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THE SOCIAL CONTEXT VARIABLE IN HOSTILE ENVIRONMENT LITIGATION

Michael J. Frank*

In all harassment cases, judging the objective severity of the harassment “requires careful consideration of the social context in which particular behavior occurs . . . . Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing . . . and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.”

Although Oncale v. Sundowner Offshore Services, Inc. is generally known for its holding that same-sex harassment is actionable under Title VII, the decision is more frequently cited for its instruction to consider social context when analyzing hostile work environment claims. Courts attempting to give effect to this instruction, however, have encountered difficulty in determining exactly what the Court meant by “social context.” Oncale’s social context exhortation is susceptible to different interpretations and can be construed to support a wide range of judicial practices. These include analyzing hostile environment claims according to a “reasonable woman” standard, placing special emphasis on any romantic relationship or friendship between the victim and putative harasser, considering all acts of harassment as an aggregate whole, and considering whether the harassment occurred in a public or private context, to name but a few.

* The author is an attorney specializing in labor and employment law. He wishes to thank Professor Samuel Estreicher, Director of the Center for Labor and Employment Law at New York University Law School, for his helpful comments and suggestions.

2 See, e.g., EEOC v. R&R Ventures, 244 F.3d 334, 340 (4th Cir. 2001); Jackson v. Quanex, 191 F.3d 647, 661 (6th Cir. 1999).
3 See infra Part II.B.
4 See infra Part II.C.
5 See infra Part II.D.
6 See infra Part II.A.
Oncale's mandate can also be interpreted as requiring courts to pay close attention to the workplace culture—sometimes called the blue- or white-collar culture—especially as this relates to the unwelcomeness and severity of the harassment, and its cause. In this age where coarse language is commonplace, an assessment of purported harassment in light of this culture could be important. According to this view, Oncale endorsed the practice whereby courts examine the record to determine whether vulgar language and unpleasant conduct is a normal part of the workplace, and whether the plaintiff participated in similar conduct. When these key attributes are found, the courts deem them highly probative in determining whether the purported harassment was severely offensive, unwelcome, or motivated by the plaintiff's sex.

Under this understanding of "social context" the prevalence of blue-collar behavior usually precludes the plaintiff's hostile environment claim, as courts interpret pervasive vulgarity as (1) indicating that the conduct was a regular part of the environment and, thus, not always directed at the plaintiff and not unwelcome, (2) suggesting that neither the plaintiff nor a reasonable person would find the conduct severe, or (3) indicating that the conduct was not based on the plaintiff's sex. This is particularly true where the plaintiff similarly used

7 Because the Sixth and Tenth Circuits have already used the adjective "blue-collar" to describe these workplaces, it is convenient to continue using this nomenclature. The author means no disrespect to blue-collar workers and recognizes that many of these workers conduct themselves in a gentlemanly or lady-like manner that would rival white-collar workers in refinement. One need only listen to the Nixon audio tapes to realize that white-collar workers are often not models of etiquette. Similarly, a recent description of a New York law office shows that juvenile behavior is not confined to blue-collar contexts. See Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser, L.L.P., 153 F. Supp. 2d 219, 222 (S.D.N.Y. 2001) ("[C]onversation became 'quite vulgar' in the evening . . .").

8 See Dominic Bencivenga, Same-Sex Harassment: Ruling Puts Work Environment Under Scrutiny, N.Y. L.J., Mar. 12, 1998, at 5 ("The broad, conduct-based analysis could establish class distinctions for Title VII plaintiffs, as it could be interpreted to allow different standards for different work environments.").

9 See, e.g., Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997) (holding that crude statements were ordinarily an expression of animosity in the workplace and thus not based on the plaintiff's sex); Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1547 (10th Cir. 1995) (holding that supervisor's offensive comments, taken in the social context of a construction company, were not based on the plaintiff's sex); Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991) (holding that crude comments and conduct were a regular part of the prison work environment and were not offensive to the plaintiff, particularly in light of the fact that she was an active participant in similar conduct).

10 This Article often speaks in terms of sexual harassment because this is the most common type of harassment litigation. See Lipsett v. Univ. of P.R., 864 F.2d 881, 898
foul language or engaged in behavior comparable to that of her purported harasser. Under this approach, the continual use of crude language, so long as it was not directed at the plaintiff, frequently will not constitute actionable harassment; only continued touching or particularly virulent invectives would result in liability for the employer.

More often than not, cases in which the courts have taken a close look at the cultural context have been easy ones that probably would have come out the same way regardless of the blue-collar environ-

n.19 (1st Cir. 1988). But the discussion is also applicable to harassment on other prohibited bases—like religion or race—and harassment which offend other statutes like the ADA or the ADEA. See Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998) ("Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment."); Silk v. City of Chicago, 194 F.3d 788, 804 (7th Cir. 1999) (applying the Title VII standard for hostile environment sex harassment to a harassment claim under the ADA); Brennan v. Metro. Opera Ass'n, 192 F.3d 310, 318 (2d Cir. 1999) ("The analysis of the hostile working environment theory of discrimination is the same under the ADEA as it is under Title VII."); Standifer v. Gen. Teamsters Union No. 460, No. CIV.A.97-2037-GTV, 1998 WL 229553, at *6 (D. Kan. Apr. 13, 1998) (race harassment under 42 U.S.C. § 1981).

11 See, e.g., Johnson, 125 F.3d at 412 n.4 (holding that hostile work environment did not exist when plaintiff responded in kind); Reed, 929 F.2d at 491 (holding that no hostile work environment existed given plaintiff's predilection toward "sexually suggestive jokes and activities"); Vaughn v. Pool Offshore Co., 683 F.2d 922, 924–25 (5th Cir. 1982) (holding that hostile work environment did not exist given that racial epithets were "bandied back and forth without apparent hostility or racial animus"); Reynolds v. Atlantic City Conv. Ctr. Auth., No. CIV.A.88-4232, 1990 WL 267417, at *18 (D.N.J. May 26, 1990), aff'd, 925 F.2d 419 (3d Cir. 1991) (holding that hostile work environment did not exist when plaintiff used obscenities).

12 Of course, one act of battery or sexual assault is sufficiently severe to constitute harassment, regardless of the social context in which it occurs. See, e.g., Smith v. Sheahan, 189 F.3d 529, 534 (7th Cir. 1999) (observing that one incident resulting in surgery to the plaintiff's wrist could constitute harassment); Todd v. Ortho Biotech, Inc., 138 F.3d 733, 736 (8th Cir. 1998) (finding that a single attempted rape was sufficiently severe to be actionable); Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) ("[E]ven a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability."); Seldomridge v. Uni-Marts, Inc., No. CIV. A.99-4232, 2001 WL 771011, at *6 (D. Del. July 10, 2001) ("In exceptional cases . . . an isolated incident may be actionable under Title VII if it is extremely serious . . . ."); Jones v. U.S. Gypsum, 126 F. Supp. 2d 1172, 1179 (N.D. Iowa 2000) (noting that a serious offensive touching may be sufficiently severe to constitute harassment); Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 958, 969–70 (D. Minn. 1998) (finding that an isolated incident of sexual assault could create a hostile environment). Because battery is also a tort at common law, and is so clearly at the harassment end of the "offensiveness spectrum," it has little relevance to a discussion of attempts to create standards to assist courts in deciding close cases.
ment. Because of this, it is difficult to ascertain the full effect that workplace culture has on the analysis. It could prove significant to the evolving hostile environment jurisprudence, particularly because many sexual harassment plaintiffs serve in traditional blue-collar jobs.\(^{13}\) The foremost justification for this sensitivity to workplace culture may be its capacity to ensure that sexual harassment law does not become a workplace civility code.\(^{14}\) Other advantages of the approach might include greater predictability, uniformity, and consistency in harassment cases.\(^{15}\) This, in turn, could result in quicker settlement of meritorious cases, less litigation, lower transaction costs, and possibly greater and speedier protection of white-collar employees and victims of egregious harassment.\(^{16}\) With a keen understanding of Title VII, and perhaps influenced by these perceived advantages, the Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits, along with several district courts and state courts, have generally adopted the practice of considering the social context of the workplace when addressing questions of motivation, objective and subjective severity, and unwelcomeness.\(^{17}\)

\(^{13}\) This is true at least as to plaintiffs whose lawsuits resulted in reported decisions. See Ann Juliano & Stewart J. Schwab, The Sweep of Sexual Harassment Cases, 86 Cornell L. Rev. 548, 561 (2001) (“Where occupation status of the plaintiff could be identified, . . . 38% of the plaintiffs we could classify were blue-collar (40% of the workforce).”).

\(^{14}\) Oncale v. SunDowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (stating that the causation requirement “prevents Title VII from expanding into a general civility code”).

\(^{15}\) See infra Part IV.

\(^{16}\) But see Ricketts v. Pa. R.R. Co., 153 F.2d 757, 761–62 n.6 (2d Cir. 1946) (Frank, J., concurring).

Perhaps the most fatuous of all notions solemnly voiced by learned men who ought to know better is that when legal rules are “clear and complete” litigation is unlikely to occur. Such writers surely cannot be unaware that thousands of decisions yearly turn on disputes concerning the facts, i.e., as to whether clear-cut legal rules were in fact violated. It is the uncertainty about the “facts” that creates most of the unpredictability of decisions.

On the other hand, courts including the First, Fourth, and Sixth Circuits have rejected any special treatment of workplace culture. They contend that any special consideration of workplace unpleasantries lowers the hostile environment standard for blue-collar workplaces, helps to exclude women from traditionally-male occupations, and gives employers a perverse incentive to create a harsher work environment in an effort to get the benefits of a reduced standard. It is also arguable that this approach is contrary to the purposes of Title VII, which was intentionally drafted "in the broadest possible terms" so that it might reach harassment in all of its forms. Furthermore, any advantages that a consideration of workplace culture may entail in terms of predictability could be outweighed by the difficulty of assigning the proper standard to specific workplaces and in defining the contours of the new standard. In short, courts that decline to consider workplace culture have plenty of arguments to support their position.


18 See, e.g., O’Rourke v. City of Providence, 235 F.3d 713, 735 (1st Cir. 2001) ("[T]here is no merit to the City’s argument at the first trial that it was entitled to a jury instruction that the firefighters’ conduct should be evaluated in the context of a blue collar environment . . . ."); Conner v. Schrader-Bridgeport Int’l, Inc., 227 F.3d 179, 194 (4th Cir. 2000) ("We are unable to discern an ‘inhospitable environment’ exception to Title VII’s mandate that employers may not discriminate . . . ."); Jackson v. Quanex Corp., 191 F.3d 647, 662 (6th Cir. 1999) ("[T]he district court was wrong to condone continuing racial slurs and graffiti on the grounds that they occurred in a blue collar environment."); Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999) ("[W]e reject the view that the standard for sexual harassment varies depending on the work environment.").

19 See Jackson, 191 F.3d at 662 (deeming reduced standard reasoning illogical); Williams, 187 F.3d at 564 (arguing that this reasoning means that “the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment").


21 See infra Part V.
This Article considers the justification, advantages, and disadvantages of considering workplace culture. To properly understand the need to examine workplace culture in harassment cases, it is first necessary to have some familiarity with the purpose of harassment law and its application in the courts. The Article, therefore, initially provides some relevant background on the hostile environment cause of action and the present standard for harassment, including the Supreme Court's suggestion that courts assess harassment claims according to the "social context" in which they arise. In Part II, this Article then addresses various interpretations of "social context" and criticizes some of them as unwarranted under Title VII. Part III narrows the focus and considers those cases that interpret Oncale as an order to look at workplace culture, and those pre-Oncale cases that are consistent with this view. It addresses the asserted justifications for examining workplace culture.

Part IV considers the advantages to be gained from this practice. In particular, it considers the ways in which this new approach might be beneficial to courts, litigants, and the general public. Among the benefits are greater certainty, predictability, and uniformity of decisions, and the concomitant advantages that greater certainty would entail. Part V presents the case against the practice of examining cultural context. Included in this indictment are charges that this practice has created a new standard for harassment in the blue-collar context, has provided perverse incentives for employers to ignore caustic work environments, and that any diminished standard is difficult to administer. The Article concludes that these criticisms exaggerate the perceived problems associated with the practice of examining social context and that this practice is necessary to a sound evaluation of the "totality of the circumstances." An examination of workplace culture does not necessarily lead to the creation of a new standard for harassment cases, but merely assures that courts are sensitive to the cultural dynamics of the workplace.

I. HOSTILE ENVIRONMENT HARASSMENT UNDER TITLE VII

A. The Development of Hostile Environment Law

By its own terms, Title VII prohibits discrimination against employees on the basis of their race, color, religion, sex, or national origin, with respect to hiring, firing, or other terms and conditions of employment.22 Although the text of the statute does not define or even use terms like "hostile environment" or "harassment," federal ap-

Pellate courts have held since at least 1971 that an employer can alter the terms and conditions of employment by making an employee's work environment unbearable. It was in 1971 that the hostile environment cause of action was first recognized by one judge of the Fifth Circuit in Rogers v. EEOC, a case of ethnicity or national origin harassment. There, Judge Goldberg, although unable to convince either of his colleagues to join his opinion, observed that Title VII necessarily extended its protection to certain attributes of the work environment, otherwise employers could evade Title VII's prohibition of using ethnicity as a factor in making personnel decisions simply by making the work environment so unbearable as to coerce the departure of protected employees. Judge Goldberg believed that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice creating a working environment heavily charged with ethnic or racial discrimination.

23 See Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (Goldberg, J., with one judge concurring in the result); see also DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995) (observing that the purpose of a hostile environment claim "is to level the playing field for women who work by preventing others from impairing their ability to compete on an equal basis with men"). Actually, in most instances it is not the employer that creates a hostile workplace; it is usually other employees. Nevertheless, Title VII has been interpreted as applying only to employers.

24 Rogers, 454 F.2d at 234. This case arrived at the Fifth Circuit in a rather strange posture. After Josephine Chavez complained to the EEOC that several white co-workers "abused" her and that her optometrist employer segregated patients, the EEOC conducted an investigation in which it requested from the employer information relating to the patients. The employer filed a petition to set aside or modify the demand for production of documents, which the district court granted in part because it found that Chavez had not suffered an unlawful employment practice. The issue on appeal was thus whether the employer's treatment of Chavez by segregating patients sufficiently suggested a violation of Title VII as to warrant discovery by the EEOC. Id. at 236-37.

25 See id. at 239. The court stated: "As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees. The petitioner's alleged patient discrimination may very well be just such a sophisticated method . . . ." Id.

26 Id. at 238. Judge Roney dissented. He argued that there is no indication in the Act or the legislative history that Congress in passing Title VII was concerned about whether an employer's business presents conditions for employment that are environmentally unattractive to all, whether the manner of his operation suits everyone, or whether a particular individ-
He recognized that harassment is a form of disparate treatment, because it entails a difference in the terms, conditions, or privileges of employment based on the employee's sex, race, religion, or national origin. Accordingly, the law only prohibits harassment that seriously affects an employee based on these protected characteristics.

In 1981, in *Bundy v. Jackson*, the District of Columbia Circuit adopted this reasoning and applied it to a case of sexual harassment. *Bundy* involved quid pro quo and hostile environment harassment, including frequent propositions for sex from several supervisors and fellow employees. When Sandra Bundy complained to one supervisor, he responded that "any man in his right mind would want to rape you." The court of appeals reasoned that a claim for hostile environment sexual harassment must be cognizable under Title VII, otherwise the plaintiff's supervisors could extort sex from her by making her life miserable. Because such a case might be thought of as a type of quid pro quo case—where the victim is implicitly asked to trade sex for a tolerable work environment—and everyone concedes that quid pro quo cases are covered by Title VII, it stands to reason that these hostile environment cases are similarly actionable. Importantly,
both the Bundy and Rogers courts recognized that harassment is only actionable when it is caused by the plaintiff's sex or race, or some other protected attribute, and, thus, general unpleasantries unconnected to race or sex are not actionable.

B. The Supreme Court Addresses Hostile Environment Harassment

A hostile environment case finally made its way to the Supreme Court in 1986 in Meritor Savings Bank, F.S.B. v. Vinson, the decision in which the Court gave its imprimatur to the reasoning of Rogers and Bundy. Plaintiff Michelle Vinson claimed that her supervisor "fondled her in front of other employees, followed her into the women's restroom . . . exposed himself to her, and even forcibly raped her on several occasions." In holding that hostile environment claims are covered by Title VII, the Court noted that Congress used broad language like "terms, conditions, or privileges of employment" to "'strike at the entire spectrum of disparate treatment of men and women' in employment." But the Court also made clear that hostile environment harassment is actionable only when it occurs because of the plaintiff's race, color, religion, sex, or national origin. Additionally, the Court defined some of the boundaries of a hostile environment case, explicitly stating that the conduct at issue must be unwelcome, and "must be sufficiently severe or pervasive" as to alter the terms and conditions of employment and "create an abusive working environ-

316–17 n.38 (1998) (discussing the overlap of quid pro quo and hostile environment cases, as well as some differences).
33 477 U.S. 57 (1986).
34 See id. at 66.
35 Id. at 60.
36 Id. at 64 (quoting L.A. Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))).
37 Id. at 66 ("[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.") (emphasis added). Subsequent to Vinson, the courts have held that the standards and elements of hostile environment harassment are the same regardless of whether the harassment is based on sex, race, color, religion, or national origin. See Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996). They have also clarified that "instances of harassment need not be stamped with signs of overt discrimination to be relevant under Title VII if they are part of a course of conduct which is tied to evidence of discriminatory animus. Harassment alleged to be because of sex need not be explicitly sexual in nature." Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999) (citations omitted).
38 Vinson, 477 U.S. at 68 ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'").
ment." Accordingly, workplace culture, even when laced with sexuality, is not violative of Title VII unless the plaintiff considers it unwelcome and severe or pervasive, and a reasonable person would agree.

Seven years later, in *Harris v. Forklift Systems, Inc.*, the Supreme Court further refined the hostile environment standard. Plaintiff Teresa Harris charged that even after complaining about her employer's antics, he continued to harass her until she felt forced to quit her job. She sued, but because she failed to show that she suffered serious psychological injury, the district court dismissed her case. The Court rejected the district court's strict approach, holding that Title VII carried no psychological harm prerequisite, especially because the statute was enacted to prevent egregious harassment before it results in serious injury: "Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct."

At the same time, the Court reiterated that only workplaces "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment'" will result in liability. While the offending conduct can take many forms, including sexual advances, requests for sexual favors, leering, unwanted attention, ridicule, threats, displays of pornography, or effigies, it must be sufficiently severe in order for a plaintiff to obtain judicial relief. The "conduct must be extreme to amount to a change in the terms and conditions of employment." To determine the level and frequency of offensiveness, courts must look to the "totality of the circumstances." Specifically, *Harris* suggested five non-exclusive factors that courts should examine in judging the hostility of an environment, although a plaintiff need not demonstrate the existence of each factor and indeed could show harassment simply by demonstrating the existence of, say, a particularly severe incident of

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39 Id. at 67–68 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). *Henson v. City of Dundee*, another of the seminal hostile environment cases, involved a police dispatcher who was subject to repeated requests for sex from the chief of police, as well as daily inquiries into her sexual habits and proclivities. 682 F.2d at 899, 900–01.


41 Id. at 19.

42 Id. at 20.

43 Id. at 22.

44 Id. at 21 (citation omitted).


46 *Harris*, 510 U.S. at 23.
harassment. The factors are: (1) the frequency of the conduct;\(^ {47} \) (2) its severity;\(^ {48} \) (3) whether the conduct was physically threatening or humiliating;\(^ {49} \) (4) whether it interfered with work perform-

\(^ {47} \) First, courts must look to the frequency or pervasiveness of the conduct. \textit{Id}. A single use of bad language does not constitute a claim of harassment, see Torres v. County of Oakland, 758 F.2d 147, 152 (6th Cir. 1985), and even a “handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage.” Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995); see also Hocevar v. Purdue Frederick Co., 225 F.3d 721, 738 (8th Cir. 2000) (holding that eight incidents of harassment, primarily the use of foul language, over a three-year period were not sufficiently frequent to constitute actionable harassment); Penny v. Fed. Home Loan Bank of Topeka, 155 F.3d 1257, 1263 (10th Cir. 1998) (holding that offensive verbal exchanges were not actionable where they occurred over a period of three years); Koelsch v. Beltone Elec. Corp., 46 F.3d 705, 706–08 (7th Cir. 1995) (holding that two isolated incidents of rubbing the plaintiff’s leg and pinching her buttocks did not amount to a violation of Title VII, in part because the incidents were separated by two years). The continued use of racial, ethnic, or sexual slurs could constitute actionable harassment. Even where there is no frequency of conduct—that is, only a single act of harassment has occurred—an employer can face liability for a hostile environment, see, e.g., Smith v. Sheahan, 189 F.3d 529, 533 (7th Cir. 1999), but this is true only if the act is particularly severe—like rape or battery.

\(^ {48} \) Frequency of conduct is only relevant to the analysis when it is considered in conjunction with the severity of the conduct. \textit{Harris}, 510 U.S. at 23; Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 52, 67 (1986). “[T]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.” Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991). As Judge Posner has characterized the severity requirement: “The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women . . . . It is not designed to purge the workplace of vulgarity.” \textit{Baskerville}, 50 F.3d at 430 (7th Cir. 1995). Thus, conduct which is only mildly offensive—even if frequent—is not actionable, and minor insults do not warrant relief. To be actionable, the conduct must be both objectively and subjectively severe. See Brennan v. Metro. Opera Ass’n, 192 F.3d 310, 318 (2d Cir. 1999).

\(^ {49} \) See \textit{Harris}, 510 U.S. at 23. Like severity, this factor is viewed both objectively and subjectively. Saxton v. AT&T Co., 10 F.3d 526, 534. Some cases are easy because the threats are so blatant and egregious. For instance, in one case, a black victim came to work and found an effigy of a black man, with simulated blood, menacingly hanging from a noose; later, he found the initials “KKK” written in the employees’ bathroom, along with the slogan “All niggers must die.” Daniels v. Essex Group, Inc., 937 F.2d 1264, 1266 (7th Cir. 1991). In other cases, however, the threats are not so obvious. In these cases, determining “what is a threat, like deciding what constitutes harassment, involves a multi-factored context specific analysis.” Suzanne Sangree, \textit{Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight}, 47 RUTGERS L. REV. 461, 515 (1995). In assessing threats, courts look to the type of behavior threatened, whether the harasser was physically capable of carrying out the threat, the immediacy of threat, the level of fear the threat would tend to cause in a reasonable person, the proximity of the harasser to the plaintiff when the threat was made, whether gestures were made or attempts to grab the plain-
ance;\textsuperscript{50} and (5) whether the conduct caused psychological harm.\textsuperscript{51} Of course, because the "totality of the circumstances" includes the general culture of the workplace, by the courts looking to this totality, \textit{Harris} implicitly instructed courts to consider the social dynamics of the workplace when analyzing harassment cases. The Supreme Court later made this explicit in \textit{Oncale}.

tiff, and any inflection of voice. See, e.g., Smith v. First Union Nat'l Bank, 202 F.3d 234, 239 (4th Cir. 2000); Baskerville, 50 F.3d at 431; Brooms v. Regal Tube Co., 881 F.2d 412, 417 (7th Cir. 1989).

\textsuperscript{50} \textit{Harris}, 510 U.S. at 23. This factor sometimes gets short shrift because its existence is not always necessary to demonstrate actionable harassment, but at least Justice Ginsburg considers it to be an important factor in the analysis. As Justice Ginsburg stated:

>To show such interference, the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job. \textit{Id.} at 25 (Ginsburg, J., concurring) (citations, internal quotations, and brackets omitted). To demonstrate the existence of this factor, a plaintiff need not show that the hostile environment resulted in a measurable decline in productivity. See King v. Hillen, 21 F.3d 1572, 1583 (Fed. Cir. 1994) ("That women who are objects of discriminatory behavior because of their sex are able to maintain satisfactory job performance is not grounds for denigrating their concerns."). It is enough to show that performance of assigned tasks became more difficult after initiation of the harassment, or that it kept the plaintiff from advancing in her chosen career. See \textit{Quick} v. Donaldson Co., 90 F.3d 1372, 1378 (8th Cir. 1996); Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988).

\textsuperscript{51} The \textit{Harris} Court held that Title VII is designed to stop harassment before it causes a nervous breakdown; consequently, a plaintiff need not show serious psychological harm from the hostile environment. \textit{Harris}, 510 U.S. at 22. Some courts have taken this to mean that psychological harm is irrelevant to the hostile environment analysis, but a more accurate reading of \textit{Harris} recognizes that mental injury, if present, is still relevant to determining whether the conduct amounts to harassment. See, e.g., \textit{Quick}, 90 F.3d at 1379; Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993). The holding of \textit{Harris} is only that such a showing is not necessary to establish a hostile environment case, and thus the failure to establish mental injury is never fatal in itself. See \textit{Kopp}, 13 F.3d at 269 ("Psychological harm to the plaintiff is relevant, as one factor among many, but Title VII does not require concrete psychological harm."). Recognizing the limited holding of \textit{Harris}, one court held that evidence that the plaintiff suffered extreme stress stemming from workplace mistreatment—manifested in headaches, nausea, and crying—indicated the plaintiff subjectively considered the defendant's conduct to be intolerable, thereby satisfying the subjective component of the test for harassment. See Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 199 (4th Cir. 2000).
C. Oncale v. Sundowner Offshore Services

Five years after Harris, the Supreme Court was again faced with a hostile environment case. In Oncale v. Sundowner Offshore Services, Inc., the Supreme Court was asked to address the issue of whether same-sex harassment is actionable under Title VII. Plaintiff Joseph Oncale worked on an oil rig in the Gulf of Mexico. While on the rig, Oncale was subjected to abuse by male co-workers, including taunts suggesting he was homosexual, threats of rape, physical assaults with sexual overtones, and what the Court mildly described as “sex-related, humiliating actions.” The supervisors routinely ignored Oncale’s complaints, and fearing that he otherwise would be raped or assaulted, Oncale quit his job. He subsequently sued his employer for hostile environment sexual harassment under Title VII. The district court, however, holding that same-sex harassment was not actionable under Title VII, granted summary judgment for the defendant. The Fifth Circuit affirmed, and the Supreme Court granted certiorari.

