressing a claim of quid pro quo sexual harassment, his reasoning on this point does not appear limited to that type of harassment.

50. *See* Steven L. Willborn, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 684-85 (1999) (stating that, when harassing conduct is sexual in nature and directed at a member of the opposite sex, “courts find that the ‘based on sex’ element is met without any proof of actual discrimination”).

51. 477 U.S. 57, 64 (1986).

quirement of sex discrimination with the following brief statement: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."⁵²

In *Andrews v. City of Philadelphia*,⁵³ the court explained its understanding of the connection between conduct that is sexual in nature and conduct that occurs because of the plaintiff's sex or gender. The *Andrews* court acknowledged that an element of a hostile environment cause of action is intentional discrimination because of sex.⁵⁴ The court concluded, however, that some of the harassing conduct alleged by the plaintiffs in that case easily could be deemed intentionally discriminatory: "The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual[ly] derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary where the actions are not sexual by their very nature."⁵⁵

The *Andrews* court's conclusion that sexual propositions can be presumed to be sexually discriminatory is not surprising. It flows naturally from the presumption, recognized in early quid pro quo and hostile environment cases, that when a man makes sexual advances toward a woman, he does so because of his heterosexual desire for the woman. What is more interesting is the court's declaration that sexual innuendo, pornographic materials, and sexually derogatory language should be recognized as sexually discriminatory as a matter of course. It is not obvious that a male supervisor would use sexual innuendo or sexually derogatory language or display pornographic materials⁵⁶ only or primarily because of his heterosexual desire for a

52. In fairness, the facts of *Meritor* strongly suggested that the plaintiff's supervisor would not have subjected a male employee to the kind of treatment to which he subjected the plaintiff: forcing her to have sexual intercourse with him, fondling her, and exposing himself to her. See *id.* at 60. The succinct discussion of the requirement of sex discrimination may thus have been appropriate in that case. It is worth noting, however, that at least one lower court read the *Meritor* opinion as indicating that it was not necessary to determine whether harassing conduct was discriminatory. In *Chiapuzio v. BLT Operating Corp.*, the court responded to the defendant's claim that the alleged harassment was not based on sex as follows: "Arguably, the *Meritor* Court moved away from a disparate treatment or 'but for' analysis of gender harassment, and moved toward the view that gender harassment occurs when unwelcome physical or verbal conduct creates a hostile work environment." 826 F. Supp. 1334, 1336 (D. Wy. 1993).

53. 895 F.2d 1469, 1482 (3d Cir. 1990).

54. *Id.*

55. *Id.* at 1482 n.3.

56. As discussed *infra* at section III.D, "pornographic materials" in some cases may raise an inference of disparate treatment sex discrimination, for example, in cases where male coworkers place pornographic materials in the desk drawers of their female coworkers, apparently in order to make their female coworkers uncomfortable. Some of the pornography complained about in *Andrews* was of this

particular female employee. Accordingly, it appears that the court's reasoning cannot be based solely on the idea that this kind of conduct evinces sexual desire and thus constitutes discrimination on the basis of sex. Instead, the court seems to be assuming that any conduct that is "sexual by [its] very nature" is sexually discriminatory. Many other courts have taken the same approach as the *Andrews* court, equating conduct that is sexual in nature with the statutory requirement of sex discrimination.⁵⁷

In short, courts came full circle from the days in which they held that sexual conduct occurring in the workplace was based on sexual desire and accordingly was not sex discrimination.⁵⁸ They assumed that any sexual conduct in the workplace was discrimination because of sex. Under this view, the sex discrimination requirement would

nature. See 895 F.2d at 1475. Some of the pornography, however, was just displayed in the locker room, with no indication that the display was intended to make women feel unwelcome in the workplace. See *id.* at 1472. In any event, there was no indication that any of the pornography was displayed due to the male police officers' sexual desire for the plaintiffs.

57. For example, in *Burns v. McGregor Electronic Industries, Inc.*, the court held that "sexual behavior directed at a woman raises the inference that the harassment is based on her sex." 955 F.2d 559, 564 (8th Cir. 1992); see also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) ("sexual behavior directed at women will raise the inference that the harassment is based on their sex"); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904-05 (11th Cir. 1988) (finding that comments made to the female plaintiff by her male co-workers "carried sexual connotations" and thus were based on the plaintiff's sex). As in *Andrews*, some of the conduct at issue in *Burns* was sexual advances, but the plaintiff also complained about sexual comments and vulgar name-calling. Because the conduct was sexual, the court concluded that it constituted sex discrimination. The court noted that "the harassment, because of its sexual nature, was based on Burns' sex." 955 F.2d at 564. Interestingly, many of the sexual comments—such as asking the plaintiff after she left the restroom if she had been "playing with [her]self in there"—were made by a female manager-trainee. *Id.* at 560. Nonetheless, the court concluded that they were made because of the plaintiff's sex. As discussed *infra* at notes 66-67 and accompanying text, most courts have rejected the presumption that sexual conduct is sexually discriminatory in same-sex harassment cases.

Similarly, in *Cline v. General Electric Credit Auto Lease, Inc.*, the court stated that if the harassment is related to sexual activity, discriminatory intent is present: "[T]he discriminatory nature of the charged conduct speaks for itself." 748 F. Supp. 650, 654-55 (N.D. Ill. 1990); see also *Smolsky v. Consol. Rail Corp.*, 780 F. Supp. 283, 295 (E.D. Pa. 1991) (holding that sexual comments created the inference that the harassment was based on the plaintiff's gender). The Seventh Circuit has noted that "it is generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male worker or workers, she has been discriminated against 'because of her sex.'" *Doe v. City of Belleville*, 119 F.3d 563, 574 (7th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998).

58. L. Camille Hebert made a similar observation in a recent article, *Sexual Harassment as Discrimination "Because of . . . Sex": Have We Come Full Circle?*, 27 OHIO N.U. L. REV. 439 (2001).

pose no obstacle to women bringing harassment actions based on nude pin-ups or discussions of sex in the workplace. Because the conduct was sexual in nature, courts would find the discrimination element satisfied.

C. A Renewed Focus on the Requirement of Sex Discrimination: *Oncale v. Sundowner Offshore Services, Inc.*

Using sexual conduct as a proxy for conduct occurring because of the plaintiff's sex may have seemed like a simple solution to many courts, allowing them to bypass the issue of discrimination to get to the issue of whether the conduct was sufficiently severe or pervasive to create a hostile work environment.⁵⁹ The problem with using sexual conduct as such a proxy, however, is that it is both under- and over-inclusive.⁶⁰

All sex-based conduct—all conduct that is sexually discriminatory—is not sexual in nature. The tendency of courts to equate conduct that is sexual in nature with conduct that is sexually discriminatory, however, led them to separate the instances of harassing conduct alleged by the plaintiff into two groups: sexual conduct and non-sexual conduct.⁶¹ Courts would consider only the conduct that was obviously sexual in nature when determining whether the plaintiff was subjected to severe or pervasive harassment that created an abusive work environment.⁶² Courts would view the non-sexual conduct—even if it was directed only at women or was motivated by animus against women—as irrelevant to a plaintiff's sexual harass-

59. See, e.g., *Cline v. Gen. Elec. Credit Auto Lease, Inc.*, 748 F. Supp. 650, 654 (N.D. Ill. 1990) (stating that “[t]he main issue in sexual harassment cases is not whether the employer harassed the employee on the basis of her gender, but whether the claimed harassment affected the terms, conditions, or privileges of the plaintiff's employment”).

60. See Willborn, *supra* note 50, at 683, 693 (explaining that sexual conduct “is an imperfect proxy for discrimination” because “‘sexual conduct’ can occur when no ‘discrimination’ is present, and ‘discrimination’ can occur when no ‘sexual conduct’ is present”).

61. In her article *Reconceptualizing Sexual Harassment*, Vicki Schultz discusses at length the disaggregation approach engaged in by courts in sexual harassment cases. 107 YALE L.J. 1683, 1706-38 (1998). Schultz contends that disaggregation is “the most prominent feature of hostile work environment jurisprudence,” in which courts disaggregate “sexual advances and other conduct that courts consider ‘sexual’ in nature from other gender-based mistreatment that judges consider nonsexual.” *Id.* at 1713.

62. See *id.* at 1714 (explaining that courts engaging in disaggregation “decide, explicitly or implicitly, that only overtly sexual conduct counts toward establishing hostile work environment harassment and that nonsexual conduct must be considered—if at all—as a separate form of disparate treatment”).

ment claim.⁶³ The problem with this disaggregation approach was that it left courts with a much too narrow view of the plaintiff's work environment. If a court only considers, for example, two sexual propositions in determining whether the plaintiff experienced severe or pervasive harassment, the court is unlikely to find that requirement satisfied. If, on the other hand, the court considers all of the harassing conduct that was caused by the plaintiff's sex—two sexual propositions and evidence that the plaintiff's coworkers frequently belittled her and sabotaged her work because of her sex, for example—the court is much more likely to find that she experienced an objectively hostile work environment. Courts' focus on sexual harassment doctrine as involving only sexual conduct in the workplace hurt the ability of plaintiffs to challenge the many other ways in which they are discriminated against in the workplace because of their sex.⁶⁴

63. Schultz describes several cases in which courts engaged in disaggregation. *Id.* at 1706-10, 1716-20. For example, in *Turley v. Union Carbide Corp.*, 618 F. Supp. 1438, 1442 (S.D.W. Va. 1985), the plaintiff alleged that her foreman treated her differently from the male employees and picked on her all the time. The court rejected the plaintiff's sexual harassment claim, reasoning that she "was not subjected to harassment of a sexual nature" because the foreman "did not demand sexual relations, . . . touch her or make sexual jokes." *Id.* Schultz notes that other courts have been more subtle than the *Turley* court, simply proceeding, "without analysis, to examine only the sexually explicit conduct for the hostile work environment claim and to consider the nonsexual conduct, if at all, under a separate disparate treatment analysis—each in isolation from the other." See Schultz, *supra* note 61, at 1720, n.178 (citing cases); see also *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564-65 (6th Cir. 1999) (criticizing the district court's consideration only of instances of harassment that were sexual in nature, because "harassing behavior that is not sexually explicit but is directed at women and motivated by discriminatory animus against women satisfies the 'based on sex' requirement").

64. Schultz contends that much of the workplace harassment experienced by women is not sexual in nature but is nonetheless based on sex:

[M]any of the most prevalent forms of harassment are actions that are designed to maintain work—particularly the more highly rewarded lines of work—as bastions of masculine competence and authority. Every day, in workplaces all over the country, men uphold the image that their jobs demand masculine mastery by acting to undermine their female colleagues' perceived (or sometimes even actual) competence to do the work. The forms of such harassment are wide-ranging. They include characterizing the work as appropriate for men only; denigrating women's performance or ability to master the job; providing patronizing forms of help in performing the job; withholding the training, information, or opportunity to learn to do the job well; engaging in deliberate work sabotage; providing sexist evaluations of women's performance or denying them deserved promotions; isolating women from the social networks that confer a sense of belonging; denying women the perks or privileges that are required for success; assigning women sex-stereotyped service tasks that lie outside their job descriptions (such as cleaning or serving coffee); engaging in taunting, pranks, and other forms of hazing designed to remind women that they are different and out of place; and

Moreover, all conduct that is sexual in nature is not sexually discriminatory. A court deciding an early quid pro quo sexual harassment case recognized that the bisexual harasser posed a problem for courts' willingness to equate sexual conduct with conduct that is sexually discriminatory, reasoning that in such a case "the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."⁶⁵ In the 1990s, courts were particularly troubled by the potential over-inclusiveness of the sexual conduct approach in cases involving same-sex sexual harassment. Many courts were unwilling to assume that conduct that was sexual in nature—and that was directed at a person of the same sex as the harasser—was harassment "based on sex" and actionable under Title VII. Courts adopted what the Supreme Court characterized as "a bewildering variety of stances"⁶⁶ on the issue of when, if ever, same-sex sexual harassment was actionable.⁶⁷

Responding to the lower courts' confusion, in *Oncale v. Sundowner Offshore Services, Inc.*,⁶⁸ the Supreme Court answered the narrow question whether conduct among members of the same sex could ever be deemed sexual harassment in violation of Title VII. In so doing, the Court also answered the broader question about the connection between sexual harassment and sex discrimination, dealing with both the under- and over-inclusiveness of the "sexual conduct" approach.

The unanimous opinion, written by Justice Scalia, held that sexual harassment could be actionable under Title VII when the harasser and the harassed employee were of the same sex.⁶⁹ The Court empha-

physically assaulting or threatening to assault the women who dare to fight back.

Schultz, *supra* note 61, at 1687.

65. *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

66. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

67. *See, e.g.*, *Doe v. Belleville*, 119 F.3d 563, 579 (7th Cir. 1997) (suggesting that all workplace harassment that is sexual in nature is actionable because such harassment conditions the plaintiff's employment "upon her willingness to endure harassment that is inseparable from her gender"), *vacated*, 523 U.S. 1001 (1998); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (holding that same-sex sexual harassment is actionable only if the plaintiff can prove that the harasser is homosexual); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that same-sex sexual harassment is never actionable under Title VII).

68. 523 U.S. 75 (1998). The plaintiff, Joseph Oncale, worked on one of Sundowner's offshore oil rigs. He alleged that his supervisor and two of his coworkers sexually harassed him by, among other things, threatening to rape him and forcing a bar of soap in his anus while he was showering. 83 F.3d 118, 118-19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

69. *Oncale*, 523 U.S. at 80. The Court noted that in its racial discrimination cases it had rejected any conclusive presumption that persons will not discriminate against members of their own race. *Id.* at 78 (citing *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)). Similarly, Title VII does not bar a claim of sex discrimina-

sized, however, that to be actionable under Title VII, sexual harassment must constitute sex discrimination within the meaning of the statute.⁷⁰ The Court rejected the idea that "sexual conduct" is a proxy for the statutory requirement of sex discrimination. First, the Court noted the over-inclusiveness of the "sexual conduct" approach, noting that not all sexual conduct in the workplace is sex discrimination: "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."⁷¹ The Court also noted that harassing conduct could constitute discrimination because of sex even if it is not motivated by sexual desire, implicitly rejecting the under-inclusiveness of the "sexual conduct" approach.⁷²

According to the Court, "the critical issue" in determining whether harassing conduct violates Title VII's prohibition against sex discrimination "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."⁷³ The Court gave several examples of ways in which a jury could infer that harassing conduct was sexually discriminatory. Where the conduct consists of proposals of sexual activity, a jury could infer discrimination if the harasser and target are

tion merely because the plaintiff and the defendant are of the same sex. *Id.* at 79. Nothing in the language of Title VII or in the Court's precedents indicated that hostile environment sexual harassment claims should be treated differently. *See id.* ("We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.")

70. *See, e.g., id.* at 76 ("This case presents the question whether workplace harassment can violate Title VII's prohibition against 'discriminat[ion] . . . because of . . . sex,' 42 U.S.C. § 2000e-2(a)(1), when the harasser and the harassed employee are of the same sex."); *id.* at 82 ("[W]e conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII . . ."). Justice Thomas' concurring opinion consisted of one sentence, focusing on the requirement of sex discrimination: "I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'" *Id.*

71. *Id.* at 80.

72. *Id.* The Court did not state expressly that conduct that is not sexual in nature can be considered in determining the existence of a hostile work environment. This is not surprising, however, given that the conduct alleged in *Oncale* was sexual in nature. *See supra* note 68. Moreover, the emphasis in the Court's opinion on whether the harasser treated members of one sex differently from members of the other sex suggests that it is not necessary for the harasser's conduct to be sexual in nature. *See* Charles R. Calleros, *Same-Sex Harassment, Textualism, Free Speech, and Oncale: Laying the Groundwork for a Coherent and Constitutional Theory of Sexual Harassment*, 7 GEO. MASON L. REV. 1, 28 n.167 (1998) (arguing that *Oncale* appears to "rebut the suggestion that sexual content, rather than the selective targeting of victims, is the critical inquiry").

73. *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

of different sexes—or, where they are of the same sex, if there is evidence that the harasser was homosexual.⁷⁴ “[I]f a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace,” a jury could infer sex discrimination.⁷⁵ Finally, the plaintiff could present “direct comparative evidence,” contrasting how the alleged harasser treated members of each sex in the workplace.⁷⁶

After *Oncale*, it is clear that sexual conduct is neither necessary nor sufficient for a sexual harassment claim.⁷⁷ Rather, to be actiona-

74. *Id.*

75. *Id.*

76. *Id.* at 80-81.

77. It may be more accurate to say that after *Oncale* it *should* be clear that sexual conduct is not sufficient for a sexual harassment claim. The clarity of this principle, however, appears to have eluded the majority of the judges on the United States Court of Appeals for the Ninth Circuit. In an opinion issued after this Article was accepted for publication, the Ninth Circuit, sitting *en banc*, held that an employee who alleged that he experienced severe, pervasive, and unwelcome “physical conduct of a sexual nature” stated a viable claim of sexual harassment in violation of Title VII. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002).

The plaintiff in *Rene*, an openly gay man, alleged that his supervisor and co-workers, all men, repeatedly grabbed him in the crotch and poked their fingers in his anus through his clothing. *Id.* at 1064. He explained that he believed the behavior occurred because he was gay. *Id.* The district court granted summary judgment in favor of the employer, reasoning that Title VII does not prohibit discrimination based on sexual preference. *Id.* The *en banc* Ninth Circuit reversed and remanded the case for trial.

The reasoning in *Rene* conflicts with the basic premise of *Oncale*, that harassing conduct must be sexually discriminatory in order to be actionable under Title VII. The *Rene* majority stated:

The *Oncale* Court’s holding that offensive sexual touching in a same-sex workforce is actionable discrimination under Title VII necessarily means that discrimination can take place between members of the same sex, not merely between members of the opposite sex. Thus, *Oncale* did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination *in comparison to other men*.

Id. There are several problems with this reasoning. First, the *Oncale* Court did not find that the harassing conduct alleged by *Oncale* was actionable discrimination under Title VII; it merely rejected the lower court’s holding that same-sex sexual harassment could never violate Title VII. *See id.* at 1073 (Hug, J., dissenting) (noting that “[t]here was no implication in the Supreme Court’s opinion that the alleged sexual harassment was ‘because of sex’”). Accordingly, *Oncale* does not stand for the proposition that offensive sexual touching is always actionable discrimination under Title VII. Second, while the *Rene* majority is correct that persons of the same sex can sexually harass each other, the *Oncale* Court emphasized that sexual harassment violates Title VII only if it constitutes discrimination because of sex. *See Oncale*, 523 U.S. at 79-80 (stating that Title VII prohibits sexual harassment “that meets the statutory requirements”). To succeed in proving the sex discrimination requirement of actionable sexual harassment, On-

ble under Title VII, harassing conduct must constitute discrimination because of sex. As discussed in the next Part, most sexual harassment cases involve one model of discrimination: disparate treatment.

III. SEXUAL HARASSMENT AS A FORM OF DISPARATE TREATMENT

A. Introduction to Disparate Treatment and Disparate Impact

There are two models of actionable discrimination under Title VII: disparate treatment and disparate impact.⁷⁸ Disparate treatment, “the most easily understood type of discrimination,”⁷⁹ is intentional discrimination.⁸⁰ To establish disparate treatment, a plaintiff need not prove that the defendant employer held ill will or animus toward

cale—or the plaintiff in *Rene*—needed to prove that he suffered discrimination *because of his sex*; it would not suffice for the plaintiff to show that he was treated differently than other employees for a reason unconnected to his gender.

The *Oncale* Court stated, “We have never held that workplace harassment . . . is automatically discrimination because of sex merely because the words used have sexual content or connotations.” 523 U.S. at 80. By implication, the Court also rejected the proposition that workplace harassment consisting of physical touching, rather than words, is automatically discrimination because of sex merely because the touching has sexual connotations. As noted in the dissenting opinion in *Rene*, the majority opinion ignores this language from *Oncale*, incorrectly interpreting that case “to mean that if the defendant’s conduct was ‘sexual in nature’ the statutory requirements of Title VII are met.” 305 F.3d at 1074 (Hug, J., dissenting). The *Rene* dissent pointed out, moreover, that following *Oncale*, the Supreme Court vacated and remanded the case of *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998), in which the appellate court had held that workplace harassment that was sexual in nature was always actionable. *See id.* at 1074 n.2. This action by the Supreme Court reinforces that “workplace harassment, which is simply ‘sexual in content,’ is not always actionable.” *Id.*

A discussion of the methods by which a same-sex sexual harassment plaintiff can prove that the harassing conduct was sexually discriminatory is outside the scope of this Article. *But see infra* note 94. However, the approach taken by the Ninth Circuit—assuming that all workplace sexual conduct is actionable under Title VII—is foreclosed by *Oncale*.

78. *See, e.g., United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713 n.1 (1983) (“We have consistently distinguished disparate-treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants.”).

79. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

80. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) (stating that in disparate treatment cases “the plaintiff is required to prove that the defendant had a discriminatory intent or motive”); *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (stating that, in a disparate treatment case, the plaintiff must prove that the defendant employer intentionally discriminated against the plaintiff).

members of a particular group.⁸¹ Rather, disparate treatment occurs whenever an employer "treats some people less favorably than others because of their race, color, religion, sex, or national origin."⁸² In a disparate treatment case, the plaintiff must prove that a factor prohibited by Title VII "actually motivated the employer's decision,"⁸³ or, in other words, that a prohibited factor caused the decision to be made.⁸⁴ Proof that a prohibited factor caused an employment decision can be made by direct or circumstantial evidence. If an employer treats female employees differently than similarly situated male employees, without a plausible nondiscriminatory reason for doing so, this may be enough for a reasonable jury to infer that the employer took the action because of the female employees' sex.⁸⁵

Disparate impact discrimination, in contrast, does not require proof of a discriminatory motive on the part of the employer.⁸⁶ Disparate impact claims are not based on allegations that an employer treated an employee differently from other employees because of her membership in a protected class. Instead, the disparate impact plain-

81. See, e.g., *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (noting that the "absence of a malevolent motive" does not render a plaintiff unable to prove disparate treatment).

82. *Teamsters*, 431 U.S. at 335 n.15.

83. *Reeves v. Sanderson Plumbing Prod., Inc.*, 120 S. Ct. 2097, 2105 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)) (both discussing the Age Discrimination in Employment Act).

84. In a recent article, Rebecca Hanner White and Linda Hamilton Krieger explain that the disparate treatment inquiry is not a search for conscious discriminatory intent, but rather a search for a causal connection between the protected characteristic and the challenged employment action. *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 499 (2001); see also Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and Its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1, 2 (1998) (stating that "the standard of causation defines the very act of intentional discrimination"); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 289 (1997) (contending that, to the Supreme Court, the "key question" in finding intentional discrimination on the basis of race "is whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states").

85. See, e.g., *Teamsters*, 431 U.S. at 335 n.15 (1977) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (establishing a procedure for analyzing discrimination claims based on circumstantial evidence). Pamela L. Perry explained the use of circumstantial evidence to prove an employer's discriminatory motive as follows: "employees must demonstrate that similarly situated female employees are treated differently from similarly situated male employees, thereby raising the inference that their different treatment was motivated by their different sexes in violation of Title VII." *Let Them Become Professionals: An Analysis of the Failure to Enforce Title VII's Pay Equity Mandate*, 14 HARV. WOMEN'S L.J. 127, 134 (1991).

86. *Teamsters*, 431 U.S. at 335 n.15.

tiff is arguing that her employer's seemingly neutral practice—one that, on its face, applies equally to all employees—is disproportionately harmful to members of a protected class, while lacking a business justification.⁸⁷ Claims of disparate impact discrimination “involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”⁸⁸

B. *Oncale*: Discrimination as Only Disparate Treatment

Although there are two theories of discrimination under Title VII, the Supreme Court's language in *Oncale* references only one of those theories: disparate treatment. The Court explained that to satisfy the discrimination requirement for actionable sexual harassment, a plaintiff must prove that the harassing conduct was caused by the plaintiff's sex, mentioning several ways in which the plaintiff could provide such proof.⁸⁹ The Court explained the discrimination requirement further by stating that “the critical issue . . . 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.”⁹⁰ This language evinces the Court's use of the disparate treatment theory of discrimination, which requires a showing that the challenged conduct was caused by the plaintiff's sex, or other characteristics prohibited under Title VII, and is often proved by showing different treatment of similarly situated persons.⁹¹ Absent from the Court's opinion is any reference to the disparate impact theory of discrimination. Moreover, early in the opinion, the Court noted that, in its harassment cases, it has interpreted Title VII's prohibition against discrimination as “evin[cing] a congressional intent to strike at the entire spectrum of

87. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (“[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet ‘the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.’”) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

88. *Teamsters*, 431 U.S. at 335 n.15.

89. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80-81 (1998). The Court stated, for example, that the plaintiff could prove that his sex caused the harassing conduct by showing that the harasser was motivated by sexual desire or by general hostility to the presence of members of his sex in the workplace. *Id.* at 80.

90. *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). The Court stated that one way to prove discrimination in a harassment case was by “offer[ing] direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.” *Id.* at 80-81.

91. See *supra* notes 82-85 and accompanying text.

disparate treatment of men and women in employment.”⁹² Commentators analyzing *Oncale* and lower courts applying the opinion have agreed that the *Oncale* Court utilized only the disparate treatment theory of discrimination.⁹³

92. *Oncale*, 523 U.S. at 78 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

93. See, e.g., Ronald Turner, *The Unenvisioned Case, Interpretive Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims*, 7 DUKE J. GENDER L. & POL’Y 57, 78 (2000) (noting that the Supreme Court treated *Oncale*’s hostile environment claims “as a disparate treatment case”); Rebecca Hanner White, *There’s Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 734-35 (1999) (stating that after *Oncale* “[t]he question, as in other sex-based disparate treatment claims, is whether the plaintiff experienced the conduct because of her sex”); 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, 262-63 (1999) (referring to the *Oncale* Court’s “attempt[] to fit hostile environment sexual harassment claims within a well-known model of discrimination law, the disparate treatment model”).

Since *Oncale*, some lower courts have expressly stated that sexual harassment is actionable only as a form of disparate treatment discrimination. See, e.g., *Raniola v. Bratton*, 243 F.3d 610, 617 (2d Cir. 2001) (stating that “[u]nder Title VII, a hostile work environment is one form of disparate treatment on the basis of ‘race, color, religion, sex, or national origin’”); *Holman v. Indiana*, 211 F.3d 399, 404 (7th Cir. 2000) (stating that “it would be anomalous *not* to require proof of disparate treatment for claims of sex discrimination (of which sexual harassment is a subset)”); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1254 n.3 (11th Cir. 1999) (Edmondson, J., concurring) (stating that “[a] claim of sexual harassment is a claim of disparate treatment”). Other courts have also applied the disparate treatment theory, holding that plaintiffs must prove that, but for their sex, they would not have been subjected to the harassing conduct. See, e.g., *Gregory v. Daly*, 243 F.3d 687, 694 (2d Cir. 2001) (finding that plaintiff alleged facts that could “establish[] that her sex, in one way or another, played a substantial role in [her harasser’s] behavior”); *Smith v. First Union Nat’l Bank*, 202 F.3d 234, 242 (4th Cir. 2000) (“An employee is harassed or otherwise discriminated against ‘because of his or her gender if, ‘but for’ the employee’s gender, he or she would not have been the victim of the discrimination”); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1248 n.5 (11th Cir. 1999) (stating that the plaintiff “must show that but for the fact of her sex, she would not have been the object of the harassment”) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) (“Any unequal treatment of an employee that would not occur but for the employee’s gender may, if sufficiently severe or pervasive under the *Harris* standard, constitute a hostile environment in violation of Title VII”). In other words, a female plaintiff must prove that her harasser would not have treated a man the way that he treated the plaintiff. See *Frazier v. Delco Elecs. Corp.*, 263 F.3d 663, 667 (7th Cir. 2001).

Michael Selmi has characterized the type of question asked by the *Frazier* court—whether the plaintiff would have been treated the same way if she were a man—as the “reversing the groups” test. Selmi, *supra* note 84, at 291 (citing David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989), as the first to articulate this test). According to Selmi, this test, which asks whether the complaining party would have been treated the same if the category proscribed by Title VII were removed, is the best test available for

C. Proving Disparate Treatment in a Sexual Harassment Case

Following the guidance given by the Supreme Court in *Oncale*, the lower courts have recognized several ways in which sexual harassment plaintiffs can prove disparate treatment.⁹⁴ Perhaps the easiest way is to demonstrate that the conduct was motivated by sexual desire—whether heterosexual or homosexual—such that a jury could infer that if the plaintiff had been of a different sex, the harassment

identifying intentional discrimination. Selmi, *supra* note 84, at 291; *see also* White & Krieger, *supra* note 84, at 510 (endorsing the “reversing the groups” test as a useful way to understand disparate treatment as an inquiry into causation).

94. *See supra* text accompanying notes 74-76. One method of proving disparate treatment, based on the case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), holds particular promise for plaintiffs alleging same-sex sexual harassment. The plaintiff in *Price Waterhouse* was denied partnership in an accounting firm, at least in part because various partners viewed her as “macho,” “overcompensat[ing] for being a woman,” and needing “a course in charm school.” *Id.* at 235. She was advised that, to improve her chances for partnership, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* The Supreme Court held that an employer violates Title VII when it takes an adverse employment action against an individual because that person failed to conform to the stereotypes associated with her sex. *Id.* at 250-51.

