

AMBIENT HARASSMENT UNDER TITLE VII: RECONSIDERING THE WORKPLACE ENVIRONMENT

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Marcia Hocevar's manager, Timothy Amundsen, brought pornographic material to work and shared it with others at meetings.¹ He threatened fe-

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male employees with violence and constantly called them “bitches,” “fuck-ing bitches,” and “fat fucking bitches.”² He told dirty jokes, including jokes that were demeaning to women.³

Amundsen also used profanity in the presence of male employees. For instance, he called a new male employee the “fucking new guy.”⁴ He played a sexually inappropriate tape at a meeting where both male and female employees were present.⁵ The court reasoned that since Amundsen was “boorish and unprofessional” to both male and female employees, his harassment of Ms. Hocevar was not “because of sex.”⁶

INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) states that sexual harassment is any “verbal or physical conduct of a sexual nature . . . [that] explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive work environment.”⁷ Marcia Hocevar said that, as a result of the harassment she faced at work, she suffered “fear, depression, anxiety and self-doubt,” and had to be treated with Prozac.⁸ Yet under the current legal framework, the court found that these conditions did not violate Title VII’s prohibition on harassment⁹ because she was not targeted as an individual “because of sex.”¹⁰

This Comment examines whether a legally cognizable claim of hostile environment sexual harassment under Title VII can stem solely from indirect environmental conditions, which I call “ambient harassment,”¹¹ and

¹ Hocevar v. Purdue Frederick Co., 223 F.3d 721, 724 (8th Cir. 2000).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 737–38 (affirming grant of summary judgment, in part because harassment was not “because of sex”).

⁷ The U.S. Equal Employment Opportunity Commission, Sexual Harassment, http://www.eeoc.gov/types/sexual_harassment.html (last visited Mar. 11, 2008). The EEOC was created by the 1964 Civil Rights Act and is empowered, inter alia, to enforce the law. 42 U.S.C. §§ 2000e-4 to -5 (2000).

⁸ Hocevar, 223 F.3d at 730.

⁹ Title VII makes it unlawful 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.” 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added). The italicized text is the part of the statute that has been construed to prohibit harassment.

¹⁰ Hocevar, 223 F.3d at 737 (holding that Amundsen’s behavior targeted everyone in the workplace and, therefore, was not “because of sex”).

¹¹ Ambient harassment is not a term of art. The types of harassment encompassed by its definition are referred to as disparate-impact harassment, indirect harassment, nondirected harassment, and nontargeted harassment. For consistency, I use the term “ambient harassment” as much as possible without changing the language of quoted sources.

concludes that under the proper analysis, it can. The defining feature of ambient harassment is that it is not clearly targeted at any individual or group of individuals in the workplace. In some instances there is no visible target (for example, pornography displayed in a common area), while in other instances everyone in the workplace is targeted but no one is singled out (for example, by sexually abusive language), which is sometimes referred to as “equal opportunity harassment.”

Ambient harassment includes pornographic images in the office (for example, on coworkers’ computers, printouts posted in common areas, or printouts in the offices of superiors), abstract discussions of “proper” gender roles, derogatory statements made about one gender, and sexually charged language used with reference to nonemployees.¹² These sorts of behaviors and conditions were once frequently cited by judges as evidence of a hostile environment.¹³ However, in *Oncale v. Sundowner Offshore Services, Inc.*,¹⁴ the Supreme Court articulated a test for harassment that focused on the “because of sex” requirement in Title VII, which, if followed, would make ambient harassment legally irrelevant.¹⁵

This Comment attempts to reconcile the expectation created by Title VII that a workplace should be welcoming to both genders with the reality of the legal doctrine by proposing a workable model for evaluating actionable sexual harassment claims based on ambient harassment. This model focuses the “because of sex” question on the messages sent by ambient harassment. Specifically, if the ambient harassment carries invidious sexual stereotyping, gender-based animus, or messages of gender subordination, a court should find it to be harassment “because of sex.” Under this proposal, a successful claim of hostile environment sexual harassment may be premised entirely or in part on ambient harassment, so long as that harassment is sufficiently pervasive to meet Title VII’s requirement.¹⁶

Part I of this Comment explains the damaging impact that ambient harassment has on women in the workplace.¹⁷ Part II outlines the statutory basis for a hostile environment sexual harassment claim. It focuses

¹² This Comment intends to show that a successful harassment claim could be based on ambient harassment alone, but in reality this type of harassment is almost always accompanied by some targeted conduct. In cases that include some directed harassment, this theory is helpful to demonstrate that all of the nontargeted behavior in the workplace contributes to the pervasiveness of harassment.

¹³ See *infra* notes 136–42 and accompanying text.

¹⁴ 523 U.S. 75 (1998).

¹⁵ *Id.* at 80–81 (outlining three approaches for proving harassment “because of sex”).

¹⁶ See *infra* notes 63–64 and accompanying text for the elements of a successful hostile environment sexual harassment claim.

¹⁷ This Comment focuses on women’s experiences of harassment because the vast majority of sexual harassment cases are brought by women and most of the literature on the impact of sexual harassment focuses on women. Further, I believe that women are more likely to be subjected to sexual harassment than are their male counterparts, especially when the focus is on subordination. However, there is no reason that this Comment’s analysis cannot be applied to sexual harassment of men in the rare case that a male plaintiff can prove the same elements.

specifically on Title VII of the 1964 Civil Rights Act, which forms the statutory basis for the claim, and the 1991 amendments to the Act, which form the basis for monetary remedies for harassment.

Part III traces the evolution of the statutory “because of sex” requirement for hostile environment sexual harassment. The case law has moved from a presumption that harassment with sexual content was “because of sex,” and judicial recognition of the gender subordination demands made by harassing behavior, to a formal equality approach to the question. Part III then examines the Supreme Court’s decision in *Oncale v. Sundowner Off-shore Services, Inc.*¹⁸ It focuses on the Court’s treatment of the “because of sex” requirement in that case and goes on to review the impact that the Court’s analysis has had on other cases alleging ambient harassment. Since *Oncale*, plaintiffs are significantly less likely to win hostile environment sexual harassment cases when much of the harassment experienced is ambient, rather than direct, harassment.

Part IV proposes a new model for the “because of sex” question in the context of ambient harassment. It centers on a case study of *Petrosino v. Bell Atlantic (Petrosino I*¹⁹ and *Petrosino II*²⁰). In *Petrosino I*, the district court, following the prevalent post-*Oncale* model, found that the harassment was not based on sex and rejected the plaintiff’s claim.²¹ The appellate court reversed, focusing on the derogatory stereotypes inherent in the harassment and contrasting the lower court’s treatment of ambient sexual harassment with its treatment of similar race-based harassment.²² Part IV concludes by recommending *Petrosino II*’s reorientation of the “because of sex” framework as a practical model for sexual harassment cases.²³

Part V summarizes previous scholarly attempts to deal with the problem of ambient harassment. These approaches put forward a disparate treatment-disparate impact distinction in hostile environment sexual harassment law. Part V looks at the theoretical model of disparate impact sexual harassment, as well as the practical impact of pursuing such a strategy. It ultimately rejects this approach in favor of looking at sexual harassment as a distinct, undivided form of intentional discrimination based on sex.

Finally, Part VI confronts several commonly expressed barriers to the application of Title VII to ambient hostile environment sexual harassment. This Comment argues that a workable model of hostile environment sexual

¹⁸ 523 U.S. 75.

¹⁹ *Petrosino v. Bell Atl. (Petrosino I)*, No. 99 CV 4072, 2003 WL 1622885 (E.D.N.Y. Mar. 20, 2003), *rev’d*, 385 F.3d 210 (2d Cir. 2004).

²⁰ *Petrosino v. Bell Atl. (Petrosino II)*, 385 F.3d 210 (2d Cir. 2004).

²¹ *Petrosino I*, 2003 WL 1622885, at *7.

²² *Petrosino II*, 385 F.3d at 222–23.

²³ *Id.* at 221–22 (holding that nondirected harassment may be “because of sex” when messages are “uniformly sexually demeaning” toward women and “communicate[] the message that women . . . [are] available for sexual exploitation”).

harassment can be based on ambient harassment. In order to be actionable, this harassment must be shown to be “because of sex,” but this showing can be made through an analysis of the harassing behavior. If the ambient harassment is sexual stereotyping or makes gender subordination demands, that behavior is harassment “because of sex.” Additionally, in order to be actionable, ambient harassment must meet all of the other requirements for actionable harassment under Title VII: it must be unwelcome, it must be pervasive, and the employer must have notice in order to be liable for the harassment.²⁴

I. DOES AMBIENT HARASSMENT REALLY AFFECT WOMEN?

The harms of directed harassment are easy to understand. When women are directly threatened or insulted, they become significantly less comfortable in their workplaces.²⁵ Courts have questioned whether ambient harassment has the same effect, and many have concluded that it does not.²⁶ Despite a general presumption that ambient harassment has a less significant effect on women than does direct harassment,²⁷ a study of two workplaces demonstrated that ambient harassment “caused negative job, health, and psychological outcomes similar to those suffered by direct targets of abuse.”²⁸

The display of pornography by coworkers or superiors is one form of ambient harassment. Many scholars have studied how exposure to pornography affects women.²⁹ At the moment of viewing pornography, many

²⁴ See *infra* text accompanying notes 63–64; see also *infra* Parts VI.A–B.

²⁵ See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (“A discriminatorily abusive work environment . . . can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”).

²⁶ See *infra* Part III.C.

²⁷ See, e.g., *Patt v. Family Health Sys., Inc.*, 280 F.3d 749, 754 (7th Cir. 2002) (denying a sexual harassment claim where the harasser “only made two of the comments directly to Patt” and finding that “the impact of such ‘second-hand’ harassment is obviously not as great as that of harassment directed toward Patt herself”).

²⁸ Dorothy Roberts, *The Collective Injury of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 365, 367 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (citing Theresa M. Glomb et al., *Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences*, 71 *ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESSES* 309 (1997)). While the study used the same term, “ambient harassment,” that is used in this Comment, there are some distinctions between what is meant by the term in the study and in this Comment. The study focused more specifically on the reactions of second-hand witnesses to directed harassment. However, there is no reason to believe that the outcome of the study would have been significantly different if the study had looked at general, non-directed behavior.

²⁹ Pornography has been defined as “the graphic sexually explicit subordination of women through pictures or words.” See Note, *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 *HARV. L. REV.* 1075, 1076 (1993) (internal quotation marks omitted). Based on this definition, much of what this Comment terms “sexual banter” is actually pornography. However, because common usage in case law distinguishes between pornographic pictures (which may be photo-

women feel embarrassed or threatened.³⁰ Other effects are cumulative and affect both genders: Since pornography often carries images of men dominating women and of women being subservient, it reinforces a “social structure of gender inequality.”³¹ Thus, pornography shapes how men and women relate to each other on a group level in a variety of settings, including the workplace.³² Scholars argue that this gender inequality contributes, among other things, to sex-based discrimination in employment, including harassment and discrimination in pay.³³

Whether “nonviolent” pornography, which depicts consensual sex, has a harmful effect on women is disputed.³⁴ However, nearly all social scientists agree that violent pornography is harmful: It encourages the viewer to “associate sexual stimulation . . . with violence directed against women.”³⁵ At a minimum, exposure to violent pornography reinforces the idea that women are subordinate to men.³⁶

Courts that have found a hostile environment as a result of pornography and sexual banter have often cited negative psychological effects of pornography similar to those described in the social science literature. The opinions point to emotional distress, such as fear,³⁷ humiliation,³⁸ and low self-esteem.³⁹ They also indicate that ambient harassment of this type makes it hard for the subjected women to focus on work.⁴⁰ The court in

graphs or drawings) and sexualized language, this Comment does the same. Scholarly analyses of pornography may be applied to both words and images.

³⁰ See *id.* at 1077–78.

³¹ See *id.* at 1078.

³² See *id.* at 1085–90; see also *infra* notes 47–51 and accompanying text.

³³ See Pete Marksteiner, *The Ongoing Pornography Debate*, 34 WASHBURN L.J. 49, 56 (1994); see also *infra* notes 47–51 and accompanying text.

³⁴ Compare Marksteiner, *supra* note 33, at 64–69 (“[T]he general consensus about non-violent erotica is that . . . it has not been demonstrably shown to be harmful.”), with Note, *supra* note 29, at 1077–79 (arguing that pornography “may harm women by thrusting upon them insulting and degrading views of their societal roles,” and noting that “some reports suggest that women find nonviolent degrading pornography *more upsetting* than the violent kind” (emphasis added)). Note that most of the proponents of the view that nonviolent pornography is not harmful are employing studies that focus on the subjects’ attitudes regarding violence toward women and rape. See Marksteiner, *supra* note 33, at 64–66. This research does not discredit the evidence that pornographic images of women—whether violent or not—make women uncomfortable in the workplace and prime men to treat women less professionally. See *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 882 (D. Minn. 1993); see also *infra* notes 45–51 and accompanying text (discussing *Jenson* in more detail).

³⁵ See Marksteiner, *supra* note 33, at 62.

³⁶ See *id.*

³⁷ See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1507 (M.D. Fla. 1991).

³⁸ See *Ocheltree v. Scollon Prods., Inc. (Ocheltree II)*, 335 F.3d 325, 333 (4th Cir. 2003); *Stair v. LeHigh Valley Carpenters Local Union No. 600*, No. CIV. A. 91-1507, 1993 WL 235491, at *20 (E.D. Pa. July 24, 1993).

³⁹ See *Jenson v. Eveleth Taconite Co. (Jenson II)*, 130 F.3d 1287, 1304 (8th Cir. 1997).

⁴⁰ See *Ocheltree II*, 335 F.3d at 333.