In an opinion authored by Justice Scalia, the Court first made clear that same-sex harassment was indeed prohibited by Title VII. In doing so, it addressed the defendants’ argument that “recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace.” The Court discussed the traditional standard for sexual harassment liability, stating that it also

53 Id. at 77.
54 Id.
55 Id.
56 Id.
57 Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 121 (5th Cir. 1996).
59 Oncale, 523 U.S. at 79. “Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.” Id. at 78 (quoting Castaneda v. Partida, 430 U.S. 482, 499 (1977)). Oncale’s holding builds upon earlier decisions concerning same-race discrimination. See St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (allowing Arabic-white’s claim of racial discrimination by European-white because “[c]lear-cut categories do not exist,” and “differences between individuals of the same race are often greater than the differences between the ‘average’ individuals of different races”). Cases subsequent to Oncale have reaffirmed this principle. See, e.g., Ross v. Douglas County, 234 F.3d 391, 396 (8th Cir. 2000) (affirming race harassment case in which both the harasser and victim were black).
applied to same-sex harassment. It observed that the Harris factors continue to be relevant in analyzing hostile environment claims and then emphasized a point it previously made in Vinson: "[T]he trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.' It stressed the need to look at the alleged harassment in its social context. In particular, the Court believed that in judging the severity of the conduct, attention to the cultural context in which the purported harassment occurs will guard against imposing liability on behavior that—although offensive to Miss Manners—does not offend Title VII. Specifically, the Court stated:

We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Accordingly, a proper analysis of hostile environment claims entails a close consideration of social context. The only problem with this directive is that the term "social context" is pregnant with mean-

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61 Id. (noting that the danger of Title VII imposing a civility code on employers "is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute").
62 See id. at 81–82.
64 Oncale, 523 U.S. at 81–82 (citation omitted) (emphasis added).
ing, and various courts have interpreted this admonition to mean different things.\textsuperscript{65}

II. The Meaning of "Social Context"

Even before \textit{Oncale}, courts generally agreed that the "legal definition of sexual harassment does not and can not enumerate which specific behaviors or patterns of behaviors, independent of context, rise to the level of harassment."\textsuperscript{66} It is not surprising, then, that the \textit{Oncale} Court considered context to be essential to any analysis of hostile environment harassment claims. The question arises, however, as to what the Court was attempting to convey in its admonition to look to social context. Was the Court simply restating its directive from \textit{Vinson}—that severity cannot be divorced from the totality of the circumstances—or was it urging a new approach to assessing purported hostile environments? In harassment cases, different federal courts have interpreted \textit{Oncale}'s term "social context" to have different meanings.\textsuperscript{67} These include social context in the sense of the public or private location of the harassment, the special sensibilities of the particular plaintiff, the social relationship between the harasser and the victim, and an aggregation of the offensive incidents. As discussed below, these definitions of social context are not mutually exclusive, and there may be substantial overlap among them. Each has some claim to endorsement by the Supreme Court, and it may be that the Court intentionally used broad language to convey a breadth of meaning.

A. Public or Private Setting of the Conduct

One possible interpretation of "social context" concerns whether the conduct occurred in a public or private setting. That is, social context might pertain to whether purported harassment occurred in the presence of other employees (after all, one definition of "social" involves "community" or "companionship with others"), as opposed to a private, non-social setting.\textsuperscript{68} Courts have frequently looked to see whether the severity of purported harassment was increased due to

\begin{itemize}
\item \textsuperscript{65} The Supreme Court has subsequently addressed sexual harassment issues, but has not further refined its "social context" admonition. \textit{See, e.g.}, Clark County Sch. Dist. v. Breeden, 121 S. Ct. 1508 (2001) (per curiam).
\item \textsuperscript{66} Richard L. Weiner & Linda E. Hurt, \textit{Social Sexual Conduct at Work: How Do Workers Know When It Is Harassment and When It Is Not?}, 34 Cal. W. L. Rev. 53, 64 (1997).
\item \textsuperscript{67} The subsequent list of interpretations or possible interpretations of "social context" is not meant to be exhaustive.
\item \textsuperscript{68} \textit{See, e.g.}, EEOC v. R&R Ventures, 244 F.3d 334, 340 (4th Cir. 2001).
\end{itemize}
the public or private context of the conduct. These courts correctly perceive that the severity of humiliation is often proportional to the number of people who observe the indignities. Unwanted attention, magnified by the gaze of others, sometimes proves more harmful. Thus, in *Smith v. Northwest Financial Acceptance, Inc.*, the court considered in the severity analysis the fact that co-workers overheard harassing remarks and witnessed the degrading treatment of the plaintiff. The court stated that the social setting of the supervisor's remarks increased the plaintiff's humiliation, and thus the severity of the conduct. Similarly, in *Conner v. Schrader-Bridgeport International, Inc.*, the Fourth Circuit found the alleged incidents of harassment—including having to mop the floors and being required to display blood stains from her uterine hemorrhage before she was permitted to leave work early—were magnified in severity because they occurred in open view of all the other employees. And in *EEOC v. R&R Ventures*, the Fourth Circuit noted that the purported harasser made his "comments in front of other employees and customers and, in doing so, made his victims uncomfortable and visibly upset." The court observed that this public display increased the severity of the conduct.

Using similar reasoning, some courts have found a decreased severity where comments were made to only the plaintiff, as these private encounters involved no public humiliation. But closed settings will not always save the defendant. Some courts have looked to the private context of propositions or conduct to find that the privacy made the actions more severe. As Judge Posner offered, "Remarks innocuous or merely mildly offensive when delivered in a public set-

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69 See Witt v. Roadway Express, 136 F.3d 1424, 1433 (10th Cir. 1998) ("As to the setting of the incident, it did not occur in a place in which Mr. Witt was forced to stay and subject himself to humiliation.").

70 See Howley v. Town of Stratford, 217 F.3d 141, 154 (2d Cir. 2000) (noting that a co-worker made offensive comments loudly "and in a large group in which [the plaintiff] was the only female and many of the men were her subordinates").

71 129 F.3d 1408 (10th Cir. 1997).

72 *Id.* at 1414.

73 *Id.*

74 227 F.3d 179 (4th Cir. 2000).

75 See *id.* at 197.

76 244 F.3d 334 (4th Cir. 2001).

77 *Id.* at 340.

78 See *id.* ("Here the severity of Wheeler's sexual misconduct was compounded by the context in which it took place.").


80 See, e.g., Hathaway v. Runyon, 132 F.3d 1214, 1225 (8th Cir. 1998) (observing that plaintiff felt threatened when two purported harassers cornered her in a small,
ting might acquire a sinister cast when delivered in the suggestive isolation of a hotel room. The same might hold true for a supervisor’s office, which many employees identify as the locus of employer authority, and so any conduct that takes place there might be more coercive and threatening. Furthermore, a private setting can sometimes exacerbate the harm, because the tormenter is not restrained by the possibility that someone might catch him in the act. Not only is such an actor uninhibited by the possibility of interruption, the private context also instills greater fear in the victim because of the knowledge that the harasser is free to act recklessly, unbridled by the fear of immediate discovery. Additionally, calls for help in a private setting may be more easily stifled or may be thoroughly useless, or the plaintiff might believe that nobody will hear and that escape is impossible. Any of these possibilities can make the harasser’s conduct all the more frightening for the plaintiff and a reasonable person, thereby increasing the severity of the harassment. In light of these considerations, a reasonable person might perceive an unwelcome hug in the middle of the plant to be less threatening than the same hug in a secluded office.

At least one court has used this reasoning in holding that the private, closed setting of the supervisor’s office made his kiss and grope more severe.

It is possible, then, that the Oncale Court was instructing courts to keep this facet of “social context” in mind when judging the severity of harassment. Indeed, in the example used by the Court to illustrate the relevance of “social context,” the Court compared a coach patting the buttocks of a player on a football field, in full view of the crowd, with the same act performed in the private setting of an office. The public/private distinction may have been one of the key points the Court was attempting to illustrate with this example.

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81 Baskerville, 50 F.3d at 431.
82 Cf. Timsco, Inc. v. NLRB, 819 F.2d 1173, 1178 (D.C. Cir 1987) (noting that the “employer’s office is the ‘locus of authority’”) (quoting NLRB v. Knogo Corp., 727 F.2d 55, 58 (2d Cir. 1984)).
83 The reasoning here is similar to the courts’ recognition in the NLRB context that the employer’s office is “the locus of authority” and that activity has greater coercive effect. NLRB v. Knogo, 727 F.2d 55, 58 (2d Cir. 1984).
B. Social Sensibilities Inhering in the Plaintiff's Particular Race, Sex, or Religion

Oncale's suggestion to look to social context also could be viewed as a command to assess the severity of the defendant's conduct according to the particular social sensibilities that might inhere in plaintiffs based on their race or sex. Courts subscribing to this view hold that "in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim." Thus, for example, if the victim were a woman, in determining whether the defendant's actions were objectively offensive, the court would look to the way a reasonable woman would perceive the conduct. If the plaintiff were black, the court would examine the conduct to see how a reasonable black person would perceive it. Of course, this approach presumes that the hypothetical "reasonable woman" or "reasonable black man" is properly presumed to have special sensibilities. The importance of this perspectivism, it is argued, centers on the inability of males or members of other races to fully appreciate the hurt which words or actions can engender in women and blacks. The premise is that conduct that offends women or blacks is not always offensive to men or whites, and therefore assessing conduct merely according to a reasonable person standard will minimize the actual harm suffered by female or black plaintiffs.

Proponents of using the particular perspective of the victim's class contend that these perspectives are as important to appreciating the social context of a hostile environment as the harasser's words or actions, since words and actions only have meaning to the recipients

86 Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).
89 Proponents take this view even though the hostile environment standard has always been that of a "reasonable person" and not a "reasonable man." Of course, one effect of adopting such a standard is different liability for essentially the same conduct, the only difference being whether the plaintiff was female or male. For example, if a reasonable woman finds a pinch severely offensive while a reasonable man does not, the same pinch will result in liability in the case of the female plaintiff, while the man's harassment may go unremedied, even though both plaintiffs subjectively found the conduct severely offensive. Interestingly, the main criticism of a blue-collar standard of conduct is that it produces different outcomes in cases that are identical, save the blue-collar context of the harassment. A woman-specific standard has the same effect.
according to their understanding of those terms, and these understandings are derived from a lifetime in a particular social group.\textsuperscript{90} So while reasonable men might perceive certain conduct as good-natured banter, reasonable women—so the argument goes—might find the same conduct repulsive and severely offensive.\textsuperscript{91} Proponents of such a shift in standards believe, probably correctly, that men "are significantly more accepting of harassing behaviors than are females".\textsuperscript{92}

Obscene language and pornography quite possibly could be regarded as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse. Although men may find these actions harmless and innocent, it is highly possible that women may feel otherwise.\textsuperscript{93}

Accordingly, when it comes time to assess liability for sexual harassment, what the average male juror deems severely offensive might differ substantially from that which the average female juror finds to be egregious.\textsuperscript{94} Plaintiffs fear that the reasonable person standard of offensiveness will hamper their ability to collect from employers whose employees are accused of harassment:

[T]here is a risk that a reasonable "person" test, however appropriate for issues like negligence, will permit the perspectives of the majority to carry the day as to race and gender issues; the majority of Whites might well not be aware that certain remarks or displays are offensive to most Blacks, and the majority of men might well be just as insensitive to certain remarks or displays that most women con-

\textsuperscript{90} Obviously this argument has a ring of deconstruction about it.

\textsuperscript{91} See Taylor v. Louisiana, 419 U.S. 522, 532 n.12 (1975) ("Controlled studies . . . have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result.").

\textsuperscript{92} Linda J. Rubin & Sherry B. Borgers, Sexual Harassment in Universities During the 1980s, in Sexual Harassment: Confrontations and Decisions 25, 34 (Edmund Wall ed., 1992) (footnote omitted); see also Robert F. Nagel, Judicial Power and American Character: Censoring Ourselves in an Anxious Age 19 (1994).

[According to this view] men must experience life on the job fundamentally differently from working women. What men thought of as jokes were cutting insults or acts of domination. What men thought of as flirtations were intimidating and oppressive. Behavior that men thought of as a natural part of the world of pressure, challenge, and conquest was out of place in a world that women expected to be ordered, decorous, and safe.

\textit{Id.}

\textsuperscript{93} Andrews v. City of Philadelphia, 895 F.2d 1469, 1485–86 (3d Cir. 1990) (citations and internal quotations omitted).

\textsuperscript{94} \textit{Id.}
sider offensive. The perspective of the reasonable "person" might turn out to be the very stereotypical views that Title VII is designed to outlaw in the workplace.95

The suggestion that courts and juries assess purported harassment from the perspective of a reasonable woman or reasonable black person has been around for a while, and several judges and circuits have even adopted it.96 This history of using women-specific standards suggests that the Oncale Court was not addressing this standard when it exhorted courts to look at social context, as the Court could have done so in much clearer terms.97 Furthermore, the underpinnings of the theory are not exactly self-evident, and it is far from obvious that "reasonableness" is sex-specific. But even if this proposed shift in standards were based on sound principles, such standards are unworkable and will inevitably lead to more problems than they purport to solve. For example, how should a judge instruct jurors—particularly male jurors, who according to proponents do not reason like


96 At least seven federal circuits have either adopted or implied that they would adopt women-specific standards for hostile environment cases. See Brooks v. City of San Mateo, 229 F.3d 917, 924 (9th Cir. 2000); Slayton v. Ohio Dep’t of Youth Servs., 206 F.3d 669, 679 (6th Cir. 2000); Brennan, 192 F.3d at 321 (Newman, J., concurring in part and dissenting in part); Torres v. Pisano, 116 F.3d 625, 632 n.6 (2d Cir. 1997); Newton v. Dept. of the Air Force, 85 F.3d 595, 599 (Fed. Cir. 1996); Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995); West v. Phila. Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1456 (7th Cir. 1994); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 965 (8th Cir. 1993); Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991); Andrews, 895 F.2d at 1485–86; Yates v. Avco Corp., 819 F.2d 680, 637 (6th Cir. 1987); see also Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1526 (M.D. Fla. 1991) ("[T]he standards for assessing women’s psychological harm due to harassment must begin to reflect women’s sensitivity to behavior once considered as acceptable.") (quotations omitted); Bowman v. Heller, No. 90-3269, 1993 WL 761159, at *8 (Mass. Dist. Ct. July 9, 1993) ("If the purpose of laws providing remedies for sexual harassment at work is to break down barriers to the full participation of women in the workplace, then the conduct must indeed be analyzed from a woman’s perspective.") (internal citations omitted), aff’d, 651 N.E.2d 369 (Mass. 1995). But see DeAngelis v. El Paso Mun. Police Officers Ass’n, 51 F.3d 591, 594 (5th Cir. 1995) ("The test is an objective one, not a standard of offense to a ‘reasonable woman.’").

97 On this logic, however, it could be argued that the Court certainly was not disapproving this practice either, since it did not do so explicitly. Furthermore, the practice of looking to cultural context existed prior to Oncale, and yet the Court arguably was not precise in its endorsement of that practice. In short, divining intent from what a court failed to say is a hazardous process.
women—on the sensibilities of a "reasonable woman?" Assuming that a reasonable black man thinks differently than a reasonable white man—a view which smacks of racism—how can a jury instruction instill the race-specific method of reasoning to jurors who are not members of that race?

Furthermore, this practice raises the question of why courts should focus only on race and sex as the primary factors in assessing susceptibility to harassment when other human attributes arguably affect the way people view the world to a greater extent than race or sex. That is, if courts should consider whether a reasonable woman would find particular behavior offensive or unwelcome, why should they not also consider whether a blue-collar plaintiff would find them offensive? Indeed, a plaintiff's social class has just as much to do with

98 It is arguable that a separate set of jury instructions would be necessary for men, or that perhaps they need some sensitivity training before they will even be permitted to serve on the jury in a harassment case. Even then, because men are supposedly incapable of appreciating the way that women think and feel, it is hard to see how a man could even understand the jury instruction. Furthermore, since the instruction is contrary to the way a man supposedly thinks and feels, there is a real danger that men will not take the instruction to heart. Similarly, if applied to race harassment as well, many a white juror will need to be "re-educated" according to the proclivities and thought-processes of blacks. Apparently, even black jurors may need some instruction because, as Derrick Bell criticized Justice Clarence Thomas, some people "look black" but "think white." See Roland Evans & Robert Novak, Thomas' Political Campaign, SAN DIEGO UNION-TRIB., July 25, 1991, at B-8 ("Harvard Law Professor Derrick Bell declared that Thomas 'looks black' and 'thinks white'.").

Of course, this sounds to reasonable people—or what used to be called the reasonable man—an awful lot like racism and sexism: to be fit for jury service you have to learn to think white, or black, or like a woman, or like a man. The courts have tried to eradicate this racism and sexism in selecting juries, and it would be foolish to let it in through the back door by adopting women- or race-specific standards of conduct. See J.E.B. v. Alabama, 511 U.S. 127, 143 (1994) (holding that peremptory challenges cannot be used to discriminate against potential male jurors in a civil case); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (holding that a civil litigant's use of race-based peremptory challenges to exclude potential jurors because of their race violated the equal protection rights of those jurors); Powers v. Ohio, 499 U.S. 400, 402 (1991) (holding that criminal defendant's right to equal protection was violated by the prosecution's use of peremptory challenges to exclude potential jurors based on their race, even though the jurors were of a different race than the defendant); Batson v. Kentucky, 476 U.S. 79, 86 (1986) (holding that a criminal defendant's right to equal protection was violated by the prosecution's use of peremptory challenges to exclude potential jurors of the defendant's race).

99 An obvious, but incorrect, answer might be that Title VII prohibits harassment based on a plaintiff's race or sex, but not on his socio-economic status or that of his workplace. This, however, fails to explain the different treatment of socio-economic status because even harassment that is not overtly racial or sexual in nature is actionable under Title VII, so long as it is motivated by the plaintiff's sex or race. See O'Shea
one’s psychological makeup—and perhaps therefore one's susceptibility to harassment—as a person’s sex or race. The tastes and sensibilities of the wealthy, of whatever race or sex, are probably more consistent with each other than the sensibilities of, for example, rich white women and poor white women. There is no principled reason for courts to examine purported harassment according to the supposed differing sensibilities of a “reasonable woman” or a “reasonable black woman.” According to the reasoning behind the reasonable woman standard, there is no justification for not instructing jurors to assess harassment from the perspective of a “reasonable, wealthy, black, homosexual man”; a “reasonable person raised in a home where profanity was commonplace”; or a “reasonable person raised in a religious home where even mild profanity is considered egregious.”

Of course, once courts head down this road, there is no limit to the number of hypothetical “reasonable persons” that could be created. For those who think that these are outrageous exaggerations that would never arise, consider that at least one circuit judge has suggested assessing conduct from the perspective of a “reasonable person” with all of the complainant’s essential and not-so-essential attributes. According to Judge Reinhardt, “a reasonable person is not defined solely by his or her sex. Other immutable traits possessed by the person bringing the charge, including but not limited to race, age, physical or mental disability, and sexual orientation, may in particular cases be relevant to the inquiry as well.”

No doubt, there are other judges that concur in this view. Fortunately, this tailoring of the sexual harassment standard to the attributes of each individual plaintiff is not what Oncale was suggesting in its “social context” admonition.

C. The Social Relationship Between the Harasser and the Plaintiff

It is also possible that, in instructing courts to look at “social context,” the Oncale Court sought to emphasize the “social relationship”

v. Yellow Tech. Servs., Inc., 185 F.3d 1093, 1097 (10th Cir. 1999); Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999). Thus, a harasser may use incentives directed at a blue-collar plaintiff’s socio-economic status to insult even though it is the plaintiff’s sex or race that motivated the harasser. For all relevant purposes, this is no different than using a plaintiff’s race to insult him because of a hatred for the plaintiff’s sex. The main difference is that overt statements of hatred for a particular race or sex will make it much easier to prove motivation, while a harasser who hides behind insults about the plaintiff’s socio-economic status may be able to conceal his prohibited motives. In that sense, this latter harassment is more inimical to the goals of Title VII than is the harassment where the harasser’s motivation is obvious.

100 Nichols v. Frank, 42 F.3d 503, 512 (9th Cir. 1994) (Reinhardt, J., with two judges concurring in the result).
between the alleged harasser and the plaintiff—whether they were friends, lovers, or mortal enemies—as this relationship can often be relevant to unwelcomeness, motivation, and objective and subjective severity. Indeed, recall that just before its "social context" admonition, the Oncale Court stated: "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."\textsuperscript{101} Also, it has repeatedly been noted that a significant number of harassment claims arise from failed romances,\textsuperscript{102} and so it is possible that the Supreme Court was instructing courts to take these failed social relationships into account when evaluating the unwelcomeness and severity of the conduct. Because the "parties to the dispute usually have some prior or ongoing relationship,"\textsuperscript{103} the nature, duration, and extent of the relationship could be highly relevant to assessing harassment claims. Take, for example, two friends who frequently swap dirty jokes. Their friendship would be highly relevant to showing that the jokes were welcome and inoffensive. Two friends who jokingly call each other names do not create the level of offensiveness that arises from two workplace enemies who bandy about the same expressions with a hostile intent.

Similarly, in cases where the plaintiff and the purported harasser ended a romance just before charges of harassment were lodged, these facts would be highly relevant to assessing the offensive conduct and in understanding a possible motive for the charge of harassment.\textsuperscript{104} Social context is particularly important in these jilted-lover harassment suits. Plaintiffs in such cases often are unable to show that

\textsuperscript{104} See Huebschen, 716 F.2d at 1172; Fitzgerald, 153 F. Supp. 2d at 225 ("[D]efense witnesses said that Fitzgerald manifested anger at Beke's unwillingness to date her.").
the harassment was "because of sex." Frequently, the record indicates that the "harassment" occurred during the relationship, and the complained-of touching and excessive attention are quite normal in the context of a romantic relationship. As to the plaintiff's motivation for bringing the suit, the existence of a relationship is highly probative. "Personal animosity," perhaps incident to a messy breakup, "is not the equivalent of sex discrimination and it is not proscribed by Title VII. The plaintiff cannot turn a personal feud into a sex discrimination case by accusation." Of course, it is true that these relationships occurred only because the harasser was attracted to members of the plaintiff's particular sex. So there is a sense in which the harassment was based on sex (a heterosexual by definition would not have had a romance with a member of the same sex; and thus members of the harasser's gender will never be subjected to post-romance harassment). But courts consider this relationship to sex to be too attenuated to invoke Title VII's prohibition of sex discrimination. They turn their attention instead to the more proximate cause of the harassment—the failed romance—and usually find the harassment not to be covered by Title VII.

Cases where the relationship between the plaintiff and the harasser is highly relevant abound. For instance, in Succar v. Dade County School Board, the court noted that plaintiff Joseph Succar com-

105 Huebschen, 716 F.2d at 1172.

When the consensual romance between Huebschen and Rader ended in November 1979, Rader did indeed react spitefully towards Huebschen by recommending that he be demoted at the end of the probationary period. But Rader's motivation in doing so was not that Huebschen was male, but that he was a former lover who had jilted her.

Id.

106 See Mosher, 240 F.3d at 668 ("[A]fter a longtime sexual relationship like this one goes sour, it will be only the unusual case that can escape summary judgment.").

107 McCollum, 794 F.2d at 610.

108 Preference of a paramour over other members of the same or opposite sex, according to the courts that have considered the issue, is not discrimination because of sex. See DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 307–08 (2d Cir. 1986); cf. Candelore v. Clark County Sanitation Dist., 975 F.2d 588, 590 (9th Cir. 1992) (per curiam) (holding that allegations another employee "received favorable treatment" because of her consensual relationship with a co-worker are insufficient to state a claim of sex discrimination under Title VII). A co-worker's romance with a supervisor similarly does not in itself create a hostile environment for a plaintiff. See Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862 (3d Cir. 1990). Also, terminating a plaintiff because of anger over a failed relationship, rather than her sex, does not itself constitute sex discrimination. See Huebschen, 716 F.2d at 1172; Mauro v. Orville, 697 N.Y.S.2d 704, 707 (App. Div. 1999).

109 229 F.3d 1343 (11th Cir. 2000).
menced a consensual relationship with fellow-teacher Clemencia Lorenz. When Succar later attempted to extricate himself from the affair, Lorenz threatened Succar’s wife and son, physically harassed him, and attempted to embarrass him in front of his colleagues. In affirming summary judgment for the defendant, the Eleventh Circuit held that “Lorenz’s harassment of Succar was motivated not by his male gender, but rather by Lorenz’s contempt for Succar following their failed relationship; Succar’s gender was merely coincidental.”