Based on the Supreme Court’s holding in *Price Waterhouse*, courts have reasoned that if plaintiffs are harassed because they failed to conform to the stereotypes associated with their sex, their harassment constitutes sex discrimination. *See, e.g.,* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002) (noting that “a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (noting that “just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity”). In *Nichols v. Azteca Restaurant Enterprises, Inc.*, the male plaintiff alleged that male co-workers and a male supervisor repeatedly referred to him as “she” and “her,” mocked him for walking “like a woman,” and called him a “faggot” and a “fucking female whore.” 256 F.3d 864, 870 (9th Cir. 2001). The plaintiff argued that he was abused because the other employees viewed him as effeminate and, accordingly, as not conforming to the stereotype that men are masculine. *Id.* at 874. The court agreed, holding that harassment based on sex stereotypes violates Title VII. *Id.* at 874-75. Courts have also found that women who are harassed because they are viewed as insufficiently feminine satisfy the sex discrimination requirement of Title VII. *See, e.g.,* Samborski v. W. Valley Nuclear Serv., Inc., No. 99-CV-0213E(m), 1999 WL 1293351, at *3-*4 (W.D.N.Y. Nov. 24, 1999) (finding that the plaintiff, who alleged she was told she had a “nice penis” and was called a lesbian, and who argued that she was harassed because she “did not exhibit her femininity in a stereotypical manner,” sufficiently alleged that she was harassed because of her sex).

would not have occurred.⁹⁵ Another method of proving that harassing conduct was caused by the plaintiff's sex is to show that the conduct

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95. See, e.g., *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1248 n.5 (11th Cir. 1999) (en banc) (stating that the plaintiff "sought to establish discrimination 'based on sex' circumstantially by claiming [that the harassing] conduct amounted to sexual advances towards her"); *Fry v. Holmes Freight Lines, Inc.*, 72 F. Supp. 2d 1074, 1079 (W.D. Mo. 1999) (finding "because of sex" satisfied in a same-sex harassment case because "[t]he persistent sexual propositions, epithets, and offensive touchings engaged in by Fry's co-workers suggest that one or all of them may be oriented toward members of the same sex"). Harassment motivated by bisexual desire, however, would not be sexually discriminatory under a disparate treatment approach. See *supra* text accompanying note 65.

In one case in which the harassing conduct, which included the plaintiff's supervisor telling her that he dreamed about her and that she reminded him of "his one true love, the person he should have married," seemed clearly motivated by sexual desire, the court found that the employer's argument that the harassing conduct was not based on the plaintiff's sex "verge[d] on the frivolous." *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1107-09 (8th Cir. 1998). The court noted that no one, not even the employer, suggested that the supervisor would have behaved toward a male employee as he did towards the plaintiff. *Id.* at 1109.

In short, the reasoning of the first appellate court to hold that sexual harassment could violate Title VII—that sexual advances were probably motivated by sexual desire, and probably would not have been made if the plaintiff had been of a different sex—is still sound. See *Barnes v. Costle*, 561 F.2d 983, 989-90 (D.C. Cir. 1977) (discussed *supra* notes 18-23 and accompanying text). Unlike the sloppy analysis engaged in by many of the lower courts prior to *Oncale*, however, most courts after *Oncale* do not assume that just because conduct is sexual in nature, it is motivated by sexual desire and thus is discriminatory. See, e.g., *Ward v. West*, No. 99-4164, 2000 WL 868587 (7th Cir. June 6, 2000) (holding that male plaintiff, who contended that a female coworker sexually harassed him by telling other coworkers confidential details about his sex life, failed to establish that the harassment was because of his sex: "Ward seems to think that the sexual content of some disclosures, and the fact that Toles is a woman, show that she acted 'because of his sex, but this is a non-sequitur"); *Black v. Columbus Pub. Sch.*, 124 F. Supp. 2d 550, 564 (S.D. Ohio 2000) (holding that sexual harassment claim of assistant principal, based on her supervisor's affair with a parent volunteer, could not survive summary judgment: "The fact that some type of sexual activity may have been occurring does not mean that the Plaintiff was subjected to harassment based on her sex").

Some courts, however, still pay little attention to the "because of sex" element in cases in which the harassing conduct is sexual in nature. For example, in *Abeita v. Transamerica Mailings, Inc.*, the plaintiff's supervisor frequently made sexual comments to the plaintiff, a woman, about models and other female employees (such as "I'd really like to lay her"). 159 F.3d 246, 248-49 (6th Cir. 1998). In considering whether the district court properly granted summary judgment to the employer on the plaintiff's sexual harassment claim, the court did not engage in an analysis of whether the supervisor made the comments because of the plaintiff's sex. Unlike in *Bales*, it was not apparent that the comments in *Abeita* reflected the supervisor's sexual desire for the plaintiff. Perhaps a reasonable jury could have concluded that the supervisor probably would not have made the statements to a male employee, but the court did not even consider this question, simply assuming that the conduct was motivated by the plaintiff's sex.

reflected an animus toward persons of the plaintiff's sex.⁹⁶ Conduct need not be motivated by anti-female or anti-male animus in order to be discriminatory; intentional discrimination—not ill will—is all that is required.⁹⁷ If, however, a female plaintiff can demonstrate that her harasser had an anti-female animus, a jury could reasonably infer that her harasser's poor treatment of her arose out of that animus and, accordingly, was due to the plaintiff's sex.⁹⁸

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96. See *Oncale*, 523 U.S. at 80 (stating that “[a] trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace”); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) (stating that “harassing behavior that is not sexually explicit but is directed at women and motivated by discriminatory animus against women satisfies the ‘based on sex’ requirement”).
97. Some commentators, who argue that harassment should not be viewed as a type of discrimination and should not be handled under the rubric of anti-discrimination law, overlook this fact. They contend that harassment should not be viewed as a form of discrimination because, while discrimination involves an animus against a certain group, harassment involves favoring a certain group, to whom the harasser is sexually attracted. See, e.g., Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 379 (1998); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 352 (1990). This argument is flawed on two points. First, much harassment does not arise out of sexual desire and is based on animus toward members of the group that the harasser is targeting. See, e.g., *Smith v. Sheahan*, 189 F.3d 529, 533 (7th Cir. 1999) (noting, in case in which a male coworker verbally and physically assaulted the female plaintiff, that “[i]t makes no difference that the assaults and the epithets sounded more like expressions of sex-based animus rather than misdirected sexual desire”); Schultz, *supra* note 61, at 1686-87 (contending that “much of the gender-based hostility and abuse that women (and some men) endure at work is neither driven by the desire for sexual relations nor even sexual in content”). Second, mainstream disparate treatment analysis, outside the harassment context, does not require a showing of animus. See, e.g., *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (stating that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy”); *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (finding a policy sexually discriminatory because it “does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different’”). Courts have held, for example, that job assignments based on race—regardless of the employer’s reason for making such assignments—constitute disparate treatment and are actionable. See *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 (11th Cir. 1999) (holding that a defendant who has no racial animus but makes job assignments on the basis of race is liable for intentional discrimination).
98. In *Jessen v. Babbitt*, for example, the court found that the plaintiff proved her supervisor’s animus toward women by testifying that the supervisor referred to two of plaintiff’s female coworkers as “stupid bitch” and “stupid fucking cunt.” No. 98-8069, 1999 WL 1246915, at **3 (10th Cir. Dec. 23, 1999). The evidence of this animus, according to the court, could lead a reasonable jury to infer that other harassing conduct by the supervisor—such as physically intimidating the plaintiff by blocking her path—occurred because of the plaintiff’s sex. *Id.* Simi-

Plaintiffs can also prove that harassment was caused by their sex by demonstrating that their harassers directed their harassing conduct only at persons of the plaintiffs' sex.⁹⁹ Where male and female workers were exposed to the same allegedly harassing conduct, however, courts generally have found plaintiffs unable to establish that the harassment was discriminatory. One such situation involves the bisexual or "equal opportunity" harasser, who makes sexual advances at both male and female employees.¹⁰⁰ The plaintiffs in *Holman v. Indiana*,¹⁰¹ husband and wife, sued their male supervisor at the Indiana Department of Transportation, alleging that he had solicited sex from each of them on separate occasions. The court rejected the plaintiffs' claims, reasoning that "Title VII does not cover the 'equal oppor-

larly, in *Smith v. First Union National Bank*, the defendant employer argued that a male supervisor did not harass the female plaintiff because of her gender, in light of the fact that both male and female employees complained about the supervisor's management style. 202 F.3d 234, 242 (4th Cir. 2000). The court found, however, that the derogatory references to women present in almost all of the supervisor's harassing remarks demonstrated that the supervisor singled the plaintiff out for harassment because of her sex. *Id.* Obviously, the same reasoning would apply if the plaintiff were male: if a male plaintiff could demonstrate that his harasser had an anti-male animus, a jury could reasonably infer that his harasser's abuse of him arose out of that animus and thus was due to the plaintiff's sex.

99. See *Oncale*, 523 U.S. at 80-81 (stating that a plaintiff can prove that harassment was caused by sex by "offer[ing] direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace"); *Smith v. Sheahan*, 189 F.3d 529, 533 (7th Cir. 1999) (stating that "[o]ne method of demonstrating that harassment is based on sex is to provide evidence of discrepancies in how the alleged harasser treats members of each sex in a mixed-sex workplace"); see also *Selmi*, *supra* note 84, at 294 (stating that "[i]n defining intentional discrimination, the question is not what the particular decisionmaker subjectively intended, but whether the record allows for an inference that an impermissible factor such as race served as the impetus for the challenged action. In short, proving the fact of differential treatment suffices to demonstrate intentional discrimination.").

In *Smith v. Sheahan*, for example, the court found that evidence that a male prison guard, who had violently assaulted the female plaintiff, engaged in recurrent hostile behavior toward only his female coworkers would permit a jury to infer that he assaulted the plaintiff because of her sex. 189 F.3d 529, 533 (7th Cir. 1999). Similarly, in *Kimzey v. Wal-Mart Stores, Inc.*, the court found that evidence that the plaintiff's alleged harassers "directed harsh treatment, abusive language, and profanity at women, but not at men" allowed a reasonable jury to conclude that the harasser's conduct was caused by the plaintiff's sex. 107 F.3d 568, 574 (8th Cir. 1997).

100. Steven Willborn refers to the bisexual supervisor as the "Loch Ness Monster of sexual harassment law because, even though the issue is discussed often in the literature and occasionally in the case law, a real-life bisexual harasser has yet to be sighted." Willborn, *supra* note 50, at 683 n.22. As discussed *infra* in the text accompanying notes 101-02, however, the Seventh Circuit decided such a case after the publication of the Willborn article.
101. 211 F.3d 399, 401 (7th Cir. 2000).

tunity' or 'bisexual' harasser . . . because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly)."¹⁰²

More frequently, plaintiffs allege that conduct not consisting of sexual advances and not rooted in sexual desire—such as foul language—constituted harassment, and courts have rejected such claims where both male and female employees were subjected to the same conduct.¹⁰³ In *Hocevar v. Purdue Frederick Co.*,¹⁰⁴ for example, the court noted that the plaintiff's supervisor used offensive language to describe both men and women and in front of both men and women, and that he played an audiotape of the "Jerky Boys"—containing "obscene, vulgar, and sexually explicit 'prank' phone calls to businesses on topics such as genital warts"—at a staff meeting that both men and women attended. The court found that the harassing conduct was not based on sex, reasoning that the use of foul language in front of both male and female employees is not sex discrimination.¹⁰⁵ Another court rejected a male plaintiff's claim that his work environment—"in which sexual jokes, pornography, office affairs and flirtations, and the display of 'sex toys' were commonplace"—violated Title VII, because both male and female employees were subjected to the same environment.¹⁰⁶

102. *Id.* at 403.

103. *See, e.g.,* *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 965 (8th Cir. 1999) (finding that the plaintiff could not prove that harassing conduct was based on her sex when she admitted that her alleged harasser used profanity when talking to both male and female employees); *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996) (stating that where males and females in the workplace receive the same treatment, such treatment cannot be harassment based on sex).

104. 223 F.3d 721, 724, 737 (8th Cir. 2000) (Beam, J., with Gibson, J., concurring only in the result).

105. *Id.* at 737.

106. *Ellett v. Big Red Keno, Inc.*, No. 98-3046, 98-3694, 2000 WL 1006743, at **1 (8th Cir. July 21, 2000). The court reasoned that "[a] dually offensive sexual atmosphere in the workplace, no matter how offensive, is not unlawful discrimination unless one gender is treated differently than the other." *Id.*

Similarly, in *Bermudez v. TRC Holdings, Inc.*, the court rejected a plaintiff's sexual harassment claims based on the allegation that her supervisor yelled at her, where there was evidence that the supervisor yelled at other workers. 138 F.3d 1176, 1179 (7th Cir. 1998). According to the court, the plaintiff needed to prove that her employer "created or condoned *discriminatory* conditions. Title VII does not require improvements in conditions that all workers experience." *Id.*; *see also* *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1253 (11th Cir. 1999) (en banc) (Edmondson, J., concurring) (stating that "the essence of a Title VII case, including one based on a claim of sexual harassment, is plaintiff's proof of actual discrimination. And in this case, plaintiff never presented evidence that other employees—particularly men—at her workplace were treated considerably differently and better than she was.").

D. Pornography and Discussions About Sex as Disparate Treatment

The cases described at the beginning of this Article involved complaints about pornography and discussions of sex in the workplace. In *Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser, L.L.P.*,¹⁰⁷ a female attorney claimed that the male attorneys with whom she worked regularly talked about their sex lives, told jokes about sex, joked about masturbation in slang terms, and used the word "fuck." These conversations were not directed to the female attorney, but she heard them and found them "acutely offensive to her as a woman."¹⁰⁸ In *Coniglio v. City of Berwyn*,¹⁰⁹ a female manager of a city's computer department claimed that she regularly observed her supervisor, while he was in his office, viewing pictures of completely naked women on Internet websites. And in *O'Rourke v. City of Providence*,¹¹⁰ a female firefighter—the first woman assigned to her engine company—saw stacks of pornographic magazines in the company's living areas, witnessed male firefighters watching pornographic movies in the company's common sitting area, and heard frequent conversation about whether the male firefighters had gotten "banged" over the weekend.

Could the plaintiffs in these cases prove disparate treatment, that the conduct about which they are complaining was caused by their sex?¹¹¹ If not, that conduct will be actionable under Title VII *only* if

107. 153 F. Supp. 2d 219, 222 (S.D.N.Y. 2001), *rev'd*, 2002 WL 313225 (2d Cir. Feb. 27, 2002).

108. *Id.*

109. No. 99C4475, 2000 WL 967989, at *2 (N.D. Ill. June 15, 2000).

110. 235 F.3d 713, 718-19, 722 (1st Cir. 2001).

111. Prior to *Oncale*, many courts likely would have assumed that the "because of sex" element was met, due to the fact that the conduct was sexual in nature. See *supra* section II.B. Some courts still tend to assume that conduct that is sexual in nature is discriminatory; in fact, the courts in the *Fitzgerald*, *Coniglio*, and *O'Rourke* cases—all post-*Oncale*—failed to analyze whether the plaintiffs were harassed because of their sex. In *Fitzgerald*, the court entered judgment as a matter of law for the defendant law firm, setting aside the jury verdict on the plaintiff's sexual harassment claim. *Fitzgerald*, 153 F. Supp. 2d at 240. The court found that the plaintiff failed to prove that she experienced severe or pervasive harassment, *id.* at 238, but the court of appeals reversed, reinstating that jury verdict. *Fitzgerald*, 2002 WL 313225. In *Coniglio*, the court denied the defendant's motion for summary judgment on the plaintiff's sexual harassment claim, finding that a reasonable jury could conclude that the challenged conduct was sufficiently severe or pervasive to create a hostile work environment. *Coniglio*, 2000 WL 967989, at *8. In *O'Rourke*, the plaintiff experienced other harassing conduct that appeared clearly directed at her because she was a woman. See *Coniglio*, 235 F.3d at 718-24. In affirming the jury verdict in favor of the plaintiff, the court simply stated the following regarding the sex discrimination requirement: "The evidence is compelling that she suffered harassment based upon sex." *Id.* at 728. *Oncale* made clear, however, that harassing conduct is not sexually discriminatory just because it was sexual in nature. *Oncale*, 523 U.S. at 80.

the disparate impact theory of discrimination can be used in the harassment setting.

Pornography,¹¹² discussions of sex, and other sexual conduct such as sex-related jokes or teasing can certainly constitute disparate treatment of women under some circumstances. One such circumstance is where the conduct is motivated by sexual desire for the plaintiff. In *Bales v. Wal-Mart Stores, Inc.*,¹¹³ for example, the plaintiff's supervisor—who had told the plaintiff that he dreamed about her and that he wanted to leave his wife—said to the plaintiff that a marker she was using “looked like a big red penis.” In light of the other evidence indicating the supervisor's sexual interest in the plaintiff, a jury could reasonably find that he made the penis comment because of the plaintiff's sex. None of the challenged conduct in the *Fitzgerald*, *Coniglio*, or *O'Rourke* cases, however, appears to have been motivated by sexual desire for the plaintiffs. In those cases, the conduct was not directed at the plaintiffs, and the plaintiffs did not contend that their harassers were motivated by sexual desire for them.

Even absent any evidence of sexual desire for the plaintiff, where pornography, discussions of sex, and other sexual conduct are directed only at women, a reasonable jury can conclude that the conduct is caused by the plaintiff's sex. For example, many cases have involved male coworkers intentionally placing pornographic material where they knew a female coworker would find it or writing a female coworker's name on pornographic material.¹¹⁴ Other cases have involved sexual comments or jokes made only to the female plaintiff,

112. Definitions of pornography vary greatly. See Nadine Strossen, *A Feminist Critique of "the" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1103-04 (1993). Some definitions include a requirement of degrading or abusive sexual behavior. See, e.g., Morrison Torrey, *We Get the Message—Pornography in the Workplace*, 22 SW. U. L. REV. 53, 82 n.178 (1992) (defining pornography as “sexually explicit material that represents or describes degrading or abusive sexual behavior so as to endorse and/or recommend the behavior as described”). This Article uses a simple dictionary definition: “a portrayal of erotic behavior designed to cause sexual excitement.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1767 (1993). The term “pornography” as used in this Article thus includes posters of naked women and copies of Playboy magazine, even if such material does not represent degrading or abusive sexual behavior.

113. 143 F.3d 1103, 1106-07 (8th Cir. 1998).

114. In *Carter v. Chrysler Corp.*, for example, the female plaintiff's male coworkers placed a photograph of a naked man in her work station. 173 F.3d 693, 697 (8th Cir. 1999); see also *Andrews v. Philadelphia*, 895 F.2d 1469, 1475 (3d Cir. 1990) (discussing female plaintiff's allegations that male coworkers placed sexual devices and pornographic magazines in her desk drawer and gathered around to laugh at her reaction); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 471 (5th Cir. 1989) (female plaintiff's male coworkers placed over thirty pornographic notes in her locker and wrote sexual graffiti about the plaintiff on the walls).

where a jury could reasonably infer that the harasser would not have made such comments to a man.¹¹⁵

It is possible, moreover, that even where sexual conduct is not obviously directed toward the plaintiff, there could still be disparate treatment if women were nonetheless intended to be intimidated or otherwise affected by the behavior.¹¹⁶ Men in some workplaces may use pornography and discussions about sex to send the message that women are not welcome in that environment, marking the workplace as a bastion of masculinity.¹¹⁷ Under such circumstances, a reasonable jury could find disparate treatment, that but for the presence of women in the workplace, this conduct would not have occurred. If pictures of naked women were suddenly displayed around the firehouse the day before the first female firefighter arrived, such conduct would be evidence of intentional discrimination.¹¹⁸ If male attorneys at a law firm started talking about sex much more frequently after a new

115. For example, in *Abeita v. Transamerica Mailings, Inc.*, the female plaintiff's male supervisor commented to the plaintiff, "oh, yellow dress and yellow shoes, yellow underwear too?" and regularly told the plaintiff about his sexual interest in models and other female employees. 159 F.3d 246, 248-49 (6th Cir. 1998). Although the court did not analyze whether the harassment was sexually discriminatory, it is possible that a reasonable jury could conclude that the supervisor would not have made such comments to another man. In contrast, in *Richmond-Hopes v. Cleveland*, the court found that a male supervisor's "stroke me" comment and simulated masturbation when he was angry with the female plaintiff was not harassment because of sex, because the supervisor had made the same gesture to male employees. No. 97-3595, 1998 WL 808222 (6th Cir. Nov. 16, 1998).

116. See Willborn, *supra* note 50, at 721-22 n.186 (asserting that obnoxious speech need not be directed at a particular woman because she is a woman in order to constitute disparate treatment: "[O]bnoxious speech directed at a large number of female employees because they are women also would be discriminatory and subject to restriction").

117. Kathryn Abrams makes this point in *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1210-11 (1998) [hereinafter *New Jurisprudence*]. She explains that when women enter traditionally male workplaces, male workers may engage or engage more intensely in sexual talk and may post sexually explicit pictures, in order to "mark the workplace as an arena in which masculinity is appropriate or even constitutive." *Id.* at 1211; see also Schultz, *supra* note 61, at 1755 (contending that most forms of sexual harassment on the job are motivated by the desire to "maintain the most highly rewarded forms of work as domains of masculine competence" and that the purpose of most harassment is to "denigrat[e] women's competence for the purpose of keeping them away from male-dominated jobs"); Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1085 (1999) (stating that "[w]hen men want to drive women out of the workplace, they sometimes do so by flaunting symbols of male sexuality, as by using obscene language, exhibiting their genitalia, and posting pornographic photographs").

118. See Willborn, *supra* note 50, at 721 ("if the pinups only began to appear when women entered the workplace . . . the speech may be evidence of discrimination").

female attorney arrived, such conduct would be evidence of intentional discrimination.

In the *Fitzgerald*, *Coniglio*, and *O'Rourke* cases, however, there is no evidence that the challenged conduct either was directed at the plaintiffs or was intended to send a message of exclusion to women in the workplace. In *Fitzgerald*, although occasionally the male attorneys appeared to realize that their talk about sex embarrassed the plaintiff, they did not engage in the conversations for that purpose: "Basically Fitzgerald's evidence about the male associates' [sic] is that they intended to have fun among themselves by talking and joking about sex."¹¹⁹ There was no evidence that the supervisor in *Coniglio* intended anyone else to see the pictures of naked women that he was viewing on the Internet.¹²⁰ In *O'Rourke*, there was no evidence that the amount of pornography increased after O'Rourke was assigned to the engine company.

As discussed in the previous section, courts have found that harassing conduct was caused by the plaintiff's sex where the conduct reflected an animus toward persons of the plaintiff's sex. Courts have not been clear, however, in explaining this "gender animus" basis for finding conduct discriminatory. When the *Oncale* Court described evidence of gender animus as a means of proving that harassing conduct was discriminatory, it seemed to refer to conduct that was directed at a person because of that person's sex.¹²¹ In other words, gender animus did not appear to be a separate means of proving disparate treatment as much as an explanation for why some conduct might be directed at a person because of that person's sex. Because none of the conduct in our sample cases was directed at the plaintiffs, if this is all that gender animus means, it would not provide an argument for this conduct to be considered disparate treatment. Some lower courts have taken this view of gender animus. Such courts have used the idea of gender animus primarily to reason that, where a harasser has demonstrated gender animus, like through the use of an offensive word to refer to women, it is likely that his other conduct directed at the plain-

119. *Fitzgerald*, 153 F. Supp. 2d at 222.

120. *Coniglio*, 2000 WL 967989, at *2; see also Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the "Reasonable Person,"* 58 OHIO ST. L.J. 1217, 1243 (1997) [hereinafter *Title VII and the First Amendment*] (asserting that "a male employee might display a nude female pin-up simply because he enjoys viewing it during the course of his work and not because he wishes to direct its message at anyone else").

121. The Court stated that a trier of fact might reasonably find harassing conduct discriminatory "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Oncale*, 523 U.S. at 80.

tiff—which might not otherwise obviously be based on her gender—was in fact caused by the plaintiff's gender.¹²²

Other lower courts, however, have found that conduct that was not directed at the plaintiff or at any other women in the workplace is sexually discriminatory if it reflects gender animus. For example, in *O'Shea v. Yellow Technology Services, Inc.*,¹²³ the female plaintiff's male coworker described to other coworkers a dream that he had about a naked woman jumping on a trampoline and told them that "Playboy is superior to a wife because at least with Playboy you get variety." The coworker did not make these statements to the plaintiff, and there was no evidence that he targeted the statements at any woman in the workplace. The district court found that the coworker did not make the comments because of the plaintiff's sex,¹²⁴ but the appellate court rejected that view, stating that "[b]ecause of the overtly sexual nature of these incidents, we think that a jury readily could find that they were based on gender or sexual animus."¹²⁵ The coworker's comments clearly involved gender, but were they sexually discriminatory under a disparate treatment approach?

If there is no evidence that such comments were caused by the sex of any of the women in the workplace, the comments might not constitute disparate treatment because that theory of discrimination requires the plaintiff to prove causation. On the other hand, one could argue that disparate treatment clearly exists where someone makes comments that are only derogatory toward or lascivious about women, and does not make such statements about men, because men and women are being treated differently.¹²⁶ Female employees hear derogatory or lascivious statements made about their gender; male employees do not. It seems likely that most courts would take the lat-

122. See, e.g., *Raniola v. Bratton*, 243 F.3d 610, 618-20 (2d Cir. 2001); *Jessen v. Babbitt*, No. 98-8069, 1999 WL 1246915, at *3 (10th Cir. Dec. 23, 1999); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565-66 (6th Cir. 1999) (stating that "[t]he myriad instances in which Williams was ostracized, when others were not, combined with the gender-specific epithets used, such as 'slut' and 'fucking women,' create an inference, sufficient to survive summary judgment, that her gender was the motivating impulse for her coworkers' behavior").

123. 185 F.3d 1093, 1098 (10th Cir. 1999)

124. *O'Shea v. Yellow Tech. Serv.*, 979 F. Supp. 1390, 1395 (D. Kan. 1997).

125. *O'Shea*, 185 F.3d at 1099.

126. See *Brennan v. Metro. Opera Assoc., Inc.*, 1998 U.S. Dist. LEXIS 5562, at *41-*42, 78 Fair Empl. Prac. Cas. (BNA) 1291, 1301 (S.D.N.Y. 1998) (rejecting female plaintiff's argument that she suffered harassment because of sex when a homosexual male coworker displayed postcards of undressed and partially undressed men, because "it is most reasonable to conclude that the sexual objectification of one sex—in this case, males—would be most offensive to members of that sex"), *aff'd on other grounds*, 192 F.3d 310 (2d Cir. 1999); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 486 (5th Cir. 1989) (Jones, J., dissenting) (contending that sexually explicit graffiti drawn on the walls of plaintiff's workplace "was arguably non-discriminatory because it included male and female references").

ter view. If presented with a case involving a male employee who always uses the word "cunt" to refer to women, who says that he is not directing that word at any of the women with whom he works, it seems likely that courts would find that such conduct constituted disparate treatment.¹²⁷

This view of gender animus and disparate treatment seems to suggest that if the pornography posted in a workplace depicts only women, if the sexual jokes make fun only of women, if the sexual discussions focus only on demeaning women, such conduct—even if not targeted at any women in the workplace—is sexually discriminatory under a disparate treatment approach.¹²⁸ Women are forced to see pictures and hear language in the workplace that demeans their gender, and men are not. This reasoning may suggest an odd conclusion, however: that as long as some of the pictures have naked men as well as naked women, as long as some of the jokes make fun of men as well as women, the conduct is not discriminatory and thus is not relevant to the plaintiff's sexual harassment claim.

In her dissenting opinion in *Waltman v. International Paper Co.*,¹²⁹ Judge Edith H. Jones made this argument, noting that sexu-

127. The racial harassment case of *Collier v. RAM Partners, Inc.*, however, may suggest otherwise. 158 F. Supp. 2d 889 (D. Md. 2001). The plaintiff, who was African-American, worked with Moody, an employee who made racist comments about many racial minority groups, including African-Americans. *Id.* at 894-95. The employer contended that the comments were not caused by the plaintiff's race. *Id.* at 898. The court rejected this argument:

RAM's contention that Collier has failed to demonstrate that Moody's comments were on account of Collier's race borders on the absurd. Apparently, the predicate for this argument is the unarticulated premise that Moody was simply an "unreconstructed bigot," who harbored an antipathy and animus toward members of all racial and ethnic groups outside his own, and that therefore, the fortuity that Collier, *the sole African-American employee in the workplace*, found his constant use of racial epithets offensive, should not give rise to liability as to RAM. I reject this notion out of hand. When Moody chose to vilify African-Americans, he intentionally injected Collier's race into his comments and thereby made humiliation and debasement on the basis of her race and ethnicity a part of her experience in the everyday workplace environment. A reasonable juror could readily conclude that Moody's comments, steeped in hateful racial overtones, were motivated, at least in part, because of Collier's race.

Id. at 899 (internal citation omitted). It is interesting that, rather than reasoning simply that Moody's use of derogatory terms to refer to racial minorities but not to whites is disparate treatment on its face and thus constitutes harassment because of race, the court contends that Moody's use of the derogatory terms must have been caused by the plaintiff's race.

