TITLE VII LIMITATIONS-KEEPING THE WORKPLACE HOSTILE

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"[R]eforms are limited by their premises, by the unexamined assumptions upon which they are based."[1]

I. INTRODUCTION

Every day women face a variety of subtle and not so subtle forms of harassment in the workplace. Harassment manifests itself on a continuum and can be as overt as blatant sexist remarks, being consigned to traditionally female lines of work, or being passed over for a deserved promotion. Although harassment can be communicated through sexual content, much harassment is motivated exclusively by gender animosity. Such forms of harassment 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 . . . denying . . . deserved promotions, [and] isolating women from the social networks that confer a sense of belonging"[2] Title VII of the 1964 Civil Rights Act has the potential to serve as a tool to legally remedy these inequities.[3] However, as currently interpreted and applied, the statute does little to change the workplace, and actually serves to perpetuate sexism.

II. Purpose

The purpose of this essay is to examine the relationship between the conceptual framework of patriarchy and the elements and application of

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[1] Frances E. Olsen, *The Family and the Market: A Study of Ideology And Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983).

[2] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686 (1998).

[3] 42 U.S.C. §§ 2000e-et seq. (2002). "It shall be unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." *Id.*

sexual harassment laws. The legal requirements of a *prima facie* case of sexual harassment reflect the narrowly prescribed roles that patriarchy affords women. Consequently, the male dominated work culture is fundamentally unaffected and effectively bolstered by the present state of the law.

III. METHOD

The underlying values and assumptions of patriarchy will be exposed by examining how the Supreme Court and federal courts have interpreted and applied the language of Title VII of the Civil Rights Act. The assumptions and agendas of patriarchy can be seen by analyzing various elements of a sexual harassment claim. The ability of patriarchy to adapt, reproduce and actually reinforce itself is revealed through the effect these laws have on the workplace.

IV. BACKGROUND

The reasons for initially including women as members of a protected class within employment discrimination law are unclear. One theory holds that the addition of "sex" was made one day prior to the passage of the Civil Rights Act, and that there were some congressmen opposed to the Act who hoped that this new category would doom the entire bill.[4] Although the statute does not specifically mention sexual harassment as a form of discrimination but judicial decisions have made this determination.[5]

In the 1986 case *Meritor Savings Bank v. Vinson*,[6] the United States Supreme Court addressed the issue of sexual harassment and held that a claim of "hostile environment" sexual discrimination is a form of sex discrimination that is actionable under Title VII. Although the terms "hostile work environment" and "*quid pro quo*" are not in the statute, they are now legally cognizable theories for pursuing a sexual harassment claim.[7] A *quid pro quo* claim is directly linked to economic grant or denial,[8] and a hostile workplace claim is premised on an environment with harassment sufficiently severe or pervasive to alter the conditions of the victim's employment.[9] *Meritor* further held that the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[10] Significantly, the Court noted that a complainant's sexually provocative

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[4] Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816 (1991).

[5] Sara L. Johnson, LL.B., Annotation, *When is Work Environment Intimidating, Hostile, or Offensive, So as to Constitute Sexual Harassment in Violation of Title VII of Civil Rights Act of 1964, as Amended (42 U.S.C.A. §§ 2000e et seq.)*, 78 A.L.R. FED. 252 (1986)

[6] 477 U.S. 57, 63-69 (1986).

[7] *Id.* at 64; *see also* Burlington Indus. v. Ellerth, 524 U.S. 742, 742-43 (1998).

[8] *Meritor Sav. Bank*, 477 U.S. at 64.

[9] *Id.* at 65, 67.