This is not to say that a former paramour can never experience harassment at the hands of her former sweetheart. She certainly can. But to prevail she must usually rebut evidence that the alleged harassment is just fallout from the breakup or that the conduct about which the plaintiff complains was the normal social interactions of a romantic couple. “[W]hen an employer penalizes an employee after the termination of a consensual relationship, a presumption arises that the employer acted not on the basis of gender, but on the basis of the failed interpersonal relationship . . . .” A plaintiff can rebut the presumption, for example, by showing that other members of her sex also experienced harassment or were similarly mistreated by her former mate. Alternatively, a presumption that the purported harassment was motivated by the breakup will become irrelevant if the harasser threatens the victim with termination if she does not continue the relationship, thereby creating a quid pro quo case.

D. An Aggregation of Incidents

The Oncale Court might also have intended its “social context” discussion to reiterate the totality of the circumstances approach necessary to an accurate evaluation of a work environment. The Court may have been trying to tell judges to consider the cumulative effect

110 Id. at 1344.
111 Id.
112 Id. at 1345.
114 See Keppler, 715 F. Supp. at 869.
115 See Mosher v. Dollar Tree Stores, Inc., 240 F.3d 662, 668 (7th Cir. 2001).
116 See Keppler, 715 F. Supp. at 869.
117 See Huebschen v. Dept. of Health & Soc. Servs., 716 F.2d 1167, 1172 (7th Cir. 1983) (“[W]e note that there is no evidence that Rader discriminated against other men in the office or that she attempted to have romances with other men in the office.”).
118 Keppler, 715 F. Supp. at 869 n.6.
119 See, e.g., O’Rourke v. City of Providence, 235 F.3d 713, 730 (1st Cir. 2001) (“Courts should avoid disaggregating a hostile work environment claim . . . .”).
of all incidents of harassment the plaintiff has had to endure, as an undivided whole, rather than as isolated incidents unconnected to each other.120 As the Eighth Circuit has described the proper analysis:

Under the totality of the circumstances analysis, the district court should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode. Instead the trier of fact must keep in mind that "each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes."121

A specific command to perform an aggregate examination may have been necessary since, as several judges have complained, some courts tend to address incidents of harassment piecemeal, thereby losing the "flavor" of the case.122 Rather than separating the events, courts need to aggregate them in order to get the full picture.123 “The existence of sexual harassment must be determined in light of the record as a whole . . . because the very term ‘environment’ indicates that allegedly discriminatory incidents should not be examined in isolation.”124 “[I]n the usual case an isolated offensive incident does not create an abusive or intimidating environment. However, by viewing each incident in isolation, as if nothing else had occurred, a realistic picture of the work environment [is] not presented.”125

120 The idea behind this principle is similar to the one behind the “cumulative effect” analysis of due process jurisprudence. Because the “cumulative effect of two or more individually harmless errors has the potential to prejudice the defendant to the same extent as a single reversible error,” courts will examine multiple harmless errors to ascertain whether their synergistic effect rises to the level of a reversible error. United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc).


122 See Williams v. Gen. Motors Corp., 187 F.3d 553, 562 (6th Cir. 1999) (“[W]hen the complaints are broken into their theoretical component parts, each claim is more easily dismissed.”).

123 Id. (“[I]t is well-established that the court must consider the totality of the circumstances.”). Courts have long recognized that they should aggregate different forms of harassment to determine whether a hostile environment exists. See Smith v. N.W. Fin. Acceptance, Inc., 129 F.3d 1408, 1413 (10th Cir. 1997) (“[W]e can aggregate evidence of racial hostility with evidence of sexual hostility to establish a hostile work environment.”).


125 King v. Hillen, 21 F.3d 1572, 1581 (Fed. Cir. 1994).
Chief Judge Boyce Martin, dissenting in *Burnett v. Tyco Corp.*, leveled this same sort of criticism at his colleagues. In that case, plaintiff Jenny Burnett complained of three incidents of harassment over a six-month period. First, a supervisor allegedly placed a pack of cigarettes inside Burnett’s tank top and brassiere strap; the same supervisor gave Burnett a cough drop, while stating, “Since you’ve lost your cherry, here’s one to replace the one you lost”; and finally, while Burnett was wearing a sweater that said “Deck the Malls,” the same supervisor childishy yelled: “Dick the malls, dick the malls, I almost got aroused.” The divided court held that “under the totality of the circumstances, a single battery coupled with two merely offensive remarks over a six-month period does not create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment.” Therefore, the panel agreed with the district court that there was no factual issue as to severity and affirmed the summary judgment. Despite the court’s statement that it considered the three incidents together, Chief Judge Martin disagreed:

The majority creates a scorecard, finding one act to be severe and two to be innocuous. While I do not fully agree with their conclusions, I object more strongly to their method of computation. The majority concludes that these numbers are insufficient to create an issue of material fact as to whether the conduct was sufficiently severe to create a hostile work environment. In doing so, the majority fails to examine the aggregate effects of the incidents.

As Judge Martin’s dissent suggests, when courts address each incident in isolation, they tend to minimize the extent of the harm inflicted. The “very term ‘environment’ indicates that alleged discriminatory incidents should not be examined in isolation,” as

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126 203 F.3d 980 (6th Cir. 2000).
127 Id. at 981.
128 Id. at 985.
129 Id. at 985–86 (Martin, C.J., dissenting); see also Smith v. Legett Wire Co., 220 F.3d 752, 765 (6th Cir. 2000) (Martin, C.J., dissenting).
130 Vance v. S. Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989) (“What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents.”).
131 Penry v. Fed. Home Loan Bank of Topeka, 155 F.3d 1257, 1262 (10th Cir. 1998).
isolated incidents can appear innocuous and seldom convey the whole picture. As the Third Circuit put it: "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."\(^{132}\) When split into discrete parts, the successive individual acts of harassment often seem less severe.\(^{133}\) Because an examination of each incident, divorced from the social context of all the episodes of harassment, fails to appreciate the full extent of the harm inflicted, plaintiffs whose claims are subject to such an analysis frequently do not survive summary judgment. Similarly, consideration of the incidents separately might distort the real reason for the conduct. "'What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents.'"\(^{134}\) In light of these legitimate concerns, it is possible that the *Oncale* Court was using its "social context" exhortation to remind courts to consider individual acts of harassment in the total social context of the work environment, including prior and subsequent acts of harassment.\(^{135}\)

### III. Social Context as Cultural Context

The foregoing demonstrates that the term "social context" can denote a multiplicity of understandings, and indeed *Oncale* may have left this somewhat open-ended in order to allow its words to take on their fullest possible meaning. Until the Court elects to clarify its language, lawyers and litigants may only guess as to its full meaning. Some lawyers, however, have taken the bull by the horns and have successfully argued that "social context" means the cultural context of the workplace, in the sense of the prevalence or lack of harsh language and juvenile behavior at a particular worksite. Thus, according to this view, purported acts of harassment must be examined according to the totality of the circumstances in the sense that general vulgarity is highly relevant to motivation, unwelcomeness, and severity. Courts that have adopted this understanding of "social context"—which arguably include the Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits—are especially sensitive to work environments

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133 *Penny*, 155 F.3d at 1262.
134 Andrews, 895 F.2d at 1484 (quoting *Vance*, 863 F.2d at 1510).
135 The Supreme Court clearly made this point in *Clark County School District v. Breeden*, 121 S. Ct. 1508, 1510 (2001) (per curiam), where it observed, "Workplace conduct is not measured in isolation; instead, 'whether an environment is sufficiently hostile or abusive' must be judged 'by looking at all the circumstances . . . .'" 121 S. Ct. at 1510 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998)).
that are permeated with "blue-collar" behavior, regardless of the race or sex of the plaintiff.\textsuperscript{136}

The theory behind this practice certainly has much to recommend it. Many hostile environment cases are based simply on words spoken to the plaintiff, and these words—indeed all words—have meaning only in context.\textsuperscript{137} As the Supreme Court has noted, "Words that are commonplace in one setting are shocking in another."\textsuperscript{138} Under Title VII, courts are called upon to assess the purported harasser’s words in an effort to determine: (1) whether they were motivated by the plaintiff’s sex; (2) whether a reasonable person would find them severely offensive; (3) whether the plaintiff himself found them severely offensive; and (4) whether the words were unwelcome. These determinations, which are essential to a Title VII claim, are highly (perhaps utterly) dependent upon the cultural context of the particular workplace.

\begin{enumerate}
\item \textsuperscript{138} FCC v. Pacifica Found., 438 U.S. 726, 747 (1978).
Accordingly, some courts have begun to take note of workplace culture when analyzing hostile environment cases, based on the notion that foul language and sexual banter are common occurrences in certain workplaces and thus have a different effect and meaning than in other settings. That is, some courts—both before and after Oncale—have reasoned that certain “blue-collar” work environment and their traditionally unrefined atmospheres are highly relevant to the hostile environment analysis, particularly with respect to whether the harassment was “because of sex”; whether the conduct at issue was unwelcome; and whether the purported harassment was objectively and subjectively severe. These courts see Oncale as an endorsement of their analytic technique, particularly because this approach is consistent with Justice Scalia’s views on language and communication: the meaning of language “cannot be determined in isolation, but must be drawn from the context in which it is used.” Nevertheless, at least three circuits have rejected this approach, holding that a considera-

139 In most cases, the blue-collar context of the harassment is simply one factor that the courts consider. But at least the Sixth Circuit has interpreted some cases as creating a separate, blue-collar standard of conduct. See Williams v. Gen. Motors Corp., 187 F.3d 555, 564 (6th Cir. 1999) (“[W]e reject the view that the standard for sexual harassment varies depending on the work environment. Thus, we disagree with the Tenth Circuit decision in Gross v. Burggraf Const. Co., 55 F.3d 1531, 1538 (10th Cir. 1995) . . . .”).

140 See, e.g., Ebert v. Lamar Truck Plaza, 878 F.2d 338, 339 (10th Cir. 1989) (“In its findings the district court recognized that rough language by employees and supervisors alike was commonplace in the kitchen area at the Truck Plaza, noting that such language was used indiscriminately by both male and female employees, including certain of the plaintiffs.”).

141 Deal v. United States, 508 U.S. 129, 132 (1993) (Scalia, J.); see also Easterbrook, supra note 137, at 64 (1994) (“Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts.”).

142 Specifically, the First, Fourth, and Sixth Circuits seem to reject an examination of workplace culture. In doing so, they often construe a workplace culture analysis as the creation of a new hostile environment standard for blue-collar employers. See O’Rourke v. City of Providence, 235 F.3d 713, 735 (1st Cir. 2001) (“[T]here is no merit to the City’s argument at the first trial that it was entitled to a jury instruction that the firefighters’ conduct should be evaluated in the context of a blue collar environment.”); Conner v. Schrader-Bridgeport Int’l, Inc., 227 F.3d 179, 194 (4th Cir. 2000) (“We are unable to discern an ‘inhospitable environment’ exception to Title VII’s mandate . . . .”); Jackson v. Quanex Corp., 191 F.3d 647, 662 (6th Cir. 1999) (“[T]he district court was wrong to condone continuing racial slurs and graffiti on the grounds that they occurred in a blue collar environment.”); Williams, 187 F.3d at 564 (“[W]e reject the view that the standard for sexual harassment varies depending on the work environment.”); see also Adkins v. Kelly-Springfield Tire Co., No. 97-C-50381, 2001 WL 219636, at *7 n.7 (N.D. Ill. Mar. 6, 2001) (stating that the fact that all em-
tion of workplace culture is completely unwarranted. An understand-
ing of these conflicting views of "social context" can best be achieved by examining the reasoning and justifications behind them, in the context of the actual cases.

A. Workplace Culture and Motivation

As discussed above, "[t]he essence of a disparate treatment claim under Title VII is that an employee or applicant is intentionally singled out for adverse treatment on the basis of a prohibited criterion."\(^{143}\) In hostile environment cases, the prohibited criteria is most frequently the plaintiff's sex,\(^ {144}\) although race-based harassment also exists. Because Title VII is designed to eliminate only discriminatory harassment, and not just rudeness or unfriendliness unconnected to the plaintiff's sex, "inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit."\(^ {145}\) "Title VII is not a shield against harsh treatment at the workplace; it protects only in instances of harshness disparately distributed."\(^ {146}\) Thus, the critical issue in any harassment case "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."\(^ {147}\) To prevail in a hostile environment claim, then, a "plaintiff must produce evidence that she was the object of harassment because of her gender."\(^ {148}\) "An employee is harassed or otherwise discriminated against

employees were exposed to harassment, and not just the plaintiff, militates in favor of Title VII liability and does not help the employer's defense). The Seventh Circuit adopted the practice of examining cultural context in Reed v. Shepard, 939 F.2d 484, 491-92 (7th Cir. 1991), and reaffirmed the reasoning behind this practice in Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997) (noting that in assessing whether certain words and conduct are motivated by sex, courts must take into consideration that vulgarity is common in certain contexts and thus is not because of sex), and Shepherd v. Slater Steels Corp., 168 F.3d 998, 1010 (7th Cir. 1999) ("Whether the sexual content of the harassment is indicative of sex discrimination must therefore be examined with attention to the context in which the harassment occurs."). But later, a split panel (notably not an en banc panel) arguably disavowed this practice. See Smith v. Sheahan, 189 F.3d 529, 534 (7th Cir. 1999).

143 Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).
144 See Lipsett v. Univ. of P.R., 864 F.2d 881, 898 n.19 (1st Cir. 1988).
145 Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000).
146 Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981).
147 Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring); see also Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 965 (8th Cir. 1999) ("Stated differently, the harassment must be based on the complaining person's sex.").
because of [his or her] gender if, ‘but for’ the employee’s gender, he or she would not have been the victim of the discrimination.” 149 Put another way, if “the nature of an employee’s environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination as a result of that environment.” 150 Thus, harassment is not actionable simply because it is highly offensive, fulsome, mean-spirited, or insensitive. 151 There must be a causal nexus between the harassment and a protected attribute, such as sex, race, religion, or national origin. 152

Importantly, however, a victim’s sex or race need not be the sole cause of the harassment for it to be actionable; 153 it merely has to be a substantial or motivating factor of the harassment. 154 But harassment that is meted out equally to all victims—regardless of their sex, race, religion, or national origin—is not disparate treatment and therefore is not a violation of Title VII. 155 Although “equal opportunity harass-

149 Smith v. First Union Nat’l Bank, 202 F.3d 234, 242 (4th Cir. 2000); see also Bowman v. Shawnee State Univ., 220 F.3d 456, 463 (6th Cir. 2000) (“Non-sexual conduct may be illegally sex-based and properly considered in a hostile environment analysis where it can be shown that but for the employee’s sex, he would not have been the object of harassment.”); Seldomridge v. Uni-Marts, Inc., No. CIV.A.99-469, 2001 WL 771011, at *8 (D. Del. July 10, 2001) (“[A]llegedly harassing conduct that is motivated by a bad working relationship, by a belief that the plaintiff has in some way acted improperly, or even by personal animosity is not actionable under Title VII.”); Weiland v. Dept. of Transp., 98 F. Supp. 2d 1010, 1017 (N.D. Ind. 2000) (“The key inquiry in these cases is whether the alleged acts of harassment occurred ‘but for’ the employee’s sex.”).

150 Peny, 155 F.3d at 1263 (quoting Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 538 (10th Cir. 1994)).

151 See Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 142 (4th Cir. 1996); McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996).

152 See Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 772 (4th Cir. 1997).

153 Galdieri-Ambrosini v. Nat’l Realty & Dev. Corp., 136 F.3d 276, 289 (2d Cir. 1998); Armstrong v. Chrysler Fin. Corp., No. CIV.3:97-CV-1557, 1999 WL 608831, at *5 (D. Conn. July 29, 1999) (“[T]o show that gender played a motivating factor in the allegedly harassing conduct, a female employee must show that one of the reasons was that she was a woman.”).


To be a motivating factor . . . the forbidden criterion must be a significant reason for the employer’s action. It must make such a difference in the outcome of events that it can fairly be characterized as the catalyst which prompted the employer to take the adverse employment action, and a factor without which the employer would not have acted.

Id.

155 See Pasqua v. Metro. Life Ins. Co., 101 F.3d 514, 517 (7th Cir. 1996) (“Harassment that is inflicted without regard to gender, that is, where males and females in
ers" may make a work environment just as degrading and unpleasant as a sexual harasser, if an employer is willing to face the risk that his employees will leave his employment or unionize rather than tolerate hostile working conditions, Title VII allows him that freedom.

This disparate treatment rule, more than anything, demonstrates that Title VII is not a general civility code. Accordingly, Oncale has been interpreted as a directive to examine the regular atmosphere of the work environment to ensure that any indignity suffered by the plaintiff was due to her sex, and not that she suffered insults that are cast about freely at both men and women. As the Seventh Circuit observed:

Whether the sexual content of the harassment is indicative of sex discrimination must therefore be examined with attention to the context in which the harassment occurs. The Supreme Court [in Oncale] so stated with respect to the objective severity of the harassment, and we believe the Court's observations in that regard are apropos here as well. Where . . . "[i]t appears plain on the record as a whole" that the statements or conduct in question "were nothing other than vulgar provocations having no causal relationship to the plaintiff's gender as a male," the sexual content or connotations of the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex.

156 See, e.g., Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) ("Bragg was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike"); Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000) ("[T]his circuit does not recognize Title VII sexual harassment claims in the case of the 'equal opportunity' harasser"). But an employee will not be treated as an equal opportunity harasser where, despite his poor treatment of all employees, he treats one class of employees worse than others or directs sexual comments only at one group. See, e.g., EEOC v. R&R Ventures, 244 F.3d 334, 339 (4th Cir. 2001) ("R&R claims that Wheeler was a difficult manager who abused male and female employees alike. The EEOC claims, however, that Wheeler singled out his female subordinates for especially cruel treatment and that this constituted sexual harassment.").

157 As the courts are fond of saying, they "do not sit as a super-personnel department." Krenick v. County of Le Sueur, 47 F.3d 953, 960 (8th Cir. 1995). Thus, employees can act foolishly with their resources, so long as they do not discriminate on the basis of protected characteristics. See Furr v. Seagate Tech., Inc., 82 F.3d 980, 986 (10th Cir. 1996) (finding that the discrimination laws are not violated by erroneous or even illogical business decisions).

158 See Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 965 (8th Cir. 1999) ("[N]one of the incidents involving Lonnie Schoenfield was based on appellant's sex. Appellant admitted that Schoenfield used profanity toward both male and female employees . . . .").
those statements or conduct will not alone raise a question of fact as to the sex-based character of the harassment.\textsuperscript{159}

Like the Seventh Circuit, many courts see this motivation analysis as one of the features that \textit{Oncale} was emphasizing in its "social context" exhortation, even though the general discussion in \textit{Oncale} primarily concerned an analysis of objective severity. These courts have seized upon the social context language and have made it one of the foundations of their practice of closely examining workplace culture. Under this view, cases such as \textit{Gross v. Burggraf Construction Co.}\textsuperscript{160} may have factored social context into the hostile environment analysis even before \textit{Oncale} endorsed this practice.

1. \textit{Gross v. Burggraf Construction Co.}

In \textit{Gross}, plaintiff Patricia Gross worked as a truck driver for a construction company.\textsuperscript{161} She complained of nine different incidents of harassment, including harsh reprimands, being called "dumb," being told to "get your ass back in the truck," and when she failed to respond to a radio call from her supervisor, she overheard him say to a co-employee, "Mark, sometimes, don't you just want to smash a woman in the face?"\textsuperscript{162} Despite these allegations (or because of them), the district court granted summary judgment for the defendant. On appeal, the Tenth Circuit affirmed, analyzing the hostile environment claim with an eye to the blue-collar context in which the alleged harassment occurred:

In determining whether Gross has established a viable Title VII claim, we must first examine her work environment. In the real world of construction work, profanity and vulgarity are not perceived as hostile and abusive. Indelicate forms of expression are accepted and endured as normal human behavior . . . . Accordingly, we must evaluate Gross' claim of gender discrimination in the context of the blue-collar environment where crude language is commonly used by male and female employees. Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments. We agree with the following comment . . . : "The standard for determining sexual harassment would be different depending upon the work environment. Indeed, it cannot seriously be disputed that in some

\textsuperscript{159} Shepherd v. Slater Steels Corp., 168 F.3d 998, 1010–11 (7th Cir. 1999) (quoting Johnson v. Hondo, Inc., 125 F.3d 408, 413 (7th Cir. 1997)) (citation omitted).

\textsuperscript{160} 53 F.3d 1531 (10th Cir. 1995).

\textsuperscript{161} \textit{Id.} at 1535.

\textsuperscript{162} \textit{Id.} at 1536.
work environments, humor and language are rough hewn and vulgar.”

From this excerpt, it is obvious that the Tenth Circuit took the cultural context into account in assessing the hostile environment claim. What the court did not make clear is its reason for emphasizing the blue-collar facet of social context. Similarly, the court did not explain the extent to which social context enters into the hostile environment calculus.

The Tenth Circuit’s assertion that indelicate forms of expression are “accepted and endured” in blue-collar contexts suggests that the court considered social context relevant to the analysis of unwelcomeness. Because unwelcomeness and severity are closely related, it’s also not surprising that the *Gross* court also suggests that the workplace culture is relevant to the severity analysis. But the court’s main focus seems to be on motivation. It noted that vulgar language exists in blue-collar contexts regardless of whether the employees are male or female, suggesting that social context is relevant to whether the harassment was “because of sex.” Along these lines, the court observed:

> The term “ass” is a vulgar expression that refers to a portion of the anatomy of both sexes. Thus, the term is gender-neutral. Its usage on a construction site does not demonstrate gender discrimination...  

... Gross has failed to demonstrate that Anderson’s reprimand was motivated by gender discrimination...  

The remaining evidence that Gross presented in support of her claim of gender discrimination reflects crude and rough comments used by a construction boss in reprimanding or motivating his employees regarding their job performance. None were related to Gross’ gender.

From these portions of the opinion, proponents of a “social context” analysis can readily make the argument that the court’s analysis was true to Title VII, and particularly *Oncale’s* instruction that sensitiv-

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163 *Id.* at 1537–38 (quoting Rabidue v. Osceola Ref. Co., 584 F. Supp. 419 (E.D. Mich. 1984), *aff’d*, 805 F.2d 611 (6th Cir. 1986)) (emphasis added and citation omitted). The court’s characterization of the typical construction environment does not seem to be disputed, and other cases confirm the accuracy of the Tenth Circuit’s description. See Parkins v. Civil Constructors of Ill., 163 F.3d 1027, 1031 (7th Cir. 1998).

164 *Gross*, 53 F.3d at 1543.

165 *Id.* at 1545.

166 *Id.* at 1547.
ity to social context will preclude liability for "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."\(^1\)

Of course, the actions about which Patricia Gross complained could have been motivated by her sex, but "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing"\(^2\) and actual harassment. That is, the social mores of each particular context—the football field or construction site on the one hand and an office setting on the other—suggest that slapping someone on the buttocks in the social context of a white-collar, office environment is not a simple case of an over-enthusiastic celebration in the end-zone, but is more probably based on sexual interest in the secretary, which in turn is based on her sex. From the facts of Gross and the court's reasoning, it is apparent that a special consideration of the blue-collar context does not preclude consideration of other evidence as to motivation, it is simply one factor relevant to the analysis, especially where there is little else to suggest that the conduct was based on the plaintiff's sex. Although the Sixth Circuit has accused the Tenth Circuit of lowering the standard of harassment in blue-collar cases,\(^3\) it is readily apparent that this was neither the intent nor the effect of the Tenth Circuit. Rather, it seems that workplace culture is simply one factor that the court will consider in assessing motivation and, perhaps, severity and unwelcomeness. The value of this analytical tool is similarly demonstrated in other cases.


The Seventh Circuit also has looked to social context in evaluating motivation. In Johnson v. Hondo, Inc.,\(^4\) the context was a Coca-Cola truck loading facility where both the harasser and the victim worked as "night loader[s]."\(^5\) The court was faced with a same-sex harassment case in which Ollie Hicks verbally threatened his co-worker, plaintiff Craig Johnson with crude statements like: "I am going to make you suck my dick."\(^6\)


\(^{168}\) Id. at 82.

\(^{169}\) See Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999) ("[W]e reject the view that the standard for sexual harassment varies depending on the work environment. Thus, we disagree with the Tenth Circuit decision in Gross v. Burggraff Const. Co., 53 F.3d 1531, 1538 (10th Cir. 1995) . . . .")

\(^{170}\) 125 F.3d 408, 412 (7th Cir. 1997).

\(^{171}\) Id. at 410.

