

9-10-2001

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Recommended Citation

Emily E. Rushing, *So Much for Equality in the Workplace: The Ever-Changing Standards for Sexual Harassment Claims Under Title VII*, 45 St. Louis U. L.J. (2001).

Available at: <https://scholarship.law.slu.edu/lj/vol45/iss4/14>

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**SO MUCH FOR EQUALITY IN THE WORKPLACE: THE EVER-
CHANGING STANDARDS FOR SEXUAL HARASSMENT CLAIMS
UNDER TITLE VII**

I. INTRODUCTION

Consider a woman working as a corporate attorney in a prestigious law firm. Several of her colleagues refer to her as “stupid,” comment on her body and tell her about the things they would like to do with her alone. There is probably little argument that this is considered sexual harassment. Now consider a woman who is employed as a seasonal truck driver for a construction company. Her supervisor calls her, among other things, “dumb.”¹ The supervisor also states over the CB radio to another employee that he sometimes wants “to smash a woman in the face.”² Consider a woman who works as a secretary in a refinery. Her co-workers display posters of nude and partially clad women in their offices and in other work areas.³ Additionally her co-workers use obscene language and call her a “fat ass.”⁴ Or, consider a woman working in a factory. A co-worker calls her a slut.⁵ Her supervisor looks at her breasts and remarks, “You can rub up against me anytime,” and also tells the woman, “You would kill me . . . I don’t know if I can handle it, but I’d die with a smile on my face.”⁶ The same supervisor also says, while the woman is bending over, “Back up. . . You can back right up to me.”⁷ Most people would believe these to be clear cases of sexual harassment under Title VII.⁸ But are they?

Women who work in fields that are traditionally male-dominated earn smaller salaries than their male counterparts, are less likely to be promoted, believed or respected, and, consequently, are more likely to be subject to

1. *See* *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1536 (10th Cir. 1995). That same supervisor was also accused of calling the woman a “cunt.” *Id.*

2. *Id.* at 1536.

3. *See* *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 423 (E.D. Mich. 1984).

4. *See id.* Rabidue’s co-worker habitually used vulgar words such as “cunt,” “tits” and “pussy.” *Id.*

5. *See* *Williams v. Gen. Motors*, 187 F.3d 553, 559 (6th Cir. 1999).

6. *Id.*

7. *Id.*

8. 42 U.S.C. § 2000e-2 et seq. (1994).

harassment.⁹ In a study by the U.S. Department of Labor after the enactment of the Civil Rights Act of 1964, figures indicated that there was still significant disparate treatment of women in the work force.¹⁰ In 1958, women earned 60.8% of the average salaries made by men, and ten years later, women still only earned 58.2% of the salaries that their male counterparts were making.¹¹ That same study indicated that in 1968, 60% of women but only 20% of men earned less than \$5,000 per year, and that 28% of men and 3% of women in the workforce earned more than \$10,000 per year.¹² Even though these numbers were gathered thirty years ago, these types of figures are indicative of the disparate treatment still prevalent in society, especially in circumstances where women choose to work in traditionally male-dominated fields.

Does it matter that a woman chooses to work in a factory or in the construction industry? What if she works in a school? Or a law firm? Should the environment where an individual works matter when evaluating a sexual harassment claim? If a court understands Title VII¹³ to mean that a woman's sexual harassment claim depends on the nature of her work environment, essentially it is judicially sanctioning that a woman will assume the risk of sexual harassment by entering into certain areas of traditionally male-dominated roles.¹⁴ In a complex way, most work environments are traditionally male-dominated in the sense that women have systemically been denied the opportunity to work outside of the home.¹⁵ Accordingly, men have

9. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 (1972), reprinted in 1972 U.S.C.A.N. 2137 [hereinafter Equal Employment Opportunity Act of 1972]. See also, Virginia Valian, *Roundtable: The Cognitive Bases of Gender Bias*, 65 BROOK. L. REV. 1037, 1038-40 (1999). Professor Valian noted that women's achievements in the workplace are generally worth less than men's. For example, a Bachelor of Arts will increase a man's salary by \$28,000, but the same degree will only increase a woman's salary by \$9,000. Additionally, studies indicate that women are generally required to meet a higher criterion for promotion than men. As Professor Valian noted, "[t]he small but systematic undervaluation of women culminates in women's smaller salaries compared to men, slower rates of promotion, and lesser access to resources necessary to excel at their jobs." *Id.* at 1050.

10. See Equal Employment Opportunity Act of 1972.

11. *Id.*

12. *Id.*

13. 42 U.S.C. § 2000e-2 et seq.

14. See generally *Gross*, 53 F.3d 1531.

15. For an example of a woman being denied the opportunity to work in a male-dominated field, see *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (J. Bradley concurring). In *Bradwell*, the plaintiff, a woman named Myra Bradwell, was suing to be admitted into the Illinois State Bar. The majority of the Court held that her right to practice law was not a privilege and immunity guaranteed to the plaintiff under the 14th Amendment. However, Justice Bradley, in his concurring opinion, also believed that the plaintiff should not be admitted into the bar, but for differing reasons:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's

always worked outside of the home, including fields that are now considered female-dominated, such as teaching. Obviously, there are some careers today that are still male-dominated.¹⁶ But should judicially sanctioned exceptions be made for these work environments by stating our belief that it is excusable or justifiable in these particular fields to permit a hostile work environment? There is conflicting evidence which indicates that perhaps not everyone is willing to embrace a uniform standard in evaluating sexual harassment claims.¹⁷