[10] *Id.* at 68.

speech or dress is relevant "as a matter of law in determining whether he or she found particular sexual advances unwelcome."[11]

In *Harris v. Forklift Systems*,[12] the Court held that the environment must be such that a reasonable person, as well as the victim, would find the environment hostile or abusive.[13] This determination requires looking at the totality of the circumstances.[14] Factors to consider include the frequency and severity of discriminatory conduct, whether it is physically threatening, humiliating, or merely offensive, and whether it unreasonably interferes with an employee's work performance.[15] Also relevant is the impact of the abuse on an employee's psychological well-being.[16]

The Court addressed same sexual harassment in *Oncale v. Sundowner Offshore Services, Inc.*[17] There, the Court reaffirmed that "conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment to a reasonable person" is beyond the purview of Title VII.[18] The Court wanted the standards for judging hostility to be sufficiently demanding so as to ensure that Title VII does not become a "general civility" code.[19] Courts and juries should not mistake ordinary socializing in the workplace, such as "male on male horseplay or inter-sexual flirtation for discriminatory conditions of employment."[20] The court reasoned that the inquiry "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target."[21]

The Court reconsidered the scope of employer liability in *Burlington Industries, Inc. v. Ellerth*[22] and *Faragher v. City of Boca Raton*.[23] Both cases held that an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee.[24] "When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages subject to proof by a preponderance of the evidence."[25] This defense is comprised of two necessary elements. First, the

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[11] *Id.* at 69.
[12] 510 U.S. 17 (1993).
[13] *Id.* at 21-22.
[14] *Id. at* 23.
[15] *Id.*
[16] *Id.*
[17] 523 U.S. 75 (1998).
[18] *Id. at* 81.
[19] *Id.*
[20] *Id.*.
[21] *Id.*.
[22] 524 U.S. 742 (1998).
[23] 524 U.S. 775 (1998).
[24] *See Burlington Indus.*, 524 U.S. at 773; *Faragher*, 524 U.S. at 777.
[25] *Burlington Indus.*, 524 U.S. at 765.

employer must have "exercised reasonable care to prevent and must correct promptly any sexually harassing behavior.[26] Second, the plaintiff employee must have "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm."[27] No affirmative defense is available when the harassment does result in tangible employment action.[28]

V. PATRIARCHAL ROOTS OF DISCRIMINATION

Patriarchy is a hierarchical social system that is male-centered, male-controlled, male-identified, and based on the fear of and the control of other men.[29] The perpetual competitiveness, pervasive aggression, and the requirement that there be a winner and loser, is a never ending game that "encourages men to seek security, status, and other rewards through control . . . [and] to fear other men's ability to control and harm them . . . ."[30] Patriarchy is a resilient institution that adapts itself to various forms of resistance. The tenets of patriarchy have existed through societal structures that have been "tribal, monarchical, totalitarian[,] . . . capitalist, socialist,: religious, or atheistic . . . ."[31] The present incarnation of patriarchy, which manifests itself in the workplace, can be traced to the nineteenth century. Patriarchy first appeared within the context of the industrial revolution, "while men's work was largely removed to the factory, and women's work remained primarily in the home, there came to be a sharp dichotomy between 'the home' and 'the [workday] world."[32] The home became a romanticized ideal, which served to "provide a haven from the anxieties of modern life- a shelter for those moral and spiritual values which the commercial spirit . . . were threatening to destroy."[33] Women were "protected" from a work world which men created and wanted exclusively. Such

> "chivalrous" protection itself may not only lead to . . . confinement or serve to justify it, but can help to keep women away from all contact with all aspects of the real world "for which they are not made" . . . because those things are not made for women.[34]

Thus, through patriarchy, a moral and social justification was created for

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[26] *Id.* at 745.

[27] *Burlington Indus.*, 524 U.S. at 765; *see also Faragher*, 524 U.S. at 807.

[28] *Burlington Indus.*, 524 U.S. at 765; *see also Faragher*, 524 U.S. at 808.

[29] Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 24 (1999).

[30] *Id.* at 24.

[31] *Id.* at 26.

[32] Olsen, *supra* note 1, at 1499.

[33] *Id.*

[34] PIERRE BOURDIEU, MASCULINE DOMINATION 62 (2001).

separating women from the workplace.