\(^{172}\) Id.
Despite complaints to management, the abuse continued, and even worsened. Hicks persistently came up to Johnson and would brush against him, or grab and manipulate his crotch while saying "[g]onna [sic] get my dick sucked."\textsuperscript{173} When management repeatedly refused to address the problem, Johnson tried talking to Hicks about his conduct, but Hicks responded by attacking Johnson with a jack stand.\textsuperscript{174} Johnson defended himself with a baseball bat, which resulted in his arrest for aggravated battery.\textsuperscript{175} Both men were subsequently fired for the incident, although Hicks was reinstated after the union put pressure on the employer. Johnson sued his employer for hostile environment harassment under Title VII. The district court granted summary judgment for the defendant, holding that the conduct was not sufficiently severe or intimidating to amount to harassment.\textsuperscript{176}

The Seventh Circuit affirmed, but it focused more on causation than the offensiveness of Hicks's conduct. In analyzing the claim, the court took into account the fact that both Johnson and Hicks used vulgar language in this blue-collar context.\textsuperscript{177} This seemed to be the key to the analysis, even though Hicks was the instigator of the verbal sparring, Johnson never threatened Hicks, and Johnson's rejoinders were not as consistently vulgar as Hicks's threats. According to the court's chain of reasoning: (1) this was a blue-collar context; (2) vulgar language is common in such contexts;\textsuperscript{178} and (3) thus, in such blue-collar contexts, vulgar language is usually motivated by the immature personalities of workers like Hicks, and not by the plaintiff's sex.\textsuperscript{179} As the court itself stated:

\textsuperscript{173} Id. (internal quotation marks omitted).
\textsuperscript{174} Id. at 411.
\textsuperscript{175} Johnson was subsequently acquitted by a jury on the grounds of self-defense. Id.
\textsuperscript{176} Id.
\textsuperscript{177} See id. at 412 n.4.
\textsuperscript{178} Id. at 412–13 (referring to the vulgar language as "generic shoptalk" and noting that such language is "commonplace in certain circles").
\textsuperscript{179} See id. at 412. The Seventh Circuit has long made this inference. Over the years, it has instructed the district courts to examine "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs." Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 674 (7th Cir. 1993) (quoting Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 (7th Cir. 1991) (quoting Brooms v. Regal Tube Co., 881 F.2d 412, 419 (7th Cir. 1989) (citing Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986))). The obvious rationale is that obscenity that preexisted the plaintiff's advent could not have been based on the plaintiff's sex, race, color, or religion. The ABA has picked up on this in its model jury instructions, where it proposes that jurors consider, among other things, the degree and type of obscenity that filled the environment before and after the plaintiff
Besides the sexual content of Hicks' remarks there is absolutely nothing in this record that supports a reasonable inference that the remarks were directed at Johnson on account of his gender. Although explicit sexual content or vulgarity may often take a factfinder a long way toward concluding that harassing comments were in fact based on gender . . . this need not necessarily be the case. Most unfortunately, expressions such as "fuck me," "kiss my ass," and "suck my dick," are commonplace in certain circles, and more often than not, when these expressions are used (particularly when uttered by men speaking to other men), their use has no connection whatsoever with the sexual acts to which they make reference—even when they are accompanied, as they sometimes were here, with a crotch-grabbing gesture. Ordinarily, they are simply expressions of animosity or juvenile provocation, and there is no basis in this record to conclude that Hicks' usage was any different.\(^{180}\)

This part of the opinion illustrates several salient features about the practice of analyzing harassment claims according to workplace culture. First, courts that have adopted this practice will look to see whether the plaintiff himself also used coarse language, as this suggests that the harasser's offensive comments were just part and parcel of the blue-collar context, and not based on sex.\(^{181}\) The fact that the harasser verbally abused other employees is also relevant, as this suggests that the harassment was not aimed at the plaintiff, or at least not exclusively at him.\(^{182}\) Unpleasant talk or conduct by other employees—i.e., employees other than the purported harasser and the plaintiff—is also relevant.\(^{183}\) These courts will look beyond the overt sexual

\(^{180}\) Johnson, 125 F.3d at 412.

\(^{181}\) See, e.g., Vaughn v. Pool Offshore Co., 683 F.2d 922, 924–25 (5th Cir. 1982) ("The court determined that Vaughn used racial slurs along with his co-employees and that other Pool employees were subjected to the same obnoxious treatment."); Reynolds v. Atlantic City Conv. Ctr. Auth., No. 88-4232, 1990 WL 267417, at *18 (D.N.J. May 26, 1990) ("[P]laintiff also used obscene language at work."); aff'd, 925 F.2d 419 (3d Cir. 1991).

\(^{182}\) Johnson, 125 F.3d at 414 ("Hicks did not single out Johnson as the object of his vulgar taunting—at least two other workers at the Coca-Cola plant were harassed by Hicks in a similar fashion."); Reynolds, 1990 WL 267417, at *18 ("Plaintiff testified that male electricians called each other obscene names.").

\(^{183}\) See Vaughn, 683 F.2d at 924, 925. Like Oncale, Vaughn involved workers on an oil rig. Dennis Vaughn claimed that he suffered hostile environment race harassment, based on numerous acts of hazing and his co-workers' use of terms such as "nigger," "coon," and "black boy." The record, indicated that life on the rig was "rowdy and rough. Raw pranks, crude practical jokes and verbal abuse abounded, some of it permeated with racial overtones." Id. at 923. The court found it relevant
nature of comments in assessing motivation, instead ascribing the motivation to the general immaturity pervading the blue-collar environment. Even when the record creates the culturally-based presumption that this conduct was not motivated by sex, a plaintiff can sometimes rebut this presumption with evidence that the harasser was attracted to members of the victim's sex or held a strong antipathy for persons of the plaintiff's sex. Thus, although a consideration of workplace culture presents plaintiffs with an evidentiary hurdle, it does not foreclose liability for hostile environment harassment in a blue-collar context.

One final aspect of Johnson is worth noting: the way the court treated Hicks's violence. Johnson is an exceptional "workplace culture" case in that most of the cases that closely consider social context do not involve acts of violence and certainly not battery with a weapon. Yet the Johnson court seemed not to be troubled by this fact, as the "altercation was not of a sexual nature ...." Although this is consistent with the court's discussion of causation and the abusive taunts, it does raise some eyebrows. Obviously the cost of an error in the court's analysis in cases where violence was used is certainly greater than in those where the plaintiff merely had to weather a barrage of caustic remarks. Nevertheless, in light of the cultural context, the court was certain that there were insufficient grounds to infer that sex was the motivating factor for the harassment, and so it consistently stood by its conclusion.

that Vaughn also used abusive language, including some racial slurs, and that white workers were also hazed by co-workers. Id. at 924–25. It further noted that "Vaughn joined in similar opprobriums which, insofar as the record reflects, were bandied back and forth without apparent hostility or racial animus. Indeed, the relations between Vaughn and the other Pool employees, aside from the crude excesses of the platform atmosphere, were friendly and cordial." Id. at 924. The Fifth Circuit affirmed the summary judgment for the employer, holding that in light of the workplace culture the acts were not severely offensive and were not based on race, particularly because even Vaughn "did not believe the pranks were racially motivated or that he was singled out for abusive treatment." Id. at 925.

184 Johnson, 125 F.3d at 413 ("[T]he plaintiff's sole evidence bearing on the gender-based nature of Hicks' provocation is the facially sexual content of Hicks' remarks. Upon scrutiny, however, no reasonable factfinder could conclude that Hicks directed his vulgar comments at Johnson because of his gender.").
185 See Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999).
186 See Johnson, 125 F.3d at 414.

Temple v. Auto Banc of Kansas, Inc.\(^{187}\) is another example of the way in which cultural context is factored into the motivation analysis. This case demonstrates that crude conduct typical of certain worksites will often indicate that, because vulgarity existed regardless of the plaintiff’s presence, the conduct was not motivated by sexual animus.\(^{188}\)

Temple involved the showroom floor of an automobile dealership, where the plaintiff was employed as a saleswoman.\(^{189}\) In an effort to increase business, the dealership held a two-day sales event with a beach party theme. Keeping with this theme, the dealership hired two female models to sit in a hot tub located on the showroom floor. Giving new meaning to the term “showroom,” the models wore only thong bikinis.\(^ {190}\) If they had stayed in the hot tub, things might have been okay, but when they started talking to a friend who happened to be talking to the plaintiff Melissa Temple, she became incensed.\(^ {191}\)

Temple complained to her manager that she was offended by the presence of the models and their attire (or lack thereof). The manager declined to do anything about the models or their skimpy attire, but offered Temple the rest of the day off, which she accepted.\(^ {192}\) Temple returned the next day, but after the models arrived, she again expressed her displeasure, and the management again suggested that she leave for the rest of the day.\(^ {193}\)

Because the compensation of sales personnel largely depends on commissions, two days away from work could have had a tangible effect on Temple’s wages. Nevertheless, in her complaint, Temple alleged hostile environment sexual harassment based on these two incidents and apparently did not assert the “lost opportunity to sell,” which her absence from the dealership undoubtedly entailed. In granting summary judgment for the defendant, the court seemed to recognize that while the models would be inappropriate in most Fortune 500 boardrooms, they were not out of line in a sales context where the employer hoped to lure male customers to the dealer-


\(^{188}\) Id. at 1130-31.

\(^{189}\) A showroom floor is, perhaps, not a traditional blue-collar environment in the sense of manual labor being performed, but it has some attributes typically ascribed to blue-collar environments.

\(^{190}\) Temple, 76 F. Supp. 2d at 1126.

\(^{191}\) Id. at 1122.

\(^{192}\) Id.

\(^{193}\) Id.
More importantly, the court held that there was no evidence that the dealership used the models because of Temple’s sex. Rather, the social context indicated that they were simply a means of attracting customers, and the dealer would have used them regardless of Temple’s sex. As the court stated:

[T]he circumstances surrounding the sales event had nothing at all to do with the plaintiff or her sex. Rather, the nature of the sales event strongly suggests that it was aimed at potential purchasers, most likely male purchasers. In other words, defendant would have been as likely to have a “beach party” sales event regardless of whether plaintiff or any other female salespersons were present in the workplace.\footnote{Temple, 76 F. Supp. 2d at 1130.}

It is important to note that \textit{Temple} did not involve any violent conduct, which is presumably unacceptable in any work context.\footnote{But even serious violence—say, attempted murder—which is not motivated by the victim’s sex (or other protected attribute) does not violate Title VII.} It is also worth noting that these two instances probably were not sufficiently offensive to constitute actionable harassment, so the court may not have needed to rely on the cultural context in making its decision. Indeed, the lack of severity may have made reliance on that ground much easier, as even if the social context were irrelevant, the plaintiff still would not have prevailed. The case demonstrates, however, that the general culture of a workplace can be highly relevant to analyzing motivation and that some courts are not shy about employing this analysis.

\textbf{B. Workplace Culture as a Gauge of Unwelcomeness and Offensiveness}

\textit{Oncale}’s admonition about social context may also have been a reminder for courts to look to cultural context in assessing whether conduct was unwelcome or severely offensive. Indeed, this was the

\footnote{See id. at 1130. To the extent the court believed that the environment could be legitimized based on the customers’ desires, it might have been going a little too far. The argument that the employer’s discrimination was merely an attempt to serve customer preference has failed employers that have asserted that sex, due to customer preference, is a bona fide occupational qualification that justified discriminatory hiring practices. See, e.g., Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting defendant’s assertion that Latin American men would refuse to do business with a female employee in her hotel room); Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1971) (holding that customer surveys that showed customer preference for young female flight attendants were not sufficient to justify discriminatory hiring practices). Although Fernandez and Diaz involved discrete adverse employment actions, they are disparate treatment cases, and harassment is simply another form of disparate treatment.}
practice of several courts even before Oncale. Because conduct is unwelcome when the plaintiff neither invited nor solicited it, and where he regards it as offensive, the concepts of unwelcomeness and severity are related. Horseplay and teasing which does not offend the plaintiff’s subjective sensibilities, or the objective sensibilities of a reasonable person, frequently will not be unwelcome. Furthermore, conduct and attention which the plaintiff welcomes is, by definition, not offensive to the particular plaintiff; for people do not welcome conduct which significantly offends them.

Resolving questions of whether attention was unwelcome can sometimes be difficult. Paying particular attention to the social context in which the alleged harassment occurred can sometimes be of assistance in the endeavor. Courts have come to realize that “[c]haracterizing behavior as sexually harassing can only be accomplished in a specific context.” In determining whether sexual advances and similar conduct are unwelcome, and severely offensive, courts look to the plaintiff’s conduct and in particular to the way she associates with co-workers through her words and actions. Specifically, they look to the plaintiff’s own use of foul language or the per-


199 See Quick v. Donaldson Co., 90 F.3d 1372, 1378 (8th Cir. 1996) (“Harassing conduct is considered unwelcome if it was ‘uninvited and offensive.’”).

200 Of course, conduct which is not subjectively unwelcome nor subjectively offensive could still be objectively offensive. Take, for example, a woman being pursued by a co-worker with a host of unsavory characteristics—bad breath, offensive odors, unkempt appearance, disagreeable personality, no manners, a tendency to use profanity, or an extensive criminal record. While most reasonable women might find contact and attention from such a man offensive, there may be a particular woman who does not.

201 See Vinson, 477 U.S. at 68.

202 Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998); see also Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1109 (9th Cir. 1998) (“Discriminatory behavior comes in all shapes and sizes, and what might be an innocuous occurrence in some circumstances may, in the context of a pattern of discriminatory harassment, take on an altogether different character . . . ”).

203 See, e.g., Vinson, 477 U.S. at 68–69; Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 966 (8th Cir. 1999) (holding that behavior is not unwelcome where plaintiff engaged in similar behavior toward other employees); Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 565 (8th Cir. 1992) (stating that evidence regarding a plaintiff’s dress and speech should be taken into account).
formance of acts similar to the ones about which she complains. These facets of workplace culture often have a bearing on the questions of unwelcomeness and the level of offensiveness. Accordingly, where a plaintiff engaged in the very type of conduct about which she complains, courts usually hold that the purported harassment was neither severely offensive nor unwelcome when the plaintiff was later forced to endure similar conduct. As the Fourth Circuit stated with respect to a plaintiff who "fully participated in, and even enjoyed, the office banter until" she became an object of it, she "cannot now cry 'foul' for conduct that was, at the time, not 'unwelcome.'" Thus, voluntary participation in offensive conduct can give rise to the inference that the plaintiff finds similar conduct unobjectionable and welcome.

Along these lines, Oncale might have been instructing courts to keep in mind the evolving social mores of the workplace and society generally when analyzing the issues of unwelcomeness and offensiveness. After all, "an objective standard for any legal determination is supposed to take into account changing views." Certainly society's tolerance of profanity and lewd talk has changed over the years. In hostile environment cases, courts must realize that conduct and talk that once would have been considered highly offensive or in extreme

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204 See Scusa, 181 F.3d at 966 ("The undisputed evidence showed that appellant engaged in behavior similar to that which she claimed was unwelcome and offensive."); Quick, 90 F.3d at 1378 ("[T]he question of whether particular conduct was unwelcome will turn largely on credibility determinations by the trier of fact.").

205 See Scusa, 181 F.3d at 967 (holding that the plaintiff's performance of similar acts prevents a finding of severe offensiveness).

206 Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 774 n.7 (4th Cir. 1997).

207 See Smith v. Sheahan, 189 F.3d 529, 534-35 (7th Cir. 1999).

208 Barbara A. Gutek et al., The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination, 5 PSYCHOL. PUB. POL'Y & L. 596, 626 (1999). Actually, that is not the sole or primary reason for an objective standard, nor must it always be the case that an objective standard is designed to take into account contemporary notions or propriety. Purported harassment is judged from an objective viewpoint, as opposed to just the plaintiff's subjective viewpoint, to preclude liability in cases of a hypersensitive plaintiff. See Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 586 (11th Cir. 2000) ("But a plaintiff's subjective feelings and personal reactions are not the complete measure of whether conduct is of a nature that it interferes with job performance. If it were, the most reasonably hypersensitive employee would be entitled to more protection than a reasonable employee . . . ."); Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) ("The objective standard protects the employer from the 'hypersensitive' employee . . . .").
bad taste, are now a regular part of American culture.\textsuperscript{209} Because modern American workplaces and employee sensibilities reflect the dynamic culture, Title VII cannot be expected to have set a standard of conduct which is stuck in 1964.\textsuperscript{210} Just as the propriety of general social conduct evolves over time, so too do the standards for appropriate workplace conduct. And just as propriety changes temporally, so too does it change spatially and socially. Conduct that is perfectly acceptable in a neighborhood tavern may be unwelcome and considered severely offensive to patrons of fine restaurants,\textsuperscript{211} even though both can broadly be considered dining establishments. Harassment, therefore, must be judged by the standard of a reasonable person living in the profanity and sex-filled culture of the twenty-first century, and not according to the sensibilities of a nun working in a convent in medieval England. Its severity must be assessed according to the mores of the particular type of workplace, not according to a one-size-fits-all standard. In short, “the culture of the workplaces does differ from setting to setting,”\textsuperscript{212} and courts need to be sensitive to this when assessing offensiveness and unwelcomeness.

According to this interpretation, \textit{Oncale} was instructing that “the severity of alleged harassment must be assessed in light of the social mores of American workers and workplace culture . . . .”\textsuperscript{213} Several courts have recognized that American culture has become much more coarse. Accordingly, in assessing allegations of harassment, one judge

\textsuperscript{209} See Baskerville v. Culligan Int’l Co., 50 F.3d 428, 431 (7th Cir. 1995) (considering purported harassment in light of “contemporary American popular culture in all its sex-saturated vulgarity”).

\textsuperscript{210} Some scholars make a similar assertion with respect to the “cruel and unusual punishment” clause of the Eighth Amendment. They contend that the Framers intended to set up a standard which could evolve according to the changing moral standards of the populace. Thus, while an eighteenth-century judge might find nothing cruel about capital punishment, a twenty-first-century judge might feel differently. See Ronald Dworkin, \textit{Comment, in Scalia, supra} note 137, at 120. Justice Scalia is not among the scholars adopting this position, at least with respect to the Constitution. See Scalia, \textit{supra} note 137, at 46 (1997) (“Under The Living Constitution the death penalty may have become unconstitutional. And it is up to each Justice to decide for himself (under no standard that I can discern) when that occurs.”). Justice Scalia has realized that the protection these changing standards provide is illusory, as what goes up often comes down. Thus, while extending the reach of the Eighth Amendment may currently be in vogue, there may come a time when courts wish to curtail its protective scope. \textit{Id.}

\textsuperscript{211} In all fairness, it is also true that conduct typical of patrons of upscale establishments might be highly offensive to regular denizens of Moe’s Tavern or similar purveyors of alcohol.

\textsuperscript{212} Smith, 189 F.3d at 535.

\textsuperscript{213} \textit{Id.} at 534–35.
noted that the purported harasser's "remarks and innuendos (about his own anatomy) were no more offensive than sexual jokes regularly told on major network television programs."\textsuperscript{214} Others have acknowledged that "the sporadic use of abusive language, gender-related jokes, and occasional teasing are fairly commonplace in some employment settings . . . ."\textsuperscript{215} Under this interpretation of \textit{Oncale}, then, courts must not be overly critical of this conduct in judging severity, lest Title VII be used as blunt instrument to regulate American culture, rather than a means of preventing discrimination.\textsuperscript{216} Several cases illustrate a proper use of workplace culture in analyzing unwelcomeness and offensiveness.

1. \textit{Reed v. Shepard}

The necessity of examining social context when assessing unwelcomeness and offensiveness is aptly demonstrated in \textit{Reed v. Shepard},\textsuperscript{217} a pre-\textit{Oncale} decision which involved a close judicial look at a prison work environment. Plaintiff JoAnn Reed was a jail employee who, after being fired for misconduct, brought an action for hostile environment harassment.\textsuperscript{218} The Seventh Circuit described the jails' blue-collar environment as "a modern version of TV's \textit{Barney Miller}, with the typically raunchy language and activities of an R-rated movie, and the antics imagined in a high-school locker room."\textsuperscript{219} For example, Reed claimed that she was frequently handcuffed and subjected to suggestive remarks, had her face forced into the groin of other

\textsuperscript{214} Indest v. Freeman Decorating, Inc., 164 F.3d 258, 264 (5th Cir. 1999) (Jones, J., with two judges concurring in the judgment).

\textsuperscript{215} Savino v. C.P. Hall Co., 199 F.3d 925, 933 (7th Cir. 1999); \textit{see also} Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1159 (8th Cir. 1999) (citing \textit{Faragher v. City of Boca Raton}, 524 U.S. 788 (1998)).

\textsuperscript{216} But one court suggests that some courts may go too far in this endeavor. According to the Federal Circuit, pre-\textit{Oncale}.

\[N\]o principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside of the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.

\textit{King v. Hillen}, 21 F.3d 1572, 1582 (Fed. Cir. 1994).

\textsuperscript{217} 939 F.2d 484 (7th Cir. 1991).

\textsuperscript{218} \textit{Id.} at 487. The misconduct involved trafficking marijuana to inmates and encouraging two prisoners to assault another inmate. \textit{Id.}

\textsuperscript{219} \textit{Id.} at 486.
workers, had a cattle prod placed between her legs, was maced, hit, and punched, and had chairs pulled out from under her.220

In short, the work environment would be considered anything but pleasant to people not accustomed to such behavior. But as the trial judge saw firsthand, the plaintiff was no shrinking violet, and she appeared to enjoy the coarseness of the work environment.221 In fact, the evidence showed that Reed frequently instigated the sexual horse-play, often told sexually-explicit jokes, and was actually placed on probation for her own use of foul language.222 As to sexual suggestiveness and an apparent desire for attention, the plaintiff had to be instructed to wear a bra when she wore T-shirts to work.223 Based on this social context—meaning the plaintiff’s own conduct and the general workplace atmosphere about which the plaintiff never complained until her termination—the trial court and the court of appeals held that the conduct was neither unwelcome nor subjectively offensive to Reed.224

Id.

Id.

Id. at 486–87. Considering the prison setting, where the use of profanity is a way of life, Reed must have had to use some pretty harsh language with some frequency to merit suspension.

Id. at 487.

Id. at 491 (“[Reed] was a willing and welcome participant.”). The district court also held that the conduct was not because of the plaintiff’s sex. Id. at 491–92. Presumably, reasonable people would find the conduct in question in Reed severely offensive.

It is interesting to compare the facts and outcome of Reed with the facts and outcome of a case in a circuit which does not place an emphasis on social context. In Swentek v. USAir, Inc., the Fourth Circuit described the plaintiff’s actions:

Numerous witnesses described [the plaintiff] Swentek as a vindictive person who often threatened her coworkers with lawsuits for real or imagined personal slights. . . . There was also testimony that Swentek was a foul-mouthed individual who often talked about sex. In addition, unrebuted testimony at the first trial revealed that Swentek placed a “dildo” in her supervisor’s mailbox to get her to “loosen up,” urinated in a cup and passed it as a drink to another employee, and once grabbed the genitals of pilot Don Matthews with a frank invitation to a sexual encounter.

Sventek v. USAir, Inc., 830 F.2d 552, 556 (4th Cir. 1987). Despite the plaintiff’s egregious behavior, the Fourth Circuit held that “it was improper for the trial judge to suggest that Swentek’s past conduct meant that she welcomed” similar behavior that was directed at her. Id. at 557. Of course, it is true that some employees who inflict harm may not welcome the same harm from others, see, e.g., Lauro v. Tomkats, Inc., 9 F. Supp. 2d 863, 872 (M.D. Tenn. 1998) (“[T]he fact that Lauro might have willingly participated in the use of foul language does not foreclose the possibility that the harassment of which she complains was unwelcome.”), but it is reasonable, on these facts, to believe that a crude individual like Swentek would not have found similar
In cases such as *Reed*, the operative principle seems to be that if a plaintiff can dish it out to others, it is probable that similar conduct is not all that distasteful to her.\(^{225}\) In such cases, social context was examined to see (1) whether conduct similar to that which engendered the plaintiff’s complaints was the cultural norm of the plaintiff’s workplace, and (2) whether the plaintiff instigated similar conduct. *Reed* demonstrates that where the plaintiff reveled in the crude culture of her work environment before filing her Title VII suit, courts will be highly suspicious when later confronted with claims that the conduct at issue was subjectively offensive or unwelcome. These courts also believe that an actionable level of offensiveness, from an objective viewpoint, is also doubtful in these cases.\(^{226}\) Since *Oncale*, courts have given particular attention to these facets of social context.

2. *Standifer v. Teamsters Union*

Union picket lines are another work-related context that are generally characterized by hostility and bad manners, suggesting that the mean-spirited behavior of picketers and strike-breakers is not terribly offensive to either group and that rude behavior would exist in this social context regardless of their race, color, sex, religion, or national origin. Thus, the federal district court in *Standifer v. General Teamsters*...
Union granted summary judgment for several defendant strikers based on the plaintiff strike-breakers' failure to demonstrate that conduct around the picket line was objectively severe, as well as their failure to show that the harassment was motivated by racial "animus."

Standifer was a § 1981 action brought by three black strike-breakers against the union and various picketers. During the strike, the union picketers repeatedly yelled racial epithets at the workers (along with race-neutral obscenities), including "slave boy," "nigger boy," "nigger," "fucking nigger," and "black bastard." After forcing a truck driven by one plaintiff off the road, and while pounding on the disabled truck, the strikers yelled invectives such as "kill the nigger" and "hang the nigger." The angry mob then struck the driver with a weapon (inflicting serious wounds) and violently smashed the windows of the truck. On other occasions, they yelled: "Nigger boy, remember that you have to leave tonight and we can't wait to get your nigger ass. We're going to mess you up bad." After having to tolerate taunts of "nigger" every day, and after having his life threatened, one of the plaintiffs succumbed to the threats and quit his job. Another plaintiff sought refuge by requesting assignment to another location, and another avoided further confrontations by taking leave.

The plaintiffs alleged that the racial harassment created a hostile environment that interfered with their contractual relationship with the employer, but the court granted summary judgment for most of the defendants. In doing so for the defendants who used only a few epithets, the court noted that "in the context of a labor dispute, defendants' behavior might be characterized as objectively reasona-

228 Id. at *6.
229 In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Supreme Court held that actions for discrimination or harassment in employment are not cognizable under § 1981 because such harassment occurs after the formation of a contract. The Civil Rights Act of 1991 added section (b)—regarding the performance and enjoyment of contracts—to § 1981 for the express purpose of overruling Patterson.