128. Similarly, if the pornography and sexual jokes involved only men, they would be sexually discriminatory under a disparate treatment approach. *But see* B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 31-32 (1993) (asserting that sexual cartoons generally depict women, but not men, in a demeaning manner).

129. 875 F.2d 468, 486 (5th Cir. 1989).

ally explicit graffiti drawn on the walls of the plaintiff's workplace "was arguably non-discriminatory because it included male and female references."¹³⁰ But should whether pornography is discriminatory and thus relevant as part of a hostile work environment turn on to what extent both sexes are depicted? The *Waltman* majority concluded that it should not.¹³¹ The majority explained that it had held in a previous case, involving sexually oriented cartoons depicting both men and women, that "any reasonable person would have to regard these cartoons as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse."¹³² The majority's reasoning, however, does not appear responsive to the question of whether the graffiti or cartoons were discriminatory against women under a disparate treatment theory. Rather, by focusing on the effect of the graffiti or cartoons on women, the court seems to be using a disparate impact theory to find discrimination.

Some radical feminists may argue that all pornography, discussions of sex, and other sexual conduct in the workplace constitute the disparate treatment of women because, in our patriarchal society, everything related to sexual intercourse contributes to the subordination of women to men.¹³³ In other words, even if a particular item of pornography depicts both women and men, it nonetheless constitutes the disparate treatment of women because everything sexual in nature communicates a message of women as sexual objects and men as sexual subjects. Like the argument made by the *Waltman* majority, however, this argument seems to focus not on different treatment of men and women but rather on the different *effect* that sexual conduct has on women. This argument supports the disparate impact theory of discrimination rather than disparate treatment.¹³⁴

130. Some of the graffiti was directed at the plaintiff, which could create an inference that it was caused by the plaintiff's sex. *Id.* at 471. Judge Jones was referring to the majority of the pornography which "had nothing to do with [the plaintiff] personally." *Id.* at 486 (Jones, J., dissenting).

131. *Id.* at 477 n.3.

132. *Id.* (quoting *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988)).

133. See, e.g., ANDREA DWORKIN, *INTERCOURSE* 137 (1987) (contending that "[i]ntercourse remains a means or the means of physiologically making a woman inferior"); *id.* at 127-28 (stating that it is unclear "[h]ow to separate the act of intercourse from the social reality of male power . . . especially because it is male power that constructs both the meaning and the current practice of intercourse as such").

134. See George, *supra* note 128, at 32 (contending that "[a] better solution" to the problem of whether harassing conduct is sexually discriminatory "would be to forego this absurd discussion of equal opportunity offensiveness and find all sexually oriented behavior actionable by recognizing its inherently differential impact on male and female employees").

The disparate treatment theory of discrimination is about causation: if the plaintiff's sex caused the challenged conduct to occur. More specifically, in determining whether sexual conduct in the workplace constitutes disparate treatment, the key is whether the conduct was targeted at one sex in the workplace.¹³⁵ This targeting could occur because the harasser is motivated by heterosexual or homosexual desire for the plaintiff. Even absent any evidence of sexual desire, a plaintiff can prove targeting—and thus disparate treatment—by showing that the harasser directed the conduct only at women. A plaintiff can also prove targeting by showing that the nature or amount of sexual conduct in the workplace changed around the time women entered the workplace.

Some workplace sexual conduct, however, is not targeted at one sex in the workplace. Some people discuss sex and view pornography because they find such discussions and pictures entertaining and enjoyable, regardless of the effect of such conduct on others in the workplace.¹³⁶ The male attorneys in *Fitzgerald*, the supervisor in *Coniglio*, and the male firefighters in *O'Rourke* may fall into this category.

Non-targeted sexual conduct in the workplace does not constitute disparate treatment because it is not caused by the plaintiff's sex.¹³⁷

135. See Calleros, *supra* note 72, at 2 (stating that "*Oncale* points to a simple, coherent theory of sexual harassment that rests on proving that the harasser targeted the victim for harassment on the basis of the victim's status as male or female").

136. See Fremling & Posner, *supra* note 117, at 1085 (stating that "often men post pornographic pictures, use foul language, and engage in similar activities not to drive women out of the workplace but merely for their own enjoyment," as evidenced by the fact that "similar conduct is commonly found in workplaces in which no women are present").

137. In an article published after this Article was substantially completed, David Schwartz confronted the issue of proving the sex discrimination requirement of actionable sexual harassment. David S. Schwartz, *When Is Sex Because of Sex? The Causation Element in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002). He agrees that the language of *Oncale* reflects a disparate treatment or causation-based understanding of discrimination. See *id.* at 1710, 1736. Schwartz contends, however, that all workplace conduct that is sexual in nature can be understood as caused by the gender of others. See *id.* at 1783 (stating that it is not "theoretically sound to assert that there is some sexual conduct that is not 'because of sex'"). He explains his argument as follows:

Take the example of telling sexual jokes or posting pornographic pictures in an all-male oil rig or fire station. This type of sexual conduct functions as a sort of waving of a flag of heteropatriarchy, calling upon the audience to salute. Those who do not salute can be identified as gender traitors and treated accordingly. This conduct is "because of sex" irrespective of whether anyone is offended by it, let alone severely abused or oppressed, although the latter reaction is necessary to make a federal case.

Id. at 1785.

Given Schwartz's broad understanding of causation, all workplace sexual conduct—whether targeted or not—would satisfy the sex discrimination requirement of actionable sexual harassment. He proposes a restoration of what he calls

Should non-targeted sexual conduct in the workplace be actionable under Title VII? It will be actionable only if plaintiffs can prove disparate impact discrimination and if courts accept such a means of proving discrimination in a sexual harassment case.¹³⁸

IV. ANALYSIS OF NON-TARGETED WORKPLACE SEXUAL CONDUCT UNDER A DISPARATE IMPACT APPROACH

A. The Law of Disparate Impact Discrimination

Disparate impact discrimination occurs when a facially neutral employment practice disproportionately harms members of a protected class and is not job-related or consistent with business necessity.¹³⁹ The Supreme Court first recognized the disparate impact theory of discrimination in the seminal case of *Griggs v. Duke Power Co.*¹⁴⁰ Black employees of Duke Power challenged the company's policies requiring a high school education and passing scores on two standardized general intelligence tests for initial assignment or transfer into any department other than Labor, the company's lowest-paying department.¹⁴¹ These policies operated to exclude a disproportionate number of blacks from the non-Labor departments.¹⁴² The Court of Appeals for the Fourth Circuit concluded that there was no racial mo-

the "sex per se" rule, in which "sexual conduct in the workplace is always, without more, 'because of sex.'" *Id.* at 1705. Accordingly, under Schwartz's approach, it would never be necessary to rely on the disparate impact theory in order to find workplace sexual conduct sexually discriminatory and thus relevant to a plaintiff's sexual harassment claim.

138. See John H. Marks, *Title VII's Flight Beyond First Amendment Radar: A Yin-To-Yang Attenuation of "Speech" Incident to Discriminatory "Abuse" in the Workplace*, 9 COLUM. J. GENDER & L. 1, 11 (1999) (stating that "[a]bsent this element of targeting, allegedly harassing activity can come within Title VII's scope, if at all, only under a theory of disparate impact").

139. 42 U.S.C. § 2000e-2(k)(1)(A).

140. 401 U.S. 424 (1971).

141. *Id.* at 427-28. Prior to the effective date of Title VII, the company openly discriminated based on race in its hiring and job assignment decisions, employing black employees only in the Labor Department. *Id.* at 426-27. The highest paying jobs in the Labor Department paid less than the lowest paying jobs in the other four departments. *Id.* at 427. The policy requiring a high school diploma for initial assignment to a department other than Labor was adopted in 1955. *Id.* The company adopted the other challenged policies—requiring a high school diploma for transfer to a department other than Labor and requiring passing scores on the standardized tests for initial assignment or transfer into any such department—on July 2, 1965, the date when Title VII became effective. *Id.* at 427-28.

142. *Id.* at 429. The Court noted that 1960 census statistics revealed that only 12% of black males had finished high school, compared to 34% of white males, and that the EEOC had found in another case that the use of a group of tests—including the two tests at issue in *Griggs*—resulted in only 6% of blacks passing the tests, compared with 58% of whites. *Id.* at 430 n.6.

tivation behind the company's adoption of the policies and that the company applied the policies in a race-neutral fashion.¹⁴³ In light of that conclusion, the court of appeals held that the policies were not racially discriminatory in violation of Title VII.¹⁴⁴

The Supreme Court reversed, holding that Title VII prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation," unless the challenged employment practice is related to job performance.¹⁴⁵ The Court explained its reasoning as follows:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.¹⁴⁶

Duke Power could not prove that either its high school diploma requirement or its standardized test passage requirement was related to successful performance of non-Labor Department jobs.¹⁴⁷ Accordingly, the Court concluded that both requirements were "artificial, arbitrary, and unnecessary barriers to employment" which operated to discriminate invidiously on the basis of race, in violation of Title VII.¹⁴⁸ The Court found the company's lack of discriminatory intent irrelevant because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."¹⁴⁹

In later cases, the Court clarified the scope of the disparate impact theory of discrimination. For example, the disparate impact theory is available in cases in which past societal discrimination did not cause the disparate impact.¹⁵⁰ Moreover, plaintiffs can use the theory to

143. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1232-36 (4th Cir. 1970).

144. *Id.* at 1235-36.

145. *Griggs*, 401 U.S. at 431.

146. *Id.* at 429-30.

147. *Id.* at 431.

148. *Id.*

149. *Id.* at 432. The Court stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.*

150. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). The *Dothard* Court used the theory to invalidate minimum height and weight requirements for the position of correctional counselor in the Alabama state penitentiary system, which disproportionately excluded women. *Id.* at 332.

The *Griggs* Court had suggested that the disparate impact of the high school diploma and test passage requirements in that case was due to past societal discrimination: "Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools . . ." *Griggs*, 401 U.S. at 430. In addition, the *Griggs* Court's reference to "freez[ing] the status quo of prior

challenge subjective or discretionary employment practices as well as objective employment requirements.¹⁵¹

In the Civil Rights Act of 1991, Congress amended Title VII and codified the disparate impact theory of discrimination.¹⁵² To establish a prima facie case of disparate impact discrimination, a plaintiff must prove that an employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."¹⁵³ The employer is then liable for disparate impact discrimination unless it "demonstrate[s] that the challenged practice is job related for the position in question and consistent with business necessity."¹⁵⁴ Even if the employer can prove that the challenged practice is job related and consistent with business necessity, the em-

discriminatory employment practices" could be read as indicating that the disparate impact theory was only applicable in cases in which the disproportionate effect of a facially neutral employment practice could be traced to past intentional discrimination. *Id.* The Court's use of the disparate theory in *Dothard* disproved that reading. *See also* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988) ("We have not limited [the disparate impact theory] to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination.").

151. *Watson*, 487 U.S. at 991.

152. 42 U.S.C. § 2000e-2(k)(1)(A)-(B). Prior to this amendment, some commentators had argued that Title VII's language did not support a disparate impact theory of discrimination. *See, e.g.*, RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 182-204 (1992); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1344-45 (1987) (arguing that the basis of the disparate impact theory "is not to be found in any provision explicitly enacting it into law or in any passage in the legislative history"); Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 497-503 (1985) (arguing that Congress intended Title VII to prohibit only intentional discrimination). The codification of the disparate impact theory via the Civil Rights Act of 1991 rendered this argument moot.

153. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

154. *Id.* "Demonstrates" is defined as "meets the burdens of production and persuasion." *Id.* at § 2000e(m). In *Watson v. Fort Worth Bank & Trust*, a plurality of the Supreme Court stated in dicta that the employer bore only the burden of production, not the burden of persuasion, on the issue of business necessity. 487 U.S. 977, 986 (1988). The plurality also characterized the business necessity defense as satisfied by evidence showing that the challenged practice "serv[es] the employer's legitimate business goals." *Id.* at 998. The Court majority adopted these views in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). In *Wards Cove*, the Court stated that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Id.* In enacting the Civil Rights Act of 1991, Congress rejected the *Wards Cove* Court's interpretation of Title VII and the disparate impact theory of discrimination. *See* Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991) (stating that one of the purposes of the Act was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)").

ployer will still be liable if the plaintiff can prove the availability of an alternative employment practice with a less discriminatory impact that the employer refuses to adopt.¹⁵⁵

A claim for hostile work environment sexual harassment alleges that the conditions of the plaintiff's employment are discriminatory. However, most disparate impact cases—and all of the disparate impact cases decided by the Supreme Court—have involved challenges to an employer's qualification standards or selection practices for hiring or promoting employees, rather than challenges to the conditions of employment.¹⁵⁶ One explanation for the limited use of the disparate impact theory in conditions of employment cases is based on an argument about the language of Title VII prior to its amendment by the Civil Rights Act of 1991. It is arguable that the original language of Title VII allowed the use of the disparate impact theory only to challenge hiring, promotion, and discharge decisions.¹⁵⁷ However, the amendment of Title VII to include an express prohibition of "a particu-

155. 43 U.S.C. § 2000e-2(k)(1)(A)(ii).

156. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 443 (1982) (discussing requirement that employees pass a written examination to be considered for promotion); *Dothard v. Rawlinson*, 433 U.S. 321, 327 (1977) (discussing requirement that applicants for employment be of a certain minimum weight and height); *Griggs*, 401 U.S. at 427-28 (discussing requirement that employees have a high school diploma and pass two standardized tests in order to be assigned initially or transferred into certain departments).

157. Courts originally interpreted the disparate impact theory of discrimination as arising out of section 703(a)(2) of Title VII, rather than section 703(a)(1). See *Teal*, 457 U.S. at 448 (stating that disparate impact claims "reflect the language of Sec. 703(a)(2)"); *Griggs*, 401 U.S. at 426 n.1 (citing only to section 703(a)(2) of Title VII, not to section 703(a)(1)). Section 703(a)(1) broadly prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Section 703(a)(2) never refers to "conditions of employment," instead barring employers from "limit[ing], segregat[ing], or classify[ing] [] employees [or applicants for employment] in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," because of a prohibited factor.

It is arguable that section 703(a)(2)'s reference to "employment opportunities" does not encompass challenges to conditions of employment, but rather is applicable only to challenges to hiring, promotion, or discharge decisions. For example, in *Garcia v. Spun Steak Co.*, the Court of Appeals for the Ninth Circuit reasoned as follows: "While policies that serve as barriers to hiring or promotion clearly deprive applicants of employment opportunities, we cannot conclude that a burdensome term or condition of employment . . . would 'limit, segregate, or classify' employees in a way that would 'deprive any individual of employment opportunities' or 'otherwise adversely affect his status as an employee' in violation of section 703(a)(2)." 998 F.2d 1480, 1485 (9th Cir. 1993); see also *Lynch v. Freeman*, 817 F.2d 380, 389-90 (6th Cir. 1987) (Boggs, J., dissenting) ("I do not agree with the court that working conditions that apply to all workers can be viewed as a method by which an employer would 'limit, segregate, or classify' employees, in the words of Sec. 703(a)(2)."). Accordingly, if the disparate impact

lar employment practice that causes a disparate impact" nullifies the argument that the disparate impact theory is unavailable to challenge conditions of employment. There is now an express statutory basis for disparate impact claims, and the phrase "employment practice" is certainly broad enough to include challenges to employment conditions as well as selection practices.¹⁵⁸

*Lynch v. Freeman*¹⁵⁹ is one of the rare cases in which a plaintiff used the disparate impact theory of discrimination to challenge successfully a condition of employment. The plaintiff in *Lynch* worked as a carpenter-apprentice at a construction site.¹⁶⁰ Her employer provided portable toilets at the construction site for the use of the workers, forbidding workers from using the indoor restrooms in the main building of the plant.¹⁶¹ The portable toilets were dirty, had no running water, and often had no toilet paper or toilet paper that was soiled.¹⁶² To avoid using the portable toilets, the plaintiff began holding her urine until she left work, until that practice caused her to suf-

theory of discrimination only applies in actions brought under section 703(a)(2), plaintiffs could not use the theory to challenge conditions of employment.

158. See *Title VII and the First Amendment*, *supra* note 120, at 1249 (asserting that "egregiously disturbing or distracting expression" could constitute a particular employment practice under the Civil Rights Act of 1991); Perry, *supra* note 85 at 155-57 (arguing that the language of the then not-yet-enacted Civil Rights Act of 1991 does not distinguish between selection and non-selection decisions); LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 20.05 (2d ed. 2001) (stating that "from a policy standpoint there simply is no good reason why discriminatory conditions of employment should not be encompassed by the *Griggs* rationale" and that the disparate impact provisions of the Civil Rights Act of 1991 "contain no particular limitation to Section 703(a)(2)").

Another possible explanation for the limited use of the disparate impact theory to challenge conditions of employment is that harassment law has become the primary means of challenging employment conditions. See Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643, 656 (1996) (noting that, except in the harassment area, "courts have not been creative in their approach to what they consider a term, condition, or privilege of employment for purposes of Title VII"). Some courts have suggested that even the disparate treatment theory of discrimination is limited to claims based on materially adverse employment decisions, implying that any challenges to conditions of employment must be analyzed under the parameters of harassment law. See, e.g., *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 885 (7th Cir. 1989) (holding that, in order to establish a violation of the ADEA, the plaintiff must show that her employer took a materially adverse employment action against her because of her age). This Article explores whether harassment and disparate impact are mutually exclusive, or whether, because the Supreme Court has emphasized that actionable harassment requires a finding of discrimination, courts should consider both the disparate impact and the disparate treatment theories of discrimination under Title VII in order to determine if a plaintiff can sue for harassment.

159. 817 F.2d 380 (6th Cir. 1987).

160. *Id.* at 381.

161. *Id.* at 381-82.

162. *Id.* at 381.

fer a urinary tract infection.¹⁶³ Thereafter, she began using the indoor restroom regularly, and her employer eventually fired her for violating its rule prohibiting such use.¹⁶⁴ Expert testimony established that women faced health risks from using the dirty portable toilets that men did not face, because of "anatomical differences between the sexes."¹⁶⁵ The court found that the plaintiff established a prima facie case of disparate impact discrimination, reasoning that "[a]ny employment practice that adversely affects the health of female employees while leaving male employees unaffected has a significantly discriminatory impact."¹⁶⁶

Disparate impact theory has been used with some frequency to challenge one particular condition of employment: English-only policies, in which an employer adopts a rule that only English can be spoken on the job.¹⁶⁷ Perhaps the most well-known case is the Ninth Circuit's decision in *Garcia v. Spun Steak Co.*¹⁶⁸ The majority of Spun Steak's employees were Hispanic and Spanish-speaking, with varying degrees of proficiency in English.¹⁶⁹ In response to complaints that some Spanish-speaking workers were making derogatory comments in Spanish about their non-bilingual coworkers, the employer instituted a policy whereby only English could be spoken in connection with work.¹⁷⁰ The Spanish-speaking employees sued, contending that the policy disparately impacted Hispanic employees.¹⁷¹

The *Spun Steak* court first acknowledged that the plaintiffs' claim was unusual in that it focused on a disparity in a condition of employment rather than on a barrier to hiring or promotion.¹⁷² However, noting the Supreme Court's instruction in *Meritor Savings Bank v. Vinson* that Title VII should be construed broadly, the court concluded

163. *Id.* at 381-82.

164. *Id.* at 382.

165. *Id.* at 384, 388.

166. *Id.* at 388.

167. See, e.g., *Gutierrez v. Mun. Court*, 838 F.2d 1031 (9th Cir. 1988), cert. granted and judgment vacated as moot, 490 U.S. 1016 (1989); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980); *EEOC v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911 (N.D. Ill. 1999); *Long v. First Union Corp.*, 894 F. Supp. 933 (E.D. Va. 1995).

168. 998 F.2d 1480 (9th Cir. 1993). *Spun Steak* has been the subject of numerous law review articles, most of them critical of the Ninth Circuit's holding. See, e.g., Cara D. Helper, Comment, *Enforcing the Equal Employment Opportunity Commission Guidelines on Discrimination Because of National Origin: The Overextension of English-Only Rules in Garcia v. Spun Steak*, 79 MINN. L. REV. 391 (1994); Roman Amaguin, Note, *Garcia v. Spun Steak Company: Has the Judicial Door Been Shut on English-Only Plaintiffs?*, 16 U. HAW. L. REV. 351 (1994).

169. *Spun Steak*, 998 F.2d at 1483.

170. *Id.*

171. *Id.* at 1485.

172. *Id.*

that disparate impact challenges to employment conditions could be brought under the statute.¹⁷³ The court explained that:

Regardless whether a company's decisions about whom to hire or to promote are infected with discrimination, policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and, if unsupported by a business justification, may be considered "discriminatory."¹⁷⁴

Despite the court's recognition that the disparate impact theory could be used to challenge a condition of employment, the *Spun Steak* plaintiffs' challenge to the English-only policy failed. The court agreed that if the English-only policy caused any adverse effects, employees of Hispanic origin would disproportionately suffer those effects.¹⁷⁵ The court found, however, that the policy caused no significant adverse effects at all. The plaintiffs contended that they suffered an adverse impact because they were denied the ability, while on the job, to speak in the language in which they felt most comfortable.¹⁷⁶ The court rejected that argument, noting that the employees were fully bilingual, such that the English-only policy merely inconvenienced them.¹⁷⁷ According to the court, "Title VII is not meant to protect against rules that merely inconvenience some employees Rather, Title VII protects against only those policies that have a *significant* impact."¹⁷⁸

The plaintiffs also argued that the English-only policy created "an atmosphere of inferiority, isolation, and intimidation" and that this tense environment constituted a condition of employment.¹⁷⁹ As the court recognized, the plaintiffs were making a harassment argument, contending that the English-only policy created a hostile work environment based on their national origin.¹⁸⁰ The court acknowledged that claims of harassment usually involve intentional discrimination, but it found that actionable harassment could be based on a disparate impact theory: "Although . . . [*Meritor Savings Bank v. Vinson*] is a

173. *Id.* at 1485-86. The court reasoned that a disparate impact challenge to a condition of employment did not fall within the language of section 703(a)(2) of Title VII, the language that was traditionally understood to give rise to the disparate impact theory. See *supra* note 157. The court concluded, however, that disparate impact challenges to employment conditions could be brought under section 703(a)(1) of the statute.

174. *Spun Steak*, 998 F.2d at 1485.

175. *Id.* at 1486. The court stated, "It is beyond dispute that, in this case, if the English-only policy causes any adverse effects, those effects will be suffered disproportionately by those of Hispanic origin. The vast majority of those workers at *Spun Steak* who speak a language other than English—and virtually all those employees for whom English is not a first language—are Hispanic." *Id.*

176. *Id.* at 1487.

177. *Id.* at 1487-88.

178. *Id.* at 1488.

179. *Id.*

180. *Id.* at 1488-89.

sexual harassment case in which the individual incidents involved behavior that was arguably intentionally discriminatory, its rationale applies equally to cases in which seemingly neutral policies of a company infuse the atmosphere of the workplace with discrimination.”¹⁸¹ For conduct to constitute actionable harassment, however, it must be severe or pervasive, and the court found insufficient evidence that the English-only policy infected the working environment to such a degree as to create a hostile work environment.¹⁸²

It is noteworthy that one of the most famous cases involving a disparate impact challenge to a condition of employment involved an argument that the condition created a hostile work environment, in effect, that the condition amounted to harassment. As discussed previously, courts generally have not thought of disparate impact and harassment law as complementary. Instead, the courts that have taken seriously the requirement that harassing conduct must be discriminatory to be actionable have generally focused only on disparate treatment discrimination.

To succeed in a claim that non-targeted sexual conduct in the workplace constitutes actionable sexual harassment under Title VII, plaintiffs must do more than satisfy the requirements of traditional sexual harassment claims, such as the severity or pervasiveness requirement. Because such plaintiffs cannot prove disparate treatment, they also must satisfy the statutory requirements for proving disparate impact discrimination. As discussed above, a plaintiff establishes disparate impact discrimination by showing that a facially neutral employment practice has a disparate impact—a disproportionately adverse effect—on persons of one sex. The defendant then has the opportunity to defeat the claim by demonstrating that the challenged

181. *Id.*

182. *Id.* at 1489. In reaching that holding, the court rejected the position taken by the EEOC. *Id.* The EEOC Guidelines provide that an employee states a prima facie case of disparate impact discrimination simply by proving that an employer has adopted an English-only policy. 29 C.F.R. § 1606.7(a) (2001). Such a policy, according to the EEOC, may “create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.” *Id.* Under the EEOC’s position, an English-only policy is consistent with Title VII only if the employer can prove it is justified by business necessity. 29 C.F.R. § 1606.7(a) and (b). One judge on the *Spun Steak* panel dissented from the majority’s rejection of the EEOC Guidelines, explaining that he would defer to the EEOC’s expertise in construing Title VII. *Spun Steak*, 998 F.2d at 1490 (Boochever, J., dissenting). The *Spun Steak* majority’s rejection of the EEOC Guidelines has been much criticized. *See, e.g.,* *Garcia v. Spun Steak Co.*, 13 F.3d 296, 299-300 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc) (contending that the panel decision’s objection to the Guidelines’ presumption of disparate impact is “incomprehensible”); Helper, *supra* note 168, at 411-21 (arguing that the EEOC Guidelines are a reasonable construction of Title VII and were entitled to deference); Amaguin, *supra* note 168, at 382-88 (arguing that the court should have deferred to the EEOC Guidelines).

practice is job-related and consistent with business necessity. Could these requirements be satisfied in the context of a sexual harassment claim based on non-targeted sexual conduct in the workplace?¹⁸³

B. A Facially Neutral Employment Practice . . .

The first step in proving discrimination via the disparate impact theory is identifying a facially neutral employment practice. Could non-targeted sexual conduct in the workplace ever constitute a facially neutral employment practice, suitable for disparate impact analysis? Answering this question requires a consideration of two separate issues: first, the meaning of "facially neutral," and second, what constitutes an "employment practice."

When the Supreme Court refers to "facially neutral" employment practices in the disparate impact context, the Court intends to encompass any practices that are not intentionally discriminatory because they are not caused by the sex of any persons in the workplace. The Court first used the phrase "facially neutral" in the disparate impact context in *International Brotherhood of Teamsters v. United States*,¹⁸⁴ stating that disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." The Court likely based that phrase on the following language in *Griggs v. Duke Power Co.*,¹⁸⁵ the Court's seminal disparate impact case: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." This language from *Griggs* indicates that a policy or practice is appropriate for analysis under the disparate impact theory if it does not explicitly differentiate on the basis of a prohibited factor and is not caused by intentional discrimination.¹⁸⁶ In other words, conduct is facially neutral and appropriate

183. In arguing for a broader understanding of disparate treatment and causation in sexual harassment cases, see *supra* note 137, David Schwartz notes the difficulties of proving discrimination under the disparate impact theory:

[D]isparate impact requires proof of the broader effects of a policy beyond the individual case—typically in the form of statistic—whereas intentional discrimination cases typically do not require such proof. It would be burdensome to shift sexual harassment plaintiffs into the disparate impact mode of proof.

Schwartz, *supra* note 137, at 1774.

184. 431 U.S. 324, 335 n.15 (1977).

185. 401 U.S. 424, 430 (1971).

186. The policies at issue in *Griggs* required a high school education and passing scores on two standardized general intelligence tests for initial assignment or transfer into any department other than the company's lowest-paying department. *Id.* at 427-28. The policies did not explicitly differentiate based on race (they did not provide, for example, that only black employees needed to pass the

for analysis under the disparate impact theory if it does not constitute disparate treatment.¹⁸⁷ Non-targeted sexual conduct in the workplace does not constitute disparate treatment because it is not caused by the plaintiff's sex. Accordingly, non-targeted workplace sexual conduct satisfies the "facially neutral" requirement of disparate impact analysis.

A more difficult task is identifying an "employment practice" on the part of the employer. Even before the Civil Rights Act of 1991 amended Title VII, the Supreme Court stated that the disparate impact theory was a basis for finding "employment practices" discriminatory.¹⁸⁸ The statute now provides that a plaintiff proves disparate impact discrimination by demonstrating that an employer "uses a particular employment practice that causes a disparate impact" based on a trait protected by Title VII, if the employer is unable to demonstrate that the challenged practice is job-related and consistent with business necessity.¹⁸⁹ Might some harassment cases involving non-targeted workplace sexual conduct provide a basis for identifying an employment practice that causes a disparate impact? The statute does not define the phrase "employment practice," and the Supreme Court has not provided much guidance on what constitutes an employment practice.¹⁹⁰

tests), and the court of appeals had found that the employer "had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees.'" *Id.* at 432 (quoting 420 F.2d 1225, 1232 (4th Cir. 1970)); *see also Teamsters*, 431 U.S. at 349 (stating that "a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group"); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (stating that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination").

187. *See EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1278 (11th Cir. 2000) (stating that "the central difference between disparate treatment and disparate impact claims is that disparate treatment requires a showing of discriminatory intent and disparate impact does not. . . . In fact, the judicial doctrine of disparate impact was created in *Griggs* specifically to redress *facially-neutral* policies or practices which visited disproportionate effects on groups protected by Title VII"); *see also Donnelly v. R.I. Bd. of Governors for Higher Educ.*, 929 F. Supp. 583, 588 (D.R.I. 1996) (stating that "[t]he doctrine of 'disparate impact' recognizes that even though an employment practice is not motivated by a discriminatory purpose and does not expressly make any class based distinction, the practice may be discriminatory if it adversely affects members of a protected class to a greater degree than non-members").