Nonetheless, "while the world of the marketplace was decried for being selfish, debasing, and exploitative, it was also admired and esteemed for its emphasis on self-reliance, progress, and modernization- each had positive connotations."[35] "The dichotomy protected women from exposure to the world's corruption while preventing the satisfaction of meeting its challenges, and disguised the inferior, degraded position of women . . . ."[36] Even today, the workplace is organized by gender expectations and imbued with gender assumptions. Gender considerations manifest themselves in the kinds of jobs that are seen as appropriate for men and for women. Relationships between different employment positions, especially within hierarchical constructs, are also defined by gender.[37]

In addition to demarcating gender roles in the social world, women enable men to psychologically define themselves. Men view themselves as what women are not. Men are strong, in control, and logical. Women are weak, passive, and emotional.[38] This theoretical difference serves a crucial purpose, i.e., to bond men. Whether men are telling a sexist joke, rating a woman's attractiveness, commiserating on the unfairness of marriage, or blaming a female employee for their own mistakes, men affirm their maleness at the expense of women. Even men who do not actively participate in such demeaning behaviors nonetheless tacitly reinforce this male-centered view through their silence.[39]

While the domination of women may not be the main purpose of patriarchy, the oppression of women does have a symbolic and a practical importance.[40] Though men ally themselves against women primarily to benefit themselves, the hierarchy they construct yields losers as well as winners.

> Most men are far from the top of the patriarchal hierarchy of control and power; women are important as consolation prizes, giving men who have little someone over whom they have rights of power and control . . . [W]omen are expected to "take care of men who have been damaged by other men." . . . When men fail . . . "women are there . . . to accept the blame and receive men's disappointment, pain, and rage."[41]

In addition to the emotional purposes that women serve for men,

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35 Olsen, *supra* note 1, at 1500.

36 *Id.*

37 Amy S. Wharton, *Feminism at Work*, 571 ANNALS 167, 175 (2000).

38 Becker, *supra* note 298, at 27.

39 *Id.* at 28.

40 *Id.* at 24.

41 *Id.* at 27.

patriarchy also has specific sexual role expectations for men and women. Men are the "sexual subjects and women [are the] objects: women's sexuality exists to please men."[42] Women "exist first through and for the gaze of others . . . as welcoming, attractive and available *objects.*"[43] Both entertainment and advertising media aggressively reinforce this sexualized view of women making women constantly aware that they are exposed "to the objectification performed by the gaze and the discourse of others."[44]

Patriarchy allows few roles for women and social institutions reflect and reinforce these biased expectations. Women are unwelcome within the male-dominated workplace. In addition, women are reduced to objects of sexual interest, and the ridiculing of their faults serves as an occasion for men to bond. These "gender based power differences (male domination over females) are assumed by our institutions to be natural and intrinsic, rather than coerced."[45]

VI. THE QUID PRO QUO CLAIM

A quid pro quo theory requires that submission to sexual demands be a condition of tangible employment benefits.[46] A tangible employment benefit may include continued employment, benefits, a salary increase or a promotion.[47] The proposal of sexual favors in exchange for such employment benefits must be made by an employee in a supervisory position to a subordinate employee.[48] In addition, a single incident is sufficient basis to bring a quid pro quo a claim.[49] To establish a prima facie claim for quid pro quo harassment, the plaintiff must establish membership in a protected class, unwelcome verbal or behavioral sexual requests for sex, and that the harassment be based on sex.[50] It is also necessary that the plaintiff show that her reaction to the harassment affected a tangible aspect of the compensation, terms, conditions, or privileges of their employment, and respondeat superior liability.[51]

While circuit courts have "found fairly consistently"[52] that employers are strictly liable for the actions of the supervisor they employ, the employer

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[42] *Id.* at 28.

[43] BOURDIEU, *supra* note 34, at 66.

[44] *Id.* at 63.

[45] Leslie Bender, *Sex Discrimination or Gender Inequality?* 57 FORDHAM L. REV. 941, 948 (1989).

[46] Christelle C. Beck, *Recent Developments in the Law of Sexual Harassment,* 28 MAY COLO. LAW 5, 5 (1999).