*Robinson v. Jacksonville Shipyards, Inc.*⁴¹ found that the emotional upset created by this type of harassing behavior, combined with its negative impact on job performance, was sufficient to “alter the conditions of [the victim’s] employment.”⁴²

Further, courts have recognized that the prevalence of pornography and sexualized language in the workplace makes it more difficult for women to be viewed professionally by their male coworkers.⁴³ In such environments, men are more likely to disrespect and to sexually demean women.⁴⁴ In *Jenson v. Eveleth Taconite Co.*,⁴⁵ the court found that in “an environment where women were viewed primarily in terms of women qua women: sexual objects and inferior to men,” a “reasonable woman would find the terms, conditions, and privileges of her employment affected by that harassment.”⁴⁶

The expert in *Jenson* cited the results of a study that he had conducted,⁴⁷ which demonstrated that mere exposure to sexist advertisements made men more likely to view women in the workplace in a sexualized manner and less likely to view them as professionally competent.⁴⁸ The court found that this study was probative of the question whether a female employee’s terms and conditions of employment were impacted,⁴⁹ and it summarized the study’s findings as follows:

The results showed that [male] subjects who had been sexually primed selected almost twice as many sexist questions [to ask a female interview candidate] as subjects who had not been primed. The results further showed that men who had been primed *moved physically closer* to the woman than non-

⁴¹ 760 F. Supp. 1486.

⁴² See *id.* at 1523–24 (alteration in original) (citation omitted).

⁴³ See *Petrosino v. Bell Atl. (Petrosino II)*, 385 F.3d 210, 222 (2d Cir. 2004) (finding that this behavior “stands as a serious impediment to any woman’s efforts to deal professionally with her male colleagues”); *accord Stair*, 1993 WL 235491, at *21.

⁴⁴ See *Carlson v. C.H. Robinson Worldwide, Inc.*, No. Civ. 02-3780, 2005 WL 758602, at *12 (D. Minn. Mar. 31, 2005).

⁴⁵ 824 F. Supp. 847 (D. Minn. 1993).

⁴⁶ *Id.* at 886.

⁴⁷ *Id.* at 882 (relating the results of a study conducted by Dr. Eugene Borgida in 1991). The results of this study were later published in a peer-reviewed scientific journal. L.A. Rudman & E. Borgida, *The Afterglow of Construct Accessibility: The Behavioral Consequences of Priming Men to View Women as Sexual Objects*, 31 J. EXPERIMENTAL SOC. PSYCHOL. 493 (1995).

⁴⁸ See Rudman & Borgida, *supra* note 47, at 498, 512–13. A similar effect was described by Dr. Susan Fiske as an expert witness in *Robinson v. Jacksonville Shipyards, Inc.* 760 F. Supp. 1486, 1503 (M.D. Fla. 1991). She testified that “the availability of photographs of nude and partially nude women, sexual joking, and sexual slurs . . . may encourage a significant proportion of the male population in the workforce to view and interact with women coworkers as if those women are sex objects.” *Id.*

⁴⁹ *Jenson*, 824 F. Supp. at 884. The court did not rely solely on Dr. Borgida’s study, however, finding the study to be “confirmatory. That is, the [c]ourt’s finding and conclusions regarding the presence of acts of sexual harassment and the effect of said acts . . . are aligned with, but are not dependent upon” the study’s conclusions. *Id.* at 886 n.91.

primed males and evaluated the female interviewee in a sexist manner—*rating her as “more friendly and less competent.”*⁵⁰

This research lends empirical weight to the idea that a sexualized workplace places a discriminatory burden on female employees.⁵¹ Since ambient sexual harassment poisons the workplace for women in the same way that direct harassment does, Title VII must prohibit ambient harassment in order to rid the workplace environment of discrimination.

II. STATUTORY ELEMENTS OF HOSTILE ENVIRONMENT SEXUAL HARASSMENT

As originally interpreted, Title VII of the Civil Rights Act of 1964 did not outlaw harassment. Title VII makes it unlawful 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.”⁵² Initially, courts and plaintiffs focused on the most obvious forms of discrimination, including lower pay for women who performed the same jobs as men and employers who refused to hire blacks. However, as the new legal regime required men to work next to women and whites to work next to blacks, employees also began to challenge the harassment they received from superiors and coworkers.

A. *Harassment as a Cognizable Claim Under Title VII*

Slowly, courts began to understand that cognizable discrimination was not limited to differences in pay or position and began to find that complaints of workplace harassment were actionable. One of the earliest cases finding harassment unlawful under Title VII is *Rogers v. EEOC*,⁵³ in which the plaintiff alleged harassment on the basis of race. The *Rogers* court found that harassment was discrimination in the “terms, conditions, or privileges of employment”⁵⁴ due to its impact on “the emotional and psychological stability of minority group workers.”⁵⁵ In so finding, the *Rogers* court held that harassment could be legally actionable, even in the absence

⁵⁰ *Id.* at 882 n.87 (emphasis added).

⁵¹ And a female employee’s psychological well-being, as well as the treatment she may be subjected to by male coworkers, is relevant to the terms and conditions of her employment. This is reflected by the *Jenson* court’s analysis of female perceptions of, and male reactions to, a sexualized work environment. *Id.* at 884–86.

⁵² 42 U.S.C. § 2000e-2(a)(1) (2000).

⁵³ 454 F.2d 234 (5th Cir. 1971).

⁵⁴ *Id.* at 238.

⁵⁵ *Id.* This language was later quoted with approval by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

of other discriminatory behavior that caused the plaintiff to suffer actual economic loss.⁵⁶

This doctrine was slowly extended to include sexual harassment.⁵⁷ In 1980, the EEOC promulgated guidelines that included two kinds of sexual harassment: (1) harassment that conditions the terms of employment on the performance of sexual favors and (2) harassment that creates a hostile work environment.⁵⁸ In 1986, in *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court held that sexual harassment need not be economically tangible in order to be discrimination “on the basis of sex.”⁵⁹ Between 1980, when the EEOC guidelines first included sexual harassment as a Title VII violation, and the end of 1985, only sixteen charges of discrimination based on sexual harassment were filed with the EEOC.⁶⁰ In 1986, after the Supreme Court put its imprimatur on the doctrine of hostile environment sexual harassment, 624 charges were filed alleging discrimination.⁶¹ The number of sexual harassment charges nearly tripled again in the next year, to 1658 charges filed in 1987.⁶² The Supreme Court’s recognition of hostile environment sexual harassment as a valid claim under Title VII dramatically expanded the number of women who were able to make a claim for relief under the statute. The ballooning number of cases filed demonstrates a significant presence of harassment in the workplace.

To have an actionable claim of hostile environment sexual harassment, the plaintiff must show the following five elements:

- (1) she belongs to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based upon sex;⁶³ (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take proper remedial action.⁶⁴

The current EEOC guidelines on sexual harassment define hostile environment sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when . . . such conduct has the purpose or effect of unreasonably interfering

⁵⁶ See *Rogers*, 454 F.2d at 238.

⁵⁷ See, e.g., *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984).

⁵⁸ See *Meritor Sav. Bank*, 477 U.S. at 65.

⁵⁹ *Id.* at 64.

⁶⁰ U.S. Equal Employment Opportunity Commission, Trends in Harassment Charges Filed with the EEOC, <http://www.eeoc.gov/stats/harassment.html> (last visited Nov. 20, 2006) (historical data no longer available on website is on file with author) [hereinafter EEOC, Trends in Harassment].

⁶¹ *Id.*

⁶² *Id.*

⁶³ This language corresponds to the statutory “because of sex” requirement. Courts use “because of sex” and “based on sex” interchangeably.

⁶⁴ *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 875 (D. Minn. 1993).

with an individual's work performance or creating an intimidating, hostile, or offensive working environment."⁶⁵

B. The 1991 Amendments: Compensatory and Punitive Damages

The paucity of available remedies for sexual harassment made the vindication of Title VII rights an empty quest. Harassment doctrine recognized and prohibited conduct that harmed employees' psychological interests.⁶⁶ Nevertheless, a continued barrier to hostile environment sexual harassment claims was the unavailability of compensatory or punitive damages under Title VII.⁶⁷ The only monetary relief available under Title VII was equitable relief awarded "as a make-whole remedy."⁶⁸ Justice Marshall's concurrence in *Meritor* noted that "[i]n the 'pure' hostile environment case . . . the employee seeks not money damages but injunctive relief."⁶⁹ Thus, only injunctive relief was available unless a plaintiff left her job due to the harassment and prevailed on a claim that the harassment was so severe that she was constructively discharged.⁷⁰ In these situations, monetary damages could be awarded.⁷¹

In *Robinson v. Jacksonville Shipyards, Inc.*, despite the court's finding that the plaintiff had suffered actionable harassment that caused her serious emotional upset,⁷² Lois Robinson only recovered one dollar in nominal damages and attorney fees because of the limitations on remedies for violations of Title VII.⁷³ In certain circumstances, this limitation on damages led to claims being dismissed if the defendant made changes during the lawsuit that rendered injunctive relief unnecessary.⁷⁴

Robinson was one of the cases that prompted amending the remedies provisions of Title VII through the Civil Rights Act of 1991 (1991

⁶⁵ EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2006).

⁶⁶ *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

⁶⁷ See *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988) (classifying "compensatory damages for mental anguish and . . . punitive damages" as "unobtainable legal relief, not equitable relief" (emphasis added)).

⁶⁸ *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1532–33 (M.D. Fla. 1991) (noting that back pay was available under the statute if "economic injury [was] suffered as a result of the discrimination"); see 42 U.S.C. § 2000e-5(g)(1) (2000) (providing for "other equitable relief").

⁶⁹ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 77 (1986) (Marshall, J., concurring).

⁷⁰ See *id.* at 78.

⁷¹ See, e.g., *Brooms v. Regal Tube Co.*, 881 F.2d 412, 423 (7th Cir. 1989) (holding that equitable relief, but not compensatory or punitive damages, may be awarded under Title VII if constructive discharge is proven). This opinion lists, as possible remedies for constructive discharge, "back pay, front pay, or prejudgment interest." *Id.*

⁷² See *supra* note 42 and accompanying text.

⁷³ *Robinson*, 760 F. Supp. at 1532–33, 1541.

⁷⁴ See, e.g., *Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988) (upholding the dismissal of the claim where "no relief [was] available to the plaintiff under Title VII" after the harasser was discharged).

Amendments).⁷⁵ Lois Robinson made a written statement regarding the inadequacy of available remedies, which was read into the congressional record.⁷⁶ In her statement, Ms. Robinson noted her frustration at “recover[ing] nothing to compensate [her] for the misery [she] ha[d] endured,”⁷⁷ and that the award of one dollar in nominal damages was “a slap in the face.”⁷⁸

The 1991 Amendments, aimed in large part at creating a remedy for sexual harassment, authorize compensatory and punitive damages in cases of intentional discrimination.⁷⁹ These amendments, making available monetary remedies for sexual harassment, appear to have led to a dramatic increase in harassment charges. From 1991 to 1995, the number of sexual harassment charges filed increased steadily, eventually leveling off after reaching 4600 annual filings.⁸⁰

The damages provision in the 1991 Amendments was intended to apply to hostile environment sexual harassment claims such as Ms. Robinson’s.⁸¹ The 1991 Amendments do not, however, extend compensatory and punitive damages to “disparate impact” discrimination.⁸² Accordingly, if ambient harassment is characterized as disparate impact discrimination, these remedies are unavailable to plaintiffs suing under this theory.⁸³

III. FROM SUBORDINATION TO FORMAL EQUALITY

The requirement that harassment be “because of sex” in order to be actionable under Title VII⁸⁴ has not been consistently interpreted by the courts. Early cases struggled with the idea that sexual behavior in the workplace was “because of sex” and not merely because of interpersonal attraction.⁸⁵ However, in its first decision on the matter, the Supreme Court

⁷⁵ *Hearings on H.R. 1, The Civil Rights Act of 1991 Before the H. Comm. On Education and Labor*, 102d Cong. 590 (1991) (report of the NATIONAL WOMEN’S LAW CENTER, TITLE VII’S FAILED PROMISE: THE IMPACT OF THE LACK OF A DAMAGES REMEDY (1991)), reprinted in 1 THE CIVIL RIGHTS ACT OF 1991: A LEGISLATIVE HISTORY OF PUBLIC LAW 102-166 (Bernard D. Reams Jr. & Fay Coutuere eds., 1994) [hereinafter THE CIVIL RIGHTS ACT OF 1991] (comparing remedies awarded under Title VII to victims of sexual discrimination, including Lois Robinson, to remedies awarded under 42 U.S.C. § 1981 to victims of racial discrimination).

⁷⁶ *See id.* at 78–82 (statement of Lois Robinson). Ms. Robinson declined to testify in person because of the stress caused by her harassment. *See id.* at 77 (letter from Lois Robinson).

⁷⁷ *See id.* at 81 (statement of Lois Robinson).

⁷⁸ *See id.* at 82.

⁷⁹ 42 U.S.C. § 1981a(a)(1) (2000).

⁸⁰ EEOC, Trends in Harassment, *supra* note 60.

⁸¹ *See supra* notes 75–78 and accompanying text.

⁸² 42 U.S.C. § 1981a(a)(1) (specifically excluding disparate impact).

⁸³ *See infra* Part V.B.

⁸⁴ *See supra* text accompanying note 63–64 for the elements of a hostile environment sexual harassment claim.

⁸⁵ *See infra* notes 90–91 and accompanying text.

supported the interpretation that sexual conduct in the workplace met the “because of sex” standard.⁸⁶ This interpretation of “because of sex” remained relatively settled for over a decade before being disturbed by the Court’s decision in *Oncale v. Sundowner Offshore Services, Inc.*⁸⁷

The courts have also experienced a related and significant shift in the jurisprudence of sexual harassment. Initially, courts focused on stereotypes and messages of subordination present in harassing behavior. However, they later shifted to a formal equality orientation: if both genders received facially similar treatment, the underlying messages of the harassing conduct were not scrutinized.⁸⁸ This shift wrongly ignores the ongoing harm created by ambient messages of gender subordination in the workplace.