188. *See, e.g., Watson*, 487 U.S. at 994 (stating that a disparate impact plaintiff "must begin by identifying the specific employment practice that is challenged"); *Teamsters*, 431 U.S. at 335 n.15 (stating that disparate impact claims "involve employment practices that are facially neutral").

189. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

190. As discussed in section IV.A, *supra*, all of the disparate impact cases considered by the Supreme Court have involved challenges to an employer's qualification

One possible understanding of the meaning of “employment practice” in disparate impact analysis is simply that the plaintiff must establish a basis for holding the employer liable for the discriminatory conduct alleged.¹⁹¹ As a general rule, Title VII prohibits discrimination only by employers, and only employers can be held liable under Title VII.¹⁹² Establishing a basis for employer liability has not presented any difficulty in most disparate impact cases, because the conduct usually challenged in such cases—the establishment and use of criteria for hiring or promoting employees—is the type of conduct for which employers are directly responsible.¹⁹³

In fact, courts have questioned employer liability for employment discrimination only in the harassment context. Where the alleged discrimination occurred in the context of a tangible employment action, like hiring or firing, courts have found employers automatically liable once the plaintiff proved discrimination.¹⁹⁴ Courts generally find em-

standards or selection procedures for hiring or promoting employees. The Court has not held or even stated in dicta, however, that the disparate impact theory is applicable only in such cases. Moreover, the Court’s holding in *Watson v. Fort Worth Bank & Trust*, that the disparate theory applies outside the context of objective employment requirements, arguably suggests a somewhat broad understanding of what constitutes an employment practice for purposes of disparate impact analysis. See 487 U.S. at 991.

191. Charles Calleros apparently takes this view: “[A]n unlawful disparate impact would be established if nondirected workplace expression *for which the employer is responsible* alters working conditions for members of a protected class in numbers disproportionate to their numbers in the total workforce that is exposed to the expression.” *Title VII and the First Amendment*, *supra* note 120, at 1244-45 (emphasis added); see also *id.* at 1249 (stating that “[s]o long as the employer is responsible for expression under agency principles, egregiously disturbing or distracting expression could constitute ‘a particular employment practice’”).
192. 42 U.S.C. § 2000e-2(a). The statute defines “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such a person . . .” *Id.* at § 2000e(b). The statute also prohibits discrimination by employment agencies and labor organizations. § 2000e(b),(c). The federal courts of appeal that have addressed the issue are in agreement that supervisors are not subject to individual liability under Title VII. See, e.g., *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177 (4th Cir. 1998); *Wathen v. Gen. Elec.*, 115 F.3d 400, 405 (6th Cir. 1997); *Dici v. Pennsylvania*, 91 F.3d 542, 552 (3d Cir. 1996).
193. When discrimination is the product of an employment policy—as is alleged in most disparate impact cases—the employer is directly liable; “it is the actions of the employer as an entity that have violated the statute.” Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 518 (1996). Where employment decisions are “in conformance with an overall policy or practice of the employer as a whole, policies or practices which the employer directly authorized or ratified, or of which it clearly knew or should have known,” employers face direct rather than vicarious liability. *Id.* at 518 n.42.
194. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998) (asserting that “there is nothing remarkable in the fact that claims against employers for dis-

ployers vicariously, not directly, liable in such cases. Pursuant to agency principles, courts have reasoned that vicarious liability is appropriate when a supervisor takes a tangible employment action against a subordinate for a discriminatory reason, because such action is within the scope of employment and/or the supervisor is aided by the agency relation in taking such an action.¹⁹⁵

In contrast to the well-accepted law on employer liability for discrimination occurring in the context of tangible employment actions, courts struggled for years to determine standards for employer liability for sexual harassment. More specifically, courts struggled to determine if and when an employer could be held vicariously liable for a hostile work environment created by a supervisor. Courts agreed that employers were vicariously liable for quid pro quo sexual harassment engaged in by a supervisor.¹⁹⁶ They also agreed that employers were not vicariously liable for a hostile work environment created by a co-worker; instead, employers were directly liable if they knew or should have known of the harassment and failed to take appropriate corrective action—in other words, if their negligence was a cause of the harassment.¹⁹⁷ Employers would also be directly liable for a hostile work environment created by a supervisor if the employers' negligence was

criminationary employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown" and stating that automatic employer liability for discriminatory tangible employment actions is an "apparently unanimous rule"); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70-71 (1986) (noting that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions"); *id.* at 75 (Marshall, J., concurring) (stating that under general Title VII law "the act of a supervisory employee or agent is imputed to the employer"); White, *supra* note 193, at 521 (noting "how little discussion the adoption of vicarious liability has provoked"); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 853 (1991) (stating that employer liability is unquestioned in non-harassment Title VII cases: "Where a supervisor discriminates in wages, hours, or working conditions, the employer must remedy that discrimination, whether or not the employer knew about it, should have known about it, or approved it.").

195. *Faragher*, 524 U.S. at 791 (citing cases holding that vicarious liability is appropriate for these reasons); see also RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment"); *id.* § 219(2)(d) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . the servant . . . was aided in accomplishing the tort by the existence of the agency relation."); White, *supra* note 193, at 530, 533 (asserting that "much intentional discrimination may be viewed as within the traditional view of scope of employment" and that "[e]ven when discrimination is outside the scope of employment, vicarious liability is still supported by common-law agency principles because it is the existence of the agency relationship that enables the supervisor to commit a statutory violation").

196. White, *supra* note 193, at 523.

197. *Id.* at 534-35.

a cause of the harassment, but courts questioned whether employers could be held vicariously liable, even though they were without fault, for hostile work environment harassment by supervisors.¹⁹⁸

Courts recognized that the agency principles supporting vicarious liability in the context of a discriminatory hiring or firing might not support vicarious liability when a supervisor creates a hostile work environment.¹⁹⁹ They reasoned that employees who engage in harassing conduct often act for personal motives, rather than out of a purpose to serve the employer, such that their conduct is outside the scope of employment.²⁰⁰ Moreover, because sexual harassment claims tend to involve conduct that could be carried out by a coworker as well as by a supervisor—a coworker as well as a supervisor could touch a plaintiff in a sexual manner or display pornography in his work area—courts questioned whether harassing conduct was aided by the agency relationship.²⁰¹

In 1998, the Supreme Court resolved the question of when an employer is liable for supervisory sexual harassment. The Court held that an employer is vicariously liable for a hostile work environment created by a supervisor.²⁰² However, unless the supervisor's harassment culminates in a tangible employment action, the employer can assert an affirmative defense by proving that it exercised reasonable care in preventing and responding to sexual harassment and that the aggrieved employee unreasonably failed to utilize preventive or corrective opportunities provided by the employer or otherwise to avoid harm.²⁰³

198. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1998) (“[A]lthough a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII, but [the plaintiff] seeks to invoke the more stringent standard of vicarious liability.”).

199. *Faragher*, 524 U.S. at 793-94.

200. *Id.* at 794.

201. White, *supra* note 193, at 523.

202. The Court reasoned that, to some extent, the authority given to a supervisor always aids the supervisor in his harassing conduct, giving the harassment “a particularly threatening character” and making the aggrieved employee more reluctant to report the harassment. *Faragher*, 524 U.S. at 802-03; *Ellerth*, 524 U.S. at 763.

203. In light of the Court's statement in *Meritor* that employers will not always be liable for harassment committed by a supervisor, the Court formulated the affirmative defense to liability that is available in cases not involving a tangible employment action. *Faragher*, 524 U.S. at 804; *Ellerth*, 524 U.S. at 763. The Court noted, moreover, that the availability of the affirmative defense will encourage both employers and aggrieved employees to take action to prevent or remedy quickly instances of harassment. *Faragher*, 524 U.S. at 805-06; *Ellerth*, 524 U.S. at 764.

With these principles in mind, how might a plaintiff establish employer liability in a case involving non-targeted sexual conduct in the workplace that arguably has a disparate impact on women? As discussed above, an employer is liable for harassing conduct if the employer's negligence was a cause of the conduct—if the employer knew or should have known of the harassment and failed to take reasonable corrective action. With regard to harassment by coworkers, plaintiffs can establish employer liability *only* by proving that the employer was negligent.

How might a plaintiff prove that her employer's negligence was a cause of the non-targeted sexual conduct she experienced? Perhaps the easiest method would be by proving that she told her employer about the conduct and the employer failed to take any corrective action. An interesting question to consider is whether it would be sufficient to establish employer negligence for a plaintiff to prove that she told her employer that she experienced the type of conduct at issue in any of the three cases described in the Introduction to this Article. If a female plaintiff demonstrated, for example, that she informed her employer that her male coworkers regularly talked about sex and used vulgar language,²⁰⁴ and that her employer took no corrective action, would she establish employer negligence and thus a basis for employer liability?²⁰⁵

At first glance, the answer to that question might seem to be yes. The Supreme Court has stated that an employer is "negligent with respect to sexual harassment"—and thus is liable for the harassment—"if it knew or should have known about the conduct and failed to stop it."²⁰⁶ *Oncale* made clear, however, that harassing conduct does not violate Title VII unless it is discriminatory. In many cases involving harassing conduct that is discriminatory under the disparate treatment theory, notice to the employer describing the conduct will also serve as notice to the employer that the conduct is sexually discriminatory. If, for example, a female plaintiff informed her employer that a male coworker frequently propositioned her for sex or made derogatory references to her gender, the employer would be on notice both of the conduct and of the likelihood that the conduct was sexually discriminatory. An employer who took no action in response to the plaintiff's complaint arguably would be negligent, providing a basis for employer liability.

204. See *Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser, L.L.P.*, 153 F. Supp. 2d 219, 222 (S.D.N.Y. 2001), *rev'd*, 2002 WL 313225 (2d Cir. Feb. 27, 2002).

205. Of course, for the conduct to constitute actionable sexual harassment in violation of Title VII, the plaintiff must also demonstrate that the harassing conduct was sufficiently severe or pervasive to alter the conditions of employment and to create an abusive work environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

206. *Ellerth*, 524 U.S. at 759.

In contrast, if a female plaintiff informed her employer that her male coworkers regularly talked about sex and used vulgar language, the employer would not automatically be put on notice that such conduct was sexually discriminatory. By definition, to be appropriate for consideration under the disparate impact theory of discrimination, the conduct must be facially neutral; accordingly, the male coworkers' conversations must not have been caused by the plaintiff's sex. The conduct is sexually discriminatory, then, only if it is disproportionately harmful to persons of one sex. Would a reasonable employer be aware that the conversations at issue were disproportionately harmful to women, such that the conversations were likely discriminatory and such that the employer could be deemed negligent in failing to respond to them?

Under the facts hypothesized, it may initially appear that the answer must be no, unless one contends that any workplace conversation about sex—indeed, any workplace sexual conduct at all—is always disproportionately harmful to women. That contention has dangerous implications. It suggests that all things sexual (at least in the workplace) are bad for women and that women need to be protected from such things. Requiring employers to assume that they must always protect women from any sexual conduct in the workplace may be more stigmatizing than helpful to women.²⁰⁷

On the other hand, it seems unreasonable to expect a female worker, who wants her employer to take action to reduce the sexualized nature of her work environment, to present the employer with statistical studies demonstrating that certain aspects of the environment disproportionately harm women. If a plaintiff needs to prove that her employer failed to respond to that kind of specific evidence in order to establish employer negligence and employer liability, allowing plaintiffs to prove the discrimination element of sexual harassment via the disparate impact theory would serve little value. It would be so difficult for a plaintiff to identify an "employment practice" that causes a disparate impact that few sexual harassment plaintiffs would ever succeed at establishing discrimination through the disparate impact theory. Accordingly, few plaintiffs would ever succeed in proving that non-targeted sexual conduct in the workplace created a sexually hostile work environment in violation of Title VII.

It may be possible, however, to develop a middle-ground approach, in which employers are not deemed to be negligent if they fail to assume that all sexual conduct in the workplace disproportionately harms women, and which does not impose such a heavy burden on plaintiffs who want to spur their employers to action. A plaintiff could be required only to complain to her employer about workplace conduct

207. See *infra* section V.B.

that she believes disproportionately harms her because of her gender. Upon receiving such a complaint, the employer would not be required immediately to institute corrective action, such as ordering that the conduct cease, in order to avoid being deemed negligent and responsible for the conduct at issue. Instead, such a complaint by a plaintiff would require the employer to undertake an inquiry into whether and to what extent persons of one sex found the conduct particularly distracting or offensive. If such an inquiry revealed or would have revealed that persons of one sex were substantially more disturbed or distracted by the conduct than were persons of the other sex, only then would the employer be required to institute corrective action in order to avoid being found negligent.

Of course, as discussed above, employer negligence can be found a cause of harassing conduct even absent an employee complaint about such conduct, if the employer should have known of the harassment. Moreover, plaintiffs need not prove employer negligence when the alleged harasser is a supervisor; employers are vicariously liable for supervisory harassment.²⁰⁸ How might these concepts operate in cases involving facially neutral conduct? It could be argued that when a workplace is obviously highly sexualized—where conversations about sex regularly occur out in the open or pornography is displayed openly, for example—the employer should know of the risk that such conduct is disproportionately harmful to women and should undertake an inquiry to determine whether such disproportionate harm is present in its workplace. Because of the dangers implicit in requiring employers to assume that workplace sexual conduct is harmful to women,²⁰⁹ however, a better approach is to require an employee complaint to trigger the employer duty of inquiry.²¹⁰ In addition, vicarious liability for supervisory harassment appears inappropriate in the context of the disparate impact theory, which requires that the plaintiff identify an “employer practice” that causes the disparate impact.²¹¹ It seems a stretch to argue that an “employment practice” could exist where there is no evidence of employer fault, and vicarious liability by definition involves imposing liability without a showing of fault.²¹²

208. See *supra* notes 202-03 and accompanying text.

209. See *infra* section V.B.

210. It is arguable, however, that courts should not require an employee complaint to trigger the employer duty of inquiry unless the employer has a well-publicized anti-harassment policy and complaint procedure. It may be unreasonable to place the burden of complaint upon the employee where the employer has not communicated its willingness to respond to such complaints.

211. See *supra* text accompanying note 189.

212. If vicarious liability was a possible basis for employer liability in the disparate impact context, the employer would be liable—and an “employment practice” would be identified—whenever a supervisor sexually harassed a subordinate. Unless the harassment culminated in a tangible employment action, the employer would have the opportunity to establish an affirmative defense. It is un-

It will not be easy for sexual harassment plaintiffs to identify an "employment practice" causing a disparate impact, even if the phrase is interpreted as simply requiring the plaintiff to establish a basis for employer liability. The plaintiff will need to demonstrate that she complained to her employer about conduct in the workplace, that her employer conducted an inquiry that revealed that the conduct had a disparate impact on persons of one sex (or that her employer failed to conduct an inquiry, which—if it had been conducted—would have revealed such a disparity), and that her employer failed to take reasonable corrective action. Despite these difficulties, however, the "employer liability" interpretation of "employment practice" may be preferable to plaintiffs when compared to the alternative.

It could be argued that the statutory requirement that a plaintiff prove that an employer "uses a particular employment practice that causes a disparate impact" mandates that a plaintiff identify some affirmative conduct by the employer that disproportionately harms members of a protected class. In other words, evidence of an employer's failure to act arguably is insufficient to satisfy the statutory language. It is thus necessary to explore the meaning of the verb "use."

The dictionary defines the verb "use" as meaning "to put into action or service: to have recourse to or enjoyment of" or "to carry out a purpose or action by means of: make instrumental to an end or purpose: apply to advantage: turn to account."²¹³ Synonyms for "use" include "employ," "utilize," "apply," and "avail."²¹⁴ These definitions and synonyms suggest that, to "use a particular employment practice," an employer must do more than merely negligently allow certain behavior to occur in its workplace. Rather, the employer must have some affirmative connection to the behavior. When an employer adopts a policy that applicants for employment must have a high school diploma or must be of a certain height, it is clear that the employer is utilizing affirmatively a rule that may disproportionately harm members of a protected class. In contrast, when an employer

likely that the facially neutral conduct appropriate for analysis under the disparate impact theory would ever culminate in a tangible employment action; thus the affirmative defense should be available in most cases. To satisfy the affirmative defense, the employer must prove that it exercised reasonable care in preventing and responding to sexual harassment and that the aggrieved employee unreasonably failed to utilize preventive or corrective opportunities provided by the employer or otherwise to avoid harm. *Faragher*, 524 U.S. at 804; *Ellerth*, 524 U.S. at 763. The employer would be unable to establish the affirmative defense if it failed to communicate and enforce an anti-harassment policy that prohibited facially neutral conduct that had a disparate impact on members of a protected group, as well as harassing conduct that was caused by the sex of the target of the conduct.

213. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2523-24 (1993).

214. *Id.* at 2524.

fails to stop employees from engaging in conversations about sex or displaying pornography, it seems more of a stretch to say that the employer is utilizing affirmatively any employment practice at all.²¹⁵

215. The decision of Congress to include the “uses a particular employment practice” language in its codification of the disparate impact theory does not suggest, however, that Congress intended to restrict the applicability of the theory to cases involving challenges to an employer’s qualification standards or selection procedures. Some challenges to conditions of employment would satisfy even a narrow interpretation of the “uses a particular employment practice” language. For example, the employer in *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), clearly used a particular employment practice when it adopted a rule requiring only English to be spoken on the job.

Other language in Title VII, however, arguably does suggest that Congress intended the disparate impact theory to apply only in cases involving challenges to qualification standards or selection procedures. After subsection (A) of the statute explains the plaintiff’s requirement of proving a disparate impact, the defendant’s burden of proving business necessity, and the plaintiff’s opportunity to prove an alternative employment practice, subsection (B) provides as follows:

With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that *the elements of a respondent’s decisionmaking process* are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

42 U.S.C. § 2000e-2(k)(1)(B)(i) (emphasis added).

Reference to an employer’s “decisionmaking process” is sensible only in the context of a case involving employer qualification standards or selection procedures; it does not make sense to refer to an employer’s “decisionmaking process” in the context of a challenge to a condition of employment. Moreover, this “decisionmaking process” language—even more so than the “uses a particular employment practice” language in subsection (A) of the statute—suggests that the disparate impact theory applies only to challenges to affirmative conduct by an employer, rather than to an employer’s failure to act.

Nonetheless, when viewed in context, it is unlikely that Congress’s use of this “decisionmaking process” language reflects a decision by Congress to limit the disparate impact theory to qualification standards or selection procedures cases. Congress drafted this part of the Civil Rights Act of 1991 in response to the Supreme Court’s 1989 decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 187-88 (2001). *Wards Cove* was a case involving a challenge to an employer’s selection procedures for hiring employees, in which the plaintiffs alleged that a variety of the employer’s selection procedures had a disparate impact on nonwhites. *Wards Cove*, 490 U.S. at 657. The Court majority held that the plaintiffs needed to show that “each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.” *Id.* The dissent contended that such a requirement was too difficult because it may be impossible for plaintiffs to separate the effect of a bundle of selection procedures. *Id.* at 672 (Stevens, J., dissenting). Congress struck somewhat of a compromise, requiring a plaintiff to prove that each employment practice causes a disparate impact unless she can demonstrate that the elements of an employer’s “decisionmaking process” are incapable of separation for analysis. 42 U.S.C. § 2000e-2(k)(1)(B)(i). Viewed in this light, Congress’s use of the phrase

Moreover, even before Congress codified the disparate impact theory via the "uses a particular employment practice" language, at least one court held that only affirmative acts by an employer constituted "employment practices" appropriate for challenge under the disparate impact theory. In *EEOC v. Chicago Miniature Lamp Works*,²¹⁶ the defendant employer obtained new employees primarily through word of mouth; existing employees would inform their friends about jobs with the defendant, and those persons would complete an application at the defendant's office. When the defendant had an opening to fill, it went through the applications it had on file.²¹⁷ The EEOC alleged that this word of mouth recruiting practice had a disparate impact on blacks in violation of Title VII.²¹⁸ The court disagreed, reasoning that the defendant's "passive[] wait[ing] for applicants who typically learned of opportunities from current . . . employees" was not an employment practice suited for disparate impact scrutiny.²¹⁹ According to the court, "for the purposes of disparate impact, a more affirmative act by the employer must be shown in order to establish causation."²²⁰

Under the *Miniature* court's interpretation of what constitutes an "employment practice" appropriate for disparate impact scrutiny, sexual harassment plaintiffs would have a difficult time establishing discrimination through the disparate impact theory. Only in a very unusual workplace could it be said that an employer affirmatively utilized sexual conversations or the display of pornography.²²¹ The *Miniature* court's interpretation, however, is based on an incorrect reading

"decisionmaking process" appears more of an attempt to modify the *Wards Cove* approach to bundled selection practices, rather than a conscious choice to prohibit the use of the disparate impact theory to challenge conditions of employment.

216. 947 F.2d 292, 295 (7th Cir. 1991).

217. *Id.*

218. *Id.*

219. *Id.* at 305.

220. *Id.*

221. Employers that affirmatively utilize sexual conversations or the display of pornography would likely fall into one of two categories. First, employers may encourage sexual conversations or the display of pornography because they know that it makes employees of a certain sex uncomfortable. Under such circumstances, the conduct would not be facially neutral; it would be intentionally discriminatory under the disparate treatment theory. See *supra* notes 116-18 and accompanying text. Second, employers may be in a sex-related business, in which discussions about sex and exposure to pornography is an essential element of some employees' jobs. Such employers, however, may be able to avoid liability for disparate impact discrimination by establishing the affirmative defense that the challenged conduct is job-related and consistent with business necessity. See *infra* section IV.D. In short, the disparate impact theory is likely to be unnecessary to impose liability on some employers that affirmatively utilize sexual conversations or the display of pornography, while other such employers will likely avoid liability under the disparate impact theory via the affirmative defense.

of *Wards Cove Packing Co. v. Atonio*,²²² one of the Supreme Court's disparate impact cases.²²³ Contrary to the *Miniature* court's description of the case, *Wards Cove* never states nor even suggests that the disparate impact theory requires an affirmative act by an employer.²²⁴ Accordingly, the *Miniature* court's interpretation of "employment practice" is unpersuasive.

Moreover, it may be possible to characterize an employer's conduct with respect to facially neutral harassment in a way that could satisfy an understanding of "employment practice" that focuses on affirmative employer conduct. A plaintiff may be able to prove that her employer has a policy or practice of allowing employees to communicate with each other in whatever manner they choose or to display whatever they choose in the workplace. When stated in this manner, an employer's refusal to take action in response to a plaintiff's complaint about sexual discussions or the display of pornography in the workplace appears more like a conscious choice by the employer to adopt a particular policy or practice than like a mere failure to act.²²⁵

222. 490 U.S. 642 (1989).

223. In support of its holding that only an affirmative act by an employer can constitute an "employment practice," the *Miniature* court relied primarily on *Wards Cove* and reasoned as follows:

"[A] Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is a racial imbalance in the work force." *Wards Cove*, 490 U.S. at 657, 109 S. Ct. at 2124. The EEOC here, in essence, is attacking *Miniature*'s overall hiring procedure by pointing to the "bottom line" results; it has not made the more focused allegation required by *Wards Cove* that a specific, affirmative employment practice caused the disparity between entry-level workers at *Miniature* and entry-level workers throughout Chicago.

947 F.2d at 305.

224. Rather than suggesting that the disparate impact theory requires an affirmative act by an employer, *Wards Cove* emphasizes causation. 400 U.S. at 657. The *Wards Cove* Court held that plaintiffs must show that a particular employment practice caused a racial disparity in hiring, rather than just showing the disparity. See 400 U.S. at 657. In *Miniature*, the EEOC did not attempt to make the argument rejected by the Supreme Court in *Wards Cove*: that, because there was a statistical disparity between the percentage of blacks in the relevant labor market and the percentage of blacks employed at *Miniature*, some recruiting or hiring practice or combination thereof by *Miniature* must be responsible for the disparity. Rather, the EEOC argued that a specific employment practice—the company's reliance on word of mouth recruiting—caused the disparity. Nothing in *Wards Cove* mandates the *Miniature* court's rejection of that argument.

225. The dirty toilets disparate impact case, *Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987), discussed previously at text accompanying notes 159-66, provides an example of how the same factual scenario can be characterized as employer omission or affirmative employer choice. The court described the plaintiff's discrimination claims as "based principally on the employer's failure to furnish adequate, sanitary toilet facilities at the worksite where the plaintiff was employed." *Id.* at 381. If the court had wanted to avoid describing the claims as based on an employer omission, the court could have characterized the challenged employment practice as the employer's refusal to allow workers to use the

A plaintiff may be able to identify an "employment practice" on the part of her employer in connection with non-targeted sexual conduct in the workplace, either by establishing a basis for employer liability for the conduct or by proving that the employer had an affirmative policy or practice of allowing employees to engage in such conduct. For non-targeted workplace sexual conduct to be actionable under Title VII, however, evidence of more than just an employment practice is required. The conduct must cause a disparate impact on members of a protected class.

C. . . . that Causes a Disparate Impact on the Basis of Sex . . .

1. Likelihood that Workplaces Will Include Facially Neutral Conduct that Has a Disparate Impact on Women

In order for non-targeted sexual conduct in the workplace to be actionable under Title VII, plaintiffs must prove that such conduct had a disparate impact on members of a protected class. Is it likely that workplaces will include conduct that, while not intentionally discriminatory against women, is disproportionately disadvantageous to women? More specifically, is non-targeted sexual conduct in the workplace likely to be disproportionately disadvantageous to women?

In light of our nation's history of job segregation by sex, it is likely that workplaces will include facially neutral conduct that disproportionately harms women. Prior to the enactment of Title VII, many employers openly excluded women from all but a few, historically female, jobs.²²⁶ Many years later, the labor market is still characterized by job segregation: men work mostly with other men, and women work mostly with other women.²²⁷ Although female workers have entered male-dominated professions, they remain greatly under-represented at the highest levels of such professions.²²⁸ Although blue-collar work is the most financially rewarding option for working class persons, "women's presence in traditionally male blue-collar jobs remains minuscule."²²⁹ This job segregation has negative consequences

indoor restrooms in the main building of the plant. *See id.* at 381-82; *see also* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 468 (4th ed. 1997) (questioning the *Miniature* holding by asking, "[D]idn't the employer make a conscious choice to hire new employees from unsolicited applications?").

226. Abrams, *supra* note 35, at 1186.

227. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 66-68, 76 (2000); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1751 (1990).

228. WILLIAMS, *supra* note 227, at 67.

229. *Id.*

for female workers, because work traditionally done by women pays less and provides fewer advancement opportunities than does work traditionally done by men.²³⁰

One significant effect—and perhaps a cause²³¹—of this job segregation by sex is that many jobs and workplaces have been structured according to male norms. The job descriptions, job structures, and workplace cultures of many desirable jobs have developed around the bodies, lifestyles, and personalities of the individuals who have generally held those positions: men.²³² To the extent that women tend to differ from men, these job descriptions and structures and workplace cultures may be disproportionately exclusionary of, or otherwise harmful to, women. As stated by Kathryn Abrams, “Women have been disadvantaged as workers by the fact that central features of the workplace have been constructed by men, according to norms that exclude and devalue experiences and perceptions characteristic of women.”²³³ There have been few successful lawsuits, however,

230. Schultz, *supra* note 227, at 1751.

231. The causes of job segregation by sex have been much debated. In her article, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, Vicki Schultz analyzes court cases challenging sex segregation in which employers asserted as a defense that women lack interest in traditionally male jobs. *Id.* at 1751. She concludes that the explanations courts have found for sex segregation—either women's choice or employer coercion—fail to take into account the ways in which employers help form women's job preferences. *Id.* at 1839-41. One of the ways whereby employers shape women's job preferences, according to Schultz, is through the work cultures of traditionally male jobs, which often convey the message that women are not welcome. *Id.* at 1832-39; see also WILLIAMS, *supra* note 227, at 66 (asserting that “[m]ost women remain in ‘women’s work,’ in substantial part, because masculine norms exclude them from jobs traditionally held by men”).

232. See Deborah J. Vagins, Note, *Occupational Segregation and the Male-Worker-Norm: Challenging Objective Work Requirements Under Title VII*, 18 WOMEN'S RTS. L. REP. 79, 80 (1996) (asserting that the workplace is structured around a facially neutral norm of the “ideal worker,” which actually “implicitly reflects the lifestyles and privileges of male workers,” such as not being the primary caretaker of young children); Abrams, *supra* note 35, at 1189 (contending that “male control of the workplace has permitted male norms to prevail” and that such norms “shape intangibles such as the ‘appropriate’ professional demeanor: the tone of voice, air of command, and quickness to accommodate or anger that mark a ‘successful’ employee”); Maxine N. Eichner, Note, *Getting Women's Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397, 1398 (1988) (asserting that “job descriptions and structures that have been adapted to male incumbents continue to bar women from those sectors of the labor market from which they were once historically excluded by intentional discrimination”).