The unwillingness to create a uniform standard for evaluating sexual harassment claims perhaps is not the largest obstacle for those who have been sexually harassed to overcome. It does create a significant problem, however, for those individuals who are harassed and feel that they have no recourse because they work in a traditionally blue collar or male-dominated environment.¹⁸ This also creates significant barriers to women in the workplace. Because there is not a uniform standard for evaluating sexual harassment claims, women are faced with a difficult decision—sue their harasser and face the consequences, or put up with the harassment. However, if the woman works in a blue collar environment, her decision becomes even more difficult. Because it is not clear whether certain work environments will dictate a stricter sexual harassment standard, the woman must make an increasingly difficult choice—sue under Title VII, hoping that the court will not sanction “traditionally” crude behavior, or endure the hostile work environment.

Courts are essentially justifying crude behavior in certain work environments, simply because these “[i]ndelicate forms of expression [in the work environment] are accepted or endured as normal human behavior.”¹⁹ These courts are also implying that women who work in blue collar fields are accustomed to this behavior and thus are somehow better equipped to deal with

protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id. at 141.

16. Some fields are even protected to remain male-dominated if it is determined that sex is a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .” See 42 U.S.C. § 2000e-2(e)(1) (1994). See also JUDITH BAER, *WOMEN IN AMERICAN LAW* 80 (2d ed. 1996).

17. See *Gross*, 53 F.3d at 1537.

18. See *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff’d*, 805 F.2d 611 (6th Cir. 1986) (holding that the standard for sexual harassment claims is “different depending upon the work environment”).

19. See *Gross*, 53 F.3d at 1537 (10th Cir. 1995). This is a classic example of judicially sanctioning a disparate standard for males in the workplace and accordingly permitting employers to manifest these differences in their working environments.

it. Accordingly, it seems as though the courts are discouraging these women from filing otherwise valid sexual harassment claims.

This Comment analyzes whether certain work environments should dictate a stricter standard for sexual harassment claims, and more specifically, whether a woman working in a blue collar or traditionally male-dominated industry should have to meet a higher threshold of abuse for her sexual harassment claim or not. Part II of this Comment outlines the relevant case history as well as 42 U.S.C. § 2000e-2(a) and how it relates to sexual harassment claims. Part III details the current status of the case law and the notable circuit split with regard to the context of the working environment.²⁰ Part IV contains the author's analysis of the circuit split. This Comment concludes by offering a solution to the differing viewpoints of the circuits to achieve a more uniform standard under 42 U.S.C. § 2000e-2(a).

II. THE HISTORICAL BACKGROUND OF SEXUAL HARASSMENT

A. *The Civil Rights Act of 1964*

The Civil Rights Act of 1964 was enacted to protect individuals from hostile work environments and unlawful employment practices.²¹ The original purpose of Title VII was “to eliminate . . . discrimination in employment based on race, color, religion, or national origin.”²² While sex-based discrimination was not included in the original codification, it was added at the last minute on the floor of the House of Representatives.²³

20. Compare *Gross*, 53 F.3d at 1538 (holding that the standard for evaluating sexual harassment claims depends upon the context of the work environment), with *Williams v. Gen. Motors*, 187 F.3d 553, 564 (6th Cir. 1999) (expressly rejecting the Tenth Circuit's view that the standard for evaluating sexual harassment claims varies depending upon the work environment).

21. 42 U.S.C. § 2000e-2(a) (1994). 42 U.S.C. § 2000e-2(a) reads as follows:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
- (2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

22. See Civil Rights Act of 1964, Pub. L. No. 88-352 (1964), reprinted in 1964 U.S.C.C.A.N. 2391 [hereinafter Civil Rights Act of 1964].

23. See BAER, *supra* note 16, at 80. The original Title VII did not address sex discrimination. The amendment adding “sex” was proposed by a notorious opponent of civil rights who urged his colleagues “to protect our spinster friends in their ‘right’ to a husband and family.” This last minute joke failed when a coalition of women legislators saved the amendment. *Id.*

The Equal Employment Opportunity Commission (EEOC) was established by authority of Title VII in 1964.²⁴ However, the EEOC's authority was limited in that it could not issue judicially enforceable orders.²⁵ In 1972, Congress re-evaluated Title VII and determined that the employment needs of women and minorities were still not being met,²⁶ and therefore Congress granted the EEOC more authority to issue cease and desist orders to employers who continued to ignore or circumvent Title VII mandates.²⁷ The purpose behind the legislation was "to implement in a meaningful way the national policy of equal employment opportunity for employees without discrimination because of race, color, religion, national origin, or sex."²⁸

In its efforts to reduce and eliminate sexual harassment issues, the EEOC codified several different guidelines. However, these guidelines are somewhat vague and perhaps even contradictory in nature. For example, the EEOC established guidelines for sexual harassment claims, including what constitutes sexual harassment, how to evaluate those claims and when an employer will be held liable for an employee's conduct.²⁹ In determining what will constitute a sexual harassment claim, the EEOC considered the following:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.³⁰

The EEOC did not mention anywhere in this codification differing standards of evaluating sexual harassment claims contingent upon the context of the work

24. See Equal Employment Opportunity Act of 1972.

25. *Id.* Under the authority of Title VII, the EEOC was limited to essentially conciliatory functions. *Id.*

26. *Id.* According to the legislative history of 1972,

[w]omen currently comprise approximately 38% of the total work force of the Nation. There are approximately 30 million employed women. Recent statistics released from the U.S. Department of Labor indicate that there exists a profound economic discrimination against women workers Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex.