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Becker, *supra* note 46, at 5.

can nonetheless refute accusations by showing a valid reason for the supervisor's adverse action. Such reasons can include subordinate employee's unsatisfactory job performance, excessive time off, lack of credential or insubordination.[53] After the employer offers his reason for termination, the employee then has the burden to prove by a preponderance of evidence that the employer's justification for termination was a pretext for the harassment.[54]

Few cases meet the requirements for a prima facie case, including *Priest v. Rotary*.[55] In that case, the plaintiff was a waitress who was fired by her employer after she rejected his sexual overtures.[56] The employer frequently put his arms around her, placed his hands on her breasts, and tried to kiss her.[57] The plaintiff was able to establish the existence of harassment because many co-workers witnessed these incidents and testified to them in court.[58] In addition, a fellow waitress was fired because she responded negatively to the defendant grabbing and kissing her.[59] Because the plaintiff was aware of this incident with her co-worker, which resulted in termination of employment, it was reasonable for the plaintiff to premise a nexus between unwanted sexual attention and the tangible loss of a benefit.[60] It was also clear that employees who acceded to sexual demands were treated differently than those who rejected them.[61] Employees who did not protest to the defendant's demands were given preference in shift and station assignments, factors, which significantly impacted their tips.[62]

Unfortunately, many harassment situations do not meet the elements of a prima facie case this distinctly. The harassment claim is seriously undermined by the difficulty in proving a demonstrable connection between the harassment and resulting economic loss. Women plaintiffs must prove that sexist offers and remarks were made, which often becomes a "he-said/she said" dilemma. In addition, there is much room for varying interpretations and "explanations" of meanings and intent. Unless the crucial nexus is proven the harassing behavior is not actionable. Due to this difficulty, harassing behavior is essentially vindicated.

The proof of tangible loss requirement especially disadvantages women who work in unskilled labor or service positions. Many of these women do

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53 *Id.*
54 *Id.*
55 Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986).
56 *Id.* at 575.
57 *Id.*
58 *Id.* at 574.
59 *Id.* at 575.
60 *Id.* at 575-76.
61 *Priest*, at 581-82.
62 *Id.* at 576.

not have the educational background, or marketable skills requisite for employment in areas with advancement potential. Because there are usually not merit based raises or promotions, there may be little opportunity to show an employment loss. Thus, because the nexus between harassment and economic loss is especially difficult for women in unskilled labor positions to establish, may they have limited legal redress for the harassment they suffer.

VII. THE "UNWELCOME" REQUIREMENT

Whether pursuing a quid pro quo or hostile environment claim, a plaintiff must prove that the alleged sexual advances were unwelcome. Defendants have used the speech or dress of the plaintiff to demonstrate that the plaintiff welcomed the sexual advances.[63] This requirement reflects a narrow, patriarchal view of women.[64] Women thus "are invisible as anything other than potential sexual objects of men . . . ."[65] This superimposed role is what a harassment victim must defend herself against. A plaintiff is suspect regardless of the circumstances.[66] The victim must prove that her attire or demeanor did not instigate the advances.[67]

For instance, one defendant supervisor offered the plaintiff the opportunity of "entertaining 'Japanese mafia' for $500.00 a day."[68] After the defendant's offer, the plaintiff was subsequently threatened that she could be killed if she disclosed the information about the Japanese mafia and she was informed that another employee had been killed after revealing sensitive information.[69] As a result of this harassment, the plaintiff suffered seizures, resigned from her job, and moved back home with her family.[70] Nonetheless, when her employer investigated the hostile work environment claim, fellow employees were asked whether the plaintiff had ever been provocative or flirtatious with her harasser, or any other employees.[71] Despite the abuse and consequences the victim suffers, she must further endure "the indignity of the court's presumption that she is to blame."[72]

It appears that the courts assume that sexual advances are common in the workplace because the tests for harassment turn on whether the employee rejected or welcomed the advances. On a practical level, conduct that is unwelcome does not fit within the hierarchical employer-employee

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63 Estrich, *supra* note 4, at 826.

64 *Id.*

65 *Id.* at 829.

66 *See generally* id.

67 *See generally id.*

68 Colbert v. Georgia-Pacific, 995 F. Supp. 697, 699 (N.D. Tex. 1998).

69 *Id.*

70 *Id.*

71 *Id.* at 701.

72 Estrich, *supra* note 4, at ,829.

relationship. Employees strive to meet the expectations of and gain the approval of their superiors. A personal factor is introduced in the professional relationship when the employee is forced to confront sexual harassment. Every employment relationship is potentially affected, and as a result, the reputation of women in the workplace is compromised.