233. Abrams, *supra* note 35, at 1191.

challenging job descriptions and structures and workplace cultures as having a disparate impact on women.²³⁴

One famous case involved an airline that set a minimum height requirement of 5' 7" for its pilots, which excluded 93 percent of women but only 25.8 percent of men.²³⁵ The court ordered the defendant to lower its height requirement to 5' 5", but the plaintiff contended that such a requirement still had a disparate impact on women.²³⁶ The court found that a height requirement of 5' 5" was justified by business necessity: "The evidence showed that pilots must have free and unfettered use of all instruments within the cockpit and still have the ability to meet the design eye reference point. In view of the cockpit design, over which defendant has little control, a height requirement must be established."²³⁷ The court never questioned the fact that the airline purchased airplanes with cockpits designed around the male body and failed to suggest that, even prospectively, the airline attempt to purchase planes that fit women's bodies as well as men's.²³⁸ The court just accepted the status quo, despite the fact that the cockpit was based on a male norm that disproportionately excluded women.

The *Lynch v. Freeman*²³⁹ case discussed in section IV.A of this Article provides another example of a workplace condition based on a male norm that was disproportionately harmful to women. Women constituted less than one percent of the hourly construction workers at the construction site where the plaintiff worked.²⁴⁰ Probably none of the construction workers, male or female, relished the toilet facilities at the site—dirty, ill-equipped portable toilets.²⁴¹ The construction company provided such shoddy facilities, however, because it designed its workplace conditions around a male norm. Men might not like dirty toilets, but their health—unlike the health of women—is

234. See Eichner, *supra* note 232, at 1410 (noting that courts "fail to recognize that the employer's conceptions of necessary job qualities and job structures may themselves contain entrenched discriminatory biases"). Some scholars have argued that the disparate impact theory should be used to challenge employer policies that disfavor those who are the primary caretakers of children, as such policies have a disproportionate effect on women. See, e.g., WILLIAMS, *supra* note 227, at 104-08; Vagins, *supra* note 232, at 87; Abrams, *supra* note 35, at 1226-29.

235. *Boyd v. Ozark Air Lines, Inc.*, 419 F. Supp. 1061, 1062-63 (E.D. Mo. 1976), *aff'd*, 568 F.2d 50 (8th Cir. 1977).

236. *Id.* at 1064. Similarly, the cabs of trucks are often designed such that they fit most men but a much lower percentage of women. WILLIAMS, *supra* note 227, at 77.

237. *Boyd*, 419 F. Supp. at 1064.

238. See Eichner, *supra* note 232, at 1410 n.53 (making this criticism of the *Boyd* court).

239. 817 F.2d 380 (6th Cir. 1987).

240. *Lynch v. Dean*, 1985 WL 56683, at *9, 39 Fair Empl. Prac. Cas. (BNA) 338 (M.D. Tenn. 1985), *rev'd sub nom. Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987).

241. *Lynch v. Freeman*, 817 F.2d at 381.

not threatened by using them.²⁴² The employer argued that, because it furnished the same facilities to all its employees, it could not be found to have discriminated against women.²⁴³ The court rejected this argument, reasoning that “[i]f apparent equality of facilities could shield an employer from Title VII liability the entire rationale of the disparate impact theory—based as it is on ‘consequences’—would be undercut. In these cases ‘discrimination results not from the decision to employ a challenged practice, but from its effect.’”²⁴⁴

It is arguable that sexual conduct in the workplace, conduct that is typically thought of as harassment, can be considered the rough equivalent of dirty toilets—facially neutral but having a more harsh effect on women. Much of the scholarship on sexual harassment contends that men and women are not similarly affected by harassing conduct and perceive such conduct differently. In fact, this recognition that men and women have different perceptions led some theorists to argue for—and some courts to adopt—a “reasonable woman,” as opposed to a “reasonable person” standard for determining when conduct is sufficiently severe or pervasive to create a hostile work environment.²⁴⁵ It is important to note, however, a fundamental distinction between the reasonable woman standard and a disparate impact approach to the discrimination element of sexual harassment. Under the reasonable woman standard, conduct that has already been found to be discriminatory is examined under a gender-specific perspective to determine if it is sufficiently severe or pervasive to be actionable.²⁴⁶ The disparate impact approach is relevant at an earlier stage of the analysis—to determine whether the conduct is discriminatory. If the conduct is not discriminatory, it does not constitute sexual harassment under Title VII regardless of its severity or pervasiveness,²⁴⁷ and, in order for non-targeted workplace sexual conduct to constitute sexual harassment, discrimination must be proved via the disparate impact theory. Despite this important distinction between them, both the reasonable woman standard and the dispa-

242. See *id.* at 384-85 (noting that “all females were placed at a higher risk of urinary tract infections by using unsanitary portable toilets or by avoiding the use of such toilets and holding their urine”).

243. *Id.* at 387.

244. *Id.* (quoting *Chrisner v. Complete Auto Transit*, 645 F.2d 1251, 1257 (6th Cir. 1981)).

245. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769.

246. See *Juliano & Schwab*, *supra* note 10, at 582 (noting that courts use the reasonable woman standard to determine whether the plaintiff has alleged “harassment sufficiently ‘severe or pervasive’ to be both subjectively and objectively hostile or abusive”).

247. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (stating that Title VII does not prohibit all harassment in the workplace, but is directed only at sex discrimination).

rate impact approach are based on the idea that perceptions of workplace conduct may differ based on gender. Accordingly, as discussed later in this Article,²⁴⁸ arguments for and criticisms of the reasonable woman standard may be relevant to determining whether non-targeted sexual conduct in the workplace should be actionable via a disparate impact approach to sexual harassment.

Several influential law review articles have argued that men and women differ in their perceptions of sexual conduct in the workplace. For example, one article states, "Substantial social science research supports the conclusion that gender has a strong effect on individuals' perceptions of what constitutes sexual harassment, with women significantly more likely than men to label conduct as harassing and offensive."²⁴⁹ Another article asserts that "[o]ne principal reason for the pervasiveness of sexual harassment in the workplace is that men regard conduct, ranging from sexual demands to sexual innuendo, differently than women do."²⁵⁰ Both articles cite the results of Barbara A. Gutek's research regarding the effects of "sex at work" on individuals and organizations.²⁵¹

Based on several years of research,²⁵² Gutek concluded that "highly sexualized [work] environments affect women's job satisfaction; the more sexualized the environment, the lower their job satisfaction," and "[i]n general, women are hurt by sex in the workplace but men are not."²⁵³ Such findings appear to support the proposition that harassing conduct that is sexual in nature has a disproportionately harsh impact on women and thus suggest that non-targeted workplace sexual conduct should be actionable via a disparate impact approach to sexual harassment. However, much of the behavior that Gutek characterizes as "sex in the workplace"—such as sexual comments and sexual touching—probably constitutes disparate treatment on the basis of sex.²⁵⁴ Because such conduct is targeted based on sex, this

248. See *infra* notes 401-15 and accompanying text.

249. Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L. REV. 151, 186 (1991).

250. Abrams, *supra* note 35, at 1202.

251. See Dolkart, *supra* note 249, at 186 n.33 (citing BARBARA A. GUTEK, SEX AND THE WORKPLACE 96-102 (1985)); Abrams, *supra* note 35, at 1206 n.99 (citing GUTEK, *supra*).

252. Gutek explains that the book "represents the culmination of a comprehensive program of research on sex at work and the interactions of women and men at work. The book is based on findings from several studies, primarily from a large random-sample survey of 1,257 working men and women in Los Angeles County." GUTEK, *supra* note 251, at x.

253. *Id.* at xiii.

254. For example, the women's version of Gutek's main questionnaire asks the following three questions: "Sometimes on the job, men make comments of a sexual nature that are meant to be compliments. On your *present* job, have you ever received sexual remarks from a man that he meant to be complimentary?" *Id.* at

research does not support the proposition that non-targeted workplace sexual conduct disproportionately harms women.

The vast majority of the research regarding gender differences in perceptions of harassing conduct presents the same problem: the researchers focused on harassment scenarios involving targeted conduct—sexual advances or other conduct directed at a particular individual, that most likely would not have occurred but for the target's sex.²⁵⁵ For example, one study asked male and female subjects to evaluate the offensiveness of a scenario in which a man pats the rear end of a woman with whom he works and compliments her on her body.²⁵⁶ The researchers found that women perceived the scenario as more offensive and more likely to constitute sexual harassment than did men.²⁵⁷ This finding might provide some support for a gender-specific standard for determining whether harassing conduct is sufficiently severe or pervasive to be actionable. However, because the scenario involved targeted conduct, conduct that is most likely discriminatory under a disparate treatment theory, this research does not suggest that non-targeted workplace sexual conduct should be actionable via the disparate impact theory.

The social science research on perceptions of sexual harassment has failed to consider the requirement that harassing conduct be sexually discriminatory in order to be actionable under Title VII. The questions asked to survey respondents and the scenarios presented to

193. "Sometimes on the job, men make sexual comments that are meant to be an insult or a 'put-down.' On your *present* job, have you ever received sexual comments from a man that he meant to be insulting?" *Id.* at 194. "Sometimes on the job, a man might touch a woman in a way that *is* meant to be sexual. On your *present* job, have you ever been touched by a man in a sexual way?" *Id.* These questions seem likely to elicit responses about comments and touching that were targeted at a woman and that the male actor would have been unlikely to direct at another man.

255. See, e.g., Michela A. LaRocca & Jeffrey D. Kromrey, *The Perception of Sexual Harassment in Higher Education: Impact of Gender and Attractiveness*, 40 SEX ROLES 921, 935, 938 (1999) (using a sexual harassment scenario involving a male professor who complimented a female student's looks and put his hand on her knee, and finding that men perceived the scenario as less harassing than did women); Carol L. Baird et al., *Gender Influence on Perceptions of Hostile Environment Sexual Harassment*, 77 PSYCHOL. REP. 79, 80-82 (1995) (reporting that, in response to scenarios involving one employee directing conduct such as nonsexual or sexual remarks or touching at an employee of the opposite sex, women rated the scenarios as more harassing than did men); Gary N. Powell, *Effects of Sex Role Identity and Sex on Definitions of Sexual Harassment*, 14 SEX ROLES 9, 13-14 (1986) (reporting that women were more likely than men to find that sexual remarks and sexual looks and gestures—whether meant to be complimentary or meant to be insulting—constituted sexual harassment in the workplace).

256. Christopher W. Williams et al., *An Attributional (Causal Dimensional) Analysis of Perceptions of Sexual Harassment*, 25 J. APPLIED SOC. PSYCHOL. 1169, 1173 (1995).

257. *Id.* at 1174.

research subjects have focused on conduct that is sexual in nature; researchers have not varied the questions and scenarios based on whether the conduct at issue was caused by the sex of the target.²⁵⁸ In light of the federal courts' history of ignoring the requirement that sexual harassment be sexually discriminatory in order to be actionable—and of equating conduct that is sexual in nature with conduct that is sexually discriminatory²⁵⁹—it is not surprising that social scientists have done the same thing. However, now that the Supreme Court has emphasized that harassing conduct must be sexually discriminatory in order to violate Title VII, social scientists should explore the implications of that holding on their research agendas. Rather than simply evaluating whether men and women have different perceptions of sexual conduct in the workplace in general, social scientists should examine whether men and women have different perceptions of non-targeted sexual conduct in the workplace, conduct that is not caused by the sex of the target. If such research revealed that more women than men were offended by non-targeted sexual joking in the workplace, for example, and would find it difficult to perform their jobs in a work environment in which sexual jokes were frequent, this result would suggest that non-targeted workplace sexual conduct should be actionable because it has a disparate impact on women.

Despite the lack of attention paid by social scientists to the requirement that harassing conduct be discriminatory, a few studies provide some support for the proposition that women perceive non-targeted workplace sexual conduct differently than men. One study asked male and female subjects, all of whom were employed, to evaluate to what extent they considered various conduct by a male supervisor that was sexual in nature to be sexually harassing.²⁶⁰ The

258. For example, the U.S. Merit Systems Protection Board surveyed over 20,000 federal employees and reported that more women than men considered uninvited sexually suggestive looks or gestures and uninvited sexual teasing, jokes, remarks, or questions to be sexual harassment. U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM* 26-28, app. C-5 – C-6 (1981). Such conduct would be discriminatory under a disparate treatment theory if the person who made the gesture or told the joke did so because of the sex of someone in the workplace. The comments of some of the survey participants indicate that at least some of this conduct amounted to disparate treatment; for example, one woman reported that she and other female employees were constantly subjected to suggestive remarks and propositions from male employees. *Id.* at 37. Because of the way the survey's writers phrased the questions, however, it is unclear whether and to what extent men and women perceive differently conduct that is not intentionally discriminatory but instead is facially neutral.

259. See *supra* section II.B.

260. Gerald L. Blakely, Eleanor H. Blakely & Robert H. Moorman, *The Relationship Between Gender, Personal Experience, and Perceptions of Sexual Harassment in the Workplace*, 8 *EMPLOYEE RESP. & RTS. J.* 263, 267 (1995).

researchers found that female subjects evaluated ambiguous conduct—conduct that the researchers considered neither severe nor innocuous—as more harassing than did male subjects.²⁶¹ Included in the examples of ambiguous conduct were the following: a male supervisor telling sexually oriented jokes to or in the presence of a female subordinate, a male supervisor making sexually suggestive remarks or gestures in the presence of a female subordinate, and a male supervisor displaying pin-up calendars or other sexually suggestive materials.²⁶² This conduct could be intentionally discriminatory under the disparate treatment theory if the supervisor's conduct was motivated by sexual desire for the subordinate or otherwise was caused by the presence of women in the workplace. Because this conduct could be non-targeted, however, the study's findings of significant gender differences in the perception of such conduct provides some support for the proposition that non-targeted workplace sexual conduct disproportionately harms women.

Participants in another study²⁶³ viewed video presentations of simulated interviews with complainants, alleged harassers, and other workers based on the facts in the cases of *Ellison v. Brady*²⁶⁴ and *Rabidue v. Osceola Refining Co.*²⁶⁵ *Ellison* involved a female employee's complaint about a male coworker who persistently asked her out on dates and sent her notes. *Rabidue* involved a female employee's complaint about male employees' open display in the workplace of pictures of nude women and a complaint about a male coworker who made extremely vulgar comments about the complainant and other women. In the *Rabidue* fact pattern, but not the *Ellison* fact pattern, women found the conduct more severe, more pervasive, more likely to meet the legal definition of sexual harassment, and more likely to have affected negatively the complainant's work environment than did men.²⁶⁶ Some of the conduct at issue in *Rabidue*, such as the extremely vulgar comments about the complainant and other women, likely constituted disparate treatment, because it is unlikely that the male coworker would have made such comments about

261. *Id.* at 270. In contrast, as the researchers had hypothesized, male and female subjects did not differ in their ratings of the extent to which severe or innocuous conduct constituted sexual harassment. *Id.*

262. *Id.* at 269.

263. Richard L. Wiener & Linda E. Hurt, *How Do People Evaluate Social Sexual Conduct at Work? A Psychological Model*, 85 J. APPLIED PSYCHOL. 75, 77 (2000). All of the participants in the study were full-time employees. *Id.*

264. 924 F.2d 872 (9th Cir. 1991).

265. 805 F.2d 611 (6th Cir. 1986).

266. Wiener & Hurt, *supra* note 263, at 79-81. In both fact patterns, women found the conduct more likely to have affected the complainant's psychological well-being than did men. *Id.* at 81.

men.²⁶⁷ Regarding the pornography, however, the evidence did not indicate that any of the display was caused by the plaintiff's sex or by the sex of other women in the workplace. This conduct could be viewed as non-targeted, such that it is discriminatory only under a disparate impact approach. The fact that women viewed the *Rabidue* facts as more severe, more likely to have harmed the complainant's work performance, and more likely to have harmed the plaintiff's psychological well-being than did men suggests that non-targeted workplace sexual conduct should be actionable because it has a disparate impact on women.

In addition, it is reasonable to suspect that women do perceive workplace displays of pornography²⁶⁸ and discussions or joking about sex—even when such conduct is non-targeted—differently than do men. Male-dominated work environments are more likely to feature discussions of sex and comparisons of sexual experiences than are female-dominated work environments.²⁶⁹ That fact alone suggests that men may be less disturbed by sexuality in the workplace than are women. If discussions of sex in the workplace interfered with the ability of many men to get their work done, it is unlikely that such discussions would be common in male-dominated workplaces. Furthermore, the comparative newness of women to many workplaces and kinds of work may cause more women than men to view their position in the

267. The coworker commonly referred to women as “whores,” “cunt,” “pussy,” and “tits.” *Rabidue*, 805 F.2d at 624 (Keith, J., dissenting). There is no evidence that he used similarly derogatory terms to refer to men. Moreover, the conduct at issue in *Ellison* was clearly disparate treatment; the male coworker's actions were motivated by sexual desire for the plaintiff, and there was no evidence that the coworker was also sexually attracted to men.

268. Susan M. Shaw conducted useful research regarding women's perceptions of pornography, although her research did not involve the workplace context. *Men's Leisure and Women's Lives: The Impact of Pornography on Women*, 18 LEISURE STUD. 197-212 (1999). Shaw interviewed women regarding their individual experiences with pornography and showed them a series of pictures taken from magazines such as *Playboy* and *Playgirl*. *Id.* at 202. The women consistently reacted negatively to the pictures. *Id.* at 203. Although the women were more negative toward pictures of sexual violence—using words like “terrified” and “disgusted” to describe their feelings when looking at the pictures—they also responded negatively to the non-violent pictures, describing feelings of embarrassment and discomfort. *Id.* at 203-05. Moreover, the women stated that such pictures made them feel inadequate and self-conscious about their own bodies, and that they believed that such pictures made men look down on women. *Id.* at 205-07.

269. GUTK, *supra* note 251, at 137; *see also id.* at 167 (stating that “[a] work environment numerically dominated by men will be characterized by a sexual ambience and the expression of male sexuality. This takes the form of comments about women in general, pictures and posters, sexual jokes and analogies, and obscenities.”); *id.* at 169 (stating that “[t]he average working man may tell sexual jokes, use explicit sexual terms to describe work situations, make sexual comments to coworkers, and display sexual pictures and posters”).

workplace as precarious and threatened by workplace sexuality.²⁷⁰ Women may not want a sexualized workplace—even if none of the workplace sexuality reflects anti-women bias or is otherwise targeted at women because of their sex—because they want to be seen as serious workers and believe that any workplace sexuality draws attention to them as potential sex objects rather than as serious workers.²⁷¹ The female firefighter who was the plaintiff in *O'Rourke v. City of Providence* described her reaction when seeing pictures of nude women that another firefighter kept in his locker: "I see these pictures of these women there, and is this what they think of women? Is this how they're viewing me? There was no respect."²⁷² In contrast, men are naturally viewed as serious workers, and a sexualized workplace poses no threat to that view.²⁷³

Moreover, women may be more disturbed than are men by pornography or discussions of sex in the workplace because women are disproportionately victims of sexual violence.²⁷⁴ As explained by

270. Abrams, *supra* note 35, at 1204-05.

271. See GUTER, *supra* note 251, at 100. It is possible, however, that women in general are not more disturbed by sexuality in the workplace than are men in general. Rather, it may be that a person—whether male or female—who is in the gender minority in the workplace is disproportionately disturbed when sexual conduct occurs in that workplace. Charles Calleros provides the example of his brother-in-law, who was the only male among more than a dozen employees in a library's cataloguing department. *Title VII and the First Amendment*, *supra* note 120, at 1243. The brother-in-law discovered that the inside of a cabinet in the copy room was lined with pictures of male nudes, which made him at least "momentarily offended." *Id.*; see also Lahey v. JM Mortgage Serv., Inc., No. 99C4074, 2000 U.S. Dist. LEXIS 5221 (N.D. Ill. Apr. 17, 2000) (plaintiff, the only male loan processor, sued his employer for sexual harassment based partly on his coworkers' hiring of a male stripper at a company Christmas party and later display of photographs of the stripper in the workplace). However, even when men are in the gender minority in a workplace, they still may be less disturbed by workplace sexual conduct than are women because women are disproportionately victims of sexual violence. See Abrams, *supra* note 35, at 1205. As Calleros noted, "although [his] brother-in-law was temporarily disturbed by the pictures of nude males in his workplace, he did not feel any threat of sexual assault from the female owner of the pictures." *Title VII and the First Amendment*, *supra* note 120, at 1246.

Nonetheless, if a plaintiff, male or female, could produce evidence supporting this workplace gender minority theory—either evidence of the reactions of persons in the plaintiff's particular workplace or evidence from general statistical studies—courts should find that the plaintiff has proved that non-targeted sexual conduct caused a disparate impact.

272. 235 F.3d 713, 723 (1st Cir. 2001); see also Torrey, *supra* note 112, at 88.

273. See GUTER, *supra* note 251, at 101; see also *id.* at 166 ("A man apparently can make sexual jokes and comments, use sexual obscenities, . . . and still be considered a desirable worker: analytical, rational, tough, a good leader. The sexual aspect of the male sex role does not interfere with the perception of men as serious, professional workers.").

274. See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (noting that "because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior").

Kathryn Abrams, "Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience."²⁷⁵ In particular, women may be aware of evidence indicating that pornography arouses men and justifies aggression against women.²⁷⁶

Non-targeted sexual conduct in the workplace, such as displays of pornography and discussions or joking about sex, may be common in some male-dominated environments, and such a sexualized workplace may be disproportionately harmful to women. It may seem obvious, then, that non-targeted workplace sexual conduct should be actionable via a disparate impact approach to sexual harassment. But does the effect caused by such conduct constitute an "impact" appropriate for disparate impact analysis?

2. *The Meaning of "Impact" in a Sexual Harassment Case*

What does "impact" mean in a sexual harassment case? All of the disparate impact cases decided by the Supreme Court—and the vast majority of disparate impact cases decided by the lower courts—have involved challenges to an employer's qualification standards or selection practices for hiring or promoting employees.²⁷⁷ The "impact" at issue in all of these cases was a pass/fail barrier to some tangible job benefit. In *Connecticut v. Teal*,²⁷⁸ for example, the employment requirement at issue was a written test that employees needed to pass in order to be considered for promotion; when the plaintiffs failed the test, they were excluded from consideration for promotion.

Non-targeted workplace sexual conduct, however, generally does not involve a pass/fail barrier to a tangible job benefit. A plaintiff could contend that exposure to such sexual conduct caused her and other women, in numbers disproportionate to men, to quit their jobs.²⁷⁹ The plaintiff would argue that the women failed to meet their

275. Abrams, *supra* note 35, at 1205.

276. See Torrey, *supra* note 112, at 88-92 (discussing studies of men's reactions to pornography).

277. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 443 (1982) (discussing employer requirement that employees pass a written examination to be considered for promotion); *Dothard v. Rawlinson*, 433 U.S. 321, 327 (1977) (discussing employer requirement that applicants for employment be of a certain minimum weight and height); *Griggs v. Duke Power Co.*, 401 U.S. 424, 427-28 (1971) (discussing employer requirement that employees have a high school diploma and pass two standardized tests in order to be assigned initially or transferred into certain departments).

278. 457 U.S. 440, 443-44 (1982).

279. See Willborn, *supra* note 50, at 688 n.45 (noting that a plaintiff could try to prove that women were "disproportionately screened out by the neutral factor" by presenting evidence that "women had quit in disproportionate numbers because of the environment").

employer's requirement that employees tolerate sexual conduct in the workplace, and that their failure to satisfy this requirement excluded them from a tangible job benefit—it cost them their jobs. Loss of a job is certainly an “impact” covered by the disparate impact theory, and characterizing the situation in this manner makes it appear as if a pass/fail barrier is involved. The difficulty, however, would be proving causation. The plaintiff cannot simply produce evidence that more women than men quit their jobs with the employer and ask the court to assume that the non-targeted sexual conduct in the workplace caused this impact,²⁸⁰ and the plaintiff may be unable to obtain more specific evidence of causation.

Moreover, even plaintiffs who do not quit their jobs may want to contend that non-targeted workplace sexual conduct had a disparate impact on them because of their sex. They may argue that such conduct disproportionately affects women—that it disturbs, distresses, and distracts women and interferes with their ability to succeed at their jobs more than it does men. Should disparate impact analysis be available when mental distress rather than a pass/fail barrier to a tangible job benefit is at issue?

The few disparate impact cases involving challenges to conditions of employment establish that disparate impact analysis can be used in cases not involving a pass/fail barrier to a tangible job benefit. In *Lynch v. Freeman*,²⁸¹ the court found that the threat to physical health that the dirty toilets posed to women, but not to men, was an “impact” that could be actionable via the disparate impact theory, reasoning that “[a]ny employment practice that adversely affects the health of female employees while leaving male employees unaffected has a significantly discriminatory impact.” In *Garcia v. Spun Steak Co.*,²⁸² the court reasoned that if the English-only policy created a tense work environment, “an atmosphere of inferiority, isolation, and intimidation,” that effect would constitute an “impact” actionable under the disparate impact theory.

Lynch and *Spun Steak* suggest that disparate impact analysis should be available when the alleged impact makes it more difficult for members of a protected class to perform their jobs, even though the impact does not constitute a barrier to their obtaining the jobs in the first place. Such a proposition is controversial, however. In his dissenting opinion in *Lynch*, Judge Danny Boggs contended that he saw nothing “in the whole movement toward sexual equality in the work-

280. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (stating that “a Title VII plaintiff does not make out a case of disparate impact simply by showing that, ‘at the bottom line,’ there is racial *imbalance* in the work force”).

281. 817 F.2d 380, 388 (6th Cir. 1987).

282. 998 F.2d 1480, 1488-89 (9th Cir. 1993). The court found that the plaintiff failed to prove such an impact, however. *Id.* at 1489.

place embodied in Title VII, to enact a requirement that working conditions for all must be upgraded to some unstated standard before women can have full access to the workplace."²⁸³ Rather, according to Judge Boggs, "the keynote of that movement has been the removal of *barriers* that are special to women so that they may then compete on the basis of their ability to do the actual job, given its conditions."²⁸⁴ Boggs' argument, in essence, is that while disparate impact analysis is available to allow a woman to get a job in the first place, she must accept the work environment as is. If such an argument were accepted, plaintiffs could not use the disparate impact theory to challenge non-targeted sexual conduct in the workplace, but Boggs' argument should be rejected.

Lynch and *Spun Steak*, unlike the Boggs' dissent, reflect the breadth of the commitment to antidiscrimination contained in Supreme Court decisions interpreting Title VII. In *Meritor Savings Bank v. Vinson*,²⁸⁵ the Court held that Title VII covered more than just tangible employment actions; it also prohibited discriminatory conduct that was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." In *Griggs v. Duke Power Co.*,²⁸⁶ the Court held that Title VII prohibited not only intentional discrimination but also practices "that are fair in form, but discriminatory in operation," that "operate as 'built-in headwinds' for minority groups." Reading the two cases together leads to the conclusion that *work environments* "that are fair in form, but discriminatory in operation" and that "operate as 'built-in headwinds' for minority groups" are prohibited by Title VII.

The *Griggs* Court was concerned about equality of opportunity and reasoned that equality of opportunity required the elimination of neutral practices that operated to "freeze" the status quo of prior discriminatory employment practices."²⁸⁷ Contrary to Judge Boggs' contention in *Lynch*, it is not equality of opportunity to tell a woman that she can work on a construction site but only if she will tolerate working conditions that developed based on a male norm and are disproportionately dangerous to the health of women, regardless of whether such conditions are necessary for the job.²⁸⁸ Citing *Meritor*, the *Spun Steak* court recognized that, for true equality of opportunity in employment, the disparate impact theory must be available to chal-

283. *Lynch*, 817 F.2d at 391.

284. *Id.*

285. 477 U.S. 57, 67 (1986).

286. 401 U.S. 424, 431-32 (1971).

287. *See id.* at 430.

288. *See Eichner, supra* note 232, at 1409 (contending that "[t]o implement the equality of opportunity guaranteed specifically by *Griggs* and more generally by Title VII, jobs must be more than open to women in name only—they must be accommodated to women as well as men").

lenge more than just pass/fail barriers to tangible job benefits.²⁸⁹ The court reasoned,

Regardless whether a company's decisions about whom to hire or to promote are infected with discrimination, policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and, if unsupported by a business justification, may be considered "discriminatory."²⁹⁰

Accepting that disparate impact analysis should be available even when a pass/fail barrier to a tangible job benefit is not at issue, does not necessarily mean that such analysis should be available when the alleged "impact" is mere mental distress. In other words, a court might be more willing to find that the threat to physical health at issue in *Lynch* is a sufficient "impact" than it would be to find that mental disturbance, distress, or distraction caused by non-targeted workplace sexual conduct suffices. The Supreme Court's reasoning in *Harris v. Forklift Systems, Inc.*,²⁹¹ however, suggests that mental distress and resulting interference with one's work should be considered a sufficient "impact" for purposes of disparate impact analysis. In explaining the standard for when conduct creates a sexually hostile work environment, the *Harris* Court made clear that one of the injuries with which Title VII is concerned is mental distress. The Court stated that its "severe or pervasive" standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."²⁹² The Court also noted that one of the factors relevant to determining whether an environment is abusive is "whether it unreasonably interferes with an employee's work performance."²⁹³

As discussed in the previous section, some male-dominated workplaces may feature a considerable amount of non-targeted sexual conduct, such as displays of pornography and discussions about sex. This conduct may disproportionately disturb, distress, and distract female employees and interfere with their ability to perform their jobs; it may operate as a "built-in headwind" for women in the workplace. If proven, this "impact" should be considered sufficient for application of the disparate impact theory of discrimination. Proving disparate impact discrimination is not an easy task, however. How would a plain-

289. *Spun Steak*, 998 F.2d at 1485.