Id.

27. *Id.*

28. *Id.*

29. See generally 29 C.F.R. § 1604.11 (1998).

30. See 29 C.F.R. § 1604.11(a). For purposes of this Comment, subsection (3) will constitute most of the analysis. In determining whether the standard should be different for varying work environments, the primary concern is whether it is an "intimidating, hostile, or offensive working environment." *Id.*

environment, presumably indicating that the EEOC did not believe that the work environment should be a guiding factor in evaluating sexual harassment claims.

However, the EEOC also sanctioned a totality of circumstances test³¹ that it believed would be key in evaluating claims of sexual harassment under Title VII:

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and *the context in which the alleged incidents occurred*. The determination of the legality of a particular action will be made from the facts, on a case by case basis.³²

This codification implies that, in fact, there are varying standards for sexual harassment, depending upon the context of the work environment.³³

The EEOC also emphasized the importance of preventing and eliminating sexual harassment in the work place by taking affirmative action, disapproving of poor work behavior and sensitizing employees to the repercussions of sexual harassment.³⁴ Most notably, the EEOC determined it was crucial that “an employer should take all steps necessary to prevent sexual harassment from occurring”³⁵ It was deemed important that the employer take affirmative steps to prevent the harassment before it began and to overcome that harassment before it spun out of control.³⁶

While it appears that the EEOC’s codifications have set forth its opinions on whether the context of the work environment dictates a higher standard in evaluating sexual harassment claims, these somewhat contradictory guidelines, as well as later case law, indicate that it is not altogether clear whether the

31. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). This “totality of circumstances test” was set forth by the Supreme Court in *Harris* in 1993 and was also codified by the EEOC in the same year. *See* 29 C.F.R. § 1604.11(b).

32. 29 C.F.R. § 1604.11(b) (emphasis added).

33. *Id.* (noting that the EEOC will look at “the context in which the alleged incidents occurred.” While this appears to set forth the EEOC’s opinion on the matter, later case law will show that it is not altogether clear whether certain work environments should dictate higher standards.)

34. *See* 29 C.F.R. § 1604.11(f).

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

Id.

35. *Id.*

36. *Id.*

work environment should dictate stricter standards.³⁷ This confusion has left some serious interpretive issues up to the federal courts. The most notable of these issues is the circuit split addressed in this Comment regarding the context of the work environment.³⁸ While Title VII was inspired by lofty goals, it wasn't necessarily embraced by employers.³⁹ Congress enabled the EEOC to be more proactive in its fight against discrimination and harassment in the workplace.⁴⁰ However, the EEOC codifications did not address all areas of sexual harassment concerns. It is these omissions that are the concerns of federal courts.

B. Title VII Interpretative Case Law

The Supreme Court has decided many sexual harassment claims pursuant to Title VII. Most certainly, the breadth and scope of sexual harassment has expanded over the years to adjust to changing perceptions in society. One issue the Court has failed to address over time, however, is whether certain work environments, specifically blue collar or traditionally male-dominated fields, should be required to meet a higher threshold of sexual harassment than other fields. What follows sets forth the early case law leading up to the circuit split regarding the work environment standard in sexual harassment cases brought pursuant to Title VII.

i. *Rabidue v. Osceola Refining Co.*

In an early case, a federal district court was faced with a claim of sexual harassment under Title VII where the plaintiff, Rabidue, worked as a secretary in a refining company.⁴¹ The court first addressed whether Title VII even spoke to sexual harassment claims. The court found that sexual harassment “is within the clear letter—and probably the spirit—of Title VII,”⁴² and therefore

37. See *Williams v. Gen. Motors*, 187 F.3d 553, 564 (6th Cir. 1999) (holding that the standard for sexual harassment should *not* vary depending upon the context of the work environment).

38. Compare *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995) (holding that the standard for evaluating sexual harassment claims depends upon the context of the work environment), with *Williams*, 187 F.3d at 564 (expressly rejecting the Tenth Circuit's view that the standard for sexual harassment varies depending upon the work environment).

39. See Equal Employment Opportunity Act of 1972. Congress recognized that “[d]espite the commitment of Congress to the goal of equal employment opportunity for all our citizens, the machinery created by the Civil Rights Act of 1964 is not adequate. Despite the progress which has been made . . . discrimination against minorities and women continues.” *Id.*

40. *Id.* (“It is essential that . . . effective enforcement procedures be provided the Equal Employment Opportunity Commission to strengthen its efforts to reduce discrimination in employment.”).

41. See *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 422 (E.D. Mich. 1984).

42. *Id.* at 428. The court noted that under the original Title VII, sexual harassment was not a large concern. In fact, the court noted that the prohibition against sexual harassment in the work

sexual harassment claims were valid assertions under Title VII. In that case, Rabidue worked with a man who used vulgar language and made obscene comments about women.⁴³ Additionally, other male employees displayed when their offices and other prominent work areas pictures of nude or partially clad women.⁴⁴ The district court held that courts are entitled to contemplate the employment environment in which the plaintiff suffered the harassment when evaluating the validity of the plaintiff's sexual harassment claim.⁴⁵ Accordingly, this gives courts authority to make considerations regarding the education of the plaintiff's co-workers and supervisors, the physical design of the plaintiff's work area and the reasonable expectations of the plaintiff regarding the kind of conduct he or she reasonably believes constitutes sexual harassment.⁴⁶

The court went on to hold that the standard for determining sexual harassment is different depending upon the work environment.⁴⁷ Most troubling was the court's determination that "it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this."⁴⁸ Accordingly, the district court found that Rabidue had not established a valid sexual harassment claim and therefore ruled against her.⁴⁹

place was added to Title VII as a last minute joke by a notorious opponent of civil rights. However, while sexual harassment was not originally a concern, it is one of the most cited Title VII issues today. *Id.* at 427-29. See also BAER, *supra* note 16, at 79-80.