Often times when a woman is not assertive in rebuffing unwelcome behavior, her actions are misinterpreted. In *Dockter v. Rudolf Wolff Futures, Inc.*, the plaintiff rejected her boss's sexual suggestions, but the court found that the plaintiff did not find the behavior unwelcome because "her initial rejections were neither unpleasant nor unambiguous, and gave [her boss] no reason to believe that his moves were unwelcome."[73] Thus, the court found that the employer's conduct was unwelcome by evaluating her supervisor's perception of the events and not by considering the plaintiff's perspective.[74] This current method of interpretation of unwelcome behavior is similar to the method used to evaluate behavior of rape victims, who until the introduction of the rape shield laws had their behavior scrutinized and attacked.[75]

VIII. BASED ON SEX

Title VII of the 1964 Civil Rights Act mandates, "It shall be unlawful employment practice for an employer to . . . discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . race, color, religion, *sex*, or national origin.[76] The lack of legislative history behind the inclusion of "sex" to this statute prevents full knowledge of whether "sex" was to denote "gender" or "sexual." However, the interpretation of this term by the Supreme Court and federal courts have construed the term to be interchangeable with "sexual."[77] This interpretation is consistent with the sexual objectification of women through patriarchy. The effectiveness of sex harassment law is seriously undermined as a useful tool for eradicating either overt sexual harassment, or acts that express gender inequality that are usually not recognized as sex harassment.

Title VII proscribes discrimination "because of an individual's . . . sex" and, thus, theoretically applies to all gender motivated discrimination. Hostile work environment actions are "rarely successful if an employee does not allege sexually motivated behavior, typically propositions, advances, or

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[73] Docktor v. Rudolf Wolff Futures, Inc., 684 F. Supp. 532, 533 (N.D. Ill. 1988).

[74] Estrich, *supra* note 4, at 829.

[75] *Id.*

[76] § 2000e-2.

[77] Joshua F. Thorpe, *Gender-Based Harassment and the Hostile Work Environment,* DUKE L.J., 1361, 1362 (1990).

physical touchings . . . conduct of a sexual nature."[78] "Even those courts which recognize gender discrimination is actionable without regard to a sexual motive have indicated that employees possess a cause of action for sexual harassment."[79]

Such an example is illustrated in *King v. Board of Regents of the University of Wisconsin System.*[80] The plaintiff in *King* was a female assistant professor who experienced both overt sexual and non-sexual gender based hostility. Her supervisor made suggestive remarks, placed objects between her legs, and ultimately sexually assaulted her.[81] She was able to prevail on a sexual harassment claim for this conduct.[82] The plaintiff also alleged that she was subjected to "salary and workload disparities, unprecedented student evaluations mistreatment at faculty meetings, limited research time, and wrongful interference with her tenure process."[83] However, "because the court envisioned conduct driven by sexual desire to be the quintessential harassment, it refused to consider the nonsexual actions under a hostile work environment framework . . . [and] relegated such actions to a disparate treatment framework."[84] This legal theory required proof that tangible job benefits had been affected, and the plaintiff could not meet that standard.[85] Despite the standard, however, the plaintiff testified that the "combination of sexual and nonsexual behavior caused her to be psychologically disabled, thereby preventing her from fulfilling the tenure requirements."[86] Thus, although the plaintiff was effectively a victim of professional sabotage, the actions were not viewed as harassment because they were not sexual.[87]

The interpretation of "sex equals sexual" reinforces the maleness of the work culture by prejudicing perceptions of women by men and even prejudicing women's perceptions of women. *DeAngelis v. El Paso Mun. Police Officers Ass'n* illustrates such perceptions.[88] Shortly after being the first female promoted to sergeant in the El Paso police force, plaintiff was repeatedly ridiculed in a police newsletter, which reached about 700 officers.[89] Most of the comments criticized women in general as incompetent, unfit for police work, and specifically referred to the plaintiff