290. *Id.*; see also *Title VII and the First Amendment*, *supra* note 120, at 1248 (contending that "[a]lthough an allegedly racist or sexist poster may not exclude members of a protected class as starkly as do entrance requirements, it could prevent those who make inroads on formerly white-male workplaces from enjoying an equal opportunity to perform their work capably or even to survive the pressures of the workplace").

291. 510 U.S. 17 (1993).

292. *Id.* at 21.

293. *Id.* at 23.

tiff prove that non-targeted workplace sexual conduct caused a disparate impact on women?

3. *Proving Disparate Impact*

a. *Proving Disparate Impact in the Typical Case*

To establish discrimination under the disparate impact theory, a plaintiff must prove that an employer “uses a particular employment practice that causes a disparate impact” based on a factor prohibited by Title VII.²⁹⁴ Before analyzing how a plaintiff might prove that non-targeted workplace sexual conduct caused a disparate impact on the basis of sex, it is useful to consider how plaintiffs prove disparate impact in the typical case involving a challenge to an employer’s qualification standards or selection procedures.

All disparate impact cases require, of course, proof of a disparate impact, proof that the challenged employer conduct disproportionately disqualified, excluded, or otherwise harmed members of a protected group. Courts have generally insisted that a plaintiff prove a disparate impact via statistical evidence showing that an employer’s qualification standard or selection procedure disqualified or excluded a disproportionate number of persons in a protected group.²⁹⁵ Proving a disparate impact tends to turn on two issues. First, what is the comparison group for determining whether there is a disparate impact? Second, what is the required magnitude of the disproportionate impact?²⁹⁶

These issues can be explored by considering the example of an employer who institutes a requirement that, in order to be hired for a particular position, all applicants must have a college degree. A plaintiff alleges that the requirement has a disparate impact on African-Americans. Can the plaintiff prove that this employment practice—the requirement of a college degree—causes a disparate impact on the basis of race?

The court first must determine the appropriate comparison group: the relevant applicant or labor pool it must examine in order to decide whether the college degree requirement causes a disparate impact on

294. 42 U.S.C. § 2000e-2(k)(1)(A).

295. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (stating that the evidence in disparate impact cases “usually focuses on statistical disparities”); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001) (stating that “statistical proof almost always occupies center stage in a prima facie showing of a disparate impact claim”); *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 953 (8th Cir. 2001) (stating that a plaintiff must present “statistical evidence of a kind and degree sufficient to show that the practice in question caused the plaintiff to suffer adverse employment action because of his or her membership in a protected group”).

296. See LEWIS & NORMAN, *supra* note 215, § 3.35.

the basis of race. Implicit in the concept of a disparate impact is the requirement of some sort of comparison.²⁹⁷ As explained by one court, "to determine whether an employment practice causes a 'disparate' impact, the court must gain some handle on the baseline racial composition that the impact is 'disparate' from; that is, what should the racial composition of the job force look like absent the offending employment practice."²⁹⁸ The appropriate comparison group will vary based on the nature of the job and the nature of the challenged employment practice.²⁹⁹

In our example, the appropriate comparison group may be the pool of persons who applied for the position.³⁰⁰ If equal numbers of whites and African-Americans applied for the position, and substantially more African-Americans than whites were excluded from consideration by the college degree requirement, it appears that the college degree requirement had a disparate impact on African-Americans—it disqualified a disproportionate number of them from being hired for the position. Moreover, even if the employer could demonstrate that, at the conclusion of its hiring process, it hired the same percentage of African-Americans who applied as it did whites, the plaintiff would still establish a *prima facie* case of disparate impact discrimination.³⁰¹ The employer violated Title VII by using a hiring requirement with a racially disparate impact; it is no defense that there was an appropriate racial balance at the end of the entire hiring process.³⁰²

What if, however, when comparing the percentages of whites and African-Americans who applied for the position with the percentages of those races who were hired, it turns out that approximately the same percentages of white applicants and African-American applicants were excluded from consideration by the college degree requirement? Under these facts, if the appropriate comparison group were

297. LARSON, *supra* note 158, § 21.03.

298. *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1312 (11th Cir. 1999).

299. *Id.* The parties, moreover, are likely to disagree on what comparison group is appropriate. *See id.* (stating that "[t]he contest between the plaintiff and the defendant is one in which both seek to answer the question of who is qualified, and thus to define the qualified applicant pool on their own terms").

300. *See id.* at 1313 (stating that actual applicants sometimes comprise the appropriate comparison group).

301. *See Connecticut v. Teal*, 457 U.S. 440, 456 (1982) (holding that there is no "bottom line" defense to a claim of disparate impact discrimination).

302. *See id.* The individual African-American plaintiff who was excluded from consideration for hire by the discriminatory college degree requirement suffered an injury cognizable under Title VII, even if the employer compensated for that discriminatory requirement by hiring a sufficient number of African-Americans to reach a nondiscriminatory "bottom line." *See id.* at 453. As noted by the Supreme Court in *Connecticut v. Teal*, "the suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees . . . individual [plaintiffs] the opportunity to compete equally with white workers on the basis of job-related criteria." *Id.* at 451.

the pool of actual applicants, the plaintiff could not prove that the college degree requirement had a disparate impact on African-Americans. The plaintiff may be able to convince the court, however, that a different comparison group is more appropriate. For example, if the requirement that applicants have a college degree was well-known, the actual applicant pool may not be the appropriate comparison group because potential applicants without a college degree may have been "discouraged from applying because of a self-recognized inability to meet the very standard[] challenged as being discriminatory."³⁰³

National or regional statistics may provide the appropriate comparison group where there is no reason to suspect that the characteristics of the potential applicant pool—those persons who would apply and be qualified for the job in the absence of the challenged employment requirement—differ greatly from those of the national or regional population.³⁰⁴ If this were the case, the plaintiff could use national or regional statistics regarding the percentages of whites and African-Americans with college degrees to prove that the college degree requirement had a disparate impact on African-Americans. However, if the job in question requires special qualifications that are not challenged by the plaintiff—for example, the ability to analyze complex data—the employer will contend that national or regional statistics do not provide the appropriate comparison group. The employer will assert that the appropriate comparison group consists of those persons who can analyze complex data. If in the group of persons who can analyze complex data, the same percentages of whites and African-Americans have college degrees, the employer will argue that the college degree requirement does not have a disparate impact on the basis of race.³⁰⁵

303. *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977); see also *EEOC v. Joint Apprenticeship Comm.*, 164 F.3d 89, 98 (2d Cir. 1998) (stating that a "statistical showing of disparate impact need not . . . be premised on an analysis of the characteristics of actual applicants" where the challenged educational requirement and age maximum likely had a chilling effect on black and women applicants).

304. See *Dothard*, 433 U.S. at 330 (stating that "reliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population").

305. The *In re Employment Discrimination Litigation* court explained the importance of the appropriate comparison group as follows:

[T]he concept of a "disparate impact" on one racial group over another only makes sense if we tailor the qualified applicant pool to reflect only those applicants or potential applicants who are "otherwise qualified," . . . (that is, qualified *but for* their failure to meet the challenged employment requirement) for the job or job benefit at issue. If the court fails to define the qualified applicant pool in an appropriately specific manner, then the challenged employment practice has not actually been shown to be "causing" any "disparate impact." Something else, unrelated to the

Related to the need to identify an appropriate comparison group is the requirement that the plaintiff produce evidence of causation. The plaintiff must prove a causal link between the challenged employment practice and the disparity.³⁰⁶ In *Wards Cove Packing Co. v. Atonio*,³⁰⁷ the Supreme Court held that the evidence of causation must be specific. Plaintiffs must “demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking [], specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.”³⁰⁸ The Civil Rights Act of 1991 codifies this requirement of specific causation; plaintiffs generally must demonstrate that each particular employment practice caused a disparate impact.³⁰⁹ The statute modifies the *Wards Cove* approach in one respect, however, by providing that if a plaintiff can demonstrate that the elements of the employer’s decisionmaking process cannot be separated for analysis, the entire decisionmaking process may be analyzed as one employment practice.³¹⁰ The plaintiff in our example could not establish a case of disparate impact simply by showing that, at the bottom line, a disproportionately low number of African-Americans were hired.³¹¹ Some evidence of causation is required. Moreover, the plaintiff could not point to that bottom line racial imbalance and contend that the employer’s hiring process in general had a disparate impact on African-Americans. Unless the elements of the employer’s hiring process were incapable of separation for analysis, the plaintiff would need to demonstrate that a specific component of that hiring process, like the college degree requirement, caused a disparate impact on African-Americans.

Once the court has decided what is the appropriate comparison group for determining whether there is a disparate impact and has looked for evidence of causation, the next issue is what magnitude of disparity is required. The Supreme Court has provided little guidance on this issue, stating in vague terms that the challenged employment

employer’s practices and procedures, may be holding back a particular racial group.

198 F.3d 1305, 1313 (11th Cir. 1999) (citation omitted).

306. 42 U.S.C. § 2000e-2(k)(1)(A).

307. 490 U.S. 642, 657 (1989).

308. *Id.*

309. 42 U.S.C. § 2000e-2(k)(1)(B).

310. *Id.*

311. See *Wards Cove*, 490 U.S. at 657 (stating that “a Title VII plaintiff does not make out a case of disparate impact simply by showing that, ‘at the bottom line,’ there is racial *imbalance* in the work force”); *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1276 (11th Cir. 2000) (stating that “a plaintiff must do more than simply identify a workforce imbalance to establish a *prima facie* disparate impact case; it must causally connect a facially-neutral employment practice to the identified disparity”).

practice must disqualify members of a protected class at a "substantially higher rate" than persons outside that class.³¹² Some lower courts have relied on the four-fifths rule from the EEOC's Uniform Guidelines on Employee Selection Procedures to determine when a disparity is of sufficient size.³¹³ This rule provides:

A selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.³¹⁴

Under this approach, if the plaintiff could demonstrate that the selection rate of African-Americans (the percentage of African-Americans in the appropriate comparison group who satisfied the college degree requirement) was less than four-fifths of the selection rate of whites (the percentage of whites in the appropriate comparison group who satisfied the college degree requirement), the plaintiff would have proven a sufficient disparity. Other courts have used tests of statistical significance to evaluate evidence of disparity, requiring that the plaintiff prove that the disparity in selection rates was unlikely to have occurred by chance.³¹⁵ Some courts have used both approaches, depending on the circumstances.³¹⁶

b. Proving Disparate Impact in a Sexual Harassment Case

In light of the requirements for proving disparate impact established by courts in the typical qualification standards or selection procedures case, how would a plaintiff prove that non-targeted workplace

312. *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (stating that the plaintiff makes out a prima facie case of disparate impact discrimination by showing that "the tests in question select applicants for hire or promotion in a racial pattern significantly different from [the] pool of applicants").

313. *See, e.g., Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002); *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1375-76 (2d Cir. 1991); *Cox v. City of Chicago*, 868 F.2d 217, 220 (7th Cir. 1989); *see also Ramona L. Paetzold & Steven L. Willborn, Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325, 333 n.22 (1996) ("The four-fifths rule is the dominant approach for determining whether an employer's selection criterion has systemically damaged the plaintiff's protected class status").

314. 29 C.F.R. § 1607.4(D) (2002).

315. *See, e.g., Fudge v. City of Providence Fire Dep't*, 766 F.2d 650, 658 (1st Cir. 1985); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506 (8th Cir. 1980); *see also Paetzold & Willborn, supra* note 313, at 333 n.22 (stating that "some courts have relied on a test of statistical significance to determine whether the pass rates for the plaintiff class and the comparator group are different").

316. *See, e.g., Smith v. Xerox Corp.*, 196 F.3d 358, 365 (2d Cir. 1999) (noting that, in evaluating disparate impact claims, the court has looked to both the four-fifths rule and to "whether the plaintiff can show a statistically significant disparity of two standard deviations").

sexual conduct caused a disparate impact on the basis of sex?³¹⁷ Could a plaintiff ever prove disparate impact in such a case?

As in the typical disparate impact case, it is necessary to decide what is the comparison group for determining whether there is a disparate impact at all. The best comparison group would be the actual employees of the particular workplace in question.³¹⁸ The plaintiff could have all of the employees in the workplace answer a questionnaire or submit to an interview regarding whether and to what extent they were disturbed, distressed, and/or distracted by the non-targeted sexual conduct occurring in that workplace and whether and to what extent such conduct interfered with their ability to perform their jobs. If the results of the questionnaire or interview indicated that female employees were disproportionately harmed by the non-targeted workplace sexual conduct, the court would simply need to determine—based perhaps on the four-fifths rule or tests of statistical significance—whether the disparity proved by the plaintiff was of sufficient magnitude to establish a *prima facie* case of disparate impact.

The advantages of this kind of workplace-specific evidence are apparent. These statistics would measure directly the effect of the non-targeted sexual conduct in the particular workplace at issue. Unlike with national statistics regarding the effect of non-targeted sexual conduct on workplaces in general, the employer would be unable to argue that his workers were affected differently by such conduct than were workers in general.³¹⁹ The employer would also be unable to argue that the non-targeted sexual conduct present in its workplace differed from the conduct involved in the national statistical study.³²⁰

Despite the advantages of workplace-specific evidence, such evidence will be difficult or impossible to obtain in many cases. One potential problem is small sample size; as sample size decreases, the

317. See *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (9th Cir. 1993) (noting that, when the alleged impact is on conditions of employment, “determining whether the protected group has been adversely affected may depend on subjective factors not easily quantified”).

318. See *Title VII and the First Amendment*, *supra* note 120, at 1256 (stating that a showing that non-targeted workplace sexual conduct caused a disparate impact “should be based not on stereotypical assumptions about the sensibilities of members of a protected group, but rather on a particularized factual showing in each case”).

319. See *id.* at 1257 (arguing that the plaintiff must prove disparate impact “with highly specific evidence of reactions within the relevant population” which “should be viewed as the group of employees who actually were exposed to the workplace speech, obviating the need for approximations, estimates, or extrapolations based on surrogate populations or on samples of a larger population, such as a local labor pool or more general population”).

320. The employer would be unable to argue, for example, that the pornography displayed in its workplace differed from the pornography at issue in the national study, such that the results of the national study were inapplicable to the employer’s workplace.

results of the sample are more likely to have occurred by chance.³²¹ Where the sample size is small, even if the plaintiff satisfies the four-fifths rule for proving a disparity, courts may find that the plaintiff's statistical evidence fails to make out a *prima facie* case of disparate impact discrimination because the disparity is not statistically significant.³²² Even if an employer employs a large number of employees at a facility, the plaintiff may still face a sample size problem if only a small number of those employees are exposed to the particular non-targeted sexual conduct about which the plaintiff complains. For example, the employer may argue that only the employees who work in the same department as the plaintiff are exposed to the pornography or sexual joking at issue and thus only those employees constitute the appropriate comparison group. Moreover, even if a large number of employees are exposed to the non-targeted sexual conduct, what if the plaintiff is the only woman, or one of a very small number of women, in that group? Such a scenario is plausible, given that non-targeted sexual conduct is more likely to occur in male-dominated workplaces.³²³ Yet a court is unlikely to be persuaded by evidence showing a disparity between the percentage of male employees negatively affected by non-targeted sexual conduct and the percentage of female employees negatively affected by such conduct when the number of female employees is very small.³²⁴

Another potential problem with workforce-specific evidence regarding reactions to non-targeted workplace sexual conduct is the possibility that some male employees could be dishonest in answering the questionnaires or participating in the interviews in order to avoid a finding of disparate impact. In typical disparate impact cases involv-

321. LARSON, *supra* note 158, § 22.05; *see also* Thomas v. Metroflight, Inc., 814 F.2d 1506, 1509 n.3 (10th Cir. 1987) (stating that "[t]he size of a sample is of concern to statisticians insofar as it affects the possibility that a given statistical disparity resulted from chance").

322. *See, e.g.,* Thomas, 814 F.2d at 1509 (stating that "a sample size of two is too small to make even a 100% impact rate significant"); Fudge v. City of Providence Fire Dep't, 766 F.2d 650, 658 (1st Cir. 1985) (asserting that "in cases involving a narrow data base, the better approach is for the courts to require a showing that the disparity is statistically significant, or unlikely to have occurred by chance, applying basic statistical tests as the method of proof").

323. *See supra* note 269 and accompanying text.

324. *Cf.* Waisome v. Port Auth., 948 F.2d 1370, 1376 (2d Cir. 1991) (finding that plaintiffs failed to prove a disparate impact through evidence showing a disparity in pass rates between black and white police officers taking an exam for promotion, because "if two additional black candidates passed the written examination the disparity would no longer be of statistical importance"); Pennsylvania v. Rizzo, 466 F. Supp. 1219, 1232 (E.D. Pa. 1979) (finding that plaintiffs failed to prove a disparate impact through evidence showing that all the firefighters who passed a test for promotion were white, because the number of blacks taking the test "was too small to permit a determination by the Court that the results were not simply due to chance").

ing qualification standards for some job benefit, there is little reason to be concerned about members of the majority group conspiring to fail the qualification standard in order to avoid a disparate impact finding. The members of the majority group presumably want to qualify to receive the job benefit. In contrast, where a workplace condition arguably causes a disparate impact on women because the workplace culture developed according to male norms, some male employees might want to avoid a disparate impact finding so that the workplace culture can remain unaltered. Some male employees might realize that the non-targeted workplace sexual conduct must cease—no more pornography, no more sexual discussions—only if there is evidence that such conduct has a disparate impact on female employees. If such conduct has the same impact on male employees as on female employees, the conduct would not be discriminatory and would not violate Title VII. Accordingly, to avoid a disparate impact finding, some male employees might indicate on the questionnaires or during the interviews that they are seriously distressed and distracted by the non-targeted workplace sexual conduct, even when they are not.

In light of these potential problems with workplace-specific evidence, could plaintiffs ever use a broader comparison group? Could plaintiffs ever prove a disparate impact using national statistics regarding gender differences in perceptions of non-targeted sexual conduct in the workplace? As discussed above, social scientists have not examined whether men and women perceive differently non-targeted sexual conduct in the workplace, as opposed to sexual conduct in the workplace in general.³²⁵ Yet even though social scientists have not yet conducted the necessary studies, it is reasonable to suspect that they will do so³²⁶ and that such studies will reveal that women perceive non-targeted workplace sexual conduct more negatively than do men.³²⁷ Compared to workplace-specific evidence, this kind of general evidence is likely to involve samples of sufficient size, such that there will be less of a problem with disparities being statistically significant. In addition, there is less concern that persons participating in the

325. See *supra* notes 255-58 and accompanying text.

326. Social scientists have conducted numerous studies of gender differences in perceptions of workplace sexual conduct in general. See, e.g., Jennifer L. Hurt, Julian A. Maver & David Hoffman, *Situational and Individual Influences on Judgments of Hostile Environment Sexual Harassment*, 29 J. APPLIED SOC. PSYCH. 1395 (1999); Jeanne Henry & Julian Meltzoff, *Perceptions of Sexual Harassment as a Function of Target's Response Type and Observer's Sex*, 39 SEX ROLES 253 (1998); Gary N. Powell, *Effects of Sex Role Identity and Sex on Definitions of Sexual Harassment*, 14 SEX ROLES 9 (1986). Now that the Supreme Court has emphasized that harassing conduct must be sexually discriminatory in order to violate Title VII, it is reasonable to suspect that social scientists will explore the ramifications of the discrimination requirement by studying whether there are gender differences in perceptions of non-targeted workplace sexual conduct.

327. See *supra* notes 260-76 and accompanying text.

study will give dishonest responses in order to avoid a disparate impact finding.

Use of general, non-workplace-specific evidence regarding gender differences in perceptions of non-targeted sexual conduct in the workplace presents two serious problems, however. The first problem is whether the persons in the studies are an appropriate comparison group to the employees in the plaintiff's workplace. The second problem is whether the non-targeted sexual conduct at issue in the studies is an appropriate comparison to the conduct at issue in the plaintiff's workplace.

Regarding the first problem, employers are likely to argue that their employees differ significantly from the persons in the studies, such that even if women in general are more harmed by non-targeted sexual conduct in the workplace than are men, such evidence does not prove that a disparity exists in the employers' workplaces. An employer may point to the age, level of education, socioeconomic status, or place of residence (whether rural or urban) of its employees as a basis for arguing that persons in the general, non-workplace-specific studies are not an appropriate comparison group. Or an employer may contend that women who choose to become firefighters, for example, are less disturbed by non-targeted sexual conduct in the workplace than are women in general.³²⁸

Regarding the second problem, employers are likely to argue that all non-targeted sexual conduct is not the same and will not cause the same gender disparity in perception. An employer may contend that while there might be a gender disparity regarding perceptions of the pornography that researchers showed or described to participants in a particular study, there is no gender disparity regarding perceptions of the specific pornography displayed in the plaintiff's workplace. An employer may make a similar argument regarding sexual jokes or discussions, contending that unlike the jokes or discussions described in the research study, the jokes or discussions in the plaintiff's workplace are either less offensive to women or offend both men and women equally. If the research study inquires about perceptions of "pornography," "sexual jokes," or "sexual discussions" in general, rather than

328. In his dissenting opinion in *Dothard v. Rawlinson*, Justice White made a similar argument. 433 U.S. 321, 348 (1977). He stated that he "was unwilling to believe that the percentage of women applying or interested in applying for jobs as prison guards in Alabama approximates the percentage of women either in the national or state population." *Id.* In other words, Justice White believed that taller and heavier women were more likely to want to be prison guards than were shorter and lighter women, such that the use of a national comparison group was inappropriate. The Court majority did not address specifically this argument, stating only that "there was no reason to believe that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population." *Id.* at 330.

describing particular instances of non-targeted sexual conduct more specifically, an employer may contend that the terms involved are too vague for the research study to provide sufficient evidence that the conduct in the plaintiff's workplace caused a disparate impact on women. The term "pornography," for example, means different things to different people, and the fact that more women than men respond to a research study by saying that they would be distressed by non-targeted pornography in the workplace does not mean that more women than men would be distressed by the particular non-targeted pornography displayed in the plaintiff's workplace.

Both of these problems present significant obstacles to the use of general, non-workplace-specific evidence to prove that non-targeted sexual conduct in the workplace caused a disparate impact on women. Although the Supreme Court has held that in some cases impact can be proved using national statistics,³²⁹ employers have a strong argument that perceptions of non-targeted workplace sexual conduct depend so much on the varying characteristics of both the employees and the conduct itself that a national comparison group is never appropriate. If courts require workplace-specific evidence of impact, however, few plaintiffs would be able to prove disparate impact.

This proof issue poses the fundamental question explored by this Article, whether non-targeted sexual conduct in the workplace should be actionable under Title VII. Such conduct will be actionable, if at all, only under the disparate impact theory of discrimination, which requires the plaintiff to prove that the conduct had a disparate impact on women. If one believes that, as a policy matter, non-targeted workplace sexual conduct should be actionable, it is necessary to accept a method of proving disparate impact other than work-specific evidence, because so few plaintiffs will be able to provide such evidence. If one believes, on the other hand, that such conduct should not be actionable, enforcing a strict requirement that the plaintiff prove disparate impact by using the most appropriate comparison group will ensure that few harassment claims based on non-targeted workplace sexual conduct will succeed.

If courts are willing to be flexible about a method of proving that non-targeted workplace sexual conduct caused a disparate impact, two possible approaches to the proof issue seem the most reasonable. First, courts could allow a plaintiff who provided workplace-specific evidence, albeit with a small sample size, to supplement that evidence with general, non-workplace-specific evidence of gender disparities in perception of non-targeted sexual conduct in the workplace. Courts have held that a small statistical sample plus additional evidence, such as expert testimony, can support a finding of disparate im-

329. *Dothard*, 433 U.S. at 330.

pact.³³⁰ Second, courts could allow plaintiffs to prove disparate impact by using general, non-workplace-specific evidence of gender disparities but allow employers to rebut the disparate impact showing by introducing evidence demonstrating that the general evidence was inapplicable to the plaintiffs' particular workplaces.³³¹ Employers would not be able to defeat the plaintiffs' disparate impact showing simply by arguing that general, non-workplace-specific evidence can never establish a disparate impact. Rather, an employer would need to produce evidence demonstrating, for example, that in its workplace there is no gender disparity regarding perceptions of non-targeted workplace sexual conduct, or that women who choose to be firefighters are less disturbed by non-targeted workplace sexual conduct than are women in general.³³²

4. *Another Approach to Proving Disparate Impact in a Sexual Harassment Case:* Robinson v. Jacksonville Shipyards, Inc. and Jenson v. Eveleth Taconite Co.

This Article has examined how plaintiffs might assert that non-targeted sexual conduct in the workplace constitutes actionable sexual

330. See, e.g., *Pietras v. Bd. of Fire Comm'rs*, 180 F.3d 468, 475 (2d Cir. 1999) (holding that, although a sample size of seven women was too small for statistical evidence alone to prove that a fire department's physical agility test had a disparate impact on women, such evidence coupled with the expert testimony of an exercise physiologist sufficed to prove disparate impact).

331. Cf. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93 (1973) (rejecting plaintiff's claim that defendant's policy of refusing to hire aliens had a disparate impact on persons of Mexican national origin, in violation of Title VII, because the evidence indicated that "persons of Mexican ancestry make up more than 96% of the employees at the company's San Antonio division, and 97% of those doing the work for which [the plaintiff] applied").

332. A plaintiff may be able to counter the employer's rebuttal evidence. If the employer's rebuttal evidence consists of responses to questionnaires indicating that male employees are just as disturbed by non-targeted sexual conduct in the workplace as are female employees, the plaintiff may be able to show that—because male employees knew the purpose of the questionnaire—the questionnaire results are unreliable.

Additionally, a plaintiff may argue that even if the evidence indicates that there is no gender disparity regarding perceptions of non-targeted sexual conduct in her workplace, persons in her workplace are not the appropriate comparison group. The argument, which seems counterintuitive, is based on the Supreme Court's recognition in *Dothard* that actual applicants for jobs as Alabama prison guards might not be the appropriate comparison group because "otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standard[] challenged as being discriminatory." 433 U.S. at 330. Similarly, a plaintiff may argue that women may have been discouraged from working in a particular workplace, such as a fire department, because of their knowledge that the workplace conditions—including non-targeted sexual conduct—were based on male norms.

harassment under Title VII, focusing on how plaintiffs might prove that such conduct had a disparate impact on women. As discussed above, many courts have ignored the requirement that sexually harassing conduct be discriminatory in order to be actionable, and other courts have interpreted the discrimination requirement as satisfied only by evidence of disparate treatment. A few courts, however, have indicated that they might be receptive to a disparate impact argument in cases involving non-targeted workplace sexual conduct.³³³

The most famous sexual harassment case involving non-targeted sexual conduct in the workplace is *Robinson v. Jacksonville Shipyards, Inc.*³³⁴ The plaintiff in *Robinson* was one of a small number of female skilled craftworkers at Jacksonville Shipyards, Inc. ("JSI"). She complained about some conduct by her male coworkers that was directed at her because of her sex, such as a coworker asking her to sit on his lap, a coworker remarking that "there's nothing worse than having to work around women," and abusive language written on the

333. For example, in *Brennan v. Metro. Opera Ass'n, Inc.*, the female plaintiff claimed that she experienced a sexually hostile work environment partly because of a homosexual male coworker's display of a set of postcards depicting males in various states of undress. No. 95CIV2926(MBM), 1998 U.S. Dist. LEXIS 5562 (S.D.N.Y. Apr. 20, 1998). The district court rejected the plaintiff's claim because she failed to prove that the conduct was sexually discriminatory: "Insofar as pictures of undressed or partially dressed men are offensive or demeaning, it is unreasonable to assume that they are offensive or demeaning only to women. Indeed, it is most reasonable to conclude that the sexual objectification of one sex—in this case, males—would be most offensive to members of that sex." *Id.* at *41.

On appeal, the court majority did not reach the issue of whether the display of the sexually provocative pictures of men was sexually discriminatory. 192 F.3d 310 (2d Cir. 1999). However, in a dissenting opinion, Judge Newman reasoned that the display could be found sexually discriminatory against women under a disparate impact theory:

[A] jury could reasonably find that a reasonable "person," regardless of gender, would consider the displayed photos more offensive to women than to men. The District Court expressed the view that "it is *most reasonable* to conclude that the sexual objectification of one sex—in this case, male—would be most offensive to members of that sex." Whether or not such a conclusion is the "most reasonable" one to be reached (which I very much doubt), it surely is not the only reasonable conclusion that could be reached. If probative evidence persuaded a fact-finder that women are more offended than men by continuous displays of male nudity, tinged with sexual overtones, that conclusion would be immune from rejection on summary judgment.

Id. at 321-22; see also *Stair v. LeHigh Valley Carpenters Local Union No. 600*, No. 91-1507, 1993 WL 235491 (E.D. Pa. July 24, 1993) (holding that the display at the female plaintiff's work sites of calendars containing photographs of nude women was discriminatory because it had "a disproportionately demeaning impact on women" and noting that the presence of the calendars made the plaintiff feel "embarrassed, humiliated, and degraded"), *aff'd without published op.*, 43 F.3d 1463 (3d Cir. 1994) (table).