43. *Rabidue*, 584 F. Supp. at 423 (noting that one co-worker of Rabidue used words like "cunt," "pussy" and "tits" and that same co-worker called Rabidue a "fat ass").

44. *Id.* The court found that Rabidue was subjected to these pictures during her work day. *Id.*

45. *Id.* at 430.

46. *Id.* The court was interpreting 29 C.F.R. § 1604.11(a)(3) (1998), which defines sexual harassment as conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment." The court was analyzing the use of the word "unreasonably." *Id.*

47. *Id.*

48. *Rabidue*, 584 F. Supp. at 430. The court went on to say:

It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

Id.

49. *Id.* at 433. The court noted:

While the vulgarity [of the co-worker] certainly was not commendable, it remains that the evidence did not go beyond showing that this one employee was vulgar. Furthermore after reviewing the evidence, plaintiff's overall work experience was not substantially affected by Mr. Henry's vulgarity. Instead, the vulgarity merely constituted an annoying – but fairly insignificant – part of the total job environment Living in this milieu, the average American should not be legally offended by sexually explicit posters.

ii. *Meritor Savings Bank v. Vinson*

The Supreme Court faced an opportunity to address sexual harassment standards in 1986.⁵⁰ In *Meritor*, the plaintiff, Vinson, worked in a white-collar bank,⁵¹ and she testified that her supervisor invited her out to dinner and suggested that they have sex.⁵² Vinson testified that she initially refused, but then agreed out of fear of losing her job.⁵³ Vinson further testified that her supervisor continued to make sexual advances, in addition to fondling her, exposing himself and forcibly raping her.⁵⁴ This case is significant because it occurred in the white collar industry of banking, indicating that sexual harassment is not just a blue collar problem; instead it is a systemic one that can occur anywhere. Even though the Supreme Court was given an early opportunity to set forth its sentiments relating to sexual harassment standards, it did not address the issue of whether the work environment should vary the standard.⁵⁵ Rather, the Court only held that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to ‘alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁵⁶

iii. *Harris v. Forklift Systems, Inc.*

The Supreme Court had another opportunity in 1993 to set forth a standard for analyzing sexual harassment claims.⁵⁷ In *Harris*, the Court established a more uniform standard, but it failed to address whether certain workplace environments should dictate a stricter standard.⁵⁸ In *Harris*, the female employee worked as a manager at an equipment rental company and was subjected to insults and sexual innuendoes by the company’s president.⁵⁹ Harris was insulted because of her gender and was degraded in front of other employees.⁶⁰ On several different occasions, the president of the company said, “[Y]ou’re a women, what do you know,” and “[W]e need a man as the

Id.

50. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

51. *Id.* at 59-60.

52. *Id.* at 60.

53. *Id.*

54. *Id.*

55. Most notably, the Supreme Court did not seem to indicate that it mattered *where* the plaintiff worked, only that he or she was exposed to an abusive working environment.

56. *Meritor*, 477 U.S. at 67 (citing *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). The Supreme Court ultimately held that Vinson’s hostile work environment sexual harassment claim was a valid claim under Title VII and was therefore an actionable claim pursuant to Title VII. *Id.* at 73.

57. See *Harris v. Forklift System, Inc.*, 510 U.S. 17 (1993).

58. *Id.*

59. *Id.* at 19.

60. *Id.*

rental manager.”⁶¹ He also called Harris “a dumb ass woman” and suggested, in front of Harris’s co-workers, that he and Harris should “go to the Holiday Inn to negotiate [Harris’s] raise.”⁶² These, among other acts by the president, forced Harris to quit her job.⁶³

The district court and the Sixth Circuit Court of Appeals held that the president’s “conduct did not create an abusive environment.”⁶⁴ The district court believed the correct standard to be whether the plaintiff’s psychological well-being was seriously affected by the conduct.⁶⁵ The Supreme Court reversed and held that “[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”⁶⁶ Consequently, the Court held that not only does the work environment have to be objectively hostile, the victim must reasonably believe it to be hostile too.⁶⁷ Accordingly, the Court stated “if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”⁶⁸

While the Court did not expressly speak to the work environment issue, it did set forth a “totality of circumstances” analysis.⁶⁹ The Court said in dictum, “whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. They may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁷⁰ The Court also said the “effect on the employee’s psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.”⁷¹ This totality test, while not necessarily speaking to the work environment issue, signaled a precursor for the circuit

61. *Id.*

62. *Harris*, 510 U.S. at 19.

63. *Id.* A few of these other acts included the company president asking Harris and other female co-workers to retrieve coins from his front pants pocket, he threw objects on the ground in front of Harris and asked her and other women to pick up the objects, and he made sexual innuendoes about Harris’ clothing. *Id.*

64. *Id.* at 19-20.