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78 *Id.* at 1365.
79 *Id* at 1365-66.
80 898 F. 2d 533 (7th Cir. 1990).
81 *See id.* at 535.
82 *See id.* at 540.
83 *Id.* at 535.
84 Schultz, *supra* note 2, at 1709.
85 *See id.*
86 *King*, 898 F. 2d at 540.
87 *See id.*
88 DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F. 3d 591 (5th Cir. 1995).
89 *See id.*

as "sergeant dingy woman."[90] The plaintiff testified that following the publication of the first article, two officers behaved insubordinately towards her.[91] She cited a correlation between other "incidents of disrespect for her authority" and the publication of these comments.[92]

Although the conduct was disparaging and sexist, the court did not find that the comments were overtly sexual.[93] The court determined that "apart from the claimed impact of the articles, there is no evidence of an atmosphere of sexual inequality or sexually demeaning treatment within the . . . Police Department."[94] The court stated further that an environment hostile to women must exhibit "conduct so egregious as to alter the conditions of employment and destroy (women's) equal opportunity in the workplace."[95] However, because the comments were not overtly sexual, the court was able to ignore the fact that the gender-based hostility had in fact changed the conditions of employment.[96] The effect of the newspaper articles exacerbated sexism within the department.[97] The increased sexism allowed the insubordination to flourish, depriving the plaintiff of an equal opportunity to be effective within the department.[98] Further, the disrespect of lower ranking officers and the "repeated comments about her incompetence challenged her self-confidence to the point where she was reluctant to apply for a promotion."[99] In the court's eyes, however, gender hostility, manifesting itself in derision and insubordination, was not considered harmful to the employee or her workplace.

IX. THE HOSTILE WORK ENVIRONMENT

The elements required to create an actionable hostile work environment ensure that the work culture remains male-dominated and alien to women. A claimant must establish that she is a member of a protected class, that she was subjected to unwelcome harassment, that the harassment was based on sex, and that her employer is liable.[100] Additionally, it is necessary to show that the harassment was sufficiently

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90 *Id.* at 594.

75 *See id.*

92 *See id.*

93 *See* Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: the Sexual and Racial Morality Underlying Anti-Discrimination Doctrine,* YALE J.L. & FEMINISM, 195, 209 (1995).

94 *DeAngelis,* 51 F.3d at 596.

95 *See id.* at 593.

96 *Id.*

97 *Id.*

98 *Id.*

99 *See id.*

100 *See* Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America,* 54 ALA. L. REV. 483, 516 (2003).

severe or pervasive to affect a term, condition, or privilege of employment. [101]

The existence of sexism in the workplace is assumed by this requirement. Therefore, only after the harassment reaches a legally intolerable level can it be addressed.[102] The rest of the harassment remains unaffected and allowable.[103] Sexism can manifest itself in variety of ways ranging from mildly offensive "blonde" jokes to actual physical assaults. A single remark or intermittent offensive behavior may not be legally actionable, but is nonetheless effective in reminding women of their role. Sexism can also be used as a weapon to eject women who will not play by the rules, or whose competence threatens other men.

In this vein, courts may view sexist behavior on a continuum to determine whether the behavior is actionable. A look at two Circuit Court cases illustrates such a continuum: *Breda v. Wolf Camera*[104] and *Coley v. Consolidated Rail Corp.*[105] In *Coley v. Consolidated Rail Corp.*, the plaintiff endured consistent sexually explicit and demeaning remarks from her supervisor, which included references to her "boobs," keeping track of her menstrual periods on his calendar and gauging her moods in relation thereto.[106] He made repeated inquiries as to when she was going to "do something nice for him," and counted the days she had left to do something nice.[107] After such a period, he would start to get mean.[108] The court found this behavior created a "hostile and offensive working environment that was sufficiently severe and persistent" to be actionable.[109]

However, the Eleventh Circuit did not find intermittent abuse actionable in *Breda v. Wolf Camera*.[110] The plaintiff in *Breda* was asked if she was going to be an "Italian feminist bitch" and was repeatedly told that she

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[101] *See* Lori A. Tetreault, J.D., Annotation, *Liability of Employer, Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A §§ 2000E Et Seq.) For Sexual Harassment of Employee By Customer Client, or Patron* 163, A.L.R. Fed. 445 (2000).