A. “Because of Sex”

Prior to the Supreme Court’s decision in *Meritor*,⁸⁹ lower courts rejected claims of sexual harassment based on sexual behavior, such as sexual advances, finding that such behavior was driven by interpersonal attraction and was not discrimination “because of sex.”⁹⁰ One representative court appears to have been “skeptical that the sexual advances were directed at the female plaintiffs because of their sex as opposed to because of the ‘personal urge’—that is, sexual desires—of their male supervisor.”⁹¹

Notably, in its first hostile environment sexual harassment case, *Meritor*, the Court spent almost no time considering whether the harassment was “because of sex.”⁹² The Court restated the facts of the case, which included significant sexual conduct such as unwelcome sexual advances, touching, sexual intercourse, and forcible rape. The Court then concluded, “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”⁹³ This circular analysis—that harassment “because of sex” is discrimination on the “basis of sex”—does not get to the root of the question what makes

⁸⁶ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); see also *infra* notes 92–93 and accompanying text.

⁸⁷ 523 U.S. 75 (1998); see also *infra* Part III.B.

⁸⁸ See, e.g., *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 738 (8th Cir. 2000).

⁸⁹ 477 U.S. 57.

⁹⁰ See L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 341 (2005) [hereinafter Hébert, *Does Motive Matter?*] (noting that many early sexual harassment cases were rejected on the basis that harassing “conduct was ‘personal’ in nature” rather than based on the protected characteristic); see also L. Camille Hébert, *Sexual Harassment as Discrimination “Because of . . . Sex”: Have We Come Full Circle?*, 27 OHIO N.U. L. REV. 439, 441–44 (2001) [hereinafter Hébert, *Full Circle*].

⁹¹ See Hébert, *Full Circle*, *supra* note 90, at 442 (citing *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977)).

⁹² See 477 U.S. 57.

⁹³ *Id.* at 64.

harassment “because of sex.” The Court simply equated sexual behavior with harassment “because of sex.”

This conclusory approach to the “because of sex” question persisted through much of the 1990s.⁹⁴ If a court seriously scrutinized the “because of sex” element of a hostile environment sexual harassment claim during that time, it was for one of two reasons: the unfavorable treatment of the plaintiff was based on an interpersonal conflict that generally did not implicate sex⁹⁵ or sexual orientation,⁹⁶ or the harasser was a bisexual harasser—someone who harassed members of both sexes—such that the conduct was not based on the victim’s sex.⁹⁷

At the same time, the courts were experiencing a shift in their understanding of the meaning of sexual discrimination. In the early years of sexual harassment jurisprudence, the courts focused on subordination of women, especially messages that women did not belong in the workplace.⁹⁸ However, as the doctrine expanded to encompass claims that women were punished for acting too masculine at work and claims that men were harassed for being too effeminate, courts started to look for formal equality: Were employees of both genders treated the same way?⁹⁹

⁹⁴ See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (“The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course.”); *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998); *Stair v. LeHigh Valley Carpenters Local Union No. 600*, No. CIV. A. 91-1507, 1993 WL 235491, at *21 (E.D. Pa. July 24, 1993); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991). See generally Hébert, *Full Circle*, *supra* note 90, at 447.

⁹⁵ See, e.g., *Rothenbusch v. Ford Motor Co.*, 61 F.3d 904, 1995 WL 431012, at *3 (6th Cir. 1995) (unpublished table decision) (distinguishing between “because of sex” and “personal animosity”); see also Hébert, *Full Circle*, *supra* note 90, at 448.

⁹⁶ See *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996) (“Title VII does not reach discrimination based on other reasons, such as the employee’s sexual behavior, prudery, or vulnerability . . . [nor] on the employee’s sexual orientation, whether homosexual, bisexual, or heterosexual.” (citation omitted)); *Dillon v. Frank*, 952 F.2d 403, 1992 WL 5436, at *7 (6th Cir. 1992) (unpublished table decision) (affirming the dismissal of claims because the harassment was due to sexual orientation, not sex).

⁹⁷ See, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 905 n.11 (11th Cir. 1982) (“Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex.”); see also Shylah Miles, Comment, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 614–15 (2001) (reporting that “at least six federal circuits have accepted in principle the equal-opportunity-harasser defense” on the basis that it defeats a finding of “discrimination based on sex”).

⁹⁸ *Stair v. LeHigh Valley Carpenters Local Union No. 600*, No. CIV. A. 91-1507, 1993 WL 235491, at *21 (E.D. Pa. July 24, 1993) (“[Pornography] place[s] an *additional obstacle* in the path of women attempting to enter the historically all-male world of the skilled crafts.” (emphasis added)).

⁹⁹ See, e.g., *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1173 (D. Nev. 1995) (asking whether harassing conduct was directed toward one or both genders in the context of same-sex harassment).

B. *Oncale v. Sundowner Offshore Services, Inc.*

Against this background, it is unsurprising that the case that introduced the formal equality approach arose in the context of same-sex harassment. The Supreme Court's succinct decision in *Oncale v. Sundowner Offshore Services, Inc.* can be seen, in one sense, to expand the limits of Title VII, resolving in the affirmative a circuit split on whether same-sex harassment is ever actionable under Title VII.¹⁰⁰ However, the opinion also calls for a more narrowly construed sexual harassment jurisprudence, limiting the types of work conditions that can be construed as harassment "because of sex."¹⁰¹ In *Oncale*, the plaintiff complained that he was subjected to severe sexual harassment, including sexual assault and threats that he would be raped.¹⁰² Despite the threatening and humiliating nature of the conduct that Mr. Oncale was subjected to, the Fifth Circuit Court of Appeals affirmed summary judgment on the claim, holding that "same-sex harassment claims are not viable under Title VII."¹⁰³ The Supreme Court reversed, concluding that same-sex harassment was prohibited by Title VII and remanding the case for further proceedings under its newly articulated test.¹⁰⁴

Despite its expansion of Title VII jurisdiction to same-sex harassment cases, the Court used the second half of its opinion to limit the reach of Title VII.¹⁰⁵ Notably, the Court provided illustrations of the kinds of evidence that could be used to prove the "because of sex" element of a same-sex sexual harassment claim: (1) "explicit or implicit proposals of sexual activity";¹⁰⁶ (2) "a female victim . . . 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";¹⁰⁷ or (3) "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."¹⁰⁸ In the first two of these examples, the Court focused on the specific motivation, or subjective mindset, of the harasser with respect to the harassee.¹⁰⁹ Although the examples

¹⁰⁰ 523 U.S. 75, 79 (1998). The opinion fills just eight pages in the U.S. Reporter. Justice Thomas wrote a one-sentence concurrence. *Id.* at 82 (Thomas, J., concurring).

¹⁰¹ *See id.* at 80–81 (majority opinion).

¹⁰² *Id.* at 77.

¹⁰³ *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 120 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

¹⁰⁴ *Oncale*, 523 U.S. at 82.

¹⁰⁵ *Id.* at 80–82.

¹⁰⁶ *Id.* at 80.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 80–81.

¹⁰⁹ *See id.* at 80. Although example (1) may appear to address only the external manifestation of conduct, the Court indicates that "in most male-female sexual harassment situations . . . it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, *if there were credible evidence*

given by the Court are examples of same-sex harassment, it is clear that the Court is articulating a standard to be applied in all cases. The Court notes that the “risk [of finding a Title VII violation where there is none] is no greater for same-sex than for opposite-sex harassment.”¹¹⁰ It also emphasized that this showing must “always” be made.¹¹¹

In order to resolve the debate over same-sex harassment, the Court did not have to address opposite-sex sexual harassment cases at all. However, its language placed renewed emphasis on the need to prove that alleged harassment is “because of sex” in all cases, including opposite-sex harassment cases.¹¹² Justice Thomas concurred separately in one sentence: “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.’”¹¹³ This language contributed to the now-prevailing understanding that if employees are treated equally, even if badly, no actionable harassment exists.¹¹⁴

The emphasis placed on the “because of sex” requirement by the *Oncale* Court represents the official rejection of the presumption that harassing behavior that has sexual content equates to sexual harassment under the law.¹¹⁵ The Court’s decision provides only a bare framework for the “because of sex” standard, but the opinion’s lack of detail did not keep it from significantly changing Title VII’s landscape: Less than a week after issuing the decision in *Oncale*, the Court vacated *Doe v. City of Belleville*,¹¹⁶ which *Oncale* had criticized for “suggest[ing] that workplace harassment that is sexual in content is always actionable.”¹¹⁷ After the Supreme Court’s action in *City of Belleville*, many lower courts adopted the language that the plaintiff “must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because of . . . sex.’”¹¹⁸

that the harasser was homosexual.” *Id.* (emphasis added). This reasoning indicates that, to the Court, the harasser’s subjective desire is relevant to a finding of sexual harassment.

¹¹⁰ *Id.* at 80.

¹¹¹ *Id.* at 81.

¹¹² *Id.* at 78–81.

¹¹³ *Id.* at 82 (Thomas, J., concurring) (emphasis added).

¹¹⁴ See Miles, *supra* note 97, at 614–16 (reviewing federal court decisions and finding that “at least six federal circuits have accepted . . . the equal-opportunity-harasser defense”).

¹¹⁵ *Oncale*, 523 U.S. at 78–82 (“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.”).

¹¹⁶ *City of Belleville v. Doe*, 523 U.S. 1001, 1001 (1998) (mem.), *vacating* 119 F.3d 563 (7th Cir. 1997) (“Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oncale v. Sundowner Offshore Services, Inc.*”).

¹¹⁷ *Oncale*, 523 U.S. at 79.

¹¹⁸ *Id.* at 81 (alteration in original); see also *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 260 (4th Cir. 2001); *Carlson v. C.H. Robinson Worldwide, Inc.*, No. Civ. 02-3780, 2005 WL 758602, at *18 (D. Minn. Mar. 31, 2005); *Velasquez v. Frontier Med. Inc.*, 375 F. Supp. 2d 1253, 1277 (D.N.M. 2005);

C. *How Has Oncale Changed the “Because of Sex” Requirement?*

After *Oncale*, many courts that have sustained harassment claims based on ambient harassment have not evaluated whether the conduct met the “because of sex” requirement. Courts have inquired instead whether the harassing conduct was sufficiently severe or pervasive to affect the terms and conditions of employment of female employees, while presuming that the harassment was “because of sex.”¹¹⁹ When courts have rigorously examined whether conduct was “because of sex,” most courts have rejected hostile environment claims based on ambient harassment.¹²⁰ As courts narrow the scope of sexual harassment law, increasing numbers of plaintiffs are left without redress in work environments that they perceive as hostile.

Although the presence of pornography and sexualized language in the workplace creates a hostile work environment for many women,¹²¹ the overwhelming consensus in the case law is that unless the plaintiff is specifically targeted by at least some of the alleged behavior, it is not actionable sexual harassment under Title VII.¹²² Courts frequently reject claims based on nondirected pornography,¹²³ derogatory sex-stereotyping language

Leiting v. Goodyear Tire & Rubber Co., 117 F. Supp. 2d 950, 962 (D. Neb. 2000); *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211, 220 (Cal. 2006) (using Title VII precedent to decide FEHA claim).

¹¹⁹ See *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430–31 (7th Cir. 1995) (indicating that “obscene language or gestures . . . [and] pornographic pictures” are both on the actionable side of “the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing” (quoting *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007, 1010 (7th Cir. 1994)) (internal quotation marks omitted)). Although *Baskerville* was decided before *Oncale*, courts have frequently applied its analysis to cases since then. See, e.g., *Coniglio v. City of Berwyn*, No. 99 C 4475, 2000 WL 967989, at *7 (N.D. Ill. June 15, 2000).

¹²⁰ See, e.g., *Ocheltree v. Scollon Prods., Inc. (Ocheltree I)*, 308 F.3d 351 (4th Cir. 2002), *rev’d en banc*, 335 F.3d 325 (4th Cir. 2003); *Patt v. Family Health Sys., Inc.*, 280 F.3d 749 (7th Cir. 2002); *Hoccevar v. Purdue Frederick Co.*, 223 F.3d 721 (8th Cir. 2000); *Brennan v. Metro. Opera Ass’n, Inc.*, No. 95 Civ. 2926, 1998 WL 193204 (S.D.N.Y. Apr. 22, 1998); *Lyle*, 132 P.3d 211; see also *infra* notes 127–31 and accompanying text (discussing the reasons that courts reject claims of ambient harassment).

¹²¹ See *supra* Part I.

¹²² See, e.g., *Ezell v. Potter*, 400 F.3d 1041, 1048 (7th Cir. 2005) (entering summary judgment for the employer despite a supervisor’s comments “reflect[ing] some ignorant stereotypes of men, of older workers and of Caucasian workers” because the “comments were not directed at [the plaintiff] personally but were simply made in his presence”); *Riske v. King Soopers*, 366 F.3d 1085, 1091 (10th Cir. 2004) (holding that in order to determine whether conduct was because of sex, the factfinder must consider the “general work atmosphere . . . [and the] evidence of specific hostility directed toward the plaintiff” (emphasis added) (quoting *Penry v. Fed. Home Loan Bank of Topeka*, 155 F.3d 1257, 1262 (10th Cir. 1998)) (internal quotation mark omitted)); *Ocheltree I*, 308 F.3d at 356–57 (entering judgment as a matter of law for employer because “the evidence demonstrates conclusively that Ocheltree would have been exposed to the same atmosphere had she been male” and “only three incidents were directed toward Ocheltree”); *DeHotman v. N.H. Dep’t of Corr.*, No. 04-CV-114-JD, 2005 U.S. Dist. LEXIS 40937, at *14 (D.N.H. June 3, 2005) (entering summary judgment for employer because, *inter alia*, the harassing “conduct was not particularly aimed at DeHotman”).