65. *Id.* at 20.

66. *Id.* at 21-22.

67. *Harris*, 510 U.S. at 21.

68. *Id.*

69. *Id.* at 23.

70. *Id.*

71. *Id.*

courts in analyzing sexual harassment claims in light of the varying work environments.⁷²

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

In 1998, the Court faced a groundbreaking case—whether same sex harassment falls under Title VII.⁷³ The Court held, in fact, that same sex harassment *does* fall within the protection of Title VII.⁷⁴ Interestingly enough, even though the Court had ample opportunity in the past to discuss it, the Court finally decided *this* was an appropriate case to discuss the social context of sexual harassment:

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.⁷⁵

While this does not truly speak to the work environment issue, it does confuse matters for lower courts looking for some guidance. After this case, it is not altogether clear whether courts in looking at the work environment should be sensitive to the “social context”⁷⁶ of the work environment or whether other factors should be the prevailing guidelines.

When the Supreme Court states that courts should be sensitive to “social context,” it is unclear whether the Court is referring merely to the “social

72. Compare *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995) (holding that the standard for evaluating sexual harassment claims depends upon the context of the work environment), with *Williams v. Gen. Motors*, 187 F.3d 553, 564 (6th Cir. 1999) (expressly rejecting the Tenth Circuit's view that the standard for sexual harassment varies depending upon the work environment). In *Harris*, the Court indicated that whether an environment can be hostile is determined “by looking at all the *circumstances*.” 510 U.S. at 23 (emphasis added). The Court's use of the word “circumstances” foreshadows the Tenth Circuit's later reliance on this totality of circumstances test to sanction a sliding scale standard for evaluating sexual harassment claims depending on the work environment.

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

74. *Id.* at 79-80.

75. *Id.* at 81-82.

76. *Id.*

context” of *actions* in the workplace, or to the “social context” of the actual workplace.⁷⁷ There is a distinction between these two statements. Under the first, the social context of actions taken in the workplace means that one action taken in a certain environment would have a different meaning than it would in another environment. However, calling a woman a “slut” in the factory really is not any different than calling a woman a “slut” in the office. Or slapping a woman on the backside in the factory really is not any different than slapping a woman on the backside in the office. However, the social context of the actual workplace is different from the social context of the action taken. By being sensitive to the social context of the work environment, courts are essentially allowing employers to excuse both their own and their employee’s behavior based upon things such as a lack of education or a sense of tradition. It is not surprising that lower courts may tend to be confused by the language in *Oncale* and have, in fact, misconstrued the meaning and intention behind this dictum.⁷⁸

v. *Faragher v. Boca Raton and Burlington Industries, Inc. v. Ellerth*

In 1998, the Supreme Court was confronted with two more sexual harassment cases.⁷⁹ In *Faragher*, the plaintiff worked as a lifeguard under the supervision of three men.⁸⁰ Faragher asserted that two of the supervisors on multiple occasions committed offensive touching, made lewd remarks and spoke of women in offensive terms.⁸¹ More specifically, Faragher claimed that one supervisor claimed he would never promote a woman and that another supervisor told Faragher, “Date me or clean the toilets for a year.”⁸²

In *Burlington Industries*, the plaintiff, Ellerth, worked as a salesperson for a large corporation.⁸³ Ellerth claimed that a company manager made remarks about her breasts, told her to “loosen up” and then warned that he “could make [Ellerth’s] life very hard or very easy at Burlington.”⁸⁴ When being considered for a promotion, the manager said Ellerth was not “loose enough” and the manager proceeded to rub Ellerth’s knee.⁸⁵ The manager then told Ellerth that she would be working “with men who work in factories, and they certainly like women with pretty butts/legs.”⁸⁶ On a later date, the manager told Ellerth, “I

77. *Id.*

78. *See Williams*, 187 F.3d at 571 (Ryan, J., dissenting).

79. *See generally* *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)

80. *Faragher*, 524 U.S. at 780.

81. *Id.*

82. *Id.*

83. *Burlington Indus.*, 524 U.S. at 747.

84. *Id.* at 748.

85. *Id.*

86. *Id.*

don't have time for you . . . unless you want to tell me what you're wearing."⁸⁷ The manager then told Ellerth that if she wore shorter skirts, "it would make [her] job a whole heck of a lot easier."⁸⁸

Even though the Court was faced with two more important sexual harassment cases, the Court once again did not address the issue of work environment and simply reaffirmed its generic stance set forth in *Oncale*.⁸⁹ The Court indicated its faith in the fact that serious sexual harassment claims would be weeded out from those less serious offenses.⁹⁰ In these two cases, the Court was faced with the issue of the employer being held vicariously liable for discrimination or harassment caused by a supervisor.⁹¹ In both cases the Court held that the employer is subject to vicarious liability for a hostile work environment created by a supervisor.⁹² Separate from its holding of vicarious liability, the Court did not address whether the context of the work environment should matter in evaluating sexual harassment claims. As a result, lower federal courts are left with the confusing work context dictum set forth in *Oncale*—not sure how it applies to them or how it affects their decisions in sexual harassment claims.

This is where the Supreme Court has left matters for the time being. It is not clear whether the work environment should be taken into account after *Oncale*. But there is clearly confusion on the matter in the lower courts, as noted below.