230 Sadly, some unions have a long history of racism. In an effort to address this problem, Congress made Title VII applicable to both employers and unions. See 42 U.S.C. § 2000e-2(c) (1994).
232 Id.
233 Id.
234 Id. at *4.
235 Id. at *3.
ble."\textsuperscript{236} It quoted \textit{Oncale} for the idea that in assessing harassment courts must look at the "constellation of surrounding circumstances,"\textsuperscript{237} and it accepted the union's suggestion that "a picket line is not an ice-cream social, and Emily Post hardly dictates the manner of behavior."\textsuperscript{238}

Like the courts in \textit{Reed} and \textit{Gross}, the judge here believed that certain unpleasant conduct, to put it mildly, is inherent in blue-collar picket lines. Accordingly, employees claiming harassment in relation to their attempts to cross picket lines, in light of this confrontational social context, will have a difficult time creating a genuine issue as to the severe offensiveness of the defendants' conduct, unless they offer some evidence that the strikers' behavior was inordinately offensive. In short, demonstrating that picket lines—which by all accounts are never friendly social contexts—were saturated with abusive language is not enough. Reasonable people who know anything about typical union behavior expect vituperative confrontations between strike-breakers and picketers. For better or worse, hurling insults at strike-breakers is one method commonly employed by unions to coerce workers to toe the union line. Plaintiffs in these blue-collar contexts will have a more difficult time demonstrating objective severity, especially where they participate in similar abusive name-calling and where such conduct is a regular part of the workplace. It is not surprising, then, that the district court granted summary judgment even for defendants who repeatedly hurled racial slurs at the plaintiffs.

Nevertheless, even in this blue-collar context,\textsuperscript{239} the district court declined to grant summary judgment for those defendants who both

\begin{itemize}
\item[\textsuperscript{236}] \textit{Id.} at *6 n.5.
\item[\textsuperscript{238}] \textit{Standifer}, 1998 WL 229553, at *6 n.5.
\item[\textsuperscript{239}] Of course, mild offensiveness is not indigenous only to certain blue-collar workplaces, and so even cases involving white-collar employment warrant an examination of social context. In \textit{Barbour v. Browner}, for example, the plaintiff, Joyce Barbour, worked in an office position for the Environmental Protection Agency. 181 F.3d 1342, 1348-49 (D.C. Cir. 1999). She claimed that employees of a contractor hired by the EPA treated her with disrespect, once by one employee turning her back to Barbour. \textit{Id.} at 1344. On another occasion, one of the contractor's employees was intentionally slow in responding to the plaintiff's request for information, and the contractor's employees called the plaintiff's supervisor to verify orders which the plaintiff had given. \textit{Id.} Based on these incidents, Barbour claimed that the EPA failed to protect her from a hostile environment based on her race. \textit{Id.} When a jury found otherwise, Barbour appealed.

The court of appeals held that the jury did not err in finding as it did, because the evidence did not indicate that the conduct was objectively severe. The court based part of its holding on the principle that offensive conduct that is customarily part of a given job or work environment usually will not constitute sufficiently severe
used racial slurs and battered one of the plaintiffs.\textsuperscript{240} The court reasoned that the battery created a genuine issue as to the "objective severity" and unwelcomeness elements, and the use of racially offensive names would permit a jury to conclude that the attack was racially-motivated.\textsuperscript{241} As the various cases demonstrate, where workplace culture is analyzed by the courts and that culture normally entails a threshold level of offensiveness, verbal conduct alone will seldom be sufficiently severe to constitute harassment, and violence without a readily apparent racial animus will not be actionable. Violence combined with racial or sexual epithets, however, will nearly always get the plaintiff a trip to the jury. Of course, this outcome is not much different from the one that would have occurred even if the court had not considered the workplace culture. All courts—regardless of whether they specially consider workplace culture—generally consider violence to be objectively severe and unwelcome, and these courts frequently hold that mere invectives are insufficiently severe to constitute actionable harassment.

3. Weston v. Department of Corrections

\textit{Weston v. Department of Corrections} is yet another post-\textit{Oncale} decision analyzing harassment according to workplace culture.\textsuperscript{242} It involves a prison context similar to that described above in \textit{Reed v. Shepard}.\textsuperscript{243} Plaintiff Michael Weston claimed that a female co-worker sexually harassed him. Initially she provocatively rubbed his back despite his objections, and a few days later she touched his buttocks by putting her finger through a hole in his pants.\textsuperscript{244} The offensive conditions giving rise to a hostile environment. \textit{Id.} at 1348. Quoting \textit{Oncale}'s reminder to pay attention to social context, the court explained:

[Barbour] does complain specifically that employees of CBSI, in an attempt to have the deadlines she imposed relaxed, would often ask [Barbour's supervisor] to confirm her instructions. It is hardly surprising, however, that a contractor would try to play off one of its Government overseers against another in this way. Barbour's protestation is like to [sic] that of a waitress who complains that her customers are sometimes rude: treatment that would be objectionable in other contexts is an inevitable part of the job. Although CBSI's gamesmanship, like its other questionable behavior, was probably regrettable, it subjected Barbour to little if anything more serious than the "ordinary tribulations of the workplace."

\textit{Id.} at 1348–49 (citation omitted).

\begin{itemize}
  \item \textsuperscript{240} \textit{Standifer}, 1998 WL 229553, at *8.
  \item \textsuperscript{241} \textit{Id.} at *7.
  \item \textsuperscript{243} 939 F.2d 484 (7th Cir. 1991); \textit{see supra} Part III.B.1.
  \item \textsuperscript{244} \textit{Weston}, 1998 WL 695352, at *1.
\end{itemize}
touching ceased after Weston complained to superiors, but soon his co-workers and managers made offensive comments, taunts, and jokes about the incidents.\textsuperscript{245}

Although Weston alleged that a hostile environment existed, the district court granted summary judgment for the defendant. It held that there was an insufficient showing of severity, based on the blue-collar context in which Weston worked, the food service division of a state prison.\textsuperscript{246} Because prisons are not exactly known for their refined environments,\textsuperscript{247} it is reasonable to expect some objectionable banter to occur in this context, and perhaps even some offensive touching. It is probably impossible for an employer to turn a prison into a bastion of civility and good manners, even among just the employees.\textsuperscript{248} As the court stated:

\begin{quote}
Mr. Weston works with those regularly confronting the criminal population; the abrupt or intensive demeanor of those whose duty it is to maintain order in prison and the stress borne out of daily conflict with the prison population pervades Mr. Weston’s working environment. These conditions almost necessarily must foster “offensive comments, jokes, and jibes.”
\end{quote}

\textsuperscript{245} Id.
\textsuperscript{246} Id. at *2.
\textsuperscript{247} "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint . . . ." Hudson v. Palmer, 468 U.S. 517, 526 (1984). Of course, that does not mean that prison employees must behave in the same antisocial manner.

\textsuperscript{248} Compare Weston, 1998 WL 695352, with Slayton v. Ohio Dep’t of Youth Servs., 206 F.3d 669 (6th Cir. 2000). Slayton arose in the Sixth Circuit, which does not take into account the workplace culture in which purported harassment occurs. In the case, the plaintiff was a female corrections officer serving in a prison for juvenile offenders. \textit{Id.} at 673. She faced treatment similar to that of Michael Weston, although unlike Weston, nobody ever touched her. Instead, one of the other guards frequently played misogynistic rap music with the inmates, along with erotic videotapes, and frequently performed erotic dances to the music or videos. \textit{Id.} at 674. The same co-worker encouraged inmates to drop their towels when the plaintiff was on shower duty, laughed when they did so, and suggested that the plaintiff check on inmates when he thought they were naked. \textit{Id.} He also opined that her attitudes were due to menstruation, called the plaintiff a “bitch,” and encouraged inmates to do the same. \textit{Id.}

In analyzing the hostile environment claim, the Sixth Circuit agreed with the defendants that by “choosing to work in a prison, corrections personnel have acknowledged and accepted the probability that they will face inappropriate and socially deviant behavior.” \textit{Id.} at 677. But the court believed that tolerating juvenile behavior from juvenile delinquents is one thing; having to withstand it from co-workers is another. Therefore, the court rejected the argument that the defendant was entitled to a little slack based on the social context of the prison work environment. It refused to
These comments, jokes, and jibes fall easily into the category of simple teasing when considered in light of the social context of prison. It is difficult for the Court to imagine a more caustic environment, or one more likely to promote harsh or even acidic banter, than prison. Working in the staff dining room, Mr. Weston works with those regularly confronting the criminal population; the abrupt or insensitive demeanor of those whose duty it is to maintain order in prison and the stress borne out of daily conflict with the prison population pervades Mr. Weston’s working environment. These conditions almost necessarily must foster “offensive comments, jokes, and jibes.” In light of the social context of the prison, the Court finds the joking and jibing... is [not] severe enough to create a hostile work environment.  

Weston demonstrates, yet again, that workplace culture can be highly relevant to judging the severity and unwelcomeness of particular conduct.

C. The Import of the Workplace Culture Cases

Before considering the analytic advantages of considering workplace culture in hostile environment cases, it might be helpful to summarize the salient points of the cases that have adopted this approach. First, courts that pay close attention to the workplace culture do so because they believe that social context is relevant to analyzing (1) severity of the offensiveness, (2) unwelcomeness, and (3) motivation. When, regardless of the plaintiff's presence, the background culture is vulgar, courts are more likely to hold that there was no hostile environment, and the probability of a court so holding increases as the background crudeness of the workplace increases. The courts may base their holding on the plaintiff's failure to create a genuine issue as to offensiveness, unwelcomeness, or motivation. In this sense, these courts are simply employing longstanding principles of hostile environment law. Thus, there should be nothing controversial about considering the social context in which the harassment occurred.

A second important point concerns the extent to which the plaintiff participated in the purported harassment or similar conduct. When courts focus on workplace culture, the likelihood of a plaintiff prevailing diminishes when the plaintiff: (1) instigated the conduct at take context into account in assessing the severity or unwelcomeness of the conduct, and instead affirmed the $125,000 verdict that the jury returned for the plaintiff. Id. at 680. Had the case arisen in a different circuit, it is not clear that Slayton would have prevailed.

249 Weston, 1998 WL 695352, at *2. It is not clear how the court arrived at the conclusion that prison environments “must foster” offensive comments and jokes.
issue; or (2) actively participated in similar conduct. Where the conduct at issue is truly serious, the background culture of the workplace will come into play only if the plaintiffs actively participated in or encouraged offensive conduct similar to that about which they complain. This was certainly true in Gross, Johnson, Reed, and Standifer. The moral for plaintiffs in these types of cases is to avoid acting like the purported harassers, as juvenile outbursts and the use of foul language will reduce their chances of prevailing in a Title VII suit.

Of course, this rule also tells employees that it is okay to misbehave so long as their comrades willingly participate in their antics or similar behavior and never display any reticence. It is true that workplace culture is considered relevant even in cases such as Temple and Weston, where the plaintiffs admittedly were not involved in conduct similar to that which sparked their complaints. But these cases involved relatively minor conduct that never reached a level of severity that most people would consider offensive, regardless of the social context of the workplace. Because the "harassment" was relatively mild, it would not have been actionable regardless of the social context in which it occurred. In short, these cases would have come out the same way even if the social context analysis had been omitted. The courts' consideration of workplace culture was simply the icing on the cake that made the defects in the plaintiffs' cases more poignant.

The cases discussed above also demonstrate that workplace culture is merely one of many factors that these courts consider, although in some cases it can be an outcome-determinative factor. The social context variable becomes increasingly outcome determinative as the background vulgarity of the workplace and the plaintiff's participation in similar conduct increases, as either of these phenomena suggest that the plaintiff is missing an essential element of his hostile environment case. Because social context is simply one factor in the analysis, even where courts place great emphasis on workplace culture, it is hard to say that they are doing anything novel, as workplace culture is part of the totality of the circumstances the Supreme

250 Also relevant is whether the plaintiff failed to complain about similar acts, which might suggest that he found them neither severely offensive nor unwelcome.
251 See supra Part III.A.1.
252 See supra Part III.A.2.
253 See supra Part III.B.1.
254 See supra Part III.B.2.
Court has long instructed courts to consider.\textsuperscript{256} Sensitivity to social context simply gives courts another perspective on the plaintiff's claim, which in many cases helps courts to see that the conduct at issue was not based on sex and was neither severely offensive nor unwelcome.

IV. ADVANTAGES OF CONSIDERING SOCIAL CONTEXT

Courts usually do not defend their prior decisions from criticism nor the analytical tools they employed to arrive at them. Not surprisingly, then, courts that have factored "social context" or "workplace culture" into the harassment analysis have not dwelt on the advantages of this approach, other than offering that this analysis is required under the prevailing jurisprudence. Many courts have not explicitly considered the other benefits (or shortcomings) of emphasizing cultural context. In assessing the value of this analytic tool, its advantages and disadvantages are certainly relevant. First, consider some of the advantages that a consideration of cultural context of the plaintiff's particular workplace might entail.

A. Minimizing the Vagueness and Overbreadth of Hostile Environment Law

Since courts first construed Title VII as outlawing harassment in the workplace, judges and scholars have criticized the vague standard for distinguishing between unpleasant banter and a full-blown case of harassment.\textsuperscript{257} One would think that, in time, as the courts addressed more cases, they would be able to discover some guiding principles. But as yet, this has not proven true. "As the case law has grown to show, determining the intensity/quantity of sexual gesturing, touching, bantering and innuendo that it takes to render a work environment sexually hostile is now no less difficult than trying to nail a

\textsuperscript{256} See Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

\textsuperscript{257} See, e.g., Gallagher v. Delaney, 139 F.3d 338, 349 (2d Cir. 1998) ("This disadvantage of imprecision is an unfortunate byproduct of the current uncertainties in a developing area of sociology and the law."); Breda v. Wolf Camera, Inc., 148 F. Supp. 2d 1371, 1376 (S.D. Ga. 2001) ("[T]his entire area of law is enervated by vague, almost circular standards"); Fall v. Ind. Univ. Bd. of Trs., 12 F. Supp. 2d 870, 877 (N.D. Ind. 1998) ("To be sure, exactly what act or combination of actions may 'objectively' constitute a hostile work environment is a rather gray area."); Mark McLaughlin Hager, Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed, 30 CONN. L. REV. 375, 393 (1998) ("As evolved under Title VII, the anti-harassment duty is overly broad and vague.").
jellyfish to the wall." In hostile environment cases, as with other litigation involving standards of conduct, incidents at the two extremes of harmlessness or unlawfulness can be usually classified as harmless or actionable without too much effort. But dull, faint lines—much less bright lines—are almost impossible to discern in the majority of hostile environment cases that fall within that expansive wasteland between actionable harassment and merely unpleasant teasing. With harassment cases comprising a greater portion of the federal and state court dockets, it seems desirable to tighten up existing hostile environment standards.

As some of the cases discussed above have shown, a consideration of social context can be particularly helpful in determining whether words are truly offensive or are just part of the general banter of the workplace; whether they are unwelcome or just accepted as unpleasant "background noise" that occasionally wafts through the workplace; and whether offensive speech was designed to harm another employee based on her sex or was just a regular facet of the particular employment setting. As Justice Scalia mentioned in *Oncale*, activities that are inappropriate in one social context, are the norm in

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259 See Indest v. Freeman Decorating, Inc., 164 F.3d 258, 264 n.8 (5th Cir. 1999) ("Cases will vary widely, as there is a continuum of sexually-categorized behavior ranging from the use of diminutives like 'sweetie-pie' on one extreme to physical assault on the other . . . ."); Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1997) ("There is no bright line between sexual harassment and merely unpleasant conduct . . . ."); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) ("It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other . . . .").

260 Justice Scalia is among the critics of vague hostile environment standards. The author of the *Oncale* opinion, he previously denounced the vagueness of the hostile environment standard in his *Harris* concurrence:

"Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person['s]" notion of what the vague word means. Today's opinion does list a number of factors that contribute to abusiveness, but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages.

Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (1993) (Scalia, J., concurring) (internal citation omitted).

261 As the Supreme Court has stated: "Words that are commonplace in one setting are shocking in another." FCC v. Pacifica Found., 438 U.S. 726, 747 (1978).
By creating a practice whereby purported harassment is assessed in the light of the background conduct of particular workplaces, courts move one small step closer to greater uniformity and predictability in hostile environment cases, as sensitivity to culture gives courts a principle by which to differentiate various cases. By examining workplace culture, employers, employees, and courts have at least one further indicia by which to assess unwelcomeness, severity, and motivation. Thus, the consideration of the workplace culture could be a partial cure for the uncertainty implicit in the broad "reasonable person standard," which both liberals and conservatives criticize, although for different reasons, as being too vague and indeterminate. These courts realize that terms "like 'reasonable' and 'undue' are relative to circumstances" and have meaning only in the context in which the conduct occurs. Moreover, "standards of reasonableness . . . vary according to individual views." Reasonable people—and judges—may differ as to what constitutes offensive or severely offensive conduct. This has led one federal judge to observe that a plaintiff who loses on summary judgment before one judge, might well have prevailed before another; "inconsistency is no stranger to this area of law." Sensitivity to social context can be a partial cure for this inconsistency.

To some extent, a consideration of cultural context can diminish the vagueness of the "reasonable person" standard because employers and employees can know that the background swearing which is nor-

263 The desirability of this goal should be obvious. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 109 (1969) ("We should not fail to clarify standards when we have the requisite understanding to clarify standards, we should not fail to develop principles when experience leads toward principles, and we should not fail to formulate rules when rules have become feasible.").
265 See JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 82–83 (2000) ("[I]t is often impossible for a supervisor or employer to know in advance whether or not offensive conduct is illegal, because of the amorphousness of the legal definitions of harassment itself.").
266 Crawford v. Ind. Dep't of Corr., 115 F.3d 481, 487 (7th Cir. 1997).
269 See Breda v. Wolf Camera, Inc., 148 F. Supp. 2d 1371, 1381 (S.D. Ga. 2001) ("Admittedly, this case might make the grade in some jurisdictions.").
270 Id.
mal in certain cultural contexts will not result in liability for hostile environment harassment. As long as no or minimal touching has occurred, and invectives are not directed solely or primarily at the plaintiff, employers will not be saddled with the responsibility of a kindergarten teacher, namely, ensuring that their charges do not use dirty words.\textsuperscript{271} Thus, an appreciation of what is normal conduct in many workplaces is merely one step, and a small one at that, toward greater continuity and predictability in hostile environment cases. A full appreciation of this advantage can only occur after examining the state of hostile environment law without the benefits of the social context analysis. As Judge Reinhardt has recognized:

The question of what constitutes sexual harassment is a complicated and increasingly important one in our society. There is no agreed upon definition of the newly popular term. In some versions, it appears to cover the widest possible range of sins, from physical assault to reading a magazine in a public facility. Whether particular conduct is appropriate or whether it crosses the line is the subject of disagreement and controversy, always heated and often legitimate.\textsuperscript{272}

In other words, judges and scholars from various political persuasions who frequently agree on little else agree that the present standard of judging hostile environment harassment suffers from an intolerable vagueness.\textsuperscript{273} On the one hand are those who claim the standard leaves too many victims unprotected,\textsuperscript{274} on the other hand are critics who contend that the reasonable person standard is too restrictive of freedom. Because there really is no single hostile environment standard, it is possible for both sets of critics to be right. It may be that in some cases vague standards result in egregious conduct going unpunished, while in other cases relatively mild comments result in substantial awards.\textsuperscript{275} Regardless of who has the better argu-

\textsuperscript{271} Of course, that is usually the outcome of cases even without a consideration of the blue-collar environment. 
\textsuperscript{272} Nichols v. Frank, 42 F.3d 503, 509–10 (9th Cir. 1994) (Reinhardt, J., with two judges concurring only in the judgment).
\textsuperscript{273} See Smith v. N.W. Fin. Acceptance, Inc., 129 F.3d 1408, 1415 n.3 (10th Cir. 1997) ("[T]here are differing views among the circuits about what constitutes a hostile work environment."); Kanzler v. Renner, 937 P.2d 1337, 1342 n.3 (Wyo. 1997) ("The term 'sexual harassment' is susceptible of many definitions, and potentially encompasses a broad range of conduct."); Hager, supra note 257, at 393 ("As evolved under Title VII, the anti-harassment duty is overly broad and vague.").
\textsuperscript{274} See supra Part II.B.
\textsuperscript{275} Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1353 (7th Cir. 1995) ("Sexual harassment in the workplace raises sensitive and complex concerns. For courts, these concerns are often competing.").
ment, both sides concur that the vagaries of the reasonable person standard leaves the criteria for prohibited or permitted conduct largely under-defined.276

As Professor Jeffrey Rosen recently argued, “it is often impossible for a supervisor or employer to know in advance whether or not offensive conduct is illegal, because of the amorphousness of the legal definitions of harassment itself.”277 Considering the wide-ranging opinions expressed in various court decisions, apparently this amorphous definition is no easier for judges and juries to digest.278 Experienced litigators know that whether “a work environment [is] ‘hostile’ or ‘abusive’ is a case-by-case determination guided by no sharply defined rules.”279 Although some courts seem to pretend that there are discernable principles supporting the myriad hostile environment decisions, other courts are more candid in their assessment.280 Anyone capable of reading the Federal Reporter would have to agree with the sentiments of one district court that attempted to reconcile the conflicting decisions: “The courts deciding summary judgment motions have reached a broad range of conclusions regarding what actions actually constitute a hostile environment.”281 Put more bluntly, many decisions which purport to apply the same standard for defining a hostile environment are inconsistent with one another. Conduct which seems severe to one judge or panel of judges is perceived by others as simply a mild irritation. Consequently, the term “irreconcilable differences” takes on new meaning for lawyers attempting to dis-

276  See Fall v. Ind. Univ. Bd. of Trs., 12 F. Supp. 2d 870, 877 (N.D. Ind. 1998) (“The Supreme Court has consistently counseled that the test for whether an environment is ‘hostile’ or ‘abusive’ is not a mathematically precise one . . . .”).

277  ROSEN, supra note 265, at 82-83.

278  Indest v. Freeman Decorating, Inc., 164 F.3d 258, 264 n.8 (5th Cir. 1999) (“Cases will vary widely, as there is a continuum of sexually-categorized behavior ranging from the use of diminutives like ‘sweetie-pie’ on one extreme to physical assault on the other . . . .”); Baskerville v. Culligan Int’l Co., 50 F.3d 428, 431 (7th Cir. 1995) (“It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other . . . .”).


till concrete principles from sexual harassment decisions that are all over the board.

Several different problems are directly traceable to this vagueness: (1) the present reasonable person standard results in jury verdicts against employers for conduct Title VII was not designed to regulate and which they could not reasonably have known was illegal; (2) consequently, in an attempt to avoid liability, some employers over-regulate the workplace, chilling speech and conduct that is not prohibited by Title VII; (3) innocent employees are punished for conduct that is not illegal or are accused of harassment where none actually existed, damaging morale and ruining reputations; and (4) at the other extreme, some employers under-regulate their workplaces, and their employees fail to regulate their own conduct, because neither group can discern what exactly is prohibited. Examining harassment in light of workplace culture might mitigate some of these problems, as at least employers in blue-collar contexts will not be forced to perform the (impossible) task of regulating the minutiae of crude language and vulgar banter which unfortunately is typical of many workplaces. Judicial sensitivity to workplace culture will not cure the vagueness of the myriad hostile environment standards, but it is a small step in the right direction.

B. Preventing a Discriminatory Backlash

Employers and consumers are not the only beneficiaries of analyzing sexual harassment cases in light of workplace culture. Women who desire employment in these workplaces, particularly blue-collar ones—which frequently pay more than other jobs traditionally considered "women's work"—also benefit from any certainty that a consideration of social context provides. This is because some employers may presently be discriminating against women in their hiring practices in

282 This defect of the hostile environment standard is particularly harmful, because in employment contexts predictability of outcomes is important to commercial stability and fairness. Foley v. Interactive Data Corp., 765 P.2d 373, 398 (Cal. 1988) (noting that in the employment context, the ability to predict the consequences of employment actions is important to the employment relationship and to commercial stability). Without a uniform and predictable hostile environment standard, employers cannot order their affairs so as to abide by the law, and thereby minimize violations and the monetary penalties they entail. Cf. Int'l Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 407 (1986) (Blackmun, J., dissenting) (noting the need for uniformity in interpreting labor laws). And hostile environment standards differ from federal circuit to federal circuit, or more frequently, from district to district, and are therefore particularly burdensome for employers with facilities in several states.
order to prevent a future hostile environment suit. Indeed, the undefined standards of hostile environment law encourage employers to discriminate against women, the most frequent hostile environment plaintiffs, in their hiring practices in order to prevent hostile environment lawsuits. These loose standards, which have resulted in a windfall for some plaintiffs, actually hurt other women—the backlash—by providing employers with a strong incentive not to hire them and inducing co-employees not to socialize with women out of fear of facing a hostile environment charge. Particularly for blue-collar employers, it might be financially wise to discriminate against women in hiring in order to avoid a hostile environment suit down the road, the outcome of which nobody can predict with any certainty. True, if an employer intentionally declines to hire women because they are women, he faces the possibility of a Title VII, sex-discrimination lawsuit. But for several reasons, the average employer is still probably better off—from a financial standpoint—in discriminating against women in the blue-collar context. First, because rejected applicants frequently do not know why they did not obtain a position and employers can easily craft a believable excuse, it is often the case that discriminatory hiring goes undetected. "Most workers are not perfect. As to them, it is usually easy to supply a plausible reason why they were

283 "Backlash" here refers to actions taken because of hostile environment, which are contrary to the presumed purposes of that law. Thus, while hostile environment law was intended to prevent women from being excluded from workplaces, it has instead resulted in the very evil it attempted to prevent.

284 This is not the first time, nor will it probably be the last time, that laws designed to benefit a particular group actually prove harmful in their application. Such was the case with the District of Columbia’s schedule of minimum wages for women, but not for men. Because employers were forced to pay women a premium, and men were free to undercut the women and hire men at the market rate. See Adkins v. Lyons, 261 U.S. 525, 553 (1923). For an excellent discussion of the case, see Hadley Arkes, The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights 13 (1994) ("[T]he law, in its liberal tenderness, in its concern to protect women, had brought about a situation in which women were being replaced, in their jobs, by men.").