¹²³ See *Ellett v. Big Red Keno, Inc.*, 221 F.3d 1342, 2000 WL 1006743, at *1 (8th Cir. July 21, 2000) (unpublished table decision) (“A dually offensive sexual atmosphere [including pornography] in the workplace, no matter how offensive, is not unlawful discrimination unless one gender is treated dif-

(including characterizations of women as “bitches,” “cunts,” and “sluts”),¹²⁴ and sexually explicit banter in the workplace.¹²⁵ The courts also frequently hold that harassing behaviors that are witnessed by a plaintiff, but not directed toward the plaintiff, are not severe enough to constitute actionable harassment.¹²⁶

The impact of *Oncale* can be found in lower courts’ attempts to determine whether ambient harassment is “because of sex.” Some courts, in finding that ambient harassment is not “because of sex,” have reasoned that if the existence of ambient harassment predated the presence of women in the workplace, it is not discrimination against a female plaintiff on the basis of her sex.¹²⁷ Others have noted that harassing behavior appeared to be based on and motivated by the sexual pleasure of male employees, and therefore not based on gender animus.¹²⁸ These decisions reflect *Oncale*’s suggestion that sexual discrimination may be found if harassment “is motivated by general hostility to the presence of women in the workplace.”¹²⁹ Many courts have simply noted that ambient harassment is visible and offensive to persons of both genders and therefore is not discriminatory.¹³⁰ These courts may be responding to *Oncale*’s call for a formal equality-based comparative view of a harasser’s treatment of members of different sexes.¹³¹

ferently than the other.” (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998)); *Scott-Riley v. Mullins Food Prods., Inc.*, 391 F. Supp. 2d 707, 718 (N.D. Ill. 2005) (“[P]ornographic pictures not directed at a plaintiff (i.e., so called ‘second-hand harassment’) may not constitute a hostile environment . . .”).

¹²⁴ See, e.g., *Kriss v. Sprint Commc’ns Co.*, 58 F.3d 1276, 1281 (8th Cir. 1995) (holding that the term “bitch” is not necessarily based on sex); *Wieland v. Dep’t of Transp.*, 98 F. Supp. 2d 1010, 1019 (N.D. Ind. 2000) (holding that the terms “bitch” and “slut” are not necessarily based on sex); *Lyle*, 132 P.3d at 228 (holding that the term “cunt” is not necessarily based on sex).

¹²⁵ *Howard v. City of Robertsedale*, 168 F. App’x. 883, 889 (11th Cir. 2006) (“[F]requent remarks . . . about female employees’ bodies and sex lives . . . do not rise to the level of discrimination under Title VII . . .”); *Ocheltree I*, 308 F.3d at 356–58 (same).

¹²⁶ See, e.g., *Patt v. Family Health Sys., Inc.*, 280 F.3d 749, 754 (7th Cir. 2002). This argument really goes to whether harassment is sufficiently “severe or pervasive” to be actionable, but it is frequently included among discussions of these issues.

¹²⁷ *Ocheltree I*, 308 F.3d at 357 (“[T]he uncontested evidence demonstrated that the men’s behavior did not begin or change as of the date Ocheltree began working with Scollon Productions but had been ongoing . . .”).

¹²⁸ See, e.g., *Williams v. City of Chicago*, 325 F. Supp. 2d 867, 876 (N.D. Ill. 2004) (“[Plaintiff] has not alleged that her colleagues were viewing pornography in order to make her feel uncomfortable The record indicates that her colleagues were viewing pornography at work for their own prurient gratification.”); see also Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?*, 81 NEB. L. REV. 1152, 1186 & n.136 (2003).

¹²⁹ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

¹³⁰ See *Ellett v. Big Red Keno, Inc.*, 221 F.3d 1342, 2000 WL 1006743, at *1 (8th Cir. July 21, 2000) (unpublished table decision).

¹³¹ See *Oncale*, 523 U.S. at 80–81.

Even post-*Oncale*, there are some situations in which pornography and sexual banter—the quintessential examples of ambient harassment—may be found to meet the “because of sex” test. Some courts have found that pornography, images, or sexualized language can be considered sexual harassment if they are specifically directed toward an employee (usually female)¹³² or if their existence is simply one element of a hostile environment.¹³³ Other courts have used ambient harassment in the workplace as a framing device to elevate otherwise nonactionable harassment to the level of sexual harassment under Title VII.¹³⁴ However, in so doing, these courts expressly or implicitly state that the mere existence of ambient harassment in the workplace, no matter how explicit, gender-biased, or pervasive, is not, without more, sexual harassment.¹³⁵

On balance, these changes have dramatic consequences for plaintiffs alleging ambient harassment, making it significantly less likely that such plaintiffs will prevail. Many of these plaintiffs would have been successful before *Oncale*. In several famous cases from the early 1990s—*Robinson v. Jacksonville Shipyards, Inc.*,¹³⁶ *Andrews v. City of Philadelphia*,¹³⁷ and *Jenson v. Eveleth Taconite Co.*¹³⁸—display of pornography in the workplace was one of the defining elements of a claim of hostile environment sexual harassment. In these cases, the courts accepted statements of the plaintiffs that pornographic pictures and sexualized banter “embarrassed, humiliated

¹³² See, e.g., *Gentry v. Export Packaging Co.*, 238 F.3d 842, 845 (7th Cir. 2001) (including among discussion of harassing conduct an incident in which a manager gave an employee a calendar page “depict[ing] cartoon drawings of different sexual positions”); *Scott-Riley v. Mullins Food Prods., Inc.*, 391 F. Supp. 2d 707, 718 (N.D. Ill. 2005) (distinguishing “pictures of naked women repeatedly placed on a plaintiff’s desk” from nonactionable pornography); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (finding that coworkers’ placement of a picture of “Richard Simmons in pink hot pants” in plaintiff’s work area was directed toward plaintiff’s nonconformity “with [coworkers’] ideas about what ‘real’ men should look or act like” (internal quotation marks omitted)).

¹³³ See, e.g., *Carlson v. C.H. Robinson Worldwide, Inc.*, No. Civ. 02-3780, 2005 WL 758602, at *39–40 (D. Minn. Mar. 31, 2005) (listing nondirected pornographic images amongst a litany of “belittling and chauvinistic behavior” in declining to enter summary judgment for employer); *Struif v. MK-I LLC*, No. 03 C 7468, 2004 WL 2921864, at *9 (N.D. Ill. Dec. 15, 2004) (listing, inter alia, “graphic workplace discussions of sexual acts and events” as objectionable behavior sufficient to satisfy the first element of plaintiff’s prima facie case of sexual harassment).

¹³⁴ See, e.g., *Ocheltree v. Scollon Prods., Inc. (Ocheltree II)*, 335 F.3d 325, 336–37 (4th Cir. 2003) (Niemeyer, J., concurring) (“[T]he presence of the background conduct based on sexual perversion leads me to believe that we cannot take the three incidents in isolation.”).

¹³⁵ See, e.g., *Scott-Riley*, 391 F. Supp. 2d at 718 (suggesting that nontargeted pornography is not actionable). However, this line of reasoning is not entirely settled. See *Petrosino v. Bell Atl. (Petrosino II)*, 385 F.3d 210, 222 (2d Cir. 2004) (holding that pornography can be harassment based on sex); see also *Brennan v. Metro. Opera Ass’n, Inc.*, 192 F.3d 310, 319 (2d Cir. 1999) (declining to determine whether nontargeted pornography constitutes harassment based on sex); *Carlson*, 2005 WL 758602, at *20 (“A *per se* rule, either way [as to whether pornography is ‘based on sex’], is not appropriate.”).

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

¹³⁷ 895 F.2d 1469 (3d Cir. 1990).

¹³⁸ 824 F. Supp. 847 (D. Minn. 1993).

and harassed them,¹³⁹ and that this conduct caused women to feel “emotional upset [and] reduced job satisfaction,” among other effects.¹⁴⁰ In none of these cases did the courts suggest that nondirected harassment posed a problem in finding the harassment to be “because of sex.”¹⁴¹ In *Robinson*, the court held that even pornography that was present in the workplace before any women worked there was harassment “because of sex.”¹⁴²

Standing in stark contrast to *Robinson*, *Andrews*, and *Jensen* is *Ocheltree v. Scollon Productions*,¹⁴³ a post-*Oncale* case from the United States Court of Appeals for the Fourth Circuit. Like the successful plaintiffs in the earlier cases, Ms. Ocheltree complained about sexual conversations, sexual comments made about employees, pornography in the workplace, vulgar language, and sexually oriented jokes, in addition to several specific instances of sexual behavior that were directed toward her.¹⁴⁴ The *Ocheltree* court found that pervasive ambient harassment was not “because of sex” because it was not targeted at the female plaintiff and began before her employment started.¹⁴⁵ This decision was reversed, however, and the jury verdict for Ms. Ocheltree was reinstated by the Fourth Circuit sitting en banc.¹⁴⁶ The opinion that reversed the panel’s decision did not argue that ambient harassment was actionable; rather, it emphasized that actionable harassment could be found based on the behavior that was specifically directed at Ms. Ocheltree and the increased intensity of the male employees’ sexual behavior after she began her employment.¹⁴⁷ In a nod to *Oncale*, the court found that the male employees used “such sex-specific and derogatory terms . . . as to make it clear that [they were] motivated by general hostility to the presence of [a] wom[a]n in [their] workplace.”¹⁴⁸

The difficulty faced by plaintiffs in proving their cases post-*Oncale* is not unique to this case. Professor Hébert conducted a survey of cases that came down in the three years after the *Oncale* decision, and she determined that the Supreme Court’s language in that case had, in fact, spurred much

¹³⁹ *Andrews*, 895 F.2d at 1472.

¹⁴⁰ *Robinson*, 760 F. Supp. at 1505.

¹⁴¹ See *Andrews*, 895 F.2d at 1482 n.3; *Robinson*, 760 F. Supp. at 1523.

¹⁴² *Robinson*, 760 F. Supp. at 1523; accord *Jensen*, 824 F. Supp. at 884 (“[E]ven if some of the behavior that occurred at Eveleth Mines did not originate with the intent of offending women, it was disproportionately offensive or demeaning to women.”).

¹⁴³ *Ocheltree v. Scollon Prods., Inc. (Ocheltree I)*, 308 F.3d 351 (4th Cir. 2002), *rev’d en banc*, 335 F.3d 325 (4th Cir. 2003).

¹⁴⁴ *Id.* at 353–54.

¹⁴⁵ *Id.* at 356–58 (ordering entry of judgment as a matter of law for employer on the basis that vulgar banter was not sexual harassment when it preexisted the female employee’s presence, was not directed at the female employee or “solely at females,” and was “equally offensive both to men and women”).

¹⁴⁶ *Ocheltree v. Scollon Prods., Inc. (Ocheltree II)*, 335 F.3d 325 (4th Cir. 2003) (en banc).

¹⁴⁷ *Id.* at 332–33.

¹⁴⁸ *Id.* at 333 (some alterations in original) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)) (internal quotation mark omitted).

closer scrutiny of whether harassment was “because of sex,” even in opposite-sex harassment cases.¹⁴⁹ She found that there was only one type of behavior—“sexual advances or proposals of sexual activity”—that the courts were more likely to find was “because of sex” after *Oncale*.¹⁵⁰ In a number of other circumstances, courts were less likely to find that harassment was “because of sex.” These circumstances included: (1) “conduct not involving explicit sexual advances”;¹⁵¹ (2) “demeaning sexually-explicit comments directed at women”;¹⁵² (3) “derogatory and gender-specific language” if “other offensive language is found in the workplace”;¹⁵³ (4) “hostile sexually-explicit conduct” that may be attributed to “non-gender based animus”;¹⁵⁴ (5) situations in which the court believed “men and women were targeted equally by the harassing behavior”;¹⁵⁵ and (6) situations where “sexually-harassing behavior . . . did not constitute different treatment of men and women.”¹⁵⁶ Several of those categories (especially (3), (5), and (6)) are implicated in claims of ambient harassment. If these behaviors, which plaintiffs perceive as harassment, are to be actionable, courts will need to find a new model for “because of sex” harassment in the post-*Oncale* world.

IV. A NEW MODEL OF AMBIENT HARASSMENT AS INTENTIONAL DISCRIMINATION

In order to appropriately address ambient harassment, courts will have to retreat from the formal equality approach to a renewed recognition of subordination demands. A model for this doctrinal change can be found in *Petrosino v. Bell Atlantic*.¹⁵⁷ Lisa Petrosino’s employment at Bell Atlantic and her experience in court illustrate the contours of ambient harassment and its treatment by the courts. The U.S. District Court for the Eastern District of New York entered summary judgment for the employer on Ms. Petrosino’s hostile environment sexual harassment claim due in large part to the nontargeted nature of the harassment and the dually offensive environment of the workplace.¹⁵⁸ The decision applied the narrow “because of sex” jurisprudence that had increasingly been used post-*Oncale* in decisions that

¹⁴⁹ Hébert, *Full Circle*, *supra* note 90, at 480.

¹⁵⁰ *See id.* at 465–66. This is unsurprising in light of the first category of proof of the “because of sex” element offered in *Oncale*. *See supra* text accompanying note 106.

¹⁵¹ *See Hébert, Full Circle, supra* note 90, at 467–68.

¹⁵² *See id.* at 468–69.

¹⁵³ *See id.* at 469–71.

¹⁵⁴ *See id.* at 472–75.

¹⁵⁵ *See id.* at 476–78.

¹⁵⁶ *See id.* at 478–79.

¹⁵⁷ *Petrosino v. Bell Atl. (Petrosino II)*, 385 F.3d 210 (2d Cir. 2004).