334. 760 F. Supp. 1486 (M.D. Fla. 1991).

walls in her working areas.³³⁵ Most of the plaintiff's harassment allegations, however, involved non-targeted workplace sexual conduct, specifically "the extensive, pervasive posting of pictures depicting nude women, partially nude women, or sexual conduct."³³⁶ The court noted that this display of pornography was not targeted at women in the workplace "because no women worked in the jobs when the behavior began."³³⁷

The *Robinson* court acknowledged that, because the pornography was not targeted on the basis of sex, the display of the pornography could be discriminatory only under a disparate impact theory.³³⁸ The court explained that non-targeted harassing conduct is actionable if it "is disproportionately more offensive or demeaning to one sex."³³⁹ Based on the evidence presented at trial, the court concluded that the pornography was discriminatory because it had "a disproportionately demeaning impact on the women now working at JSI."³⁴⁰

The plaintiff in *Robinson* presented the expert testimony of Dr. Susan Fiske on the subject of sexual stereotyping.³⁴¹ Dr. Fiske testified that both the preconditions for and the effects of sexual stereotyping existed at JSI, particularly the sex role spillover effect, in which co-workers and supervisors evaluate women employees as sex objects rather than based on their merit as workers.³⁴² According to Dr. Fiske, workplace pornography implicates two of the preconditions for sexual stereotyping and sex role spillover: priming and a nonprofessional workplace ambience.³⁴³ Priming occurs "when specific stimuli in the work environment prime certain categories for the application of stereotypical thinking."³⁴⁴ Pornography, along with other non-targeted workplace sexual conduct such as sexual joking, can prime men in the workplace to view their female coworkers as sex objects and to interact with them in that way.³⁴⁵ Dr. Fiske testified that,

335. *Id.* at 1498-99. The graffiti appeared to be targeted at the plaintiff because of her sex, and included such phrases as "lick me you whore dog bitch," "eat me," and "pussy." *Id.* at 1499.

336. *Id.* at 1494.

337. *Id.* at 1523.

338. Some courts, however, have failed to recognize that the disparate treatment theory does not encompass conduct that is not targeted on the basis of sex. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (stating that the "intent to discriminate on the basis of sex in cases involving . . . pornographic materials . . . is implicit, and thus should be recognized as a matter of course").

339. *Robinson*, 760 F. Supp. at 1522-23.

340. *Id.* at 1523.

341. *Id.* at 1502.

342. *Id.* at 1503.

343. *Id.* at 1503-05.

344. *Id.* at 1503.

345. *Id.*

similarly, a nonprofessional workplace ambience, in which pornography and sexual joking are common, leads men to treat their female coworkers as sex objects.³⁴⁶ Based on Dr. Fiske's testimony, the court concluded that the pornography displayed at JSI had a disparate impact on women because it "sexualize[d] the work environment to the detriment of all female employees."³⁴⁷

Another case, *Jenson v. Eveleth Taconite Co.*,³⁴⁸ involved sexual harassment allegations similar to those in *Robinson*, including allegations of non-targeted workplace sexual conduct. Male employees exhibited sexually-focused graffiti, photos, and cartoons throughout the workplace.³⁴⁹ As in *Robinson*, the plaintiffs in *Jenson* presented the testimony of an expert witness on the subject of sexual stereotyping and its sex role spillover effect.³⁵⁰ The expert in *Jenson*, Dr. Eugene Borgida, testified that a sexualized work environment—in which sexual photographs, cartoons, and jokes are common—primes men to think of, evaluate, and act toward their female coworkers in sexual terms.³⁵¹ Based on Dr. Borgida's testimony regarding sexual stereotyping, the court concluded that "the presence of sexual graffiti, photos, language, and conduct, some of which may have existed at Eveleth Mines for years prior to women entering the work force" had a disparate impact on women.³⁵² According to the court, this non-targeted workplace sexual conduct "was disproportionately offensive or demeaning to women" and "told women that the sex stereotypes reflected in and reinforced by such behavior were part and parcel of the working environment at Eveleth Mines."³⁵³

In light of the discussion in the previous subsection, one might have expected that the evidence of disparate impact at the *Robinson* and *Jenson* trials would focus on whether the women at JSI or Eveleth Mines were disproportionately disturbed, distressed, or distracted by the non-targeted sexual conduct, or whether the conduct disproportionately interfered with their ability to perform their jobs. Instead, through the expert testimony regarding sexual stereotyping, the *Robinson* and *Jenson* evidence focused primarily on the effect of non-

346. *Id.* at 1504.

347. *Id.* at 1523.

348. 824 F. Supp. 847, 879-80 (D. Minn. 1993). The plaintiffs in *Jenson* also alleged that the employer discriminated against women in hiring and in conditions of employment including job assignment, promotion, compensation, discipline, and training. *Id.* at 856. In addition, the plaintiffs complained about some harassing conduct that was directed at them because of their sex, such as a male employee pretending to perform oral sex on a sleeping female coworker and a woman being presented with various dildos. *Id.* at 880.

349. *Id.*

350. *Id.* at 880-81.

351. *Id.* at 881-82.

352. *Id.* at 884.

353. *Id.*

targeted workplace sexual conduct on *men*. According to the *Robinson* and *Jenson* courts, non-targeted workplace sexual conduct has a disparate impact on women because such conduct causes men to treat their female coworkers as sex objects. The method of proving disparate impact discussed in the previous subsection centered on the direct effect of non-targeted pornography or sexual joking on women. The method used by the *Robinson* and *Jenson* courts, in contrast, relied on evidence that such conduct causes men to engage in the disparate treatment of women, thus indirectly harming women.

The approach to proving disparate impact used by the *Robinson* and *Jenson* courts is certainly different from the approach discussed in the previous section. Is the *Robinson/Jenson* “indirect effect” approach a valid one, and, if so, is it preferable to the “direct effect” approach? Employers might argue that the indirect effect approach used by the *Robinson* and *Jenson* courts inappropriately combines disparate treatment discrimination with disparate impact discrimination. According to the indirect effect approach, the harm that non-targeted workplace conduct inflicts upon women—the disproportionate impact of such conduct—is that it causes men to treat women as sex objects. Employers might contend that plaintiffs should simply prove those instances of disparate treatment, rather than claiming that non-targeted pornography or sexual joking should be actionable in itself under the disparate impact theory.

Although the argument against the indirect approach has some merit, this kind of evidence of disparate impact may be useful in providing the factfinder with a clearer view of the plaintiff’s work environment and how that environment harms women. The evidence provided through the indirect approach—that non-targeted workplace sexual conduct harms women by causing men to treat them as sex objects rather than competent workers—may assist the factfinder in understanding that particular conduct by a male coworker may have been caused by the plaintiff’s sex. For example, such a factfinder, in light of evidence that pornography pervaded the plaintiff’s workplace, may be more likely to find that a male coworker’s sabotage of the plaintiff’s work was caused by her sex. In addition, one could argue that regardless of whether the harm comes directly or indirectly from the challenged conduct—here, non-targeted sexual activity in the workplace—if the conduct causes disproportionate harm to women, plaintiffs should be able to challenge it under the disparate impact theory. The reasoning of the court in *Garcia v. Spun Steak Co.*,³⁵⁴ moreover, provides additional support for the validity of the indirect approach to proving disparate impact. According to the *Garcia* court, the plaintiffs could prove that the employer’s English-only policy dis-

354. 998 F.2d 1480 (9th Cir. 1993).

proportionately harmed employees of Hispanic origin if they had evidence that the policy caused the workplace atmosphere to be infused with ethnic tensions or hostility toward Hispanic workers.³⁵⁵ In other words, the plaintiffs could prove that the policy disproportionately injured Hispanic employees through a showing of indirect effect, by showing that the policy caused other employees to treat them with hostility.

Despite the arguments in favor of the indirect effect approach to proving a disparate impact, the direct effect approach described in the previous subsection may be preferable. The vast majority of disparate impact cases involve proving a disparate impact via statistics based on appropriate comparison groups, and the indirect effect approach is far removed from this norm, more so than the direct effect approach. In addition, when compared to the direct effect approach, it is more difficult to determine how employers could rebut a plaintiff's proof of disparate impact through the indirect effect approach. Could an employer contend that even if non-targeted sexual conduct in the workplace generally causes men to treat their female coworkers as sex objects rather than as competent workers, such conduct did not have that effect in this employer's workplace? To support that contention, would the employer need to prove that none of its male employees treated any female coworker as a sex object?

Both the direct effect approach and the *Robinson/Jenson* indirect effect approach should be considered permissible means for proving that non-targeted workplace sexual conduct had a disparate impact on women. However, even if a plaintiff proves that her employer uses a particular employment practice that causes a disparate impact on women, the employer will not be liable for disparate impact discrimination if it can prove that the challenged practice is job-related and consistent with business necessity. How might this affirmative defense operate in a case involving non-targeted sexual conduct in the workplace?

D. . . . and Is Not Job-Related or Consistent with Business Necessity

The precise scope of the affirmative defense of business necessity and job-relatedness is unclear. In *Griggs v. Duke Power Co.*,³⁵⁶ its first disparate impact case, the Supreme Court stated that the "touchstone" of the affirmative defense is "business necessity," and that the employer must prove that the challenged employment practice has "a manifest relationship to the employment in question." In *Dothard v.*

355. *Id.* at 1488-89.

356. 401 U.S. 424, 431-32 (1971).

Rawlinson,³⁵⁷ the Court continued to interpret the affirmative defense in a rigorous manner, stating that, to establish the affirmative defense, the employer must prove that its employment practice is "necessary to safe and efficient job performance."

In contrast to the *Griggs* and *Dothard* strict necessity interpretations of the affirmative defense, in *New York City Transit Authority v. Beazer*,³⁵⁸ the Court stated in dicta that the affirmative defense is met if the employer's "legitimate employment goals of safety and efficiency" are "significantly served by, even if they do not require" the employment practice at issue. Similarly, in *Watson v. Fort Worth Bank & Trust*,³⁵⁹ a plurality of the Court stated that to satisfy the defense, the employer must merely "produc[e] evidence that its employment practices are based on legitimate business reasons." Finally, in *Wards Cove Packing Co. v. Atonio*,³⁶⁰ a majority of the Supreme Court adopted the broad business necessity standard stated in dicta in *Beazer* and articulated by the plurality in *Watson*. The Court stated that the challenged practice need not be "essential" or "indispensable" to the employer's business; rather, the practice need only serve, in a significant manner, the employer's legitimate employment goals.³⁶¹ The Court also stated that the employer bears only the burden of producing evidence that its challenged practice was justified; the ultimate burden of proof remains with the plaintiff.³⁶²

The Civil Rights Act of 1991 did little to clarify the scope of the defense of business necessity and job-relatedness. The legislation provides unequivocally that, contrary to the Supreme Court's statement in *Wards Cove*, the employer's justification is an affirmative defense to a prima facie case of disparate impact discrimination on which the employer bears the burdens of production and persuasion.³⁶³ The statute is much less straightforward, however, regarding what an employer must prove to establish the defense. Although the Act provides that the affirmative defense requires a showing of both job-relatedness and business necessity, it "offers only a calculatedly ambiguous understanding of what business necessity means."³⁶⁴ The Act expressly provides that only one specified interpretive memorandum shall be considered as legislative history relevant to the meaning of the affirmative defense, and that memorandum states simply that "[t]he terms 'business necessity' and 'job-related' are intended to reflect the concepts enunciated" in *Griggs* and other pre-*Wards Cove* de-

357. 433 U.S. 321, 331 n.14 (1977).

358. 440 U.S. 568, 587 n.31 (1979).

359. 487 U.S. 977, 998 (1988).

360. 490 U.S. 642, 659 (1989).

361. *Id.*

362. *Id.* at 659-60.

363. 42 U.S.C. §§ 2000e-2(k)(1)(A)(i), 2000e(m).

364. LEWIS & NORMAN, *supra* note 215, § 3.35.

cisions.³⁶⁵ As discussed above, the Supreme Court cases prior to *Wards Cove* did not articulate a single understanding of the affirmative defense; *Griggs* and *Dothard* support a strict business necessity standard, while *Beazer* and *Watson* support a relaxed standard. Accordingly, the Civil Rights Act of 1991 did not relieve the confusion concerning which standard to apply, and this confusion has led lower courts to adopt varying formulations of what an employer must prove to satisfy the affirmative defense.³⁶⁶

Despite the lack of clarity regarding the meaning of the affirmative defense, applying the defense to cases involving non-targeted sexual conduct in the workplace presents no difficult issues. Whether business necessity and job-relatedness are interpreted strictly or broadly, it is unlikely that non-targeted sexual conduct would be job-related or consistent with business necessity in the vast majority of workplaces.³⁶⁷ In most workplaces, non-targeted sexual conduct, such as displays of pornography or discussions of sex, could not be considered manifestly related to the employment in question or necessary to safe and efficient performance. Moreover, even if the broad interpretation of the defense is used, it is unlikely that non-targeted sexual conduct could be viewed as reasonably related to the employer's legitimate business goals. Sexual pictures, jokes, and discussions are completely

365. Civil Rights Act of 1991, § 105(b); 137 CONG. REC. 15276 (daily ed. Oct. 25, 1991).

366. See, e.g., *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer must prove that the challenged practice is demonstrably necessary to meet an important business goal); *Donnelly v. R.I. Bd. of Governors for Higher Ed.*, 929 F. Supp. 583 (D.R.I. 1996) (holding that employer must prove that "the challenged practice is reasonably necessary to achieve an important business objective"), *aff'd on other grounds*, 110 F.3d 2 (1st Cir. 1997); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 322 (N.D. Cal. 1992) (holding that employer must prove that the challenged practice "significantly serves legitimate employment goals").

367. Steven Willborn contends that the disparate impact model is inapplicable in sexual harassment cases, in part because "the business necessity stage of a disparate impact case simply does not compute as applied to harassment situations." Willborn, *supra* note 50, at 688. He finds it difficult to envision harassing conduct that is job-related and consistent with business necessity.

As discussed above, non-targeted workplace sexual conduct will be actionable under Title VII only if courts allow the discrimination element of sexual harassment to be proved using the disparate impact theory. The fact that employers would be unable to establish the business necessity defense in most cases involving non-targeted workplace sexual conduct is not a reason to refuse to find such conduct actionable or to refuse to apply the disparate impact theory in sexual harassment cases. If it is difficult to envision harassing conduct that is job-related and consistent with business necessity, but it is possible to envision facially neutral harassing conduct that disproportionately injures women, such a scenario supports—rather than undermines—the use of the disparate impact theory in sexual harassment cases. Moreover, as discussed below, harassing conduct in the form of non-targeted workplace sexual activity will be job-related and consistent with business necessity in some cases.

unrelated to the nature of the work performed at most businesses. In the cases described at the beginning of this Article, for example, it is unlikely that it was reasonably related to the legitimate business goals of the law firm for the male attorneys to discuss their sex lives and to tell jokes about sex. It is unlikely that it was reasonably related to the legitimate business goals of the city's computer department for one of its employees to view pornography on the Internet during work hours. It is unlikely that it was reasonably related to the legitimate business goals of the fire department for the male firefighters to view pornographic magazines and movies in the engine company's common living areas.

Whether business necessity and job-relatedness are interpreted strictly or broadly, some non-targeted workplace sexual conduct will satisfy the affirmative defense in cases in which the employer's business and the plaintiff's job are sex-related. For example, if the plaintiff works for *Playboy* magazine, depending upon the nature of the plaintiff's job, it may be necessary for the efficient performance of her job that she be exposed to pornographic pictures that are candidates for publication in the magazine. The plaintiff might be able to argue, however, that despite the sex-related nature of the business and of her job, her male coworkers' constant and graphic discussions of their own sex lives would not be job-related nor consistent with business necessity. A less obvious example of a scenario in which the employer might satisfy the affirmative defense is where the plaintiff is an attorney in a law firm that defends employers in sexual harassment cases. It may be necessary for the efficient performance of the plaintiff's job that she be exposed to detailed information about the sexually harassing conduct alleged in the cases on which she works. Such a plaintiff could argue, however, that non-case-related jokes about sex told by other attorneys would not be job-related nor consistent with business necessity.

In his dissenting opinion in *Lynch*, Judge Boggs contended that plaintiffs should not be able to challenge conditions of employment via the disparate impact theory, partly because he believed that the business necessity defense would not be workable in such cases.³⁶⁸ Judge Boggs reasoned that it could rarely be said that any conditions of employment are "necessary" because almost any condition can be improved at a certain cost.³⁶⁹ Judge Boggs' concern—that allowing conditions of employment to be challenged via the disparate impact theory would force employers to make expensive changes to their workplaces—may be a valid one. This concern, however, does not apply where the challenged condition of employment is non-targeted sex-

368. 817 F.2d 380, 389 (6th Cir. 1987).

369. According to Judge Boggs, Title VII does not empower courts to determine how much a condition can be improved without threatening the business. *Id.*

ual conduct in the workplace. Employers could change this condition by eliminating the pornography displays or the discussions of sex, with little to no out of pocket cost. Although employers may incur costs associated with enforcing a prohibition of non-targeted workplace sexual conduct—the costs of training employees on the policy and responding to complaints that the policy was violated, for example—these costs are arguably different from the cost of physically modifying the workplace that concerned Judge Boggs.

Some employers in non-sex-related businesses may focus on a different “cost” of eliminating non-targeted workplace sexual conduct, arguing that this cost means that the conduct is job-related and consistent with business necessity. Returning to the cases described at the beginning of this Article, the fire department may contend that allowing its firefighters to view pornography in the engine company’s common living areas helps them relax and bond with each other. This relaxation and bonding is very important in a job that is both stressful and tedious, in which teamwork is essential. Thus, the fire department may argue, allowing its firefighters to relax and bond in the manner of their choice—including viewing pornography—is reasonably related to its legitimate business goal of having employees mentally prepared to fight fires. Similarly, the law firm may contend that its attorneys spend a great deal of time at the office in a stressful atmosphere, and that allowing its associates to relax and bond in the manner of their choice—including talking about sex—is reasonably related to its legitimate business goal of having attorneys with sufficient morale to serve the firm’s clients well.

This “male bonding as business necessity” argument should be rejected. In effect, the employers are arguing that what is good for the majority of employees should be controlling, because if most employees are happy, the business will be more successful. Such an argument is inconsistent with the disparate impact theory. Under the disparate impact theory, if a neutral practice disproportionately harms a minority of employees, it is unlawful unless it is justified by business necessity—despite the fact that eliminating the practice could be viewed as harming the employees in the majority.³⁷⁰ In *Griggs*, for example, the Supreme Court held that the employer must eliminate its test passage and high school diploma requirements because those requirements disproportionately injured African-Ameri-

370. The authors of one of the leading employment discrimination casebooks explain this tension within the disparate impact theory as follows:

Imagine a new employer who is considering what employee selection procedure to adopt. Using a test will result in 90 percent white employees and 10 percent black employees. In contrast, a structured interview will result in 70 percent whites and 30 percent blacks. Isn't it clear that whatever the employer does will have a disparate impact on some group?

ZIMMER ET AL., *supra* note 225, at 573-74.

can job applicants. Adopting other requirements that did not have a disparate impact on African-Americans would, at least when compared with the old requirements, have a disparate impact on white applicants. That result did not cause the *Griggs* Court concern. Similarly, courts should reject the argument that non-targeted workplace sexual conduct is justified by business necessity, despite its negative impact on female employees, because it makes male employees happy.

The affirmative defense of job-relatedness and business necessity would not pose an obstacle to disparate impact liability in most cases involving non-targeted sexual conduct in the workplace. In fact, although it is necessary to interpret "employment practice" broadly and to accept a nontraditional method of proving a disparate impact, it is plausible that plaintiffs could satisfy all of the statutory requirements for establishing disparate impact discrimination in sexual harassment claims based on non-targeted sexual conduct in the workplace. Determining whether non-targeted sexual conduct in the workplace should be actionable, however, requires more than just doctrinal analysis. It is necessary to explore the public policy implications of finding such conduct actionable via the disparate impact theory.

V. POTENTIAL PROBLEMS WITH FINDING NON-TARGETED WORKPLACE SEXUAL CONDUCT ACTIONABLE

A. Conflict with the First Amendment

Finding non-targeted sexual conduct in the workplace to be actionable sexual harassment poses a great potential for conflict with the First Amendment. A full discussion of the interaction between the First Amendment and sexual harassment doctrine—a subject which the Supreme Court has never addressed directly but about which many scholars have written—is outside the scope of this Article. It is useful to consider briefly, however, why finding non-targeted workplace sexual conduct actionable might pose a potential First Amendment problem and whether there is any way to reconcile such a finding with First Amendment principles.

Numerous commentators have criticized the sexual harassment doctrine as inconsistent with the First Amendment.³⁷¹ Much harassing conduct takes the form of speech; in particular, non-targeted workplace sexual conduct often takes the form of verbal expression, such as sexual discussions or joking, or graphic expression, such as displays of

371. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993).

pornography.³⁷² Moreover, Title VII's prohibition of sexually hostile work environments constitutes state action restricting speech.³⁷³ Employers are compelled to restrict the speech of their employees by the threat of civil liability if they fail to do so.³⁷⁴

The Supreme Court has stressed that it will scrutinize closely any restriction of speech based on its content, stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."³⁷⁵ This prohibition of content-based restrictions of speech

372. See Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 697 (1997) (noting that harassing conduct can include a wide range of speech, such as sexual propositions; sexual jokes, cartoons, and innuendo; and pornography); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1800-01 (1992) (stating that alleged harassment may consist, entirely or in part, of speech, such as sexually explicit comments and pornography displayed in the workplace).

373. See Browne, *supra* note 371, at 510-11 (stating that "[a]lthough the primary method of enforcement of the harassment prohibition is through civil actions between private parties, imposition of liability by the courts under federal and state statutes easily falls within the definition of 'state action'"); Charles R. Calleros, *Title VII and Free Speech: The First Amendment is Not Hostile to a Content-Neutral Hostile Environment Theory*, 1996 UTAH L. REV. 227, 237 [hereinafter *Title VII and Free Speech*] (stating that "[e]fforts by courts or government agencies to enforce statutes such as Title VII in public or private workplaces . . . constitute state action and are subject to First Amendment limitations").

374. Private employers may restrict the speech of their employees without raising any First Amendment concerns because private employers are not state actors. See Estlund, *supra* note 372, at 689 (noting that the First Amendment does not prohibit private employers from censoring and punishing their employees' speech); Volokh, *supra* note 372, at 1816 (noting that no First Amendment difficulties arise if a private employer creates an anti-harassment policy on its own). When, however, "the law condemns employee speech and effectively compels employers to regulate it," such state action poses the potential for conflict with the First Amendment. Estlund, *supra* note 372, at 689. As explained by one scholar, "The government cannot escape First Amendment scrutiny for its speech restriction by forcing someone else, on pain of liability, to implement that restriction." Volokh, *supra* note 372, at 1817.

375. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); see also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

In *R.A.V. v. City of St. Paul*, the Court struck down a city ordinance which prohibited the display of symbols that amounted to "fighting words"—a category of speech that the Court had previously held to be appropriate for regulation—known to "arouse[] anger, alarm or resentment in others" on the basis of race, color, creed, religion or gender. 505 U.S. 377, 380 (1992). The Court explained that the government cannot selectively regulate speech, even speech falling into the fighting words category, based on government's disapproval of the speech's content. *Id.* at 383-84. Certain categories of expression, such as fighting words, obscenity, or libel, "can, consistently with the First Amendment, be regulated be-

arguably conflicts with many courts' pre-*Oncale* interpretation of sexual harassment doctrine. Before *Oncale*, many courts interpreted Title VII's prohibition of sexual harassment as encompassing conduct, including speech, that was sexual in nature, regardless of whether it was sexually discriminatory.³⁷⁶ Such an interpretation restricted speech on the basis of its content—whether that content was sexual or not—and thus arguably was inconsistent with the First Amendment.

As discussed above, since *Oncale*, courts have focused on the requirement that harassing conduct be discriminatory in order to be actionable.³⁷⁷ Most sexual harassment cases involve conduct that amounts to disparate treatment, conduct that is targeted based on sex.³⁷⁸ A prohibition of targeted conduct is arguably content-neutral, basing liability not on the content of harassing speech, but rather on the harasser's selectively targeting speech at one sex in the workplace.³⁷⁹ Restricting such speech poses little risk to First Amendment

cause of their constitutionally proscribable content," but they are not "categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* In other words, "the government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed." *Id.* at 386.

376. See *supra* section II.B.

377. See *supra* section III.B.

378. See *supra* section III.C.

379. Charles Calleros contends that basing harassment doctrine on selective targeting of victims due to their membership in a protected class, rather than on whether allegedly harassing speech is sexual in nature, poses a minimal threat to First Amendment values. See *Title VII and Free Speech*, *supra* note 373, at 262-63. He points to some dicta from *R.A.V.* in support of his contention. *Id.* at 246. In the first dictum, the Court stated that "'sexually derogatory fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices," implying that the Court would consider this regulation of speech incidental to Title VII's prohibition of discriminatory conduct. *Id.* (discussing *R.A.V.*, 505 U.S. at 389-90). In the second dictum, the Court stated that "[a] prohibition of fighting words that are directed at certain persons or groups . . . would be *facially* valid if it met the requirements of the Equal Protection Clause." *Id.* (discussing *R.A.V.*, 505 U.S. at 392). Reading the dicta together, Calleros reasons that the government can regulate speech, consistent with the First Amendment, "on the basis of the defendant's targeting of victims but not on the basis of the political or social content of the speech." *Id.* at 248.

Steven Willborn has made a similar argument, relying on the Supreme Court's statement in *Wisconsin v. Mitchell* that "the First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." Willborn, *supra* note 50, at 720 (quoting 508 U.S. 476, 489 (1993)). According to Willborn, if a plaintiff can prove that her harasser targeted harassing speech at her because of her sex, finding that such speech contributed to a hostile work environment would not threaten the First Amendment. *Id.* at 720-21. Under such circumstances, Willborn reasons, the speech "is not being regulated directly," but rather "is merely evidence of illegal discrimination." *Id.* at 720-21.

values.³⁸⁰ This Article, however, focuses on non-targeted sexual conduct in the workplace, which is actionable, if at all, only under a disparate impact theory of discrimination. This type of restriction of speech is content-based, not just because of its focus on conduct that is sexual in nature, but also because it restricts speech based on its differing impact on male and female listeners. Any use of the disparate impact theory to prove the discrimination element of sexual harassment means that regulation of speech will be related to the content of the expression.³⁸¹ Accordingly, finding non-targeted workplace sexual conduct actionable under the disparate impact theory presents serious First Amendment concerns.³⁸² As noted by one commentator, “[t]he Court has never held that generally applicable restrictions are exempt from First Amendment scrutiny . . . when they operate to restrict speech because of its communicative impact.”³⁸³

Even though sexual harassment claims based on non-targeted workplace sexual conduct would involve content-based restriction of speech, it may be possible to allow such claims without violating the First Amendment.³⁸⁴ Charles Calleros reasons that the government

380. According to Charles Calleros, “[s]o long as regulation under Title VII is content-neutral and is not justified on the basis of a desire to suppress speech, First Amendment values should be satisfied if Title VII’s restrictions are reasonably narrowly tailored to serve a significant or a substantial government interest.” *Title VII and the First Amendment*, *supra* note 120, at 1222. He reasons that the government’s interest in eradicating discrimination in the workplace is substantial and discusses several factors relevant to determining whether restrictions on discriminatory harassing speech are “reasonably narrowly tailored” toward serving that interest. *Id.* at 1222-23, 1225-36.

381. *See id.* at 1250 (stating that when “the discriminatory nature of undirected expression spring[s] from its impact on viewers rather than on selective reception of the expression, the content of the expression necessarily plays a greater role in the regulation, placing the content-neutrality of the regulation in doubt”). Calleros notes, moreover, that *R.A.V.* does not support the argument that restricting speech based on its disproportionate effect on minorities somehow makes the restriction content-neutral: “In *R.A.V.*, selective regulation of bigoted fighting words presumably would not have been saved by the argument that fighting words of such content had a disparate impact on minorities” *Id.* at 1254 n.139.

382. The *Jenson v. Eveleth Taconite Co.* court, which found non-targeted workplace sexual conduct to be actionable sexual harassment, would disagree with this proposition. 824 F. Supp. 847, 884 n.89 (D. Minn. 1993). The court reasoned that “acts of expression which may not be proscribed if they occur outside of the workplace may be prohibited if they occur at work,” and concluded that, more specifically, “expression in the workplace that is offensive to and has a psychological impact on a member of a protected group may be prohibited.” *Id.*

383. Volokh, *supra* note 372, at 1830 (emphasis removed).

384. Some commentators would reject, on First Amendment grounds, any sexual harassment claims based on non-targeted workplace sexual conduct. Eugene Volokh, for example, contends that the line between permitted speech and prohibited harassment should be drawn “between directed speech—offensive speech that is targeted at a particular employee because of the employee’s race, sex, re-

has greater authority to regulate speech in the workplace context than it has in a public forum, because of "government interests in equal employment opportunities, and in protecting the autonomy and dignity of unwilling listeners who cannot retreat into their homes during working hours."³⁸⁵ Thus, although a content-based restriction of speech in a public forum would ordinarily require "the most exacting scrutiny,"³⁸⁶ Calleros concludes that liability for the disparate impact of speech in the workplace can be based on a more lenient standard.³⁸⁷ The appropriate standard, according to Calleros, would limit liability for the disparate impact of workplace speech

to cases in which discrimination through disparate impact is clearly shown, a substantial adverse effect of the speech on working conditions is established [through] a properly formulated objective standard, implied consent is clearly absent, and recipients of the speech are captive in the sense that they have no feasible way to "avert their eyes."³⁸⁸

Calleros asserts that perhaps the most important factor in determining whether Title VII can prohibit workplace speech based on its disparate impact in light of the First Amendment is the extent to which an employee is unable to avoid the speech.³⁸⁹ Accordingly, to

ligion, or national origin—and undirected speech, such as overheard conversations between willing employees, or printed matter posted in the workplace." Volokh, *supra* note 372, at 1871.