III. CURRENT STATUS OF THE LAW: THE CIRCUIT SPLIT

While the Supreme Court has decided multiple sexual harassment cases since the advent of the Civil Rights Act of 1964, there still remain some cloudy issues, including whether certain work environments should dictate stricter standards in evaluating sexual harassment claims. Most notably, there is a

87. *Id.*

88. *Burlington Indus.*, 524 U.S. at 748.

89. *Faragher*, 524 U.S. at 788 (noting that "the standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code'") (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

90. *Faragher*, 524 U.S. at 788 (citing B. LINDEMANN & D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992) (finding that the standards for judging hostility "will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'")).

91. *See generally Faragher*, 524 U.S. 775; *Burlington Indus.* 524 U.S. 742.

92. *See generally Faragher*, 524 U.S. 775; *Burlington Indus.*, 524 U.S. 742. This same vicarious liability standard was codified in the Code of Federal Regulations: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." *See* 29 C.F.R. § 1604.11(d) (1998).

circuit split between the Sixth and Tenth Circuits regarding this matter.⁹³ What follows sets forth the circuit split regarding whether the work environment should dictate a stricter standard in evaluating sexual harassment claims brought pursuant to Title VII.

A. *Gross v. Burggraf Construction Company – The Tenth Circuit’s Approach*

While *Gross* originated before the confusion set forth in *Oncale*, it still remains an important case in the development of whether the work environment should matter in evaluating sexual harassment claims.⁹⁴ *Gross*, the plaintiff, was employed as a truck driver for the defendant construction company, and was supervised by one George Anderson.⁹⁵ *Gross* was a seasonal worker and an hourly employee.⁹⁶ After *Gross* was laid off, she filed suit against the defendant construction company and Anderson for gender discrimination in violation of Title VII.⁹⁷ *Gross* alleged that Anderson called her a “cunt”; he said over the radio to another employee, “Mark, sometimes, don’t you just want to smash a woman in the face?”; Anderson referred to *Gross* as “dumb” and used profanity in reference to her.⁹⁸ Both defendants moved for summary judgment in the United States District Court for the District of Wyoming and the district court granted the motion.⁹⁹

On appeal, the Tenth Circuit determined it would follow the “totality of circumstances” test set forth by the Supreme Court in *Meritor*.¹⁰⁰ In doing so, the Tenth Circuit determined it must look at the work environment to determine if the plaintiff established a legitimate Title VII claim.¹⁰¹ The court said: “In the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior.”¹⁰² The court went on to hold that it “must evaluate [plaintiff’s] claim of gender discrimination in the context of a *blue collar environment* where crude language is commonly used by male and

93. Compare *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995) (holding that the standard for evaluating sexual harassment claims depends upon the context of the work environment), with *Williams v. Gen. Motors*, 187 F.3d 553, 564 (6th Cir. 1999) (expressly rejecting the Tenth Circuit’s view that the standard for sexual harassment varies depending upon the work environment). This Comment only addresses the reasoning used by the Sixth Circuit and the Tenth Circuit to reach their respective decisions in these two cases. Accordingly, the author does not attempt to evaluate the merits of either of the plaintiffs’ claims.

94. See *Gross*, 53 F.3d 1531.

95. *Id.* at 1534.

96. *Id.* at 1535.

97. *Id.*

98. *Id.* at 1536.

99. *Gross*, 53 F.3d at 1536.

100. *Id.* at 1537 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69 (1986)).

101. *Id.*

102. *Id.*

female employees.”¹⁰³ The court also stated that “[s]peech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments.”¹⁰⁴ The Tenth Circuit agreed with the district court’s reasoning in *Rabidue*, which held that “the standard for determining sex[ual] harassment would be different depending upon the work environment. Indeed, it cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound.”¹⁰⁵ The Tenth Circuit affirmed the district court’s findings that the plaintiff failed to establish that the sexual harassment was pervasive or severe enough to alter the terms, conditions or privileges of employment.¹⁰⁶

B. Williams v. General Motors Corporation – The Sixth Circuit’s Approach

Marilyn Williams sued General Motors, her employer of thirty years, for sexual harassment.¹⁰⁷ Williams worked in the tool crib on the midnight shift in a General Motors plant in Ohio.¹⁰⁸ Williams alleged in her complaint that another employee continuously used the “F-word” in his vocabulary; the same employee called Williams a “slut.” William’s general supervisor looked at William’s breasts and said “You can rub up against me anytime;” he also told Williams to “back up” and, “You can just back right up to me” when Williams was bending over; and that the co-worker also said, “I’m sick and tired of these fucking women.”¹⁰⁹

The United States District Court for the Northern District of Ohio granted summary judgment for General Motors, holding that the alleged sexual harassment was not so severe or pervasive as to constitute a hostile work environment.¹¹⁰ The Sixth Circuit Court of Appeals, however, felt that there was still a genuine issue of material fact and reversed the district court’s grant of summary judgment as to William’s sexual harassment claim.¹¹¹

The Sixth Circuit took issue with the Tenth Circuit’s reasoning in *Gross* and expressly rejected “the view that the *standard* for sexual harassment varies depending on the work environment.”¹¹² Accordingly, the Sixth Circuit disagreed with the Tenth Circuit’s decision in *Gross*¹¹³ stating:

103. *Id.* at 1538 (emphasis added).

104. *Gross*, 53 F.3d at 1538.

105. *Id.* (citing *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

106. *Gross*, 53 F.3d at 1547.

107. *See Williams v. Gen. Motors*, 187 F.3d 553, 558 (6th Cir. 1999).