¹⁵⁸ *Petrosino v. Bell Atl. (Petrosino I)*, No. 99 CV 4072, 2003 WL 1622885, at *6–7 (E.D.N.Y. Mar. 20, 2003), *rev’d*, 385 F.3d 210 (2d Cir. 2004).

found for the employer.¹⁵⁹ After citing *Oncale* as the standard for the “because of sex” determination,¹⁶⁰ the district court noted that because employees of both genders were equally exposed to the allegedly harassing conduct, “their mistreatment shared a common cause that was *unrelated to their sex*.”¹⁶¹ The district court found that both men and women were exposed to much of the behavior of which Ms. Petrosino complained, and thus, the harassment was not “because of sex.”¹⁶² In a groundbreaking order, the United States Court of Appeals for the Second Circuit reversed the lower court on Ms. Petrosino’s sexual harassment claim, “rejecting [the] argument that the common exposure of male and female workers to sexually offensive material necessarily precludes a woman from relying on such evidence to establish a hostile work environment based on sex.”¹⁶³

A. Petrosino I: *Eastern District of New York*

Like many victims of ambient sexual harassment, Ms. Petrosino was employed in a traditionally male field: telephone installation and repair.¹⁶⁴ During much of her employment at Bell Atlantic, she was the only female employee in her work group.¹⁶⁵ In recounting Ms. Petrosino’s allegations, the district court mentioned several targeted incidents of sexual harassment¹⁶⁶ and described in detail the sexually explicit conversations and pornographic graffiti that Ms. Petrosino was exposed to on a daily basis.¹⁶⁷

Most of Ms. Petrosino’s time at work was spent out in the field installing and repairing telephone cable.¹⁶⁸ While in the field, she frequently encountered pornographic or otherwise sexual graffiti that was drawn on the telephone equipment she serviced.¹⁶⁹ These pornographic images included depictions of employees.¹⁷⁰ Two drawings referred to Ms. Petrosino.¹⁷¹ One of the drawings of Ms. Petrosino depicted her performing oral sex on her boss.¹⁷² Other drawings were similarly sexual and included “representations

¹⁵⁹ *Id.* at *6.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at *7 (emphasis added) (quoting *Brown v. Henderson*, 257 F.3d 246, 254 (2d Cir. 2001)) (internal quotation mark omitted).

¹⁶² *Id.*

¹⁶³ *Petrosino v. Bell Atl. (Petrosino II)*, 385 F.3d 210, 223 (2d Cir. 2004).

¹⁶⁴ *Petrosino I*, 2003 WL 1622885, at *1.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at *7. Although the court does not explicitly exclude the other directed incidents of sexual harassment experienced by Ms. Petrosino, neither does it clearly consider them in reaching its conclusion.

¹⁶⁷ *Id.* at *1–3.

¹⁶⁸ *Id.* at *1.

¹⁶⁹ *Id.* at *2.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

of disembodied female and male genitalia and other company employees, most of them male, in various sex acts with each other and animals.”¹⁷³

Ms. Petrosino also complained of vulgar and sexually explicit conversations among her male coworkers. Male employees engaged in frequent sexual banter about “fictitious sexual exploits with each others’ wives.”¹⁷⁴ Male employees used foul language such as “scumbag,” “cocksucker,” and “ass.”¹⁷⁵ Some of this language spilled over into sexually discriminatory comments aimed at Ms. Petrosino, including statements about her being “on the rag,” about her breasts, that “maybe women can’t handle [the job],” and that “[w]omen are too thin-skinned.”¹⁷⁶

Despite the explicit nature of the harassment, the district court entered summary judgment for Bell Atlantic on Ms. Petrosino’s claim of hostile environment sexual harassment. In its analysis, the district court cited *Oncale*, quoting that “Title VII ‘does not prohibit all verbal or physical harassment in the workplace; it is directed only at *discrimination* . . . because of . . . *sex*.”¹⁷⁷ The court did not clearly define the different elements of a hostile environment claim¹⁷⁸ and referred both to “severe or pervasive” and “because of sex” in the same section of its analysis.¹⁷⁹ By combining these two factors, the court used a divide-and-conquer approach to break down Ms. Petrosino’s claims and ultimately to reach the conclusion that since most of the harassment that Ms. Petrosino suffered was not because of her sex, and the other directed harassment occurred only infrequently, she was not subjected to actionable sexual harassment.¹⁸⁰

In finding that the sexually explicit and vulgar language used in Ms. Petrosino’s workplace was not actionable sexual harassment under Title VII, the court focused on the general, nontargeted nature of the language.¹⁸¹ The court did not consider the significance of the gender stereotypes expressed in the language used, including stereotypes that are uniquely harmful in a work situation, such as that women are not fit to work in physically

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at *2–3.

¹⁷⁶ *Id.* See also *supra* notes 47–51 and accompanying text (discussing the priming effects of ambient harassment).

¹⁷⁷ *Petrosino I*, 2003 WL 1622885, at *6 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

¹⁷⁸ See *supra* text accompanying notes 63–64.

¹⁷⁹ *Petrosino I*, 2003 WL 1622885, at *6.

¹⁸⁰ *Id.* at *7–8. This divide-and-conquer approach is one of the dangers of introducing the disparate treatment-disparate impact divide into sexual harassment doctrine. See Timmons, *supra* note 128, at 1256 (“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.”).

¹⁸¹ *Petrosino I*, 2003 WL 1622885, at *7 (“There is no evidence that the [ambient] crude language was motivated by hostility toward Petrosino because of her sex.”).

demanding jobs such as Ms. Petrosino's and that women should be sexually subordinate to men.¹⁸²

In its evaluation of the sexual graffiti to which Ms. Petrosino was exposed, the district court considered only the graffiti that depicted Ms. Petrosino, not the impact of being forced to view the sexual images contained in other graffiti on a daily basis.¹⁸³ The court determined that Ms. Petrosino was not harassed because of sex because male employees were also targeted by the sexual graffiti.¹⁸⁴ The court did not consider the invidious sexual stereotypes suggested by the graffiti—for instance, that Ms. Petrosino had her job only because she performed sexual favors for the boss—which could be viewed as discrimination because of sex. The court's finding hinged on the fact that both male and female employees were depicted in the graffiti.¹⁸⁵

B. Petrosino II: Second Circuit Court of Appeals

A bare reading of the facts presented by the United States Court of Appeals for the Second Circuit bears strong similarities to the presentation of facts in the district court opinion. However, the appellate court's framing of the facts is vastly different. It found that

[t]he hostility [in the workplace] took two forms: (1) persistent sexually offensive remarks and sexual graffiti that *conveyed a low regard for women*, and (2) specific comments or actions toward Petrosino that made plain that *this negative view of women extended to her and to her work performance*.¹⁸⁶

The Second Circuit's recognition of the fact that even nontargeted comments and pornographic images can poison the work environment for women, and that these incidents of harassment can lead to low regard for female employees, framed an analysis that dramatically departed from the district court's decision.¹⁸⁷ The Second Circuit's evaluation in *Petrosino II* of the sexual stereotypes and subordination demands present in the workplace provides a workable model for an inquiry into whether ambient harassment is "because of sex."

The court of appeals took notice of what seemed to be the elephant in the room in the district court decision: The male employees' comments and

¹⁸² See *id.* at *3. The statements that women are "too thin-skinned" to work the job and that women "can't handle" the work are indicative of the invidiously stereotyping language of the workplace.

¹⁸³ *Id.* at *7.

¹⁸⁴ *Id.* ("[T]he fact that men were also depicted [in sexual graffiti] gives rise to the inference that the individuals represented were not selected because of their sex.")

¹⁸⁵ *Id.*

¹⁸⁶ *Petrosino v. Bell Atl. (Petrosino II)*, 385 F.3d 210, 214 (2d Cir. 2004) (emphasis added).

¹⁸⁷ In its analysis, the court mirrors the outline of the harm caused by the harassment that is given by the experts in *Jenson and Robinson*. Both the direct impacts on women's self-esteem and the priming of men to view women as sexual objects and as less than equal are predictable effects of ambient harassment. See *supra* Part I.

graffiti subordinated and disrespected women.¹⁸⁸ In contrast to the district court's opinion, which quickly dismissed the contribution of the sexually explicit conversations to Ms. Petrosino's claim, the appellate court quoted several examples, such as: "Your wife couldn't answer the phone last night because my balls were on her chin," and "Your wife left her panties next to my bed after I fucked her all night until she screamed."¹⁸⁹ The Second Circuit described these conversations as "imagined sexual exploitation."¹⁹⁰ Disrespect, violence toward women, and sexual exploitation are all themes through which men seek to assert dominance over women.

The appellate court found that *Oncale*'s language, defining harassment from the perspective of a "reasonable person in the plaintiff's position," indicated that claims of harassment are to be adjudicated with the plaintiff's sex in mind.¹⁹¹ Further, the court held that a reasonable jury could determine that "the sexually offensive comments and graffiti here at issue [are] more offensive to women than to men and, therefore, discriminatory based on sex."¹⁹² The court did not find that this analysis, which uses the language of disparate impact analysis,¹⁹³ posed any problems under Title VII's existing hostile environment regime. The court went on to clarify further why Ms. Petrosino's workplace was discriminatory toward women, even though both men and women were the subjects of sexual discussions and images.¹⁹⁴ The court examined the messages disseminated in the workplace and what they said about the two groups and found that while some men were ridiculed, the comments and graffiti "frequently touted the sexual exploits of others. . . . By contrast, the depiction of women . . . was uniformly sexually demeaning."¹⁹⁵ This expression of stereotypes, which places some men in a position superior to that of all women, reinforces the traditional gender hierarchy that Title VII seeks to eliminate.¹⁹⁶

¹⁸⁸ See *Petrosino II*, 385 F.3d at 214.

¹⁸⁹ *Id.* at 214 n.3.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 221 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)) (internal quotation mark omitted).

¹⁹² *Id.* at 222.

¹⁹³ This framework, which includes behavior that is "more offensive to [one gender] than to [the other]" in the definition of sexual harassment, is the inquiry performed by proponents of disparate impact sexual harassment theories. See *infra* note 239 and accompanying text.

¹⁹⁴ Compare with the common view described by Professor Timmons: "[A]s 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 . . ." See Timmons, *supra* note 128, at 1184.

¹⁹⁵ *Petrosino II*, 385 F.3d at 222.

¹⁹⁶ See Note, *supra* note 29, at 1085–90.

In order to bolster its rejection of the district court's analysis and to strengthen its position in traditional Title VII jurisprudence, the Second Circuit quoted at length from the dissent in *Ocheltree I*¹⁹⁷:

Suppose, for example, that an African-American plaintiff brings a race discrimination claim alleging a hostile work environment due to his coworkers' daily use of the meanest racial slur against African-Americans. Suppose further that the workplace had previously been all white and that the pattern of racial slurs was the same both before and after the plaintiff's arrival. . . . I find it difficult to believe that any court would fail to find race-based harassment in these facts.¹⁹⁸

The clarity of the situation, when viewed in analogous race-based terms, belies the confusion that exists in the case law over sexual harassment. However, it is useful to clarify why the dominant approach to ambient sexual harassment is flawed.

The standards for race-based harassment and sex-based harassment are articulated identically in the case law. The analogous nature of the two types of harassment has led to much crossover between the cases.¹⁹⁹ Ambient harassment is one of the only areas in which the case law between race-based harassment and sex-based harassment diverges: the above example demonstrates that courts are more likely to recognize messages of racial subordination and, thus, to find that ambient or indirect harassment is "because of race."

Ultimately, Ms. Petrosino's case did not rise and fall on ambient harassment alone. There were a number of incidents directed toward her personally that were based on sex.²⁰⁰ After concluding that the language and graffiti could constitute harassment based on sex, the court of appeals went on to use this conduct as a framing device for the direct harassment alleged

¹⁹⁷ *Ocheltree v. Scollon Prods., Inc. (Ocheltree I)*, 308 F.3d 351, 376 (4th Cir. 2002) (Michael, J., dissenting in part and concurring in the judgment in part), *rev'd en banc*, 335 F.3d 325 (4th Cir. 2003). In the later en banc opinion, authored by Judge Michael, the court adopted similar reasoning to reverse a grant of summary judgment on Ms. Ocheltree's hostile environment sexual harassment claims. *Ocheltree v. Scollon Prods., Inc. (Ocheltree II)*, 335 F.3d 325, 331–33 (4th Cir. 2003).

¹⁹⁸ *Petrosino II*, 385 F.3d at 222–23 (quoting *Ocheltree I*, 308 F.3d at 376 (Michael, J., dissenting in part and concurring in the judgment in part)); *cf.* *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006) ("Unquestionably, a working environment dominated by racial slurs constitutes a violation of Title VII." (quoting *Jackson v. Flint Ink N. Am. Corp.*, 370 F.3d 791, 794 (8th Cir. 2004)) (internal quotation marks omitted)); *Lake v. AK Steel Corp.*, No. 2:03CV517, 2006 WL 1158610, at *26 (W.D. Pa. May 1, 2006) ("Of course, 'racial epithets need not be hurled at the plaintiff in order to contribute to a working environment [that is racially hostile].'" (alteration in original) (quoting *Jackson v. Quanex Corp.*, 191 F.3d 647, 661 (6th Cir. 1999))).

¹⁹⁹ *See, e.g.*, *Mack v. ST Mobile Aerospace Eng'g, Inc.*, 195 F. App'x 829, 2006 WL 2129661, at *8–9 (11th Cir. July 31, 2006) (race-based harassment case citing *Faragher-Ellerth* defense to determine employer liability); *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 950 (7th Cir. 2005) (citing *Hostelter v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000)) (race-based harassment case citing sexual harassment case for "severe or pervasive" standard).

²⁰⁰ *Petrosino II*, 385 F.3d at 214–15.

by Ms. Petrosino.²⁰¹ This situation—in which both direct and ambient harassment exist in the workplace—is similar to the workplace conditions present in *Ocheltree*.²⁰² As previously noted, it is likely that ambient harassment is accompanied by direct harassment.²⁰³

However, the analysis in *Petrosino II* is imperfect: the structure of the court’s decision implies that perhaps taken alone, the court would not have found that the ambient harassment rose to the level of “severe or pervasive” required to meet Title VII’s standard. The court evaluated the harassment under the heading “The Severity and Pervasiveness of the Challenged Conduct,”²⁰⁴ which reveals another common error in evaluating sexual harassment cases: requiring harassment to be both severe *and* pervasive to be actionable. The proper standard is severe *or* pervasive.²⁰⁵ While each individual incident of nontargeted sexual banter or pornographic graffiti may not have been severe, Ms. Petrosino’s testimony is that her work environment was replete with sexually explicit and demeaning conversations and vulgar graffiti.²⁰⁶ Viewed under the proper standard, there is no reason that pervasive ambient harassment alone could not constitute a cognizable claim for sexual harassment.