285 See Juliano & Schwab, supra note 13, at 561 ("Where occupation status of the [sexual harassment] plaintiff could be identified, . . . 38% of the plaintiffs we could classify were blue-collar (40% of the workforce.").

286 See 42 U.S.C. § 2000e-2(a) (1994) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire . . . because of such individual’s . . . sex . . .").
not hired . . . "287 Because of this, many of these potential failure-to-hire suits are never even initiated.

Furthermore, even if a plaintiff commences a failure-to-hire discrimination suit, the employer's chances of prevailing in such a suit are probably greater than in the average hostile environment action. This is due, in part, to information deficits that failure-to-hire plaintiffs face,288 the ease by which an employer can come up with a believable reason for his hiring decisions, and the fact that the law is more definite and predictable in the failure-to-hire context than in the sexual harassment one. An employer knows that in a failure-to-hire suit he merely must come up with a believable explanation for his hiring decision. Contrast that to a hostile environment suit, where the employer cannot be sure that his male employees did not proposition or stare at an attractive female employee, and neither he nor his lawyers can predict the standard by which his workplace will be judged. Thus, it makes sense for some employers to exclude women altogether and instead take their chances with a failure-to-hire suit. This is part of the backlash that indeterminate hostile environment standards have caused for women. To the extent that an examination of cultural context solidifies the hostile environment analysis, and blue-collar employers are made aware of these changes, rational employers should curtail the backlash against hiring women.289 Similarly, as the boundaries between acceptable and actionable conduct are more clearly defined, co-employees might have less reason to fear a harassment suit, and thus might be more willing to include women in social outings which can often prove career enhancing for the women.290 There-


288 Specifically, she, the applicant, does not know for certain why she was not hired and particularly whether it was based on her sex. Furthermore, she is usually deprived of knowledge that might suggest discriminatory hiring, such as the sex of the person actually hired.

289 This assumes that these employers learn that the vulgar banter normal in such workplaces will no longer be held against them in a hostile environment suit, at least as long as the plaintiff is not singled out for abuse.

290 Under the present system, women are often excluded from social groups because employers and co-employees fear hostile environment suits. "Not surprisingly, many women begin to feel shut out with fewer chances to join in informal lunches, business travel, weekend-socializing, and general camaraderie, they may find it hard to do their jobs as well or rise as far as the men." WALTER OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE 82 (1997).
fore, female employees and applicants are also beneficiaries of a sensitivity to social context.\textsuperscript{291}

Examining cultural context, by increasing certainty, consistency, and predictability in hostile environment litigation, also benefits legitimate hostile environment plaintiffs. These plaintiffs presently must suffer under the same loose standards that employers face. This results in substantial and unnecessary litigation costs,\textsuperscript{292} expenses which some plaintiffs are not always able to bear.\textsuperscript{293} Similarly, the greater certainty will allow plaintiffs' attorneys to know when a case is more likely to be a loser, so that he can either decline the case or cut his losses early, perhaps by the summary judgment stage. This, in turn, should save courts the trouble of having to address the large number of less-than-meritorious hostile environment cases that now flood the federal docket. Settlement of meritorious and non-meritorious cases should also increase, as parties will have a greater ability to accurately predict their chances of success. The average American will also benefit from increased certainty because they presently pay for loose standards in at least two ways: (1) through increased litigation costs and erroneous judgments, which employers pass on to consumers in the price of goods or services produced; and (2) through increased taxes which citizens must pay to fund the courts and their staff, who in turn must sift through the facts of each hostile environment case in an attempt to apply the presently loose standards.

This is not to say that an examination of workplace culture solves all problems associated with hostile environment cases. Indeed, although it increases certainty and uniformity in close cases, even courts that consider workplace culture are cabined by the multi-factored analysis required by the \textit{Harris} factors and the genuinely difficult question of determining unwelcomeness. Because of the fact-intensive nature and other peculiarities of hostile environment law, it is not surprising that litigation costs for hostile environment cases are "far higher than those associated with the major criminal offenses or tor-

\textsuperscript{291} This also holds true for other groups that have traditionally faced discrimination.

\textsuperscript{292} \textit{See} Posner, \textit{supra} note 287, at 514. In light of the Supreme Court's recent decision in \textit{Circuit City Stores, Inc. v. Adams}, 532 U.S. 105 (2001) (holding that the Federal Arbitration Act does not preclude arbitration of discrimination claims), the frequency of employers requiring employees to arbitrate rather than litigate harassment claims will rise, and the costs of uncertainty will certainly diminis.

\textsuperscript{293} Although contingency agreements with their attorneys can ameliorate this concern, some plaintiff's lawyers will only take cases that have a reasonable potential for victory. Furthermore, even in contingency fee cases plaintiffs are frequently responsible for incidental expenses, such as filing fees, depositions, and transcript fees, which are usually steep.
tious actions against strangers." Somebody is forced to bear these costs—whether it is employees, employers, or consumers. So any factor that adds greater certainty to the equation performs a great service to all concerned parties. To the extent that a consideration of workplace culture adds even a modicum of additional certainty and predictability, this analytical tool provides something positive for an area of law greatly in need of some clarity.

C. Chilling of Speech

In the First Amendment context, the courts have recognized the negative, chilling effect that vague and substantially overbroad laws can have on speech, especially those that regulate speech based on its content and viewpoint. Thus, in most free speech cases, the courts are particularly solicitous to ensure that regulations of speech are not vague or overly broad and that viewpoint- and content-based restrictions receive exacting scrutiny. Modern judges are so protective of free speech rights that laws are now frequently struck down as unconstitutional based merely on fears that they might "chill" protected conduct. Their rationale is that vague restrictions might cause cautious individuals to refrain from expressing their views out of fear that they will be held liable for violating the law in question. Similarly, in overbreadth cases, laws are struck down when they restrict more speech than is necessary to achieve compelling governmental interests.

294 Epstein, supra note 103, at 350–51.
296 Other rationales for striking down vague laws include the belief that the actor has insufficient notice of what is prohibited, authorities have insufficient guidelines to check their enforcement of the law, and requiring legislatures to draft narrowly drawn laws encourages considered legislative judgment. The void for vagueness doctrine exists under both the Due Process Clause and the First Amendment, with the latter requiring laws with greater specificity than the Due Process Clause. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). A law is void for vagueness where reasonable persons could differ as to the meaning of the law.

[T]he instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.
For reasons that are not entirely clear, the same cautious approach is generally not employed by the American judiciary when facing hostile environment cases. "There is no bright line between sexual harassment and merely unpleasant conduct . . . ." Consequently, hostile environment law has developed a standard of conduct that is both vague and overly broad. This leaves many employers—among others—unable to discern what exactly is prohibited by Title VII, as was discussed above. According to Justice Kennedy, this means that potential hostile environment defendants must operate in "a climate of fear." Because it is often difficult for employers to know whether their employees have committed acts of harassment, to be safe, both employers and employees often curb their speech and

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298 Professor Nagel has suggested that offensive speech receives less protection in the workplace because of society's desire to make the workplace comfortable for women, apparently to encourage more women to work:

Sexual harassment on the job is treated specially in our society for the plain reason that we have decided that it is crucially important to remove impediments to job opportunities for women. As a society, our choice is that it is more important to protect women from sexual pressure and vulgarity on the job than at the newsstand or along the street or in the home.

NAGEL, supra note 92, at 16. Although noble, this is hardly a good reason to alter the constitutional analysis.

299 This may be changing. See Saxe, 240 F.3d at 214 (holding school district's anti-harassment policy, which looks an awful lot like the Title VII "standard" for harassment, facially unconstitutional). Interestingly, the school district defended its anti-harassment policy by arguing that it was merely a replica of the Title IX standard, which is a knock off of the Title VII standard of harassment. The Third Circuit's response to this argument is that "there is no categorical ‘harassment exception’ to the First Amendment's free speech clause." Id. at 204.

300 Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1997).


302 See Wayne Lindsey Robbins, Jr., When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims, 47 BAYLOR L. REV. 789, 809 (1995) ("The vagueness of the definition of what constitutes harassment leaves those subject to regulation without clear notice of what is permitted and what is forbidden.").

303 Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 681 (1999) (Kennedy, J., dissenting) (discussing the result of allowing unlimited liability under Title IX).
steer clear of anything that might conceivably offend co-workers.\textsuperscript{304} Although the co-employee harassers cannot be held liable under Title VII, as at-will employees, they are certainly terminable simply for being accused of harassment, regardless of whether they actually harassed anyone.\textsuperscript{305}

Since an employer receives no direct economic benefit from his employee's free speech,\textsuperscript{306} but can face civil liability under EEOC guidelines if his workers' statements on politics, religion, or sex are construed by the courts as creating "an intimidating, hostile, or offensive working environment," the employer's incentive is to overcensor his employee's speech.\textsuperscript{307}

This inhibition of speech is believed to be commonplace. The Sixth Circuit has suggested that this censorship, and the signal it sends about these types of speech, is the intended effect of hostile environment law.\textsuperscript{308} It may frequently be "good" censorship—that is, the Judeo-Christian tradition recognizes the immorality of vulgar and racist speech, and this censorship presumably reduces the amount of such speech—but nobody should lose sight of the fact that it is still censorship that the courts are endorsing, and oftentimes "good" censorship stifles useful speech along with the harmful.\textsuperscript{309}

\textsuperscript{304} See David E. Bernstein, \textit{Sex Discrimination Laws Versus Civil Liberties}, 1999 U. Chi. Legal F. 133, 142. Professor Bernstein relates:

\begin{quote}
No wonder, then, that the Murfreesboro, Tennessee city government removed an impressionistic painting by Maxine Henderson, depicting a partially clad woman, after a city employee filed a hostile environment complaint. After the city removed the painting, the City Attorney said, "I feel more comfortable siding with protecting the rights under the Title VII sexual harassment statutes than I do under the First Amendment." The attorney also commented, "You really can't be too cautious. A sexual harassment judgment usually has six zeroes behind it."
\end{quote}

\textit{Id.} (footnotes omitted).

\textsuperscript{305} See, e.g., Pacheco v. Rice, 966 F.2d 904, 905 (5th Cir. 1992) (stating that employee was terminated after being accused of sexual harassment); Pealo v. AAF McQuay, Inc., 140 F. Supp. 2d 233, 236 (N.D.N.Y. 2001) (same).

\textsuperscript{306} It is true that restricting employee speech could result in a reduction in morale, which could result in an economic loss. But such a loss is hardly a sure thing, and certainly not as probable, or probably as great, as the loss that Title VII's compensatory and punitive damages could entail.


\textsuperscript{308} See Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988) ("By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well.").

\textsuperscript{309} For instance, because religious speech could be construed as creating a hostile environment, it too is often censored by employers. See Wilson v. U.S. W. Commun.,
Because the vague hostile environment standards fail to adequately inform employers as to how much speech they should censor, employment attorneys forthrightly admit that they advise employer-clients to be highly restrictive of employee speech, as contrary advice would violate their duties to their clients.

Imagine an employer comes to you for legal advice: one of his employees has told him she feels harassed by a coworker’s sexist political statements, or by a Gauguin calendar the coworker has posted on his cubicle wall. What do you tell your client? Theoretically, the client can only be held liable if the coworker’s speech is “severe or pervasive” enough to create a “hostile or abusive” environment. But how can you tell whether this standard will be met? How can you predict whether a jury (perhaps a jury that is not keen on Gauguin nudes, for reasons entirely unrelated to sex discrimination) will indeed find the speech to be “severe” or “pervasive,” or the environment “hostile” or “abusive”?

You would be committing malpractice if you did not tell the client to shut the offending employee up. The downside of letting the employee talk is uncertain, but possibly huge. The downside of restraining the employee is slight—maybe some ruffled feathers, but it is doubtful that the employee will quit over this.

Yet another attorney advises employers:

Your policy should go beyond what the law forbids. If you set your standards too low, one mistake by one supervisor could make you the next landmark case. Also, the EEOC accepts claims for conduct that clearly is not illegal. Since it’s costly to respond to such claims, it’s in an organization’s best interest to minimize them.

Considering that this advice is probably frequently given to employers and that many employers wisely follow this counsel, it is not surprising that Title VII is often criticized for discouraging innocuous speech and conduct. This excerpt also demonstrates a false hope

58 F.3d 1337, 1342 (8th Cir. 1995) (affirming dismissal of employee’s religious discrimination complaint arising from her termination for disseminating religious/pro-life message that other employees purportedly found offensive).

310 See Eugene Volokh, Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration, Law & Contemp. Probs., Winter/Spring 2000, at 299, 301 (“The prudent employer is wise to restrict speech . . . [even if not directed at a particular co-worker].”).


312 Rosen, supra note 265, at 81–82 (quoting RITA RISSER, RESEARCH REPORT: NEW LAW OF SEXUAL HARASSMENT (Fair Measures Mgmt. Law Consulting Group 1997)).

313 At the same time, some avid fans of present hostile environment standards trivialize the chilling effect they have on workplace speech:
that sexual harassment standards will someday become sufficiently definite as to eliminate the present over-regulation of speech. This is unlikely, especially considering that courts have spent thirty years attempting to develop workable hostile environment standards all to no avail.

Title VII has also led to a greater monitoring of employees by their employers. To protect themselves from the risks of expensive liability, companies face increasing pressure to launch formal investigations in response to allegations of relatively trivial offenses, monitoring and prohibiting far more speech than the law actually forbids. This is especially true now that the Supreme Court has given employers, through an affirmative defense, increased incentive for more invasive investigations and harsher disciplinary measures that are designed to prevent or correct "offensive" conduct. In light of Faragher and Ellerth, if the accused harasser is a fungible commodity, the employer would be well advised to terminate him—regardless of the employee's guilt or innocence—lest the employer lose the benefit of the affirmative defense. Undoubtedly, this further inhibits a free exchange of ideas, forces employers to act something like George Orwell's Big Brother, and, understandably, leads to a form of workplace paranoia that cannot be conducive to productivity.

Beyond the pure speech that it chills, Title VII also inhibits social interactions and office relationships. For example, although some wealthy employers like Bill Gates have enough capital to risk being rejected and accused of harassment by his former employee Melinda French (who is now his wife), most employers frequently prohibit interoffice relationships in an attempt to reduce their potential liability for harassment lawsuits when the romance sours. This is not because they lack the romantic flare of a computer geek. Rather, in an increasingly litigious environment, employers are concerned that what starts as a romantic relationship may end as a claim of harass-

Lack of predictability of an ultimate jury reaction might cause employers and employees to be more formal in their workplace relationships than is necessary or desirable, in order to avoid any possible claim of sexual harassment. This disadvantage of imprecision is an unfortunate byproduct of the current uncertainties in a developing area of sociology and law.

Gallagher v. Delaney, 139 F.3d 338, 349 (2d Cir. 1998).
315 Id. at 81.
These concerns are certainly legitimate, as a substantial minority of sexual harassment claims arise out of consensual relationships, whether because of jealousy, a jilted lover's quest for revenge, or just a refusal to concede defeat in a failed relationship. Thus, while the banning of interoffice dating might seem excessive, such practices make particularly good sense from the perspective of avoiding Title VII liability. This chilling of such romance may seem trivial to some, but in an age where Americans spend an increasing amount of time at work, and thus have less time to search for a suitable mate, the workplace has become one of the primary places to meet a future spouse.


319 Hager, supra note 257, at 380 n.8 ("27% of sexual harassment complaints stemmed from intra-office relationships gone bad.").

320 As noted previously, many Title VII cases arise out of failed relationships. See cases cited supra note 102 and accompanying text.

321 As an alternative, some employers require dating employees to disclose their relationships to the employer and to sign dating waivers reminiscent of parental permission slips of elementary school. See Nejat-Bina, supra note 317, at 327. In modernity, a young man no longer seeks a father's permission to date his daughter; instead he asks her employer. You've come a long way baby!

322 The Second Circuit's Chief Judge McLaughlin is not one of those who trivializes this problem. He offers: "It is repugnant to our most basic ideals in a free society that an employer can destroy an individual's livelihood on the basis of whom he is courting .... " McCavitt v. Swiss Reinsurance Am. Corp., 237 F.3d 166, 170 (2d Cir. 2001) (per curiam) (McLaughlin, C.J., concurring). But the cause of these anti-courting rules is the employer's well-founded fear that it will become an attorney's object of affection, and that this unwanted pursuing will result in its own "court-ing," the result of which will be the employer getting screwed. Unfortunately, rather than admitting that this problem is caused, in part, by the judiciary's promulgation of vague hostile environment standards, the good judge thinks that yet another layer of judicial involvement should be added to the mess in the form a cause of action against employers who are merely trying to protect themselves from a Title VII lawsuit. Id.

323 Or, to put it more poetically: "As the work force grows and people spend more of their time at work, the workplace inevitably becomes fertile ground for the dating and mating game." Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1353 (7th Cir. 1995).

324 See Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994) (Reinhardt, J., with two judges concurring only in the judgment).

As our workforce grows, and more and more of us find it necessary, or desirable, to earn our own living, we spend an increasing amount of our time at work. Sexual barriers to employment have lessened. We tend these days, far more than in earlier times, to find our friends, lovers, and even mates in the
Despite the increased amount of time spent in the workplace, and, thus, the increased need for social interaction in that context, workplace dating is more frequently being curtailed to protect employers from potential liability for harassment. As supervisors dating their charges becomes particularly dangerous from a hostile environment perspective, perhaps only a person with the financial resources of Microsoft would risk a Title VII sexual harassment suit. "With the increase in office relationships, despite their initially consensual nature, employers are increasingly exposed to sexual harassment liability for the conduct of supervisory employees."

This increased exposure to liability is partly traceable to the vague standards of Title VII. These vague standards raises a host of questions for employees, employers, and the courts, as one judge has noted:

When does a healthy constructive interest in romance become sexual harassment? To what extent is pursuit of a co-worker proper but of a subordinate forbidden? Is wooing or courting a thing of the past? Must a suitor cease his attentions at the first sign of disinterest or resistance? Must there be an express agreement before the person seeking romance may even hold the hand of the subject of his affection?

workplace. We spend longer hours at the office or traveling for job-related purposes, and often discover that our interests and values are closer to those of our colleagues or fellow employees than to those of people we meet in connection with other activities.

Id. 325 "It is, unfortunately, all too true that the workplace has become another home for most working Americans. Many employees spend the better part of their days and much of their evenings at work." O'Connor v. Ortega, 480 U.S. 709, 739 (1987) (Blackmun, J., dissenting).

326 See McCavit, 237 F.3d at 167 (observing that male employee was terminated for dating co-worker, even though company had no written policy against dating); Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 65 (2d Cir. 1997) (affirming dismissal of female supervisor's Title VII claim, when she was forced to resign for dating a male employee in violation of company's anti-fraternization rule); Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1042 (7th Cir. 1999) (affirming dismissal of Title VII claim of female employee terminated for violating company's "no-dating" policy); Karp v. The Fair Store, Inc., 709 F. Supp. 737, 741 (E.D. Tex. 1988) (denying recovery to male employee when male and female employee were both terminated for violating unstated no-dating policy).

327 See Sarsha, 3 F.3d at 1039 (Sears claimed that it fired its manager because his relationship with a subordinate "exposed Sears to potential liability in the form of a sexual harassment suit.").

328 Nejat-Bina, supra note 317, at 327.

329 Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994) (Reinhardt, J., with two judges concurring only in the judgment).
Unfortunately, the present hostile environment standards provide no answers, just educated guesses, to Judge Reinhardt's questions.

Prohibiting dates with coworkers will necessarily result in the denial of rewarding relationships for some. Perhaps more importantly, potential workplace romances of today will never blossom into the stable, tax-paying, citizen-producing families of tomorrow. As Judge Terence Evans has opined, federal judges "should not be in the business of throwing a wet blanket over activities that can lead to consensual amour." Furthermore, as "it is the man who usually makes the first move," men may be hit harder by Title VII than women. But women, too, feel the effects. Women meet more future husbands at work than any other place except perhaps school. Therefore, prohibitions on workplace dating are yet another backlash from hostile environment law that women are forced to suffer.

And of course, it is not just romance that is chilled by vague sexual harassment standards, but also simple friendships, or the telling of jokes with a splash of "unacceptable" humor. Still, a little lost speech in these areas might be characterized as inconsequential and might not justify any changes in the law. What is far more important is the chilling of religious and political speech which hostile environment law has wrought. Because religious harassment is also actionable under Title VII, certain forms of religious proselytizing can be

330 True, where there's a will there's a way, and employees intent on dating will not let their bosses get in the way. But there is an added cost: the stress of keeping the romance a secret and worrying about others discovering it, not to mention the dishonesty that will be necessary to pull off the whole charade. This, in turn, will result in lower productivity and happiness.

331 Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1353 (7th Cir. 1995).

332 Id.

333 See, e.g., Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1042 (7th Cir. 1993) (noting that male supervisor was terminated for dating female subordinate, who retained her job).


335 As to the vagueness contention, see Sangree, supra note 49, at 529 ("[H]ostile environment prohibitions are not impermissibly vague."). The key word in that assertion is "impermissibly." Even if they are not unconstitutionally vague, it is hard to contend that the present hostile environment standards are optimally certain. There is plenty of room for improvement.

considered harassment.\textsuperscript{337} As with dating, perhaps these are de minimis concerns, but it is interesting to compare the amount of speech that is repressed due to fears of Title VII liability to speech that is left unregulated because of other federal statutes or constitutional provisions. For example, in one Title VII case, the First National Bank of Boston prohibited an employee from posting political photographs in opposition to the Iranian government—one showed Iranians burning an American flag and the other depicted America’s favorite Ayatollah, Ayatollah Khomeini—because an Iranian co-employee objected that they were a form of national-origin harassment.\textsuperscript{338} If burning an American flag is protected by the First Amendment, should not the posting of a picture displaying a burning flag merit comparable protection?\textsuperscript{339} True, the employer, not the government, forced the employee to take the pictures down, and thus the First Amendment is not implicated, but apparently this was done only out of fear of a hostile environment lawsuit. In another case, U.S. West Communications fired a management-level employee for wearing, in accordance with the dictates of her faith, an anti-abortion button, because co-workers said this constituted harassment.\textsuperscript{340} Compare this to the facts of the Republic Aviation case, where the Supreme Court held that the National Labor Relations Board can prevent employers from firing employees who wear pro-union buttons.\textsuperscript{341} Consider also that through the First Amendment, courts protect the “speech” of nude dancers

\begin{footnotesize}
\begin{itemize}
\item[338] Pakizegi v. First Nat’l Bank of Boston, 831 F. Supp. 901, 904 (D. Mass. 1993). Because the employer immediately forced the employee to remove the pictures, the court did not address whether their continued display would have constituted a hostile work environment. \textit{Id.} at 909.
\item[341] Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802–03 (1945).
\end{itemize}
\end{footnotesize}
and other adult entertainers from the chill of "vague" laws,342 while Title VII freezes out much more valuable speech through the strict enforcement of its vague standards.

The point here is not to criticize the NLRA or First Amendment jurisprudence, but to point out that values which Americans cherish are unnecessarily being trammelled through the vagueness of the hostile environment standards,343 thereby suggesting a greater need for a more definite benchmark, perhaps starting with an examination of harassment claims in light of workplace culture.344 When vague hostile environment standards cause employers to over-regulate the workplace, they harm everyone.345 They chill the speech of both men and women, black or white, based largely on the viewpoint or content of the speech.346 The harm goes one step further when employers pass along the added cost of regulating the workplace to the consumers—both men and women, black and white—so that everyone pays the price for vague and overbroad harassment standards.347 Because a greater sensitivity to workplace culture has the potential to prevent some of this over-regulation, this analytic tool entails advantages that should not be ignored.

D. Deterrence of Serious Harassment

To the extent that an examination of workplace culture provides slightly greater definitude to hostile environment law, it will also result in Title VII deterring serious harassment to a much greater extent

343 See Daniels v. Essex Group, Inc., 937 F.2d 1264, 1272 (7th Cir. 1991) ("[T]he objective standard allows the fact-finder to consider the work environment and the instances of harassment against a reasonableness standard.").
344 It is worth noting that a sensitivity to social context might not have helped either of the employees in Pakizegi or Wilson, as the expressive activity in those cases took place in white-collar contexts.
345 The judiciary also suffers from the unpredictability fomented by vague hostile environment standards in that people are less likely to respect their decisions, since these decisions seem to be rooted in nothing but caprice and each judge's beliefs as to what is unacceptable behavior. See Breda v. Wolf Camera, Inc., 148 F. Supp. 2d 1371, 1378 (S.D. Ga. 2001) ("Statutes requiring judges to 'know it when they see it' ultimately eviscerate the very predictability respected judicial systems require.") (footnote omitted).
346 See Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 207 (3d Cir. 2001) ("Loosely worded anti-harassment laws may pose some of the same problems as the St. Paul hate speech ordinance: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint.").
than it does now. The present, vague standards probably cause most employers who know about the potentially devastating damage awards to err on the side of caution and over-regulate conduct that is not truly unlawful. But it might also be true that other employers—those who have not yet had to defend a harassment case—under-regulate actionable conduct, since they too are uncertain as to what exactly is prohibited by Title VII.\(^{348}\) When “a law is unclear, prospective violators will discount the punishment cost of the violation not only by the probability that they will be caught but also by the additional probability, significantly less than one, that the law will be held applicable to the conduct in which they engaged.”\(^{349}\) This almost certainly happens with Title VII.