385. *Title VII and the First Amendment*, *supra* note 120, at 1255; see also Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 706 (1995) (stating that, due to "the captive situation of many employees," some "expression that might be protected in other contexts should not necessarily be protected at work").

386. *Title VII and the First Amendment*, *supra* note 120, at 1255 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

387. *Id.*

388. *Id.* Cynthia L. Estlund has proposed another means of reconciling Title VII's prohibition of discriminatory harassment with the First Amendment, under which some non-targeted workplace sexual conduct might be considered unprotected speech. See Estlund, *supra* note 372, at 695 (explaining that she "propose[s] a compromise in the form of certain constraints on the manner of expression in the workplace forum"). According to Estlund, "even speech that is not directed at a particular individual should forfeit protection if it is made in a manner that is manifestly and grossly offensive to coworkers on the basis of their race, sex, religion, or other protected trait and that is not reasonably avoidable by listeners who are thus offended." *Id.* at 750. She explains that the widespread pornography at issue in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991)—the most famous case involving non-targeted workplace sexual conduct—arguably would be unprotected under her standard: "most of [the material] could fairly be described as grossly offensive on the basis of sex and was displayed in areas the plaintiffs could not reasonably avoid during their workday." *Id.* at 756.

389. *Title VII and Free Speech*, *supra* note 373, at 246-47. This "captive audience" rationale is an important one. The *Robinson* court rejected the employer's contention that an order of injunctive relief against future non-targeted workplace sexual conduct would violate the First Amendment, in part by reasoning that

avoid a potential conflict with the First Amendment, courts may want to find non-targeted workplace sexual conduct actionable only where the plaintiff proves that she was unable to avoid the speech without limiting her ability to function in the workplace. For example, if the plaintiff in *Coniglio v. City of Berwyn*³⁹⁰ could have communicated easily with her boss without viewing the pornography on his computer, the court may not want to allow the plaintiff to rely on the pornography in her sexual harassment claim because of First Amendment concerns. If, on the other hand, the *Coniglio* plaintiff could only avoid viewing the pornography by never entering her boss's office, and if she needed to enter his office on occasion to perform her job effectively, the court should be more willing to find the non-targeted sexual conduct actionable.³⁹¹ The female firefighter in *O'Rourke v. City of Providence*,³⁹² who complained about stacks of pornographic magazines in her engine company's common living areas and pornographic movies being shown in the company's common sitting area, would be able to prove that she could not avoid the speech; she would not be required to refrain from entering the engine company's common living areas in order to satisfy First Amendment concerns. If, however, the male firefighters kept pornography in their private bedrooms in the company living quarters,³⁹³ finding such conduct actionable would be much more likely to violate the First Amendment.

B. Overprotecting and Stigmatizing Women

Another potential problem with finding non-targeted workplace sexual conduct actionable is the risk of overprotecting and stigmatizing women. Non-targeted sexual conduct in the workplace satisfies the discrimination element of actionable sexual harassment only if it is disproportionately more harmful to women than it is to men. Find-

"female workers at JSI are a captive audience in relation to the speech that comprises the hostile work environment." 760 F. Supp. at 1535.

390. No. 99C4475, 2000 WL 967989, at *2 (N.D. Ill. June 15, 2000).

391. Of course, a plaintiff establishes a sexually hostile work environment that is actionable under Title VII only if she can prove that she experienced discriminatory conduct that was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive working environment. It is unlikely that a plaintiff could satisfy the severity or pervasiveness requirement just by proving that she observed her supervisor viewing pornography on the Internet. If, however, a plaintiff proves that she observed her supervisor viewing pornography on the Internet under circumstances such that she had no feasible way to avert her eyes, the court should be willing to consider that non-targeted sexual conduct as a relevant part of the plaintiff's harassment claims despite any First Amendment concerns.

392. 235 F.3d 713, 718-19, 722 (1st Cir. 2001).

393. See *id.* at 719 (stating that each firefighter in the plaintiff's initial engine company had a private bedroom).

ing such conduct actionable means that courts and employers must focus generally on the differences between men and women and more specifically on the possibility that sexual conduct in the workplace harms women more than it does men.

This issue raises a fundamental dilemma, which Martha Minow has termed "the dilemma of difference," about the best route to achieving gender equality in the workplace: "The stigma of difference may be recreated both by ignoring and by focusing on it. . . . The problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently."³⁹⁴ Emphasizing the ways in which men and women differ—here, the difference in their perception of non-targeted sexual conduct in the workplace—poses a risk of characterizing women as needing protection and special treatment. In our nation's history, gender-conscious laws aimed at protecting women have been detrimental rather than helpful to gender equality in the workplace;³⁹⁵ such legislation operated to "put women, not on a pedestal, but in a cage."³⁹⁶ For example, in 1872, the Supreme Court held that the decision of the Supreme Court of Illinois refusing to grant a woman a license to practice law in the state did not violate the U.S. Constitution,³⁹⁷ with one Justice declaring that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."³⁹⁸ Finding non-targeted workplace sexual conduct actionable because it disproportionately harms women may reinforce this detrimental image of women as timid and delicate.

Ignoring the ways in which men and women differ, however, may also be harmful to gender equality in the workplace. Workplace conditions, such as non-targeted sexual conduct in the workplace, may be neutral in that the conditions developed without any intent to discriminate against women and both men and women are exposed to the same conditions. Yet because of our nation's history of job segregation

394. MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND THE AMERICAN LAW* 20 (1990); see also Dolkhart, *supra* note 249, at 169-71 (noting that, although the equal treatment model of equality "fails to take into account the real differences of women and minorities," many feminists prefer it because "any kind of special treatment is a double-edged sword permitting unfavorable as well as favorable treatment against an historic background of separate spheres ideology").

395. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (upholding a Michigan law barring women from serving as bartenders in taverns unless they were the wife or daughter of the male owner); *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding an Oregon law limiting the hours that women could work in factories or laundries).

396. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

397. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138-39 (1872).

398. *Id.* at 141 (Bradley, J., concurring).

by sex, some workplace conditions developed according to male norms,³⁹⁹ and some of those norms disproportionately disadvantage women. Eliminating the male tilt from seemingly neutral workplace conditions requires a focus on the different effect such conditions have on men and women.⁴⁰⁰ Absent a focus on the differences between men and women, workplace conditions that disproportionately and unnecessarily harm women will continue to exist.

This same "dilemma of difference" underlies a longstanding debate over another aspect of sexual harassment doctrine: whether, when determining if harassing conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, the factfinder should apply the standard of the "reasonable person" or that of the "reasonable woman." Courts initially applied the gender-neutral reasonable person standard common in traditional tort theory.⁴⁰¹ In the 1991 case of *Ellison v. Brady*,⁴⁰² however, the Ninth Circuit held that severity or pervasiveness should be determined based on the standard of the reasonable woman.⁴⁰³ The court noted that men and women have different perspectives, such that conduct that may not bother most men may offend most women.⁴⁰⁴ Concerned that the gender-neutral reasonable person standard may be male-biased and ignorant of women's experiences, the court reasoned that "a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men."⁴⁰⁵ This rationale is remarkably similar to the argument for finding non-targeted workplace sexual conduct actionable because of its disparate impact on women: if a seemingly neutral standard devel-

399. See *supra* notes 226-44 and accompanying text.

400. See Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. SOC. CHANGE 325 (1984-85), reprinted in FEMINIST LEGAL THEORY FOUNDATIONS 128, 131 (D. Kelly Weisberg ed., 1993) (describing the disparate impact theory as "provid[ing] a doctrinal tool with which to begin to squeeze the male tilt out of a purportedly neutral legal structure and thus substitute genuine for merely formal gender neutrality").

401. See, e.g., *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 650 (6th Cir. 1986).

402. 924 F.2d 872, 879 (9th Cir. 1991).

403. The court held that "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Id.*

404. *Id.* at 878. Although the *Ellison* court focused on gender differences in perceptions of workplace sexual conduct, it is important to note that the harassing conduct at issue in *Ellison* was targeted based on the plaintiff's sex. The plaintiff alleged that one of her male coworkers wrote her passionate letters indicating his devotion to her and desire to have a relationship with her. *Id.* at 874. Because a factfinder could reasonably infer that the coworker would not have sent such letters to another man, the conduct was discriminatory under the disparate treatment theory.

405. *Id.* at 879.

oped based on male norms, and that standard favors men, the law may need to be gender-conscious in order to achieve true gender equality in the workplace.⁴⁰⁶

Many commentators have rejected the reasonable woman standard as paternalistic and patronizing to women. They have reasoned that the reasonable woman standard makes women appear hypersensitive, overly emotional, and prudish.⁴⁰⁷ In addition, the reasonable woman standard may essentialize women by suggesting that there is a single "women's perspective" possessed by all women, regardless of race, class, or sexual orientation.⁴⁰⁸ Another potential problem involves how factfinders—some of whom will be male—can apply the reasonable woman standard. They are likely to rely on stereotypes of women as weak and vulnerable.⁴⁰⁹ Instituting a gender-specific standard for

406. Commentators' arguments in favor of the reasonable woman standard also parallel the arguments for finding non-targeted workplace sexual conduct actionable under the disparate impact theory. For example, Caroline Forell contends that courts should adopt the reasonable woman standard because "[t]aking women's perspectives into account helps assure that workplaces are hospitable to both male and female workers." Forell, *supra* note 245, at 805; *see also* Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER L. 195, 228 (2001) (arguing that the reasonable woman standard "liberates [women] from a male-biased legal tradition"); Abrams, *supra* note 35, at 1206 (arguing that "[i]f judges continue to strive for the ostensibly objective perspective in assessing sexual harassment claims, then they will succeed primarily in entrenching the male-centered views of harassment that prevail in many workplaces").

407. *See* Dolkart, *supra* note 249, at 204 (arguing that the reasonable woman standard makes women "appear more vulnerable, more subject to emotion (hypersensitive compared to the male norm), and more prudish"); *see also* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 475 (1997) (contending that the reasonable woman standard "seems to contemplate a fragile, ultrasensitive victim").

408. Anita Bernstein has argued that those who envision the "reasonable woman" actually have a particular woman in mind: "white, heterosexual, upper-income, something of a moderate or liberal feminist, untroubled by intense religious feeling, and a little prissier than the reasonable person in reacting to office shenanigans." Bernstein, *supra* note 407, at 473; *see also* Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, 1995 DISSENT 48, 50 [hereinafter *Reasonable Woman*] (noting that some feminists challenged the reasonable woman standard by arguing that the standard's "unitary depictions of women replicated the false and exclusory universalism of the gender-neutral approach"); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1434 (1992) (noting that while "the actions of a reasonable woman may differ depending on whether she is black or white, rich or poor, a professional or unemployed, . . . [t]he reasonable woman standard does not include these multiple perspectives, generating instead a cookie-mold stereotype").

409. *See* Paul B. Johnson, *The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?*, 28 WAKE FOREST L. REV. 619, 654 (1993) (noting that "if the reasonable woman theory is correct in its core assumption that male triers of fact cannot understand the reasonable woman's perspective, male judges and jurors

determining reasonableness, moreover, builds into the law the assumption that men and women think and feel very differently about sexual conduct in the workplace, which seems likely to entrench such differences.⁴¹⁰ One state supreme court rejected the reasonable woman standard because of these concerns:

[A] gender-conscious standard could reintrench the very sexist attitudes it is attempting to counter. The belief that women are entitled to a separate legal standard merely reinforces, and perhaps originates from, the stereotypic notion that first justified subordinating women in the workplace. Courts utilizing the reasonable woman standard pour into the standard stereotypic assumptions of women which infer women are sensitive, fragile, and in need of a more protective standard. Such paternalism degrades women and is repugnant to the very ideals of equality that the act is intended to protect.⁴¹¹

In addition, largely because of these concerns, Kathryn Abrams, an early proponent of the reasonable woman standard, has rejected it,⁴¹² as has Barbara Gutek,⁴¹³ whose research on gender differences in perceptions of workplace sexual conduct has been cited frequently in support of the standard.

will be forced either to ignore the standard or to resort to stereotypes of female behavior”).

410. See Franke, *supra* note 48, at 750 (contending that “[t]he reasonable woman standard in sexual harassment cases resolves some of the sex-based bias in the law at the price of potentially normalizing and enforcing certain gender stereotypes or commonly accepted social norms about women as a group and men as a group”); Cahn, *supra* note 408, at 1402-03 (asserting that “the use of separate standards operates to entrench differences between men and women, rather than to establish a standard that transcends issues of sameness and difference”); Johnson, *supra* note 409, at 635 (arguing that codifying the differences between men and women in a legal standard “cannot help but interfere with genuine legal and social equality”).

411. *Radtke v. Everett*, 501 N.W.2d 155, 167 (Mich. 1993) (interpreting the Michigan Civil Rights Act, M.C.L. §§ 37.2101-37.2804 (2003)).

Two years after the Ninth Circuit’s *Ellison* decision, the United States Supreme Court held in *Harris v. Forklift Systems, Inc.*, that to be actionable harassing conduct must be severe or pervasive enough to create an environment that “a reasonable person” would find hostile or abusive. 510 U.S. 17, 21 (1993). Although the Court used the reasonable person standard, it did not expressly reject the reasonable woman standard. Since *Harris*, the lower courts are divided on whether to use the reasonable person or the reasonable woman standard. See Julianio & Schwab, *supra* note 10, at 582 n.138 (collecting cases).

412. See *New Jurisprudence*, *supra* note 117, at 1224 (advocating the gender-neutral standard of the reasonable person “with a solid base of political knowledge regarding sexual harassment”); *Reasonable Woman*, *supra* note 408, at 51-52 (asserting that a gender-neutral standard of the reasonable person who is “enlightened concerning the barriers to women’s equality in the workplace” is preferable to the reasonable woman standard).
413. See Barbara A. Gutek & Maureen O’Connor, *The Empirical Basis for the Reasonable Woman Standard*, J. Soc. ISSUES, Spring 1995, at 151, 161 (concluding that “it would be more useful to explore the reasons why men and women differ; rather than to infer that men and women are so different on the issue of sexual harassment as to require different standards of reasonableness”).

Finding non-targeted workplace sexual conduct actionable under the disparate impact theory initially appears to avoid many of the problems presented by the reasonable woman standard. Rather than simply instructing a factfinder, who may be male, to determine how a reasonable woman would perceive certain conduct, the disparate impact approach set out in this Article requires the plaintiff to prove that non-targeted sexual conduct in the workplace had a disparate impact on women. Finding a disparate impact would require proof based on objective facts rather than overgeneralizations based on assumptions and stereotypes about women.⁴¹⁴ The disparate impact approach would not entrench in the law the assumption that men and women are different; the plaintiff must prove such differences.

Viewing the method of proving a disparate impact with a more critical eye, however, reveals that it has more in common with the reasonable woman standard than initially might be apparent. If a plaintiff proved that non-targeted sexual conduct had a disparate impact on women in her workplace by using workplace-specific evidence, the factfinder would be required to engage in few assumptions and generalizations about women. As discussed above, however, many plaintiffs will be unable to produce such evidence. Instead, they will need to rely on non-workplace-specific evidence demonstrating how women in general react to non-targeted workplace sexual conduct.⁴¹⁵ The further removed the evidence of disparate impact is from evidence of the situation in the plaintiff's own workplace, the more the factfinder must base his or her decision on generalized views of what women think and how women react, thus essentializing women.

One response to the argument that finding non-targeted workplace sexual conduct actionable risks overprotecting and stigmatizing women is that such a danger is inherent in the disparate impact approach. All disparate impact claims, unlike disparate treatment claims, require the plaintiff to prove that persons differ from each other based on their membership in a protected class. Thus all disparate impact claims could raise the specter of inferiority, of stigmatizing a particular group by sending the message that persons of that group cannot compete if treated the same as others. Nonetheless, Congress made the policy judgment to allow such claims when it amended Title VII to codify the disparate impact theory of discrimination. That policy judgment by Congress, one could argue, means that

414. See *Title VII and the First Amendment*, *supra* note 120, at 1256 (asserting that proving a disparate impact "should be based not on stereotyped assumptions about the sensibilities of members of a protected group, but rather on a particularized factual showing in each case").

415. If a plaintiff uses the *Robinson/Jenson* indirect effect approach to proving a disparate impact, the plaintiff will rely on how this non-targeted workplace sexual conduct makes men in general react, and how that reaction affects women in general.

non-targeted workplace sexual conduct should be actionable despite the risk of stigmatizing women.

The problem with this line of reasoning is that finding non-targeted workplace sexual conduct actionable may present a greater risk of stigmatizing women than does the typical disparate impact case involving a challenge to an employer's qualification standards or selection procedures. In the typical disparate impact case, the plaintiff is arguing that the employer's system for hiring employees, such as a test passage requirement, disproportionately excludes persons in the plaintiff's protected class. Implicit in the plaintiff's claim is the argument that if this unnecessary obstacle to entry is removed, the plaintiff and other persons of that protected class can succeed on the job under its existing conditions, just like persons outside the protected class.

In contrast, a claim that non-targeted sexual conduct in the workplace has a disparate impact on women involves asking an employer to do much more than merely remove an obstacle to entering a job. Asserting that an employer needs to alter the conditions of a job in order to allow women to function well in the workplace seems more likely to create the stigmatizing impression that women cannot be as successful in the workplace as men unless they receive special treatment. Such an assertion will have effects outside the courtroom; it will influence employers. Telling employers—and causing employers to tell their employees—that they must eliminate sexual conduct from the workplace, despite the lack of any discriminatory intent, because such conduct hurts women⁴¹⁶ may reinforce the views of some employers and employees that women differ so much from men that they do not belong in certain workplaces.⁴¹⁷

416. One response to this argument may be that employers do not face Title VII liability for any and every instance of harassing conduct; rather, conduct becomes actionable sexual harassment only when it is sufficiently severe or pervasive to alter the conditions of employment and to create an abusive work environment. See *Harris*, 510 U.S. at 21. Thus employers need not eliminate all sexual conduct from their workplaces but only sexual conduct that crosses the severity or pervasiveness threshold. As Eugene Volokh has noted, however, employers are likely to find little comfort in the notion that they will be liable for harassing conduct only if it crosses the severity or pervasiveness threshold, because the location of that threshold is unclear. Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 635-36 (1997). "Severe," "pervasive," and "abusive" are vague terms which provide employers with little guidance about what conduct they should prohibit. *Id.* Accordingly, the message that employers are likely to hear—and to repeat to their employees—is, "We have to get rid of everything sexual because it upsets women."

417. Moreover, the effect of allowing non-targeted sexual conduct in the workplace to be actionable via the disparate impact theory may not be that all such conduct vanishes from the workplace. Rather, the effect may be that male employees engage in certain kinds of non-targeted workplace sexual conduct—like discussions or joking about sex—when female employees are not around. Such sex segrega-

In addition, a disparate impact challenge to non-targeted sexual conduct in the workplace may be more likely to stigmatize women than would a disparate impact challenge to other conditions of employment. In *Lynch*, for example, the court's finding that, because of the different anatomy of men and women, women are more likely to become physically ill after using dirty toilets seems unlikely to reinforce stereotypes that historically have disadvantaged women. Arguing that non-targeted sexual conduct in the workplace has a disparate impact on women, however, reinforces the stereotype that sex and sexual expression are bad for women, which has disadvantaged women in the past. For example, the desire to protect women from sexual language led the Arkansas Supreme Court in 1949 to uphold a statute allowing women to serve on juries only if they specifically volunteered.⁴¹⁸ The court reasoned that "[c]riminal court trials often involve testimony of the foulest kind, and . . . the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove . . . degrading to a lady."⁴¹⁹

C. Reemphasizing the "Sexual" in Sexual Harassment

Yet another potential problem with finding non-targeted workplace sexual conduct actionable is the risk that doing so will encourage courts and employers to focus their anti-harassment efforts primarily on eliminating sexual conduct from the workplace. As discussed in Part II of this Article, for many years courts understood sexual harassment law to prohibit only workplace conduct that was sexual in nature, ignoring instances of gender-based abuse that did not involve sexual conduct. Not surprisingly, employers understood sexual harassment law the same way, and many employers' anti-harassment policies still describe the prohibited conduct as sexual in nature.⁴²⁰ Since *Oncale*, however, courts have started recognizing that sexual

tion in workplace socializing seems likely to hurt, rather than help, the ability of women to achieve workplace equality.

418. See Strossen, *supra* note 385, at 726 (citing *Bailey v. State*, 219 S.W.2d 424 (Ark. 1949)).

419. *Bailey*, 219 S.W.2d at 428.

420. As part of a panel discussion on workplace harassment, Vicki Schultz noted that she had looked at employers' sexual harassment policies and discovered the following:

Almost all of them defined sex harassment primarily, if not exclusively, in terms of sexual misconduct. They had adopted isolated policies and procedures for dealing with sex harassment, rather than dealing with it as an aspect of a broader anti-discrimination program. Unfortunately, they did not see eradicating harassment as part of a larger, more affirmative project of creating a company culture that is gender-integrated and welcoming to both sexes.

Vicki Schultz, *Panel VI: Fighting Gender and Sexual Orientation Harassment*, 9 J.L. & POL'y 417, 424 (2001).

harassment is not just about sexual conduct. They have started recognizing that Title VII prohibits sex discrimination and that sexual conduct is neither necessary nor sufficient to satisfy the discrimination element of a sexual harassment claim.

Finding non-targeted workplace sexual conduct actionable, however, will reemphasize the "sexual" component of sexual harassment law, creating a risk that courts and employers will return to their earlier limited understanding of what conduct constitutes sexual harassment. Such regression would hurt many sexual harassment plaintiffs, even some whose complaints of harassment include allegations of non-targeted workplace sexual conduct. The female firefighter in *O'Rourke v. City of Providence*,⁴²¹ for example, complained about pornographic magazines and movies in her engine company's common living areas and about the male firefighters' frequent discussions of their sex lives. The plaintiff also alleged other, nonsexual conduct that was targeted at her because of her sex and was discriminatory under the disparate treatment theory.⁴²² She alleged that, following a major fire at which several firefighters had made mistakes, her supervisors yelled only at her and had only her involuntarily transferred to another engine company.⁴²³ She alleged that the male firefighters at her new engine company ostracized her; forced her to take details when it was not her turn to do so; refused to give her directions when she was driving, even though they commonly helped each other with directions; refused to provide her with feedback on her performance; and glued her locker shut.⁴²⁴

These instances of nonsexual conduct were arguably more severe than the non-targeted sexual conduct that the plaintiff experienced. It seems likely that, if given a choice between her employer putting a stop to the disparate treatment she received from her supervisors and coworkers and her employer putting a stop to the non-targeted sexual conduct in her workplace, the plaintiff would choose the former. One could argue, of course, that the plaintiff should not have to make such a choice: Title VII prohibits both disparate treatment and disparate impact, and the plaintiff has the right to a work environment free from harassment that is discriminatory under either theory. In light of courts' and employers' histories of understanding sexual harassment as involving only sexual conduct, however, it is possible that finding non-targeted sexual conduct actionable will renew the belief

421. 235 F.3d 713, 718-19, 722 (1st Cir. 2001).

422. In addition to the non-targeted sexual conduct and the targeted nonsexual conduct that the plaintiff experienced, she also alleged several instances of targeted sexual conduct. For example, male firefighters commented on her breasts and her scent, blew in her ear, snapped her bra, propositioned her for sex, and said that she had "nothing but big tits." *Id.* at 718, 723.

423. *Id.* at 720-21.

424. *Id.* at 722-23.

that the way to stop sexual harassment is simply to eliminate all sexual conduct from the workplace. Courts and employers will continue "to focus obsessively on sexual conduct," rather than attempting to eradicate the "arguably more common, non-sexual forms of gender-based hostility that women . . . endure every day in workplaces all over the country."⁴²⁵

D. A Practical Problem: No Jury Trials for Disparate Impact Claims

Along with the public policy issues raised by finding non-targeted workplace sexual conduct actionable, there is also a practical problem with allowing plaintiffs to allege that such conduct constituted discriminatory harassment under the disparate impact theory. The Civil Rights Act of 1991 authorized jury trials and compensatory and punitive damages for plaintiffs alleging intentional discrimination under Title VII.⁴²⁶ The statute provides, however, that plaintiffs alleging disparate impact discrimination cannot receive a jury trial and cannot recover compensatory or punitive damages.⁴²⁷

This distinction between the rights and remedies for disparate treatment and disparate impact discrimination presents no significant difficulty in sexual harassment claims the plaintiff concedes are based completely on non-targeted workplace sexual conduct. In such cases, the judge would simply determine whether the plaintiff has proven disparate impact discrimination along with the other requirements for a sexual harassment claim.⁴²⁸ If the judge finds that the plaintiff has proven her case, the judge could award prospective relief, requiring the employer to eliminate the disproportionately harmful non-targeted sexual conduct.⁴²⁹

In many cases, however, the plaintiff will not concede that all of the harassing conduct she experienced was non-targeted.⁴³⁰ Rather, the plaintiff will allege some conduct that might be discriminatory

425. Schultz, *supra* note 420, at 421.

426. 42 U.S.C. § 1981a(a)(1) and (c) (2000).

427. *Id.*

428. The other requirements of a sexual harassment claim include the severity or pervasiveness of the harassing conduct and a basis for employer liability. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

429. See LEWIS & NORMAN, *supra* note 215, § 4.26 (stating that "Title VII plaintiffs who prevail only by demonstrating the disproportionate adverse impact of neutral practices . . . are still limited to the traditional, equitable Title VII remedies of prospective relief and back pay").

430. Plaintiffs, of course, have an incentive to argue that they experienced harassing conduct that was targeted based on their sex, rather than non-targeted sexual conduct, because they can recover compensatory and punitive damages only for the former. See 42 U.S.C. § 1981a(a)(1) and (c).

under the disparate treatment theory and some non-targeted sexual conduct that could only be discriminatory under the disparate impact theory.⁴³¹ Under such circumstances, it appears that the appropriate procedure would be as follows. First, the jury would determine what conduct was targeted based on sex and could award compensatory and/or punitive damages based on that conduct. Second, the judge would determine what conduct was discriminatory under the disparate impact theory⁴³² and could award prospective relief based on that conduct.

The problem with separating the consideration of harassing conduct in this manner is that harassment must cross a threshold of severity or pervasiveness in order to be actionable under Title VII at all. All discriminatory conduct in the workplace does not violate Title VII. Rather, unless there is a tangible employment action, discriminatory conduct violates Title VII only if it is sufficiently severe or pervasive to alter the conditions of employment and to create an abusive work environment.⁴³³ Dividing harassing conduct into two groups—the conduct that is disparate treatment and the conduct that has a disparate impact—means that it is less likely that the conduct in either group will be sufficiently severe or pervasive to be actionable.⁴³⁴ Given that this problem is caused by the express language of the Civil Rights Act of 1991, no judicially-created solutions to it are apparent.

VI. CONCLUSION

Should non-targeted sexual conduct in the workplace be actionable under Title VII? Plaintiffs may be able to meet all the doctrinal requirements necessary to prove that such conduct has a disparate impact on women, thus satisfying the discrimination element of actionable sexual harassment. Finding such conduct actionable via the disparate impact theory, however, presents several public policy concerns: concerns about the First Amendment implications of the

431. This was the situation facing the female firefighter in *O'Rourke v. City of Providence*. See *supra* text accompanying notes 421-24.

432. This may include conduct that the plaintiff unsuccessfully argued to the jury was targeted based on her sex. For example, the plaintiff may have argued that certain pornography displayed in the workplace was intended to make her uncomfortable and thus was targeted based on her sex. If the jury rejects that argument, the judge could still find the pornography display discriminatory under the disparate impact theory.

433. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998); *Harris*, 510 U.S. at 21.

434. A similar problem existed prior to *Oncale*, when many courts considered only conduct that was sexual in nature in determining whether the plaintiff alleged actionable sexual harassment. By considering only some of the harassing conduct alleged by the plaintiff, courts were less likely to find that the harassment crossed the severity or pervasiveness threshold. See *supra* notes 61-64 and accompanying text.

government restricting speech based on its effect on listeners; concerns that emphasizing the differences between men and women will stigmatize women; and concerns that courts and employers will concentrate their anti-harassment efforts on eliminating sexual conduct from the workplace, ignoring non-sexual forms of gender-based abuse. What is the best way to balance these concerns against the value served by allowing such conduct to be actionable: eliminating a workplace condition that developed according to male norms and is disproportionately, and unnecessarily, harmful to women?

Perhaps the best method of striking a balance is for courts to find non-targeted workplace sexual conduct actionable via the disparate impact theory only if the conduct's disproportionate impact on women is great. Currently, because research has not been done specifically on the extent to which men and women perceive differently non-targeted sexual conduct in the workplace, the size of the disparity is unclear. Only if there is a great disparity between the effect of such conduct on women and on men is it worth running the risk to free speech, the risk of overprotecting and stigmatizing women, and the risk of reemphasizing the sexual aspect of sexual harassment law.