108. *Id.* at 559.

109. *Id.*

110. *Id.* at 560 (citing *Harris v. Forklift System, Inc.*, 510 U.S. 17, 21 (1993)).

111. *Id.* at 568.

112. *Williams*, 187 F.3d at 564.

113. *Id.*

We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment; indeed, we find this reasoning to be illogical, 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.¹¹⁴

The Sixth Circuit noted that district courts were supposed to “look at the totality of circumstances and the context of the alleged harassment,” but that “does not mean that courts can point to long-standing or traditional hostility toward women to excuse hostile-work-environment harassment.”¹¹⁵

The court pointed out that Williams was still required to establish that her work environment was objectively hostile and that she subjectively perceived the work environment to be hostile.¹¹⁶ The court appeared to agree with the Supreme Court’s logic in *Oncale* that sensitivity to social context is appropriate, but disagreed with the Tenth Circuit’s logic that courts can make judgments as to the woman’s assumption of risk upon entering a hostile work environment.¹¹⁷

C. *Williams v. General Motors Corporation – The Dissenting Opinion*

Judge Ryan of the Sixth Circuit dissented from the majority opinion.¹¹⁸ The dissent believed the majority opinion was flawed because it asserted that the totality of circumstances test does *not* include the context of the workplace environment.¹¹⁹ Accordingly, the dissent contended that the majority opinion was “dead wrong” because the Supreme Court had made it “very clear that the workplace environment indeed is a component of the totality of circumstances to be taken into account in assessing a claim of sexual harassment under Title VII.”¹²⁰ Additionally, the dissent noted the Tenth Circuit’s approach in *Gross* and cited the case favorably.¹²¹

Furthermore, the dissent noted that in today’s civilized society, it is easy to make the argument that an employer should be obligated to provide a sensible

114. *Id.*

115. *Id.*

116. *Id.*; see also *Harris v. Forklift System, Inc.*, 510 U.S. 17, 21 (1993) (setting forth the totality of circumstances test to be used by lower federal courts in evaluating sexual harassment claims); *Faragher v. Boca Raton*, 524 U.S. 775, 787-88 (1998) (reaffirming *Harris*’ totality test).

117. *Williams*, 187 F.3d at 564 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

118. *Williams*, 187 F.3d at 569 (Ryan, J., dissenting.)

119. *Id.* at 570-71.

120. *Id.* Judge Ryan was relying on the language set forth in *Oncale*: “In [all] harassment cases, that inquiry requires careful consideration of the social context in which the particular behavior occurs and is experienced by its target.” *Oncale*, 523 U.S. at 75.

121. *Williams*, 187 F.3d at 571 (citing *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995)).

working environment where sexual harassment is not tolerated, but that is not what Title VII was meant to do.¹²² Judge Ryan went on to note that the shop floor “is a rough and indelicate environment in which finishing school manners are not the behavioral norm.”¹²³ Accordingly, when a woman decides to enter a traditionally male-dominated work environment “that may be tastelessly suffused with rudeness, personal insensitivity, crude behavior, and locker room language, she must do so with the understanding that Congress has not legislated against such behavior and such a workplace environment.”¹²⁴ The dissent noted that just because the work place is hostile does not mean that the employer is free from liability.¹²⁵ In fact, he argued the employer would be liable, but only if the hostile encounters were on a regular basis and the context of the work environment was taken into account.¹²⁶

IV. ANALYSIS OF THE CIRCUIT’S VARYING APPROACHES

A. *The Tenth Circuit’s Approach*

The Tenth Circuit’s approach in evaluating sexual harassment claims is to look at the context of the work environment to determine whether the harassment is sufficiently severe enough to constitute a valid claim.¹²⁷ This approach, while problematic, is also understandable when viewed under the microscope of historical influences.¹²⁸ The Tenth Circuit felt obligated to look at the work environment in evaluating Gross’s claims of sexual harassment.¹²⁹ In doing so, the court went so far as to say: “In the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. *Indelicate* forms of expression are accepted or endured as normal human behavior.”¹³⁰ However, concentrating on whether words are “indelicate” takes away from the true problem of sexual harassment claims—that is, whether the work environment is so objectively hostile or abusive as seen by a reasonable person, or, subjectively hostile or abusive, as to constitute a Title VII violation.¹³¹

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Williams*, 187 F.3d at 571.

127. *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995).

128. *See Vicki Schultz, Life’s Work*, 100 COLUM. L. REV. 1881, 1918 (2000) (“Even when we enact laws that recognize and seek to equalize women’s work roles, the remnants of family-wage ideology creep into the law and deplete much of its transformative potential.”).

129. *Gross*, 53 F.3d at 1537.

130. *Id.* (emphasis added).

131. *Harris v. Forklift System, Inc.*, 510 U.S. 17, 21-22 (1993). There are two different forms of sexual harassment claims: quid pro quo and hostile work environments. Quid pro quo is

Notably, the standard is an objective one—meaning that the work environment is hostile or abusive to a reasonable *person*, not a reasonable man or a reasonable woman.¹³² This type of standard indicates that in order to determine whether a work environment is hostile, courts need only look to a reasonable person standard. However, under the Tenth Circuit’s reasoning, courts should only look at what a reasonable *man* or reasonable *woman* perceives to be hostile.¹³³

The Tenth Circuit’s reasoning seems not only to justify, but also to sanction “indelicate” behavior simply because work environments such as construction areas or factories are traditionally unpolished or categorically unrefined.¹³⁴ Accordingly, the court takes the attitude that Title VII was not meant to change people’s attitudes in the work place.¹³⁵ This is problematic thinking. If Title VII was not meant to change people’s attitudes, what exactly *is* the purpose of it?