The vagueness of hostile environment law, therefore, may cause some employers to incorrectly think that their workplaces are in compliance with Title VII,\(^{350}\) or that even if they are not, that a plaintiff will not prevail in a hostile environment suit. Similarly, plaintiffs might not sue in some egregious cases because of their, or their lawyer’s, mistaken interpretation of vague hostile environment standards. Since they are susceptible to variable and broad interpretations, a reasonable lawyer might not think that his client’s travails rise to the level of being “pervasive or seriously offensive.” Or he might mistakenly believe that he could not prove his case to such a high standard.\(^{351}\) Where an attorney is called upon to risk his own money in litigating harassment cases, he might be less inclined to do so where the standard for recovery, and thus his chance of remuneration, seems speculative at best.

The greater certainty that a consistent examination of workplace culture would entail will allow employers, plaintiffs, and attorneys to ascertain with greater certainty exactly what is prohibited and any additional steps they need to take in order to comply with Title VII. In the few workplaces where employers are presently interpreting hostile environment standards minimalistically, sensitivity to workplace cul-

\(^{348}\) “[N]early all businessmen will normally comply with law they understand.” Davis, supra note 263, at 72.

\(^{349}\) Posner, supra note 347, at 591.

\(^{350}\) See McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352, 358 (1995) (“Congress designed the remedial measures in these statutes [ADEA and Title VII] to serve as a ‘spur or catalyst’ to cause employers ‘to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges’ of discrimination.”).

\(^{351}\) Obviously there is a risk of attorney error in interpreting any statute. Hostile environment law, however, presents particular difficulties since there is nothing in the text of Title VII that provides guidance. Even after scouring the Federal Reporter, a lawyer will be hard pressed to say he has found a clear standard, Harris factors or not.
ture should result in increased self-regulation. Where they can more accurately ascertain what is prohibited, and can realistically predict their potential liability, employers might be more conscientious about policing their workplaces. Likewise, where potential plaintiffs know that they are being subjected to actionable harassment, they will be more likely to seek a remedy, whether internal, administrative, or judicial.

E. Fewer False Accusations

Because an examination of workplace culture results in greater definiteness, this practice also should result in fewer findings of harassment where none indeed existed. Errors often can result in gross injustices being inflicted on innocent persons. Although purported harassers, unless they own the defendant company, are not financially responsible for any damages awarded in a hostile environment suit, money damages are not the only damage inflicted in these cases. There is also damage to reputation, loss of respect among one’s peers, and, of course, the stress of litigating a sexual harassment case. Employers are also more likely to fire employees accused of harassment, whether guilty or not, particularly because a termination will help satisfy their duty under the Faragher/Ellerth affirmative de-

352 There may be a drawback in situations where employers are over-regulating conduct (i.e., prohibiting conduct that is not proscribed by Title VII), but where no useful speech is inhibited. For example, where employers prohibit profanity in the workplace. Even in those situations, however, it might be better not to saddle employers and consumers with the costs of censoring employee speech.

353 See, e.g., Nichols v. Frank, 42 F.3d 503, 512 (9th Cir. 1994) (Reinhardt, J., with two judges concurring only in the judgment).

354 See EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995). Another step in the right direction would entail inflicting liability on the harassers, rather than the employers, since harassers are in the best position to prevent hostile environment harassment. But employers have deeper pockets, and so they are held responsible instead.

355 Kathleen Murray, A Backlash on Harassment Cases, N.Y. TIMES, Sept. 18, 1994, at 23 (writing that men are frequently presumed to be guilty when accused of sexual harassment).

356 Litigation, so everyone hears, is not a pleasant experience, as Learned Hand expressed: “After some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.” Learned Hand, The Deficiencies of Trials To Reach the Heart of the Matter, in 3 LECTURES ON LEGAL TOPICS, 1921–1922, at 89, 105 (Ass’n of the Bar of the City of New York 1926), quoted in RICHARD A. POSNER, LAW AND LITERATURE, A MISUNDERSTOOD RELATION 124–25 (1988).
fense.\textsuperscript{357} Falsely accused employees, because they are usually at-will employees, frequently have no remedy for an adverse employment action precipitated by false accusations.\textsuperscript{358} In short, it "is as necessary to protect defendants against false accusations that can destroy family and career as it is to protect plaintiffs from forced advances with the same devastating effects."\textsuperscript{359}

Vague and malleable harassment standards make it easier to construe innocent conduct as harassment and to "prove" false charges. In many hostile environment cases, the plaintiff was truly the object of unwanted attention and genuinely found the conduct annoying. These plaintiffs may mistakenly think that unwanted attention alone amounts to actionable conduct, and because they think that the conduct at issue is hostile environment harassment, they are likely to charge harassment. The vague standards of hostile environment harassment law, by failing to let potential plaintiffs know what is and is not actionable, lead to complaints about conduct that is not truly prohibited by Title VII. Furthermore, because the severity of even mildly offensive conduct can be magnified through creative interpretations, it is not difficult to construe simple teasing as "objectively severe" harassment.

Take, for example, a plaintiff who claims that he works in a hostile environment because a supervisor repeatedly stares at him. Where workplace culture is taken into account and supervisors are required to watch over their charges, "staring" by a supervisor whose job it is to oversee the plaintiff's work would not be considered objectively severe or motivated by the plaintiff's sex. But under the hostile environment standards presently applied by most courts, the "staring" is turned into a federal case, even though it may actually be a manifes-

\textsuperscript{357} Under this defense, an employer must show that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior. See Faragher v. City of Boca Raton, 524 U.S. 775, 805 (1998). Terminating an accused harasser, even if the employer knows the employee was falsely accused, will go a long way towards showing that an employer exercised reasonable care in immediate cases and any subsequent cases of harassment.

\textsuperscript{358} But see Shannon P. Duffy, Jury Awards $150,000 to Employee Subjected To Questioning on Relationship with Co-Worker, The Legal Intelligencer, Oct. 24, 2001, at 3.

In a case that turned the tables on sexual harassment, a Philadelphia jury has awarded $150,000 to a man who said his employer invaded his privacy by subjecting him to an embarrassing, police-style interrogation after he had an innocent, romantic tryst with a female co-worker that she had reported to management as a rape.

Id.

\textsuperscript{359} Epstein, \textit{supra} note 103, at 355.
tation of a supervisor’s assigned task of oversight.\textsuperscript{360} Supervisors, after all, are paid to oversee and supervise work. Thus, “although ‘following and staring’ can betray romantic or sexual attraction, the everyday observation of fellow employees in the workplace is also a natural and unavoidable occurrence when people work together in close quarters or when a supervisor keeps an eye on employees.”\textsuperscript{361} Although this seems obvious, the fact that the Eleventh Circuit had to explicitly state this proposition means that at least one plaintiff’s lawyer was willing to risk his own money on the hope that vague hostile environment standards would result in a victory.

Without a real standard by which to judge conduct, you cannot really fault the plaintiff or his attorney. Since there is no objective standard of hostile environment harassment to which the court’s ruling might be compared to ensure its accuracy, is it not just as reasonable to say that the court got it wrong? Who is to say that the plaintiff wrongly perceived himself as a target of inordinate attention, or the attorney wrongly interpreted this conduct as a violation of Title VII? This, of course, assumes that the accuser has no ill intentions and honestly believed that his supervisor was intentionally harassing him. The point is, he might simply have misinterpreted otherwise innocent conduct, which is easy to do where the lines separating the permitted from the prohibited are not clear. But in other cases, where an accuser has malevolent designs, the lack of clarity in hostile environment standards makes it all the easier to carry out those evil intentions.\textsuperscript{362} With manipulable standards, it is not surprising that more than one competitive co-worker or jilted lover has resorted to Title VII in an attempt to exact some revenge.\textsuperscript{363} Similarly, harassment claims “have become a powerful weapon for a disgruntled employee seeking to settle a perceived private score with his or her employer.”\textsuperscript{364} In other cases, it has been charged that plaintiffs seek to take advantage of loose standards to obtain quick payoffs through hostile environment suits. Because “it is often difficult under current

\textsuperscript{360} On the other hand, workplace culture might also show that the supervisors never or only seldom observe employees at work. This practice would suggest that extra attention paid to the plaintiff might be the result of her sex, although it might also be explained by her poor performance or newness at the job, and thus her need for greater supervision.

\textsuperscript{361} Mendoza v. Borden, Inc., 195 F.3d 1238, 1248 (11th Cir. 1999).

\textsuperscript{362} See, e.g., Swentek v. USAir, Inc., 830 F.2d 552, 555–56 (4th Cir. 1987) (“Various witnesses testified that [the plaintiff] Swentek told them that she intended to get Ludlam [her supervisor] fired.”).

\textsuperscript{363} See OLSON, supra note 290, at 62.

\textsuperscript{364} Heflin v. Daly, 742 F. Supp. 515, 516 (C.D. Ill. 1990).
law to distinguish ‘simple teasing, offhand comments, and isolated incidents,’ it is easy to portray innocuous conduct as harassment.

True enough, false accusations occur regardless of the clarity of standards. Indeed, in the criminal context, where crimes are usually clearly defined, and the prosecution has the burden of proof beyond a reasonable doubt, false accusations nevertheless occur. But Title VII's loose standards for assessing conduct encourage fabrications by increasing the chance of success and making small exaggerations more meaningful. Innocent conduct is thus more readily misinterpreted, or intentionally misconstrued, as actionable harassment. Actions characteristic of a king of kindness can be construed as conduct typical of the prince of darkness. For example, in some cultures and among certain ethnic groups, standing in close to proximity to others is considered normal, and even a sign of friendliness. Such conduct can easily be construed, by a scheming plaintiff or a skilled lawyer, as an offensive invasion of one's personal space. While this might not be actionable in itself, it can easily be spun together with other questionable deeds to create a web of purported harassment. Furthermore, with the American rule of attorneys' fees, some plaintiffs will have little to lose in attempting such a scheme. To the extent that a sensitivity to workplace culture will curtail some of the vagueness and uncertainty that encourages these practices, it is a welcome addition to an area of law greatly in need of reform.

F. A Guard Against Paternalistic Employee-Specific Standards

Sensitivity to workplace culture might also be defended as a means of repelling the paternalism that is creeping into hostile environment law through the use of the "reasonable woman" standard of conduct. Indeed, this standard might more aptly be named the

366 Judge Kleinfeld has hypothesized a case of false accusation that not only is despicable, but would actually be contrary to the purposes of Title VII. He considered the possibility that an employee would accuse a black co-worker of sexual harassment just to get the employee terminated. See Fielder v. UAL Corp., 218 F.3d 973, 1000 (9th Cir. 2000) (Kleinfeld, J., dissenting). Loose hostile environment standards make racist schemes like this much more likely to succeed.
367 The plaintiffs' attorneys, however, have an interest in not taking unwinnable cases, so they presumably will be the first line of defense against frivolous lawsuits. But even they are handicapped (or empowered) in this endeavor by the vague standards of conduct.
368 For a discussion of these standards and the list of courts that have adopted them, see supra Part II.B.
“woman-specific standard” since it requires employers to make their workplaces fit for the apparently more-delicate sensibilities of some women. To this extent, adopting women-specific standards does exactly the opposite of what Title VII was designed to do: eradicate Victorian notions of the fragility of women.\(^{369}\)

As discussed above, proponents of woman-specific standards essentially argue that the “reasonable woman” standard is necessary because women are not as crude or tough as men.\(^{370}\) This harks back to an age where women were considered unequal, and indeed inferior, to men. Women were considered unable to work in male-dominated work environments. The efforts to impose women-specific standards perpetuate these outdated notions. They are nothing less than an “attempt to insulate women from everyday insults as if they remained models of Victorian reticence.”\(^{371}\) They turn Title VII on its head, as this statute was designed “to prevent the perpetuation of stereotypes.”\(^{372}\) Proponents therefore do a great disservice to the women who have worked hard to prove that they can perform as well as men in the modern workplace.\(^{373}\) Adoption of the woman-specific standard of severity or unwelcomeness would eliminate some of these gains and turn the clock back to the days when women were believed to be too delicate for manly work environments. They would constructively amend Title VII to require employers to accommodate the special sensibilities of those women who cannot tolerate male-dominated work environments.\(^{374}\)

A consideration of workplace culture would prevent this from occurring by ensuring that the same standard of conduct is applied to

\(^{369}\) Title VII was designed to “level the playing field for women” so that they would be permitted to “compete on an equal basis with men”; it was not intended to require special accommodations for them. DeAngelis v. El Paso Mun. Police Officers Ass’n, 51 F.3d 591, 593 (5th Cir. 1995). Women-specific standards are based on “on old, ‘outdated’ stereotypes of female vulnerability and male strength.” Nagel, supra note 92, at 18 (1994).


\(^{371}\) DeAngelis, 51 F.3d at 593.


\(^{374}\) Title VII does not mandate special accommodations for race or sex. See Lynch v. Freeman, 817 F.2d 380, 390 (6th Cir. 1987) (Boggs, J., dissenting). The statute does require employers to accommodate some religious practices. See 42 U.S.C. § 2000e(j) (1994) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is *unable to reasonably accommodate* to an employee’s or prospective employee’s religious observance or practice without undue hardship . . . .”) (emphasis added).
both male and female workers in a given workplace. Under this approach, women would not be considered delicate flowers that must be protected from the foul language and sexual innuendos of men. Rather, the law would treat them as adults and as fully competent to decide for themselves whether to participate in the blue-collar banter or not. Acknowledgment of workplace culture—both the good and the bad—treats women and men as equals, recognizing that when they choose to participate in workplace pranks and banter they cannot use similar behavior to later claim that they were innocent victims of harassment. Their own use of foul language or participation in conduct similar to that about which they complain will be examined as one relevant factor in the unwelcomeness, severity, and motivation analyses.

V. Criticisms of the Social Context Analysis

Despite the advantages that a consideration of workplace culture brings to hostile environment law, the First, Fourth, and Sixth Circuits have rejected this approach, believing that it is contrary to the purposes of Title VII and the developing common law. Specifically, it can be argued that a special consideration of the workplace culture is unwarranted because: (1) there is no textual support for this approach; (2) it does not lead to greater predictability and uniformity in decisions; and (3) to the extent that it does, it is at the expense of regulating invidious harassment. These and other criticisms, along with responses to them, are considered below.

375 O'Rourke v. City of Providence, 235 F.3d 713, 735 (1st Cir. 2001); Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 194 (4th Cir. 2000); Jackson v. Quanex Corp., 191 F.3d 647, 662 (6th Cir. 1999); Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999); see also Adkins v. Kelly-Springfield Tire Co., No. 97-C-50381, 2001 WL 219636, at *7 n.7 (N.D. Ill. Mar. 6, 2001) (holding that the fact that all employees were exposed to harassment militates in favor of Title VII liability and does not help the employer's defense). As mentioned above, the Seventh Circuit has equivocated on the issue. The Seventh Circuit appeared to have adopted differential standards in Reed v. Shepard, 939 F.2d 484, 492 (7th Cir. 1991), and reaffirmed the reasoning behind them in Shepherd v. Slater Steels Corp., 168 F.3d 998, 1010-11 (7th Cir. 1999) ("Whether the sexual content of the harassment is indicative of sex discrimination must therefore be examined with attention to the context in which the harassment occurs.") , and Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997) (noting that in assessing whether certain words and conduct are motivated by sex, courts must take into consideration that vulgarity is common in certain contexts, and thus is not because of sex). But another panel, notably not an en banc panel, later disavowed such standards. See Smith v. Sheahan, 189 F.3d 529, 534–35 (7th Cir. 1999).
A. Lack of Textual Support

Critics of using workplace culture in the hostile environment analysis believe that the text of Title VII does not support this practice. The text of a statute is the starting point for assessing a statute and the causes of action that are based on its prohibitions.\footnote{See Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978) ("[T]he starting point for every case involving construction of a statute is the language of the statute itself."); Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 268 (5th Cir. 1998) (stating that the touchstone for interpreting Title VII is the words of the statute).} Admittedly, the text of Title VII provides no explicit command that courts look to social context in assessing hostile environment cases. Title VII states that it is unlawful for an employer to discriminate with respect to the terms and conditions of employment because of the individual’s sex.\footnote{42 U.S.C. § 2000e-2(a)(1) (1994).} There is no mention of the relevant factors for harassment cases, much less a suggestion that workplace culture is relevant to the analysis. There is no explicit assumption of risk defense\footnote{Smith, 189 F.3d at 535 ("There is no assumption-of-risk defense to charges of workplace discrimination."); Williams, 187 F.3d at 564 ("[J]udgments by the court as to a woman’s assumption of risk upon entering a hostile environment are improper."); Moteles v. Univ. of Pa., 730 F.2d 913, 922 n.2 (3d Cir. 1984) (Becker, J., dissenting from the denial of rehearing) ("There is no ‘assumption of risk’ defense recognized in Title VII."). See generally Kelly Ann Cahill, Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?, 48 VAND. L. REV. 1107 (1995).}—to which a consideration of social context might be analogized—nor a rule that an employee’s forbearance from complaining about harassment precludes liability.\footnote{There are three important qualifications to the rule (which is literally true) that temporary forbearance alone will not preclude liability. First, under \textit{Faragher} and \textit{Ellerth}, a plaintiff who fails to promptly report harassment might be barred from recovering if her employer can establish the plaintiff’s forbearance was unreasonable and that it took prompt action to prevent or correct the harassment. \textit{See} Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998) (holding that the plaintiff’s decision not to complain of hostile environment harassment, where the employer took reasonable efforts to prevent or correct harassment, can preclude liability under Title VII); Parkins v. Civil Constructors of Ill., 163 F.3d 1027, 1038 (7th Cir. 1998) ("[T]he law against sexual harassment is not self enforcing’ and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists."). Second, an employee must file a charge of discrimination with the EEOC within 180 days (or 300 days if filed with a state administrative agency) of the incidents of harassment about which he complains. \textit{See} Mosher v. Dollar Tree Stores, Inc., 240 F.3d 662, 667 (7th Cir. 2001).} Indeed, while Title VII regulates discrimination on
such diverse bases as race, color, sex, religion, and national origin, the statute applies the same prohibition to all these types of discrimination, regardless of the particular culture of a workplace, suggesting that plaintiffs of all workplaces should all be treated equally.

Where a statute fails to suggest a contrary intent, as here, uniformity in application is the presumed course of action. This means that similar cases are to be treated similarly, and that the same level of scrutiny should be applied across the board regardless of whether the workplace is populated with common ruffians or cultured royalty. From the White House to the warehouse, Title VII was intended to impose the same standards on employers and their employees. The text of the statute reveals nothing to the contrary, and even the Supreme Court has suggested that there should be one general standard for different types of hostile environment harassment—whether based on race, sex, religion, or age—to the extent feasible. This lack of textual support has led the Fourth Circuit to comment: "We are unable to discern an 'inhospitable environment' exception to Title VII's mandate that employers may not discriminate based on employee's [sic] gender as to the 'terms, conditions, or privileges of employment.'" In that case, the district court had concluded that

2001) ("Although an employee facing a discriminatory or harassing work environment is not required to file suit before resigning, failure to object to egregious conditions or to seek some form of redress is compelling evidence that the employee, or any reasonable worker, would not find the conditions intolerable.").


381 Furthermore, "remedial statutes . . . are to be construed liberally." Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 232 (3d Cir. 1998) (holding that a remedial provision should be liberally construed to give a remedy in all cases intended to be covered) (citing Miller v. Robertson, 266 U.S. 243, 248 (1924)). For a sound criticism of this rule, see Stomper v. Amalgamated Transit Union Local 241, 27 F.3d 316, 320 (7th Cir. 1994). There, the court stated:

Plaintiffs stress that the LMRDA is a remedial measure and seek a liberal construction. This maxim is useless in deciding concrete cases. Every statute is remedial in the sense that it alters the law or favors one group over another. But after we determine that a law favors some group, the question becomes: How much does it favor them? Knowing that a law is remedial does not tell a court how far to go. Every statute has a stopping point, beyond which, Congress concluded, the costs of doing more are excessive—or beyond which the interest groups opposed to the law were able to block further progress. A court must determine not only the direction in which a law points but also how far to go in that direction.

Id.

382 See Faragher, 524 U.S. at 787 n.1 ("[W]e think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.").

some of the comments at issue "were simply insufficient to constitute harassment, in light of the 'rugged environment' of physically demanding work . . .". The Fourth Circuit rejected the view that the text of Title VII permits an exception for harassment that takes place in the context of strenuous work, or that social context should even enter the analysis.

It is important, however, to keep in mind that although Title VII does not explicitly endorse an examination of social context, the statute also does not explicitly mention "hostile environment" nor even the term "harassment." Not only are these terms not mentioned in the statute, they are left undefined. Although Congress significantly amended the statute in 1991, nothing was done to remedy these "oversights." The normal assumption in such situations is that this failure to legislate was intentional, possibly because Congress could not reach a consensus on the issue or because Congress intended courts to use their own judgment in defining these essential terms. This is, of course, a basic function of courts in the common-law system. "Broadly worded constitutional and statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decisions in the common-law tradition." Because Title VII "does not use the term [sexual harassment] or otherwise refer specifically to the conduct described by it, the metes and bounds of the wrong have been left for definition by the courts . . .". If that is so, the lack of textual support for a close examination of workplace culture is not a fatal, or even a particularly sound, criticism.

384 Id.


386 See Posner, supra note 356, at 251 ("One way to achieve compromise is to use general language, in effect shoving off on the courts the task of completing the legislation."); Mary Ann Glendon, Foundations of Human Rights: The Unfinished Business, 44 AM. J. JURIS. 1, 10 (1999) ("[P]ractical agreements . . . are achieved only at the price of a certain ambiguity.").

387 See Posner, supra note 347, at 590 ("The costs of legislative enactment imply that statutes will often be ambiguous. After all, one way to reduce the cost of agreement is to agree on less—to leave difficult issues for future resolution by the courts.").


Although the decision by courts to consider workplace culture involves more of an evidentiary issue than a substantive issue, even if it is assumed that this approach effects a substantive change in the law, the Supreme Court in *Oncale* was free to make such an alteration of hostile environment law. If courts are free to fill the gaps in statutes left by Congress, they are also free to create the standards and burdens of, as well as defenses to, hostile environment claims. Once this is done, courts certainly may consider evidence relevant to these various facets of a harassment claim, including evidence of workplace culture. The Supreme Court has so understood its creative role in hostile environment law. Along these lines, although there is no real textual support for an application of the avoidable consequences doctrine to Title VII, in *Faragher* and *Ellerth* the Supreme Court applied a modified (and more defendant-friendly) version of this doctrine to supervisory harassment cases. *Faragher* and *Ellerth*’s adoption of the avoidable consequences doctrine is simply one manifestation of this practice. Discrimination is a statutory employment tort; therefore the courts have frequently looked to common-law tort doctrines to create the common law of Title VII. They have liberally adopted many tort principles in crafting the statutory torts of Title VII and similar

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390 This gap filling role is a significant part of a court’s duties, especially with respect to labor and employment laws. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 240 (1959) (“This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to not small extent, by the judicial process.”) (referencing the NLRA). When the text of a statute does not specifically speak to an issue, “courts are left with no choice but to construct a rule that makes the best sense, while adhering as closely as possible to what we can discern Congress would have wanted.” Rizzo v. Children’s World Learning Ctrs., 213 F.3d 209, 220–21 (5th Cir. 2000) (en banc) (Jones & Smith, JJ., dissenting), cert. denied, 531 U.S. 958 (2000).

391 See Savino v. C.P. Hall Co., 199 F.3d 925, 934–35 (7th Cir. 1999) (noting that the avoidable consequences doctrine of tort law only reduces a defendant’s level of liability, and does not completely preclude liability; but under *Faragher* and *Ellerth*’s incorporation of the doctrine, it can result in complete absolution from liability).

392 See Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (holding that failure to complain of harassment where employer took reasonable steps to prevent it precludes liability); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive and would serve Title VII’s deterrent purpose).

statutes, some of which inure solely to the benefit of defendants. These tort principles include the doctrine of avoidable consequences mentioned above, respondeat superior liability, the discovery rule, shifting burdens of proof, the fellow servant rule, principles of causation, the eggshell skull rule, and others. It stands to reason, then, that courts may take the less-drastic step of focusing on workplace culture as one factor applicable to the analysis of the hostile environment tort, especially considering that social context is highly relevant to unwelcomeness, severity, and causation. Some critics have argued that the courts which consider workplace culture have created a special defense for blue-collar employers or have even created a more lenient standard of conduct for blue-collar workplaces. Although these charges are largely unfounded, it is worth noting that Congress has apparently given courts the authority to create a quasi-defense based on workplace culture, or even a less-strict blue-collar

394 See Ellerth, 524 U.S. at 764 ("Title VII borrows from tort law the avoidable consequences doctrine."); Ford Motor Co. v. EEOC, 458 U.S. 219, 231 n.15 (1982).
395 See Ellerth, 524 U.S. at 764; Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993); Miller, 600 F.2d at 213.
397 See Price Waterhouse, 490 U.S. at 264 (O'Connor, J., concurring) ("[T]he common law of torts has long shifted the burden of proof to multiple defendants. . . .").
398 See Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (Title VII uses a "negligence standard that closely resembles the 'fellow servant' rule" in assessing co-worker hostile environment cases.).
399 See Buenrostro v. Collazo, 973 F.2d 39, 45 (1st Cir. 1992) ("[P]rinciples of causation borrowed from tort law are relevant to civil rights actions brought under § 1983.").
400 See Avitia v. Metro. Club of Chi., Inc., 49 F.3d 1219, 1228 (7th Cir. 1995) (FLSA) ("In a statutory tort case as in a common law tort case, the 'eggshell skull' rule prevails, so it is no defense to an award of full damages that the plaintiff's injury was amplified by a preexisting condition for which the defendant was not responsible."); see also Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1294 (8th Cir. 1997) (Title VII); Doty v. Sewall, 908 F.2d 1053, 1059 (1st Cir. 1990) (NLRA). It is worth noting that proponents of women-specific standards could look to the eggshell skull principle for support of their position, as the "eggshell plaintiff" rule requires the defendant to take his victim as he finds her, arguably delicate sensibilities and all. See Pierce v. S. Pac. Transp. Co., 823 F.2d 1366, 1372 n.2 (9th Cir. 1987) (FLA) ("When an emotional injury causes physical manifestations of distress we can see no principled reason why the eggshell plaintiff rule should not apply.").
401 See Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 540 (1999) (limiting principal's liability for punitive damages); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 432 (7th Cir. 1995) ("What is reasonable depends on the gravity of the harassment. Just as in conventional tort law a potential injurer is required to take more care, other things being equal, to prevent catastrophic accidents than to prevent minor ones.").
standard for hostile harassment cases, even though the text of Title VII does not explicitly ordain this course of action. The courts’ power to fill gaps in statutes entails the ability to redress judge-made defects in the judge-made hostile environment standard as those problems become apparent. Courts could do this by reforming or defining in greater detail those aspects of the hostile environment standard that have proven problematic for courts and litigants alike. Accordingly, the argument that an examination of workplace culture is not supported by the text of Title VII is not particularly cogent.