C. Applying the Lessons of *Petrosino v. Bell Atlantic*

In order to have a coherent doctrine of sexual harassment that is applicable to directed conduct, ambient harassment, or a combination of the two, courts need to reorient their approach to the “because of sex” standard. Rejecting the post-*Oncale*²⁰⁷ approach—a formalistic requirement that harassment has to be targeted in order to meet the “because of sex” requirement—would not require *Oncale* to be overturned. The analysis of the circuit court in *Petrosino II* demonstrates how a gender-subordination standard for “because of sex” harassment can be applied.²⁰⁸ When the *Petrosino II* court ex-

²⁰¹ *Id.* at 224 (“It is within this context that the remaining evidence of sexual harassment must be considered.”).

²⁰² *Ocheltree II*, 335 F.3d at 333 (describing a variety of direct and ambient harassing behaviors).

²⁰³ In fact, the existence of ambient harassment in the workplace makes direct harassment more likely. See *supra* notes 43–51 and accompanying text (discussing ambient harassment’s priming effect).

²⁰⁴ *Petrosino II*, 385 U.S. at 223.

²⁰⁵ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive.”); see also *Southerland v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 125 F. App’x 14, 19–20 (6th Cir. 2004) (approving a jury instruction stating that “while individual incidents of alleged harassment may not alone create a hostile environment, the accumulated effect of such incidents may be sufficiently severe or pervasive to create a hostile environment”); *Dawson v. County of Westchester*, 373 F.3d 265, 274 (2d Cir. 2004) (“[In] considering a motion for summary judgment, a court must ask whether a rational factfinder could conclude, on the basis of evidence in the record, that the conditions of plaintiffs’ employment were sufficiently ‘severe or pervasive’ to create an objectively hostile or abusive work environment.”).

²⁰⁶ *Petrosino II*, 385 F.3d at 214.

²⁰⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

²⁰⁸ *Petrosino II*, 385 F.3d at 222.

amined the messages sent by the pornographic graffiti and the sexualized banter, it was clear that those messages were overwhelmingly negative and harmful to women, even if both men and women were exposed to them.²⁰⁹ Thus, the court held that a reasonable jury could find this behavior to be discrimination “because of sex.”²¹⁰ This analysis takes into account the command of *Oncale* 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.’”²¹¹

First, a court applying the *Petrosino II* approach must reject formal equality approaches—such as the “but-for” test—to determining whether sexual harassment is “because of sex.” Second, in order to determine whether ambient harassment is discrimination “because of sex,” courts must actually examine whether the harassment sends gender-biased messages. If a court determines that ambient harassment carries these messages—and thus, is “because of sex”—it should then continue with the hostile environment sexual harassment framework to determine whether it rises to the level of actionable sexual harassment.²¹² Because each individual incident of ambient harassment would not be considered severe under the current model, courts should consider whether the harassment alleged—ambient and direct—is pervasive, based on a “review [of] the work environment as a whole.”²¹³

Applying Title VII’s “because of sex” requirement helps to clarify how ambient harassment discriminates: While pornography or banter that contains consistently negative stereotypes of women or consistently portrays women to be subordinate to men may be offensive to men, it is not harassment because of a man’s sex. A simple example demonstrates that the same behavior may be harassment to one gender and not to the other.²¹⁴ If a man constantly tells a female coworker, “[w]omen can’t do this job [that they are employed to do]”—even if he does not say that she specifically cannot do the job—it could be considered harassment because of sex.²¹⁵

²⁰⁹ See *supra* notes 194–95 and accompanying text.

²¹⁰ *Petrosino II*, 385 F.3d at 222–23.

²¹¹ *Oncale*, 523 U.S. at 82 (Thomas, J., concurring).

²¹² For a discussion of the hostile environment sexual harassment framework, see *supra* notes 63–64 and accompanying text.

²¹³ *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999).

²¹⁴ This is why many courts analyze sexual harassment from the perspective of a “reasonable woman” rather than a “reasonable person.” See *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (“A complete understanding of the [harassment] victim’s view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women.”). Although the Court in *Oncale* refers to the standard as one of the “reasonable person,” it also makes references to “the plaintiff’s position” and stresses the need to consider “all the circumstances.” *Oncale*, 523 U.S. at 81.

²¹⁵ See *EEOC v. Cont’l Airlines, Inc.*, No. 04 C 3055, 2006 U.S. Dist. LEXIS 123, at *10, *53 (N.D. Ill. Jan. 3, 2006) (holding that a reasonable jury could find sexual harassment based on comments such as, “Man, she a [sic] woman . . . This a [sic] man’s job”). This example would hold true even if it

However, if the same man told a male coworker, “Women can’t do this job,” it may be offensive to the coworker, but he would not have a cause of action for sexual harassment under Title VII.²¹⁶

This example also shows why a “but-for” standard is inappropriate for determining whether offensive conduct is sexual harassment. A “but-for” standard asks whether offensive conduct would have occurred but for the presence of women in the workplace. In *Ocheltree I*, the court used this inappropriate standard in making its decision that the harassing behavior was not “because of sex” because some of the conduct occurred before Ms. Ocheltree was hired.²¹⁷ In an all-male workplace, a male employee may make the statement “Women can’t do this job” without his comment being sexual harassment to any of the company’s employees. However, if a woman joined the workplace and he persisted in saying that, it would become sexual harassment. Further, once a woman entered the workplace, there is no compelling reason that the offending statement must be made directly to her in order for it to be sexual harassment. It seems that as long as she could hear it, there would be sufficient cause for a harassment claim.

Instead of applying a formal equality approach to the “because of sex” question, courts must examine whether ambient harassment sends messages of gender subordination that are uniquely and illegally harmful to women. *Oncale* reaffirmed the holding in *Harris v. Forklift Systems, Inc.*²¹⁸ that discrimination “because of sex” occurs when “members of one sex are exposed to disadvantageous *terms or conditions* of employment to which members of the other sex are not exposed.”²¹⁹ Reading this holding in combination with the precedent of *Rogers v. EEOC* that emotional and psychological comfort are terms and conditions of employment²²⁰ suggests that a work environment filled with negative sexual stereotypes and derogatory language toward women is discrimination against female employees “because of sex.”

The subordination model for evaluating ambient harassment proposed in this Comment is better able to target discriminatory animus than the “but-for” or formalistic gender neutral standard that is commonly applied. The discriminatory animus that underlies the “because of sex” element of ambient harassment can be found by looking at the underlying messages of

were a female employee making the offensive comment. See *Oncale*, 523 U.S. at 80 (giving the example of a female harasser motivated “by general hostility to the presence of women in the workplace”).

²¹⁶ But see *Leibovitz v. New York City Transit Auth.*, 4 F. Supp. 2d 144, 146 (E.D.N.Y. 1998) (affirming a verdict for a plaintiff who observed sexual harassment of other women but was never a victim herself), *rev’d*, 252 F.3d 179 (2d Cir. 2001).

²¹⁷ See *Ocheltree v. Scollon Prods., Inc. (Ocheltree I)*, 308 F.3d 351, 357 (4th Cir. 2002), *rev’d en banc*, 335 F.3d 325 (4th Cir. 2003).

²¹⁸ 510 U.S. 17 (1993).

²¹⁹ *Id.* at 25 (O’Connor, J., concurring) (emphasis added).

²²⁰ *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971); see also *supra* notes 53–55 and accompanying text (explaining harassment’s impact on the “terms and conditions of employment”).

and motives for harassing behavior. The example given above where male employees frequently state that women are not fit to work in their workplace puts women in that workplace in an inferior position and, thus, is discriminatory. In other instances, one must consider what male employees intend to accomplish by posting pornography in the workplace, bragging about sexual domination of women, or making derogatory stereotypical comments about women.²²¹ The explanation that men do these things for base sexual satisfaction is naïve. Pornography is particularly prevalent in traditionally male workplaces; skilled trade unions and shops, police departments, fire departments, mines, and transportation companies are representative of the defendants in cases with significant ambient harassment.²²² In this context, harassment can be seen as “a means of preserving workplace power for [men].”²²³ Similarly, pervasive pornography and sexually explicit language can be seen as marking the workplace as a place for men.²²⁴

Finally, once it is determined by a court that the harassment alleged is indeed discriminatory, the court must consider whether that harassment meets the other standards set for actionable harassment under Title VII.²²⁵ In the case of ambient harassment, the question for the court will usually be whether the totality of the incidents of harassment is sufficiently pervasive as to alter the “terms, conditions and privileges of [the plaintiff’s] employment.”²²⁶ This is a question of fact and can be determined on the same basis for ambient harassment as it is for direct harassment. If a case contains both ambient and direct harassment—which will most often be the case—the decisionmaker should consider both types of harassment in concert.²²⁷

²²¹ See Note, *supra* note 29, at 1091 (“When male employees fight adamantly for their ‘right’ to use pornography at work, a crucial question to ask is ‘Why?’”).

²²² Janine Benedet argues that pornography is so prevalent in these workplaces “because the dominant heterosexual male culture affirms it.” Janine Benedet, *Pornography as Sexual Harassment in Canada*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 28, at 417, 432.

²²³ Katherine M. Franke, *What’s Wrong with Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 28, at 169, 178.

²²⁴ See Roberts, *supra* note 28, at 367 (“Permeating the work environment with speech, conduct, and artifacts that represent male sexual and other prerogatives is a way of demarcating it *for men only*.” (emphasis added)).

²²⁵ See *supra* notes 63–64 and accompanying text (listing the standards for actionable harassment under Title VII).

²²⁶ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

²²⁷ *Cf. Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999) (reversing the lower court decision finding for defendant because the district court conducted an “impermissible disaggregation of the incidents”).

V. AN ALTERNATE APPROACH: THE DISPARATE TREATMENT-DISPARATE IMPACT DICHOTOMY

Much of the confusion over whether ambient harassment is actionable under Title VII stems from an attempt to superimpose onto harassment the earlier-developed distinction between disparate treatment and disparate impact discrimination. Although these two categories were not created by the original statute, the distinction between disparate treatment and disparate impact was made clear in *Griggs v. Duke Power*.²²⁸ Disparate treatment—treating one gender, race, or other protected group differently “because of” that group status—was initially understood to be the only discrimination prohibited by Title VII.²²⁹ The theory of disparate impact applies to discriminatory outcomes that result from the application of a seemingly neutral practice, such as the high school diploma requirement in *Griggs* that led to segregated employment.²³⁰

In applying disparate impact to sexual harassment, theorists argue that certain conditions, such as pervasive posting of pornography in the workplace, are neutrally applied—because all workers, regardless of gender, are exposed to them—but still have a disparate impact on female workers. The recent spate of articles on disparate impact sexual harassment demonstrates the power of this idea. However, this Comment rejects the disparate impact harassment framework for several reasons: (1) Using a disparate treatment-disparate impact approach to harassment is not supported by legislative history, (2) disparate impact theory ignores the discriminatory sexual stereotypes that motivate even ambient sexual harassment, and (3) the disparate impact theory of harassment will ultimately hinder aggrieved women from bringing successful harassment claims by precluding plaintiffs from recovering money damages.

A. *Applying a Disparate Impact Model to Harassment*

In response to the renewed judicial focus on the “because of sex” element of sexual harassment, a number of scholars have recently suggested or considered a disparate impact model of harassment, specifically addressing the problem of pornography and sexualized banter in the workplace.²³¹ These commentators accept the view that the *Oncale* decision and tradi-

²²⁸ 401 U.S. 424 (1971).

²²⁹ See *id.* at 429 (noting that the court of appeals held “that, in absence of a discriminatory purpose, use of such requirements [resulting in disparate impact] was permitted by [Title VII]”).

²³⁰ See *id.* at 432 (“[G]ood 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 capacity.”).

²³¹ See Hébert, *Does Motive Matter?*, *supra* note 90; Robert A. Kearney, *The Coming Rise of Disparate Impact Theory*, 110 PENN ST. L. REV. 69 (2005); Timmons, *supra* note 128; David T. Bower, Note, *Make It Stop or I’ll Sue!: The Feasibility of a Hostile Work Environment Claim Created by Sexually Explicit Spam*, 90 IOWA L. REV. 1577 (2005).

tional Title VII jurisprudence foreclose the possibility of a court finding that ambient harassment is “because of sex.” Disparate impact theorists operate under the presumption that all actionable discrimination under Title VII is allocated into two distinct categories: disparate treatment and disparate impact.²³² Because ambient harassment encompasses behavior to which all members of a given workplace are audibly or visually exposed, it does not fit the traditional model for disparate treatment.²³³ Thus, these theorists argue, it must be actionable as disparate impact discrimination.

As a group, the disparate impact theorists presume that no discriminatory animus can be proved in situations of ambient harassment²³⁴ if there is no facially disparate treatment.²³⁵ It is this apparent lack of discriminatory motive that leads them to believe that a new model of sexual harassment—a disparate impact model—is needed to successfully bring these claims.²³⁶ Rather than focusing on the intent of the harasser, disparate impact theorists focus on the impact of the ambient harassment on the victim.²³⁷ In traditional disparate impact cases brought under the *Griggs v. Duke Power Co.* approach,²³⁸ plaintiffs use statistical information to demonstrate that a facially neutral practice creates a statistically significant disparity in the number of members of their group that are hired, fired, or promoted, or that

²³² Although these two categories were not clearly defined in the original statute, the distinction between disparate treatment and disparate impact was made clear in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²³³ Timmons, *supra* note 128, at 1186 (“Non-targeted sexual conduct in the workplace *does not constitute disparate treatment* because it is not caused by the *plaintiff’s sex*.” (emphasis added)); see also Hébert, *Does Motive Matter?*, *supra* note 90, at 343 (noting that post-*Oncale*, courts have focused on “whether the harasser has *singled out the target* of harassment because of his or her gender” (emphasis added)); Kearney, *supra* note 231, at 73–76 (describing the traditional view that sexual harassment is intentional discrimination).

²³⁴ Timmons, *supra* note 128, at 1186 (“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.”). They do not, however, uniformly believe that this motive is lacking. See, e.g., Hébert, *Does Motive Matter?*, *supra* note 90, at 345 (“[E]ven sexual conduct not specifically directed at a particular target is likely to have been *motivated by considerations of gender*.” (emphasis added)).