[102] *See generally* DUNCAN KENNEDY, SEXY DRESSING (1993). The author theorized that there is a "tolerated residuum" of sexual abuse within society. *See generally id.* The law determines what is, and is not legally actionable. *See generally id.* While the law may condemn certain activities in the abstract, it may nevertheless operate in such a way that many instances of clearly wrongful abuse are tolerated. *See generally id.* An egregious example of abuse such as rape may be a social aberration and legally actionable, but the limited attention which police and government give to the persecution of this crime conveys at least two different messages. *See generally id.* First, even egregious sexual abuse is not taken seriously by society. *See generally id.* Secondly, the very presence of sexual abuse acts as a warning and reminder to women about their societal role and vulnerability. *See generally id.*

[103] *See generally id.*

[104] Breda v. Wolf Camera, Inc., 148 F. Supp. 2d 1371, 1379 (S.D. Ga. 2001).

[105] Coley v. Consolidated Rail Corp., 561 F. Supp. 645, 647 (E.D. Mich. 1982).

[106] *Id.* at 647.

[107] *See id.*

[108] *See id.* at 647.

[109] *See id.* at 649.

[110] *Breda*, 148 F. Supp. 2d 1371, 1379.

only made sales because the male customers wanted to have sex with her.[111] Additionally, her co-worker said that he wanted to "shoot a room full of bitches dead," and that women and men should not work together.[112] The court held that although the conduct was "juvenile, offensive, and at times even mean spirited[,] . . . merely inserting every . . . rude or sexualized comment/gesture/joke into a lengthy list accumulated over years of employment does not . . . a Title VII claim make."[113] As can be seen by comparing these two cases, the severe and pervasive element leaves sexism intact in the workplace until a judicially discretionary threshold is crossed.[114]

X. EMPLOYER LIABILITY

The requirement of employer liability serves to maintain sexism in the workplace in a variety of ways. Sometimes, the laws that ostensibly protect women from harassment actually protect the employer to the detriment of women. Sexism is effectively allowed to remain intact, while depriving women of legal redress.

For example, in *Redman v. Lima City School District Board of Education*,[115] the court acknowledged that the plaintiff had been a victim of conduct severe and pervasive enough to satisfy a hostile environment claim.[116] The plaintiff was physically led to a room, forced against a wall, and assaulted in a "sexual" manner by her superior.[117] However, summary judgment was granted to the employer because the complaint was investigated and the harasser terminated.[118] This practice is analogous to jailing one criminal from a crime-ridden neighborhood. One perpetrator is removed, but the environment has not changed. Addressing sexism on an ad hoc basis, treating only the symptoms and not addressing the cause allows sexism to be unaffected and reinforced.

A related problem is that an employer can make an affirmative defense to a hostile workplace claim if they can show they had an anti-harassment policy in place. However, the very requirement of "special rules" serves to highlight women's "intrusive" presence in the workplace. These special accommodations, requiring adherence to and implementation of governmental regulations may cause resentment and be perceived as detracting from the "real work" of creating revenue and reputations.

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111 *See id.*

112 *See id.* at 1379-80.

113 *Id.* at 1381.

114 *See Coley*, 561 F. Supp. 645; *Breda* 148 F. Supp. 2d 1371.

115 889 F. Supp. 288 (N.D. Ohio 1995).

116 *Id.* at 293.

117 *See id.* at 291.

118 *See id.* at 294.

The remedies provided by employers to redress harassment further promotes sexism because they do not really change the male dominated work culture. Employees who are harassed are "protected" by their employer, while the offending party may be re-routed, and the behavior temporarily pre-empted. For example, one plaintiff who brought sexually harassing behavior to the attention of her employer was told that she did not have to return to work the next day, and was offered a transfer to another department.[119] Another plaintiff who was subjected to sexual comments and gestures told her harasser she found his behavior objectionable and was admonished.[120] She was scolded not to threaten a vice president, and told in profane terms that she was a poor employee.[121] The company investigated the complaint and remedied the harassment by promising the plaintiff she would never have to work with him again.[122] Separating women from individual harassers without addressing the pervasiveness of sexist conduct does nothing to effectively end sexism. Instead, it reinforces the perception that women do not belong in the workplace.