B. Flawed Motivation Analysis

As discussed above, some courts find support for their examination of culture in the “because of sex” language of Title VII. They reason that, when a work environment is already saturated with sexual innuendo, foul language, and childish behavior even before the arrival of the plaintiff, its continuation probably had nothing to do with the plaintiff’s sex. Rather, it is reasonable to assume that the foul language and unpleasant behavior are typical of the particular culture of the workplace. The problem with this reasoning, it is argued, is its inaccuracy. The plaintiff might well have been harassed because of her sex even though others in the same environment were subjected to similar conduct for other reasons. It is possible that the motivation for the sexual banter changed with the advent of the plaintiff.

Because it is hard to tell what a harasser’s true motivations are, and indeed the harasser might have multiple motivations, critics argue that it is best to leave this question to the jury and that a consideration of social context cannot give foolproof results in the causation analysis. Consider for example, *Pirolli v. World Flavors*, where a retarded man was subject to ridicule and violence, he claimed, because of his sex and disability. In its milder forms, the conduct at issue included making fun of the way the plaintiff walked, ate, drank, and sat. The more severe manifestations included punching him, stuffing him in a garbage can, and throwing objects at him. It was undisputed that horseplay and juvenile behavior was a regular part of the

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402 42 U.S.C. § 2000e-2(a)(1) (1994) ("It shall be an unlawful employment practice for an employer—... to discriminate... because of such individual’s race, color, religion, sex, or national origin...") (emphasis added).
405 *Id.* at *3.
406 *See id.* at *1.
407 *See id.* at *1, *4.
work environment, and that employees other than the plaintiff were also subject to taunts and roughhousing.\textsuperscript{408}

On summary judgment, the district court held that, because women were subjected to similar treatment, there was little to suggest that the plaintiff’s treatment was due to his sex.\textsuperscript{409} The court used a similar rationale when holding that Pirolli failed to create an issue for trial on his disability harassment claim: other non-retarded individuals were also subject to similar horseplay, suggesting that Pirolli’s treatment was not based on his disability.\textsuperscript{410} Of course, considering the social context that existed, it may have been that Pirolli’s colleagues were simply fun-loving fellows who wanted Pirolli to feel like one of the regular guys. But it is also possible that some of their treatment was due to his disability. Although Pirolli’s male and female colleagues were indisputably subjected to similar conduct, the district court’s opinion makes no mention of their being ridiculed for their deficient mental abilities or for the way they talked. Importantly, to withstand summary judgment, Pirolli only had to create a genuine issue for trial. And to prevail on this issue, Pirolli only had to show that a reasonable jury could believe that his sex or disability was a motivating factor of the conduct.\textsuperscript{411}

To be a motivating factor, the forbidden criterion must be a significant reason for the employer’s action. It must make such a difference in the outcome of events that it can fairly be characterized as the catalyst which prompted the employer to take the adverse employment action, and a factor without which the employer would not have acted.\textsuperscript{412}

A prohibited motivating factor need not be the sole factor motivating the harassment.\textsuperscript{413} Thus, a hostile environment plaintiff does not have the burden of showing that the prohibited reason was the only cause of the harassment: This, more than anything else, demonstrates a possible flaw in the district court’s reasoning. Even if, the harassment of other non-disabled employees definitively demonstrates that the plaintiff was not harassed solely because of his disability,

\textsuperscript{408} See id. at *5.
\textsuperscript{409} See id. at *6.
\textsuperscript{410} See id. at *7.
\textsuperscript{411} 42 U.S.C. § 2000e-2(m) (1994) (“Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”) (emphasis added).
\textsuperscript{412} Foster v. Arthur Andersen, L.L.P., 168 F.3d 1029, 1033–34 (7th Cir. 1998).
\textsuperscript{413} See id.
this is not the test for liability. It is possible that the harasser also mistreated the plaintiff for reasons that are not unlawful. Even then, the defendant will be liable for the harassment if the prohibited criterion was a motivating factor of the ill treatment.

Furthermore, suppose that Pirolli and his non-retarded colleagues had been subjected to similar mistreatment in the sense that all of them were ridiculed and assaulted. But also suppose that the plaintiff’s mistreatment was more severe and frequent than that which his colleagues endured. In such a case, it is at least plausible that these additional dimensions of mistreatment were due to Pirolli’s disability. Focusing on the childish workplace culture, however, might cut short further analysis of the claim. Courts adopting this practice might reason that Pirolli’s treatment was not due to his disability because other non-retarded co-workers were treated similarly. But according to the hypothetical facts, because of its frequency and severity, the dissimilarity between Pirolli’s treatment and that of his colleagues is greater than any similarity they may share. Thus, emphasizing the workplace culture presents the danger of a false negative.

One problem with this criticism, however, is its presumption that courts will not grasp the nuances of a case and that they cannot differentiate between background culture of a workplace and disparate treatment of a plaintiff. The Eighth Circuit, however, has shown that most courts are quite capable of making the necessary distinctions. Facing a case similar to Pirolli, the Eighth Circuit correctly decided that harsher harassment directed at one group—true disparate treatment—sufficiently demonstrates the harasser’s motivation. In Kopp v. Samaritan Health System, Inc., the hospital defended a hostile environment suit by showing that the harasser mistreated both men and women. The Eighth Circuit agreed that both groups of hospital employees were subjected to inhospitable treatment. Nevertheless, it held that there was sufficient evidence that the harassment of the female plaintiff was “because of sex” in light of the more serious harass-

414 In attempting to make out a prima facie case of discrimination where the plaintiff was punished for an infraction, he usually must show that other individuals who also committed misconduct were treated better than him (i.e., he must show a difference in treatment). In demonstrating this similarity, courts require the plaintiff to show that his infraction was similar in kind and degree to that committed by the better-treated co-employee. See Radue v. Kimberly Clark Corp., 219 F.3d 612, 617 (7th Cir. 2000). It seems reasonable, then, that employers claiming the benefit of a blue-collar standard should likewise be compelled to show that mistreatment of an employee was similar to the mistreatment endured by other employees not in the plaintiff’s class.

415 13 F.3d 264, 269 (8th Cir. 1993).
ment suffered by women. Presumably other courts will also be able to see this distinction, and, thus, they do not need to turn a blind eye to workplace culture simply to avoid false negatives. True, a consideration of workplace culture is not error-proof, but it is relevant to the analysis of the harasser's motivation. And, the magnitude of its utility is far greater than the danger that it might distort the analysis.

The main criticism of the Pirolli court’s use of social context can be traced to the fact that there were no other disabled individuals in Pirolli’s workplace. The workplace culture analysis is most effective when the workplace contains more than one member of the plaintiff's protected class. This allows the court to see with greater certainty what motivated the behavior at issue, because if there are two members of a class in the workplace—say, a female plaintiff and a female co-worker—and only one is harassed, it is likely that the harassment was not due to the common trait. Similarly, if one is harassed along with men, it is also likely that the harassment was not due to the plaintiff’s sex. If both females are harassed, along with men, it is also unlikely that the conduct is due to the plaintiff’s sex. If, however, both women are mistreated, and men are not, it is more likely that the harassment was due to their sex. Still, the inference behind a consideration of workplace culture in the causation analysis—that offensive conduct which existed prior to the plaintiff's arrival, or which is also borne by men, or which is traditionally part of such workplaces, is not substantially motivated by the plaintiff's sex—remains reasonable even if there is only one member of a protected class in the particular workplace. It simply commands less certainty than its employment in a situation where other workers subjected to the same treatment share the protected trait.

Thus, because Pirolli was the only disabled individual at that workplace, there is less certainty that the horseplay existed regardless of the plaintiff's disability. But that conclusion is still reasonable, especially because conduct similar to that at issue in the case existed in the workplace prior to Pirolli’s arrival there, and non-disabled people were subjected to the same treatment. Notably, absolute certainty is not required for summary judgment, just the failure of the plaintiff to create a genuine issue for trial, which Pirolli failed to do. The district court’s analysis of social context undoubtedly assisted the court in re-

416 Id. ("[T]he incidents involving female employees are of a more serious nature than those involving male employees. For example, several of Albaghdadi’s alleged abuses of women involve actual physical contact and harm; all of the incidents involving male employees consist only of a raised voice or a verbal insult.").
alizing the plaintiff’s failure, thus demonstrating its value in such cases.

C. Workplace Culture and Unwelcomeness

Those courts that emphasize workplace culture in their analysis of welcomeness are also accused of utilizing flawed logic. According to critics, these courts assume that any plaintiff who would consent to work in an environment filled with vulgarities must not find such behavior objectionable. This charge is unfounded. It is true that some employees will tolerate vulgarity and abuse, not because they welcome it, but because they think they have no other choice, whether economically or legally. Not surprisingly, then, most courts have held that an initial failure to object to abusive conduct is not necessarily fatal to a harassment claim. Among them is the Supreme Court, which in *Meritor Savings Bank, F.S.B. v. Vinson* held that even though the plaintiff consented to some of the harassment from her supervisor, this did not in itself prove that all of the harassment was welcome and certainly did not preclude a hostile environment claim.

But the *Vinson* Court never held that the plaintiff’s behavior was never relevant to unwelcomeness or that a court could never grant summary judgment on the unwelcomeness element when taking into account the plaintiff’s participation in the harassment. Rather, the Court observed that the plaintiff’s reluctance to complain about certain conduct is certainly relevant to the question of unwelcomeness, and thus in some egregious cases, it might preclude recovery. Accordingly, this criticism of courts that remain sensitive to workplace culture—including aspects of the plaintiff’s behavior that are consistent with that culture—fails to take into account the degree to which the plaintiff’s behavior may enter the analysis of unwelcomeness. Cer-

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417 See, e.g., Reed v. Shepard, 939 F.2d 484, 487 (7th Cir. 1991). But remember, it is reasonable to assume that a plaintiff who fails to complain about working conditions either did not find them unwelcome or did not perceive them as severe. See Mosher v. Dollar Tree Stores, Inc., 240 F.3d 662, 667 (7th Cir. 2001) (“Although an employee facing a discriminatory or harassing work environment is not required to file suit before resigning, failure to object to egregious conditions or to seek some form of redress is compelling evidence that the employee, or any reasonable worker, would not find the conditions intolerable.”). True, the plaintiff’s reticence might be attributable to something else—say, fear—but that does not obviate the reasonableness of a presumption that a failure to complain indicates that the plaintiff was not seriously offended.


419 See id.
tainly not every harassment claim that arises in an inhospitable environment is ascribable to that culture, and some employees may continue working there, without complaining, even though they find the background culture objectionable. But where a plaintiff in such an environment revels in this culture, and invites sexual attention, it is not unreasonable to factor this into the hostile environment analysis.

Again, courts must exercise sound judgment in analyzing workplace culture and its relevance to unwelcomeness. Obviously a plaintiff who execrates co-workers may not be immune to similar abuse directed at him; but a court may reasonably presume that a plaintiff who frequently tells dirty jokes is not offended—and offensiveness is closely related to unwelcomeness—by similar vulgarity spouted by other employees. Additionally, a plaintiff whose tongue is no stranger to all sorts of invectives cannot credibly complain that hearing similar epithets greatly offends his sensibilities, for if he is that sensitive to vulgarity, he would not use such language himself. Not surprisingly, then, the courts that pay attention to workplace culture frequently do so only when the plaintiff has participated in sexually-based conversations and conduct similar to that which he complains about in his suit, and only when the plaintiff’s participation cannot be described as an incidental occurrence. Where courts show this sensitivity, there is little danger that they will mistake a legitimate harassment claim for a simple manifestation of workplace culture. They are not, as some courts have charged, creating a defense of unclean hands, or unclean tongues, or assumption of risk. Rather, they are properly assessing the claims according to the totality of the circumstances, which includes the social context in which the harassment occurred.

D. Turning Title VII on Its Head—Creating Perverse Incentives

Some critics also charge that focusing on workplace culture allows employers to use past and pervasive harassment to shield themselves from liability. An employer, so the criticism goes, thus has a perverse incentive to make his workplace more blue-collar by permitting vulgarity and boorish behavior, as this will lead reviewing courts to perceive any actual harassment as part of the social context of the workplace. Thus, the severity and pervasiveness of harassment, which should be grounds for liability, are actually used to protect the em-

420 See, e.g., Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999) ("[J]udgments by the court as to a woman's assumption of risk upon entering a hostile environment are improper."); Moteles v. Univ. of Pa., 730 F.2d 913, 922 n.2 (3d Cir. 1984) (Becker, J., dissenting from the denial of rehearing) ("There is no 'assumption of risk' defense recognized in Title VII.").
ployer. Smart employers, it is argued, will tolerate, and even ensure, that their workplaces are sufficiently offensive as to be considered blue-collar.\footnote{21} The more a workplace mirrors the lax mores of society, the greater the chance the employer has of prevailing in a Title VII suit.\footnote{22}

In \textit{Jackson v. Quanex Corp.}, the Sixth Circuit used these arguments to criticize the practice of focusing on workplace culture.\footnote{23} In \textit{Jackson}, the EEOC required Quanex Corp. to hire more black workers; among these was plaintiff Linda Jackson, who worked as a saw and furnace operator in a factory.\footnote{24} Apparently some of these newly-hired employees bumped white workers from their positions, and so they became unpopular with some of the whites. The plaintiff overheard anti-black comments and jokes, including references to black employees as “niggers,” employees talking about “nigger-rigging” equipment and their desire not to work for a “nigger,” and that “no nigger was going to bump a white woman.”\footnote{25} The district court granted judgment as a matter of law for the defendant, in part because most of the alleged harassment was not directed at the plaintiff, many of the alleged incidents were outside the statute of limitations, and because racial slurs and the telling of racial jokes seemed to be “conventional conditions on the factory floor,” and thus not because of the plaintiff’s race.\footnote{26} In reversing, the Sixth Circuit criticized the district court’s reasoning because it “renders less actionable racial incidents in the workplace so common as to constitute, in his mind, ‘conventional conditions on the factory floor’ . . . .”\footnote{27} This, the court

\footnote{21} See \textit{Jackson v. Quanex Corp.}, 191 F.3d 647, 662 (6th Cir. 1999).
\footnote{22} As the Second Circuit submits: Title VII “might require standards higher than those of the street.” \textit{Gallagher v. Delaney}, 139 F.3d 338, 342 (2d Cir. 1998). But in fact, Title VII only requires parity, or rough equality of treatment. Of course, an employer who permits some of its employees to mistreat both men and women equally, while not subject to liability under Title VII, could face a lawsuit under state tort law. For example, an employer might be held liable for intentional infliction of emotional distress or battery. The advantage to such a claim, from a fairness and deterrence standpoint, is that the offending employee will also be subject to liability, an advantage that Title VII plaintiffs (and defendants) do not enjoy. Personal liability would give employees a strong incentive to police their own conduct, and since they are the party in the best position to do so, it seems sensible.
\footnote{23} \textit{Jackson}, 191 F.3d at 662.
\footnote{24} \textit{Id.} at 650.
\footnote{25} \textit{Id.} at 651.
\footnote{26} \textit{See id.} at 656, 659.
\footnote{27} \textit{Id.} at 660 (citation omitted).
of appeals thought, condones "racially harassing conduct the more prevalent that conduct becomes." It held:

[T]he district court was wrong to condone continuing racial slurs and graffiti on the grounds that they occurred in a blue collar environment. We have deemed such reasoning illogical in the context of sexual harassment, "because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment." 429

In a sex harassment case, a divided panel of the Seventh Circuit expressed similar views:

It is true that the severity of alleged harassment must be assessed in light of the social mores of American workers and workplace culture . . . but nothing in Oncale even hints at the idea that prevailing culture can excuse discriminatory actions. Employers who tolerate workplaces marred by exclusionary practices and bigoted attitudes cannot use their discriminatory pasts to shield them from the present-day mandate of Title VII. 430

These courts have recognized that "American popular culture can, on occasion, be highly sexist and offensive. What is, is not always what is right, and reasonable people can take justifiable offense at comments that the vulgar among us, even if they are a majority, would consider acceptable." 431 Accordingly, these courts would not place

428 Id.
429 Id. at 662 (quoting Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999)). The Federal Circuit has expresses similar sentiments:

[N]o principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside of the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.

King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994).

430 Smith v. Sheahan, 189 F.3d 529, 535 (7th Cir. 1999). The Smith court failed to realize that the "present-day mandate of Title VII" is that there be no discrimination "because of" sex and that harassment because of sex is only prohibited when it is severe and unwelcome. Title VII does not mandate that all workplaces receive the Miss Manners seal of approval. They can be "marred by exclusionary practices and bigoted attitudes" and a host of other undesirables, so long as there is no severely offensive and unwelcome harassment that is motivated by the victim's sex, race, color, religion, or national origin.

431 Torres v. Pisano, 116 F.3d 625, 633 n.7 (2d Cir. 1997). Of course, the problem with the Torres court's analysis is that conduct which the majority finds inoffensive,
any particular emphasis on analyzing claims in the context of the background culture, since it is that culture that generates harassment. They believe, moreover, that considering harassment in light of the general unpleasantness of the workplace culture would create a perverse incentive for employers to make their worksites offensive, as the more offensive the workplace the easier it is to camouflage severe sex-based harassment.

It should be recognized, however, that the perverse incentives this criticism envisions are a little far fetched. What employer, after all, is going to encourage conduct that might constitute harassment, out of a hope that if he is ever sued for harassment his workplace will be judged to be sufficiently injurious that the plaintiff cannot claim severity, unwelcomeness, or discriminatory motivation? First of all, at some point the increased unpleasantness of a workplace will negatively affect productivity and employer’s ability to retain employees with firm-specific skills. As these factors are related to the employer’s ability to generate profits, and generating profits is presumably the goal of the firm, no employer in his right mind would jeopardize profits by intentionally creating an unpleasant environment simply to increase his chances convincing a court that any harassment was simply a manifestation of background culture.

Second, because of the uncertainty of the reasonable person standard, even when courts properly consider workplace culture, such an employer is taking a great risk that he will encourage too much bad conduct and that he will face general liability along with punitive damages. Furthermore, he will also preclude himself from being able to assert the *Faragher/Ellerth* affirmative defense. It would be much easier for an employer simply to over-regulate his workplace and prohibit all off-color remarks and joking. Although these efforts may never prove completely successful, and could be costly, they (1) might be sufficient to prevent actionable harassment from ever occurring, (2) might constitute sufficient care so as to preclude liability under the negligence standard of co-worker harassment, and (3) may constitute sufficient efforts to prevent or correct harassment as to satisfy the employer’s prong of the *Faragher/Ellerth* affirmative defense. In short, employers have strong incentives to create hospitable workplaces.

Finally, even if an employer were foolish enough to tolerate harassment with the hope that he can later escape liability by pointing to the social context of the workplace, courts will be able to see through this and will adjust their analysis accordingly. Sensitivity to workplace assuming they are reasonable people, cannot as a matter of law be actionable under Title VII because reasonable people do not find it severely offensive.
culture exists because courts realize that the workplace culture often exists regardless of and despite the employer. Workers, as products of their particular cultures, cannot help but bring some of that culture into the workplace, and an employer should not be penalized for those aspects of culture that he cannot change. In contrast, where an employer negatively alters the nature of the work environment, or should know that employees are suffering discriminatory harassment, courts are smart enough not to permit such an employer to hide behind workplace culture.

CONCLUSION

Lately there has been a noticeable coarsening of American culture, including workplace culture.\(^{432}\) Because of limits placed on the government by the Supreme Court's First Amendment jurisprudence, it is generally believed that the government is largely powerless to stem the tide of vulgarity that passes for entertainment in modern America. This is unfortunate, because what society is culturing is its future citizens, and America has already seen some of the ill effects of lyrics that glorify violence against women and the weak.\(^{433}\) This may simply be a foretaste of what is to come.\(^{434}\)

One aspect of this modern culture is a fascination with all things sexual.\(^{435}\) Not surprisingly, this and other aspects of general culture have made their way into the workplaces of America and are now a regular staple of some work environments. Title VII, which prohibits hostile environment harassment, has been invoked against workplace vulgarity and childishness. However, Title VII is violated only when harassment is severely offensive, unwelcome, and based on the plaintiff's sex or other protected attribute. Realizing that courts often have difficulty in making these assessments, the Supreme Court offered some advice: look to the social context of the workplace, as it can be


\(^{433}\) "Where can you get the idea that sexual violence against women is fun? From a music store, through Walkman earphones, from boom boxes blaring forth the rap lyrics of 2 Live Crew." George F. Will, America's Slide into the Sewer, in The Leveling Wind 13, 13 (1994) (discussing the Central Park "wilding" incident).

\(^{434}\) "[T]he most important determinant of crime is probably the culture of a given society." Gerard V. Bradley, Retribution and the Secondary Aims of Punishment, 44 Am. J. Juris. 105, 110 (1999).

\(^{435}\) "The social air is heavily scented with sex. It saturates commerce and amusement—advertising, entertainment, recreation." Will, Sex Amidst Semicolons, in The Leveling Wind, supra note 433, at 31, 31 (1994).
helpful in making these essential determinations.\textsuperscript{436} Although the Court's command is susceptible of several constructions, interpreting "social context" to mean "workplace culture" makes good sense because workplace culture is highly relevant to three essential elements of a hostile environment case: unwelcomeness, severe offensiveness, and motivation.

That is, some of the vulgarity that is labeled "harassment" is not caused by the plaintiff's womanhood, but on the culture's distorted sense of manhood. Similarly, because this juvenile behavior is omnipresent, its severity is greatly attenuated for all but the most reclusive plaintiffs. By reminding courts that they must consider the "social context" in which purported harassment occurs, the \textit{Oncale} Court was restating its admonition from \textit{Harris} that a hostile environment must be judged within the totality of the circumstances,\textsuperscript{437} and the culture of the workplace is perhaps the most important part of this "totality." The Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits have appreciated this fact and accordingly have judged harassment claims with a sensitivity to the culture in which the incidents occurred. By doing so, these courts have helped to ensure that Title VII does not become more of a workplace civility code than it already has. These courts have also given slightly greater definition to the hostile environment standard and thereby increased the certainty and predictability of the standard.

Not surprisingly, even some of the courts that disparage the emphasis placed on workplace culture agree that this culture must be taken into account.\textsuperscript{438} They agree that this is one facet of the "social context" analysis mandated by \textit{Oncale}.\textsuperscript{439} These courts are correct that, taken too far, the social context analysis can result in erroneous rulings. But this is hardly a good reason for abandoning such a useful tool, and indeed critics have failed to identify a case where a court gave social context inordinate weight in assessing a hostile environment claim. Still other courts have suggested that workplace culture or the inhospitable work environment should not enter into the evaluation of motivation, severity, or unwelcomeness. As demonstrated above, these courts object on a whole host of grounds, none of which

\begin{itemize}
\item \textsuperscript{436} \textit{Oncale} v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).
\item \textsuperscript{437} \textit{Harris} v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
\item \textsuperscript{438} \textit{Smith} v. Sheahan, 189 F.3d 529, 534–35 (7th Cir. 1999) ("[T]he severity of alleged harassment must be assessed in light of the social mores of American workers and workplace culture."); \textit{Williams} v. Gen. Motors Corp., 187 F.3d 553, 571 (6th Cir. 1999) ("[T]he customary 'culture,' or lack of it, in a particular workplace is part of the totality of the circumstances to be taken into account.").
\item \textsuperscript{439} \textit{Smith}, 189 F.3d at 534–35 (citing \textit{Oncale}, 523 U.S. at 75).
\end{itemize}
have much merit. They have not demonstrated that the background culture of a workplace is contrary to Title VII or is irrelevant to the hostile environment analysis. These courts have simply demonstrated that problems can arise when workplace culture is over-emphasized, a danger inherent in any analytic tool.

The Supreme Court acknowledged in *Harris* that the test for hostile environment harassment "is not, and by its nature cannot be, a mathematically precise test." At the same time, the analysis need not be completely unprincipled. Despite the fact that hostile environment suits have been around for thirty years, the courts still have a long way to go in defining the conduct that constitutes actionable harassment. Examining purported harassment in light of workplace culture adds another dimension to the analysis, hopefully making sexual harassment law more predictable and uniform. Factoring workplace culture into the hostile environment analysis is simply one small step in the right direction.

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