²³⁵ In many of the cases cited by the disparate impact proponents, some of the conduct is actually facially disparate treatment, while the bulk of the conduct fits the ambient harassment model. This is not surprising in light of the research done by Dr. Eugene Borgida, Dr. Susan Fiske, and others on the priming effects of sexualized images and language. See *supra* notes 47–51 and accompanying text. When ambient harassment spills over into some targeted conduct, which can be expected in the majority of cases, the characterization of harassment as disparate impact rather than disparate treatment is particularly inappropriate.

²³⁶ Hébert, *Does Motive Matter?*, *supra* note 90, at 343 (arguing that intent is the touchstone of the traditional model of sexual harassment). Hébert poses the disparate impact model of sexual harassment as a challenge to the “courts’ overriding concern with issues of intent and motive.” *Id.*

²³⁷ See, e.g., *id.* at 346. Compare EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2006) (focusing on conduct’s impact on the victim of harassment), with *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (focusing on harasser’s mindset).

²³⁸ 401 U.S. 424 (1971).

there is a statistically significant disparity in compensation between groups. In disparate impact sexual harassment cases, plaintiffs would seek to show that their group was disproportionately “disturbed, distressed, and/or distracted by the non-targeted sexual conduct occurring in the workplace.”²³⁹

In addition, Professor Kelly Cahill Timmons argues that the impact of sexual stereotyping (of women) on men is a facet of disparate impact harassment.²⁴⁰ She cites the expert testimony from *Robinson*²⁴¹ and *Jenson*²⁴² on sexual stereotyping and the priming effect.²⁴³ However, here Professor Timmons moves away from her analysis of disparate impact and focuses on the way that male employees change their treatment of women in the workplace due to ambient harassment.²⁴⁴ This approach coincides with her argument that a plaintiff could allege both disparate impact and disparate treatment harassment in the same suit, and she notes that the evidence of disparate impact might bolster the argument for disparate treatment.²⁴⁵ In this analysis, she draws from the line of cases that use sexualized banter and pornography as a framing device for other acts of harassment.²⁴⁶

In at least one case, a district court has drawn on this body of literature, in conjunction with the *Oncale* standard for harassment “because of sex,” to suggest that complaints of pornography in the workplace may be “more appropriate when a plaintiff is proceeding under a disparate impact theory (pornography affects sexes differently) than when a plaintiff is proceeding . . . under a disparate treatment theory of discrimination.”²⁴⁷ Although the district court went on to find that there were enough targeted incidents of harassment to sustain the plaintiff’s claim, its suggestion that the case could

²³⁹ See Timmons, *supra* note 128, at 1226. Hébert suggests that “generalized evidence about the effect of workplace harassment” would be sufficient to show disparate impact, unless there is “reason to believe that that evidence is not generally applicable to women in the employer’s workplace.” Hébert, *Does Motive Matter?*, *supra* note 90, at 384. Hébert’s model would place the burden of proof on the defendant to show that either the particular conduct at issue did not have a disparate impact on women or that the women in a particular workplace were not susceptible to this impact. *Id.* This approach creates a rebuttable presumption of discrimination when there is any sexualized conduct in the workplace and largely sidesteps the issue of whether the challenged conduct actually has a disparate impact on the women in a particular workplace.

²⁴⁰ See Timmons, *supra* note 128, at 1231–36.

²⁴¹ *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

²⁴² *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993).

²⁴³ See *supra* notes 47–51 and accompanying text.

²⁴⁴ See Timmons, *supra* note 128, at 1235 (“The method used by the *Robinson* and *Jenson* courts . . . relied on evidence that such conduct causes men to engage in the disparate treatment of women, thus indirectly harming women.”).

²⁴⁵ *Id.* (“[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.”).

²⁴⁶ See *supra* note 134 and accompanying text.

²⁴⁷ *Williams v. City of Chicago*, 325 F. Supp. 2d 867, 876 n.18 (N.D. Ill. 2004) (citing Timmons, *supra* note 128).

have been brought under a disparate impact theory shows the influence of scholars such as Professor Timmons.²⁴⁸

There are several reasons, however, why the disparate impact model, often used to prove discrimination in hiring, pay, and promotions, is not appropriate for ambient sexual harassment. First, the disparate impact model for ambient harassment should be rejected because it does not adequately capture the gender-biased dynamic of ambient harassment. Pornography and sexualized discussions that are demeaning to one gender or that promulgate invidious sexual stereotypes discriminate against the entire gender-class that is the target of their animus. A disparate impact approach presumes that the workplace practice is neutral and not implicated by subordination, stereotyping, or animus.²⁴⁹ Applying this theory to pornography and sexual banter that is filled with derogatory messages about one gender runs contrary to this presumption of neutrality.²⁵⁰

Additionally, while the proponents of the disparate impact sexual harassment model intend to broaden the range of tools available to victims of sexual harassment,²⁵¹ this theory is unlikely to have the practical effect of creating more successful harassment claims. In fact, it is likely to have the opposite effect: because Title VII explicitly denies compensatory and punitive damages for claims proceeding under disparate impact theory,²⁵² private practitioners will have little incentive to represent plaintiffs bringing such claims.²⁵³ By pushing for wide acceptance of the idea that ambient harass-

²⁴⁸ See *id.* at 876.

²⁴⁹ At least one proponent of the disparate impact sexual harassment claims admits the apparent inconsistency in finding that ambient harassment is a “facially neutral employment practice.” Hébert, *Does Motive Matter?*, *supra* note 90, at 363. Her analysis is primarily focused on demonstrating that this is not a barrier to evaluating harassment claims as disparate impact discrimination. *Id.* at 364–69.

²⁵⁰ This example operates under the presumption that the pornography and sexualized discussions in the workplace have a gender-bias, such as the pornography and discussions in *Petrosino II*. Presumably, if a defendant could show that the pornography and sexual banter in its workplace was gender-neutral and did not reinforce negative stereotypes about one gender or elevate one gender over the other, it could escape liability under this theory. This Comment does not deal extensively with this possibility because it is thought to be the rare exception, rather than the rule. Additionally, other standards for sexual harassment, such as the requirement that harassment be both subjectively and objectively offensive, should protect an employer from liability for inoffensive messages that implicate sexuality. In some situations, expert testimony on sexual stereotyping may be useful to address this issue.

²⁵¹ See Hébert, *Does Motive Matter?*, *supra* note 90, at 345 (“[F]or some types of sexual harassment claims, plaintiffs may be able to prevail under the disparate impact theory when they cannot prevail under the disparate treatment theory.”); Kearney, *supra* note 231, at 77–78 (arguing that *Oncale* “unwittingly unloosed the disparate impact hostile environment claim”).

²⁵² 42 U.S.C. § 1981a(a)(1) (2000).

²⁵³ Because the economic damages resulting from sexual harassment are de minimis in most cases, the remedies available to a disparate impact harassment plaintiff will likely provide too small a payoff to compensate lawyers for the risk of loss. *But see* Hébert, *Does Motive Matter?*, *supra* note 90, at 343–44 n.14 (“[A] plaintiff might reasonably decide that limited relief under the disparate impact theory is preferable to no relief under an unsuccessful disparate treatment claim, in which a court finds discriminatory motive or different treatment on the basis of sex to be absent.”). Hébert’s argument, however, presumes that the plaintiff at issue can afford to bankroll the prosecution of a lawsuit.

ment constitutes disparate impact discrimination rather than disparate treatment, these scholars may provide yet another tool for employers trying to avoid liability for compensatory and punitive damages.

B. 1991 Amendments, Part 2: The Folly of Disparate Impact Theory

Disparate impact theorists operate under the presumption that all actionable discrimination under Title VII is allocated into two distinct categories: disparate treatment and disparate impact.²⁵⁴ However, the section of the 1991 Amendments authorizing compensatory and punitive damages refers to two different categories of actionable discrimination: disparate impact and intentional discrimination (defined as everything that does not fall into the disparate impact category).²⁵⁵ The legislative history of the 1991 Amendments suggests that all harassment was intended to be conceptualized as intentional discrimination and that the attempt to divide harassment into disparate impact and disparate treatment is nonsensical.²⁵⁶ There was no apparent attempt in the amendments to distinguish between the directed conduct in a case like *Robinson v. Jacksonville Shipyards, Inc.*—sexual advances; comments made about Ms. Robinson’s clothing; and demeaning nicknames, including “honey,” “baby,” “sugar-booger,” and “momma”—and ambient harassment such as pornography, sexually abusive graffiti, and comments made to other employees.²⁵⁷

In at least one proposed version of the 1991 Amendments, there was a separate section, “Sec[ti]on 8. Providing For Additional Remedies for Harassment In the Workplace Because of Race, Color, Religion, Sex, or National Origin.”²⁵⁸ This section appears to be a previous or alternative version of the enacted language, which refers generally to “intentional discrimination.”²⁵⁹ This understanding—that harassment generally is encompassed by “intentional discrimination”—is supported by the language used by President George H.W. Bush when he vetoed the Civil Rights Act of

²⁵⁴ See *supra* note 232.

²⁵⁵ 42 U.S.C. § 1981a(a)(1) (2000). This semantic distinction suggests that not all discrimination must be classified as either disparate impact or disparate treatment. Rather, for the purposes of compensatory and punitive damages, the relevant distinction is between disparate impact and intentional discrimination. Under this framework, intentional discrimination includes what we generally think of as disparate treatment as well as all harassment.

²⁵⁶ See *infra* notes 258–64 and accompanying text.

²⁵⁷ 760 F. Supp. 1486, 1493–99 (M.D. Fla. 1991). It similarly appears that the court in *Robinson* did not distinguish between behavior that was directed toward Ms. Robinson and behavior that she merely witnessed. See *id.* It devoted more space to descriptions of pornography than it did to any behavior directed at Ms. Robinson. See *id.*

²⁵⁸ H.R. REP. NO. 102-83, at 11 (1991), reprinted in 1 THE CIVIL RIGHTS ACT OF 1991, *supra* note 75, at doc. no. 3.

²⁵⁹ 42 U.S.C. § 1981a(a)(1).

1990 and proposed a new civil rights bill.²⁶⁰ There is no indication that this change in language was intended to provide money damages only for some kinds of harassment and not others. Although the President's version of the bill used the later codified language of "intentional discrimination,"²⁶¹ he described the provision as "creating new monetary remedies for the victims of practices such as sexual harassment."²⁶² The enacted language seems to be broader than the earlier proposed language, extending the availability of compensatory and punitive damages to other forms of intentional discrimination for which money damages were already available.²⁶³

It appears that the distinction between intentional discrimination and disparate impact in this section was written to underscore the fact that compensatory and punitive damages were not available for plaintiffs alleging that an employer's otherwise neutral practices created a discriminatory disparity in the numbers of employees hired, fired, or promoted, or in the amount of compensation. In the interpretive memorandum that was read into the congressional record after the final version of the 1991 Amendments, this section of the bill is described as follows:

We have resolved the problem of legal redress toward discrimination in the work force. We have provided, for the first time, a remedy for women who have been harassed on the job, a remedy of damages, and we have done so in a way that satisfies the administration as not constituting quota legislation. The position that the administration now takes is that *this is not a quota bill*.²⁶⁴

This reference to quotas is a reference to judicial oversight of hiring and firing decisions under disparate impact theory, which is generally frowned upon. The distinction drawn by the bill's language, prohibiting compensatory and punitive damages for claims of disparate impact, is applicable only to the type of disparate impact discrimination that falls under the analysis laid out in *Griggs v. Duke Power Co.*²⁶⁵ Therefore, specifically with regard to compensatory damages, ambient harassment should not be distinguished from targeted harassment for the purposes of the 1991 Amendments.

²⁶⁰ See S. DOC. NO. 101-35 (1990) (message from Pres. George H.W. Bush, returning S.2104 without approval), *reprinted in* 3 THE CIVIL RIGHTS ACT OF 1991, *supra* note 75, at doc. no. 118.

²⁶¹ H.R. DOC. NO. 101-251, at 25 (1990) (message from Pres. George H.W. Bush, transmitting alternate language to S.2104), *reprinted in* 3 THE CIVIL RIGHTS ACT OF 1991, *supra* note 75, at doc. no. 119.

²⁶² S. DOC. NO. 101-35, at 1, *reprinted in* 3 THE CIVIL RIGHTS ACT OF 1991, *supra* note 75, at doc. no. 118.

²⁶³ Contemporary sources interpret this change in language to be expansive, rather than restrictive. See 1 THE CIVIL RIGHTS ACT OF 1991: LEGISLATIVE HISTORY 1 (Douglas S. McDowell ed., 1992) ("Importantly, these new damages are *not* limited to cases of . . . harassment. Victims of any type of intentional discrimination (e.g., hiring, promotion, transfer, discharge, etc.) may be eligible for this new relief.").

²⁶⁴ 137 CONG. REC. S15,277 (daily ed. Oct. 25, 1991) (statement by Sen. Danforth) (emphasis added), *reprinted in* 2 THE CIVIL RIGHTS ACT OF 1991, *supra* note 75.

²⁶⁵ 401 U.S. 424 (1971).

In light of the general provision of monetary damages for all types of sexual harassment outlined above, once harassment is shown to be “because of sex,” remedies should automatically follow, with no further proof needed that the harassment constituted disparate treatment as such.

VI. OVERCOMING COMMON CRITICISMS

A. *Opening the Floodgates*

The *Oncale* Court indicated that one of the reasons it emphasized the “because of sex” requirement in sexual harassment cases was to prevent Title VII from becoming “a general civility code for the American workplace.”²⁶⁶ This concern has been cited by other courts in finding that ambient harassing language and imagery are not because of sex.²⁶⁷ The ambient harassment sex discrimination analysis proposed in this Comment, however, would not open the floodgates of litigation. The “because of sex” limitation would continue to preclude harassment claims based on workplace hostility that is rooted in nonsexual interpersonal conflicts, scatological humor, and nonsexual vulgarity, such as excessive use of the words “shit,” “damn,” and “fuck” (when used in a nonsexual context). By requiring that plaintiffs make a showing of the stereotypical or demeaning content of the harassment, courts can limit this theory to apply to true sexual harassment.