The meager punishments employers mete out to harassers illustrate the lack of concern for, and tolerance of, sexism in the workplace. An example of this can be seen in *Faragher v. City of Boca Raton.*[123] The behavior the plaintiff in *Faragher* complained that her employer inappropriately touched her, tackled her, solicited sex from her , and simulated sex in front of employees.[124] However, after investigation, the harassers in *Faragher* had only been given a choice between suspension without pay or forfeiture of annual leave.[125] With such lenient punishment, potential or practicing harassers learn that the risks for their inappropriate conduct are minimal and women employees realize that sexist behavior is a mainstay of employment.

The requirement that a victim make use of company procedures also reinforces sexism, as women are required to work against deeply ingrained patterns in the work culture. The workplace is a culture that encourages teamwork. The act of complaining about a supervisor or co-worker distances women from other employees, setting up retaliatory possibilities. It creates a quasi-adversarial relationship with the employers. Even when women follow procedure, the employer response is negative because the complaint just highlights that the company is not following its own policy. Also, each complaint of harassment implies the possibility of a lawsuit, further

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119 *See* Yancey v. National Center on Institutions and Alternatives, 986 F. Supp. 945, 950 (D. Md. 1997).

120 *See* Indest v. Freeman Decorating, Inc., 164 F.3d 258, 260 (5th Cir. 1999).

121 *See id.*

122 *See id.* at 261.

123 *See Faragher*, 524 U.S. at 782.

124 *See id.*

125 *Id.* at 783.

alienating women from their employers.

In addition to breaching the workplace code, some victims may fear other kinds of consequences from complaining. In *Jones v. USA Petroleum Corp.*, each plaintiff worked at night, in a small cashier's booth at a gas station.[126] For an hour each night, the plaintiffs were required to be alone with the defendant in this enclosed space.[127] Each plaintiff claimed "a fear of repercussion from [the defendant] if they reported his behavior."[128] Rather than recognizing the potential awkwardness or the plaintiff's safety concerns, the court granted summary judgment, holding that "generalized fear of repercussions can never constitute reasonable grounds for [an] employee's failure to complain to his or her employer."[129]

XI. CONCLUSION

The present interpretation and application of Title VII reinforces sexism in the workplace. In order to make the statute an effective tool against sexism the court must remove those elements most influenced by patriarchal assumptions and agendas. However some changes might be done through the interpretation of the law, other changes must overcome prejudices that are deeply embedded. A major change in consciousness would be required to recognize some forms of oppression.

The element most amenable to practical change is the requirement that there be proof that the sexist behavior is unwelcome. This element is perhaps the most reflective of the patriarchal view of women as exclusively sexual beings who invite erotic interest. Women are portrayed as inviting the behavior that menaces their working lives. If society were truly serious about using the agency of the law to abolish sexism, there would be more specificity as to what constitutes harassment. The emphasis would be on the behavior of the harasser, and not the potential culpability of the victim.

The requirement of pervasive or severe conduct should be exchanged for a zero tolerance policy on sexist remarks and behaviors. Workplaces should set parameters about what constitutes sexist behavior, and should react swiftly and appropriately. If such procedures were set (similar to safety or accounting procedures) individual and intermittent displays of sexism would be sanctioned, and a workplace rife with sexism would not have an opportunity to develop.

The most obvious remedy, however, results in the most ambiguity. If courts were to interpret "based on sex" as based on "gender," most conduct

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[126] Jones v. USA Petroleum Corp., 20 F. Supp. 2d 1379, 1381 (S.D. Ga. 1998).

[127] *Id.* at 1381.

[128] *Id.* at 1386.

[129] *Jones*, 20 F. Supp. 2d at 1386.

would fall within Title VII protection. However, social and cultural norms underlie the dynamics between the sexes. Men may be unaware that their behavior is sexist. The female subordinate and sexualized role is so deeply ingrained and socially reinforced that even women may not be aware that there may be alternative roles.

Sexism in the workplace expresses itself through a variety of actions or comments, from strategically exclusionary practices to physically threatening manifestations. The effects of sexism include making a woman's working life harder, preventing women from realizing their goals, and fragmenting the perception of women within the workplace and society. Sexism therefore deprives both the workplace and society of the opportunity of utilizing the optimum efforts, energy, and intelligence of half of its members.