B. *Liability for Ambient Harassment*

Another potential argument against finding actionable sexual harassment for ambient harassment is that it is not appropriate to hold a company liable for conduct that may only be considered harassment if one gender is exposed to it. This could raise concerns that the concept of ambient harassment is too vague or that the company would not have sufficient notice to correct the situation before being subject to litigation.²⁶⁸ Additionally, fairness concerns might be implicated by the fact that the introduction of female employees can transform a Title VII-compliant workplace into a sexual harassment liability.²⁶⁹

²⁶⁶ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

²⁶⁷ *See, e.g., Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 741 (8th Cir. 2000) (Gibson, J., concurring) (“The standards for establishing a hostile environment are set high so that Title VII ‘does not become a ‘general civility code.’” (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998))).

²⁶⁸ The most extreme fairness concerns might be present in situations where plaintiffs allege that sexually explicit spam creates a hostile environment. *See generally* Bower, *supra* note 231.

²⁶⁹ This could have the additional, and unfortunate, result of discouraging employers from hiring women or discouraging them from putting women into situations where they might be offended. *See id.* at 1606.

The *Faragher-Ellerth* defense should protect a company from sudden, unwitting liability by requiring that an employee complain about harassment to her employer before the employer can be liable for harassment.²⁷⁰ However, some courts have determined that open and pervasive harassment can lead to a finding that the company had constructive knowledge.²⁷¹ Depending on which policy goal is determined to be the most important in a given case—fairness to the employer or creating a safe working environment for women—the court could decide whether an imposition of constructive knowledge is appropriate for the situation. However, situations in which employers are found liable for ambient harassment under a theory of constructive knowledge are likely to be an extraordinarily small percentage of overall cases. The larger concern should be women who are denied relief despite the fact that they have repeatedly and unsuccessfully asked for changes to their workplaces.

C. First Amendment Concerns

Some commentators have noted that restrictions on harassing speech in the workplace may violate the First Amendment's Free Speech Clause.²⁷² These commentators tend to find that ambient harassment poses a special problem for First Amendment jurisprudence because it imposes content restrictions on speech that may be directed to willing listeners but overheard by others who it may offend.²⁷³ These commentators believe that this distinction makes regulation of ambient harassment more intrusive than regulation of direct harassment and, thus, a violation of the First Amendment.²⁷⁴ However, there is no constitutional conflict in holding that ambient harass-

²⁷⁰ As long as the employer has established a reasonable harassment policy, promulgated it among its employees, and responded appropriately to complaints of harassment, it will be shielded from liability. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(d) (2006).

²⁷¹ See *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (finding that pervasive harassment, including offensive graffiti, raises the question of employer knowledge); *EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 953 (N.D. Ill. 2001) (holding that the company should have known of sexual harassment because of the open display of "offensive materials, including sexual cartoons, magazines, and calendars"); *Mills v. Amoco Performance Prods.*, 872 F. Supp. 975, 987 (S.D. Ga. 1994) (finding constructive knowledge based on pattern of "frequent and nondiscrete," "offensive, sexually suggestive and explicit acts and comments").

²⁷² U.S. CONST. amend. I; see also Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

²⁷³ See Kingsley R. Browne, *The Silenced Workplace: Employer Censorship Under Title VII*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 28, at 399, 409–10 (discussing problems with limiting liability to only "directly targeted speech"); Volokh, *supra* note 272, at 1797, 1848–63 (distinguishing undirected harassment from directed harassment and finding that the former should be protected).

²⁷⁴ See Volokh, *supra* note 272, at 1846.

ment in the workplace—whether pornographic images or sexually derogatory or stereotyping speech—is a violation of Title VII.²⁷⁵

There is no constitutional distinction between ambient harassment and most other verbal harassment based on sex. Although some extreme harassing comments, such as a threat that a woman will be raped if she returns to the workplace, are unprotected criminal threats,²⁷⁶ most harassing language falls short of this exception to the First Amendment and, thus, cannot be banned outright by the government. However, the individual harasser does not have a constitutional claim. A public employer has the authority to curtail speech²⁷⁷ when its interests as an employer outweigh the employee's free speech interests.²⁷⁸ Under the *Connick-Pickering* balancing test,²⁷⁹ the employer's interests are weighed against the employee's free speech interests to determine "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."²⁸⁰ The employer's interests, as outlined above, are identical in situations of ambient harassment and directed harassment. When the employer is a private party, rather than the government, it has even wider latitude to regulate speech and generally can do so unless the regulation is otherwise contrary to public policy.²⁸¹ In the case of sexual harassment, this is an easy test for the employer to satisfy, as it is the harassment, not the regulation of it, that is contrary to public policy.

However, the idea that the government may use Title VII to coerce public and private employers into restricting employee speech is not neatly answered by the above cases. Perhaps most importantly, the argument that

²⁷⁵ In fact, in some jurisdictions, pornography and profanity (which are major components of ambient harassment) are considered "low value" speech and receive less protection under the First Amendment. See Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 628–29 & n.5 (1997).

²⁷⁶ See *United States v. Fulmer*, 108 F.3d 1486, 1492–93 (1st Cir. 1997) ("[A] true threat is unprotected by the First Amendment.").

²⁷⁷ This is true even if that speech passes the threshold test for protection: whether it may be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146 (1983). Restrictions on a government employee's speech will usually be subject to the balancing test only if the employee can make this showing. See *id.* at 147. It is unlikely that harassing speech will rise to the level of "a matter of public concern."

²⁷⁸ See *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("The determination whether a public employer has properly discharged an employee for engaging in speech requires 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968))).

²⁷⁹ See generally *Connick*, 461 U.S. 138; *Pickering*, 391 U.S. 563.

²⁸⁰ *Rankin*, 483 U.S. at 388 (citing *Pickering*, 391 U.S. at 570–73).

²⁸¹ See David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 29–32 (1998).

Title VII's antiharassment provisions violate the First Amendment has little force in practice. Many courts avoid the issue of whether Title VII and the First Amendment conflict, by simply not addressing the question. The court in *Robinson* approached the question head-on and wrote extensively on why there is no conflict between the First Amendment and an order of injunctive relief in a hostile environment sexual harassment case.²⁸² Although the *Robinson* court enumerated seven reasons, there are three general arguments. The first argument relies on the fact that the defendant in *Robinson* "ha[d] disavowed that it [sought] to express itself through the sexually-oriented pictures or the verbal harassment by its employees."²⁸³ The second reason the court gave is that harassment is actually discriminatory conduct, rather than expressive speech.²⁸⁴ The third reason the court gave, the one most commonly given by courts, is that workplaces are special environments in which speech that would normally be protected by the First Amendment can be regulated or banned.²⁸⁵

Not every case will be as clear as *Robinson* in this regard. Conflict with the First Amendment could arise if one employee felt harassed by the political speech of another employee. For instance, a male firefighter might speak out against differential fitness requirements for men and women joining the force: "If women can't pass the tests, they shouldn't be firefighters." Despite the fact that the author of this Comment is uncertain how this case should come out, this is exactly the type of speech that is susceptible to the *Connick-Pickering* balancing test articulated above.²⁸⁶ The mere possibility of conflicting public interests should not be a barrier to establishing this rule.

²⁸² *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534–37 (M.D. Fla. 1991).

²⁸³ *Id.* at 1534–35 (noting that only expressive speech is protected by the First Amendment). While this reason is dependent on the defendant's posture on the expressiveness of the speech at issue, *id.* at 1534, it is likely that many defendants in harassment cases would fall into the same category.

²⁸⁴ *Id.* at 1535 (finding that harassment "is indistinguishable from the speech that comprises a crime, such as threats of violence or blackmail"). For a comparative perspective, see Benedet, *supra* note 222, at 433, which examines a Canadian decision that "took an approach to expressive rights that permits an evaluation of speech in its social context" and that led to a finding that "the speech itself is . . . an act of domination." *Id.* at 433 (citing *Ross v. Sch. Dis. No. 15*, [1996] 1 S.C.R. 826 (Can.)).

²⁸⁵ See *id.* at 1535–37. The court cites a number of factors contributing to this finding, including (1) that the restriction is only on "time, place, and manner" of speech; (2) that female workers "are a captive audience"; (3) that the government has a "compelling interest" in workplace equality that must be balanced with the free speech interests; (4) that an employer (even a government employer) may regulate speech in the interest of "maintaining discipline and order in the workplace"; and (5) that a workplace restriction is distinguishable from a law that "conveys a message that [some speech] is always inappropriate and always subject to punishment, regardless of the context in which it appears." *Id.*; see also Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 538–40 (1995) (arguing that a confluence of factors, including the captive audience in the workplace, the interest in "penalizing coercive speech," and the fact that Title VII is not a direct restriction on speech but an economic incentive to regulate it, preclude conflict between the Title VII and the First Amendment).

²⁸⁶ See discussion *supra* notes 277–80.

Additionally, there may be some workplaces that could raise a business necessity and free speech defense to charges of ambient harassment. One example is raised in *Lyle v. Warner Brothers Television Productions*.²⁸⁷ The plaintiff in this case worked as a comedy writer's assistant on the television show *Friends*.²⁸⁸ Her claim of sexual harassment was based primarily on sexualized discussions in the workplace²⁸⁹—discussions that under this Comment's framework may be ambient harassment. Because the business of the employer was to create scripts for a television show with sexual themes, industry groups including the Writers Guild of America argued that regulation of sexual discussions would fetter the creative process necessary to produce the business's product.²⁹⁰

Although the majority of the Supreme Court of California found it unnecessary to reach the constitutional question in order to affirm the entry of summary judgment for the employer,²⁹¹ Justice Chin wrote separately about the First Amendment implications of harassment law in an expressive workplace.²⁹² He found that, in *Lyle*, imposing liability for the allegedly harassing speech would make it nearly impossible to produce the business's creative product.²⁹³ His concurring opinion was limited to workplaces where the "product is . . . creative expression itself."²⁹⁴ This analysis would preclude sexual harassment claims based on work-related expressive conduct in similar workplaces, including pornography industries, museums, art galleries, adult bookstores, or law firms or court systems where sexually explicit conduct is litigated "if the speech that creates the hostile work environment is an *inherent part of the employer's business*."²⁹⁵

However, there are limits to this defense, even when applied in the context of an expressive workplace. Although Justice Chin warned against too exacting an evaluation of whether the alleged harassment was a part of the creative process,²⁹⁶ courts should have some ability to evaluate the speech occurring in expressive workplaces and to deny the applicability of

²⁸⁷ 132 P.3d 211 (Cal. 2006).

²⁸⁸ *Id.* at 215.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 233 (Chin, J., concurring).

²⁹¹ *Id.* at 231 (majority opinion).

²⁹² *Id.* (Chin, J., concurring).

²⁹³ *Id.* at 233.

²⁹⁴ *Id.* at 232.

²⁹⁵ *Id.* at 232–33 (emphasis added) (quoting Volokh, *supra* note 272, at 1853) (internal quotation marks omitted) (citing Miranda O. McGowan, *Certain Illusions About Speech: Why the Free-Speech Critique of Hostile Work Environment Is Wrong*, 19 CONST. COMMENT. 391, 391 (2002); Volokh, *supra* note 272, at 1853, 1861).

²⁹⁶ *See id.* at 233–34.

the defense if the harassing speech is clearly unrelated to the business product.²⁹⁷

Similarly, courts would be able to examine the context of the offending speech to determine whether it is actually harmless.²⁹⁸ A claim of sexual harassment based on nude sculptures, paintings, or drawings in the workplace would likely be baseless unless the art was accompanied by additional behavior or speech that transformed it into harassment.²⁹⁹ In order to satisfy the extant requirements for a claim of sexual harassment, the display of the art would have to be demonstrated to be “because of sex”³⁰⁰ and sufficiently severe or pervasive to affect a “term, condition or privilege of employment.”³⁰¹

CONCLUSION

The analysis in *Oncale v. Sundowner Offshore Services, Inc.*,³⁰² which had the intended effect of opening Title VII harassment remedies to victims of same-sex harassment, had the ironic effect of denying redress to another class of harassment victims: women whose work environments are poisoned with pornographic images and sexual stereotypes that label them as subordinate to their male coworkers. However, the narrow interpretation of “because of sex” in and after *Oncale* stems from a misunderstanding of the historical evolution of sexual harassment, as well as from a failure on the part of courts to evaluate the motives of male harassers. Courts need to reorient their harassment analysis. Rather than looking to see whether both male and female employees were exposed to harassing behaviors, courts must examine whether ambient harassment contains gender-biased messages. Courts should look at whether the images or discussions complained

²⁹⁷ There is a delicate balance to be struck between this evaluation and the presumption against governmental regulation of expressive speech. However, keeping in mind the usual standards for free speech cases, this issue could be litigated without placing too high a burden on freedom of speech.

²⁹⁸ Eugene Volokh points to several incidents in which art was the basis of complaint. Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 566–67 & nn.11–14 (1995). Only one of these incidents actually led to a lawsuit, see *Jones v. Flagship Int’l*, 793 F.2d 714 (5th Cir. 1986), which was also based on several directed incidents of harassment and was found insufficient on the basis that the allegations were not “sufficiently pervasive.” *Id.* at 716–17, 720–21. This Comment agrees that public art should not be the basis for a harassment claim. However, Volokh includes in this category the pervasive display of pornography in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493–99 (M.D. Fla. 1991). Volokh, *supra*, at 566 n.11. This Comment draws a distinction between the situation in *Robinson* (actionable harassment) and the other incidents described by Volokh.

²⁹⁹ For instance, if a piece of art were altered in order to titillate or embarrass female employees.

³⁰⁰ A nude sculpture, for instance, would not meet the requirement for “because of sex” harassment described in this Comment, which requires that the speech or conduct be based on sexual stereotypes or animus.

³⁰¹ This is the basis on which the claim of harassment based on art failed in *Jones v. Flagship International*. 793 F.2d at 719–21; see also *supra* note 298.

³⁰² 523 U.S. 75 (1998).

of contain sexual stereotypes or gender subordination demands. A closer look at the motivations of sexualized behavior in the workplace can provide a remedy without turning Title VII into a “general civility code for the American workplace.”³⁰³

³⁰³ *Id.* at 80.