While it may be conceded that some work environments are obviously less refined than others, this should not mean that courts can justify or excuse the unrefined behavior. As stereotypical as it may seem, a blue collar job is more likely to be subject to an unrefined work environment. But under the Tenth Circuit’s reasoning, a woman in a blue collar environment will have to prove more, meaning she would have to be subjected to more objectionable behavior than a woman working in an office or in a school.¹³⁶ This is an inequitable

recognized when an employer imposes a condition of job benefits only in exchange for sexual favors. *See Henson v. City of Dundee*, 682 F.2d 897, 908-09 (11th Cir. 1982). Hostile work environments, on the other hand, are created when an employee is faced with sexual advances that are pervasive and severe enough to create a hostile or abusive work environment. *See Harris*, 510 U.S. at 21. Because a hostile work environment can be created by co-workers, in this Comment only the hostile work environment will be analyzed as it pertains to standards for evaluating sexual harassment claims.

132. *Harris*, 510 U.S. at 21-22.

133. *See Gross*, 53 F.3d at 1538.

134. *Id.*

135. *Id.* While the court doesn’t explicitly state this presumption, it does quote the *Rabidue* court which affirmatively set forth:

Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

Gross, 53 F.3d at 138 (citing *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

136. This was the rationale of the Sixth Circuit in *Williams*, 187 F.3d at 564. There the court noted it was illogical to assume that a woman who works in a male-dominated field relinquishes her right to work in harassment free environment. The court said that if this was the standard, it

result—one that seems like a bitter pill to swallow, given that Title VII was meant to make the work place more equal and to prevent both discrimination and the disparate treatment of women.¹³⁷ If this is the result, Title VII has made the work place “more” equal for women by allowing them to enter into male-dominated fields, but consequently, has shifted the burden of proving sexual harassment claims to women who choose to work in a male-dominated field, simply because they have exercised their rights pursuant to Title VII.¹³⁸ Ironically, the same mechanism that allows women the freedom to enter the work force would also be interpreted to mean that those same women may suffer the consequences for exercising that freedom.

Of course, there are noticeable differences in certain fields of work. A factory floor probably has a higher level of crudeness than a doctor’s office. But the problem is not the work environment itself; it is the actions *taken* in the work environment that matter. Justice Scalia wrote for the Supreme Court:

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.¹³⁹

Justice Scalia’s argument shows that one action can convey different connotations in different work environments.¹⁴⁰ Justice Scalia was simply pointing out that lower courts should be aware of this difference. However,

would be an inequitable result: “[T]he 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.” *Id.*

137. See Civil Rights Act of 1964; see also *supra* notes 21-22.

138. What the term “equality” means is controversial. For example, there are two types of feminism that deal with this notion of trying to make women adapt to a man’s environment—equality feminism and difference feminism. Equality feminism suggests that all gender-based classifications should be abolished, and the notion that all men are created equal should be reconfigured to include women. Equality feminism urges that men should be viewed as the benchmark or reference point to women, and that women should be accorded the same opportunities as men based on this benchmark. The other theory, difference feminism, suggests that because men and women are inherently different in some regards (such as reproduction capabilities and child-rearing), the law should recognize the ways that men and women differ and accordingly accommodate those differences. See NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN AND THE LAW* 189-93 (1998). See also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1290-91 (1991) (“Society defines women . . . according to differences from men: hence the sex difference, as gender is customarily termed. Then equality law tells women that they are entitled to equal treatment mainly to the degree they are the same as men.”).

139. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

140. See *Severity of Harassment and Economic Class*, 16 No. 19 *EMPLOYMENT ALERT* 3 (September 16, 1999).

Justice Scalia's example is confusing.¹⁴¹ After the *Oncale* opinion, it seems to say that lower courts should distinguish certain work environments when evaluating Title VII claims.¹⁴² However, this is troubling because it appears that is probably *not* what Justice Scalia intended.

The troubling part of the Tenth Circuit's reasoning is that it is implicitly suggesting that women (or men) should assume the risk when they enter a particular type of work environment that society presumes is traditionally "rough hewn and vulgar."¹⁴³ After the *Gross* case, all women within the jurisdiction of the Tenth Circuit who are working in the construction industry (or any other traditionally male-dominated field) and who file sexual harassment claims may find those claims to be taken less seriously than those that occurred in a white collar environment, simply because in the construction field, "profanity and vulgarity are not perceived as hostile or abusive."¹⁴⁴ The Tenth Circuit has left no consistent rule to apply in sexual harassment claims if the court relies on a sliding scale to evaluate those claims. This is troubling for women in hostile work environments who are looking to file a sexual harassment claim. While it is known that the courts will use a "totality of circumstances" test,¹⁴⁵ and they will also look at whether the work environment is objectively hostile or abusive as seen by a reasonable person, or, subjectively hostile or abusive,¹⁴⁶ victims looking to prove their cases are left with many questions.

If a woman working in an automotive parts factory wants to file a sexual harassment claim, does that mean she has to be subjected to twice as much objectionable behavior as a woman working in an accountant's office? Three times as much? Does she have to be harassed every day in order to establish a valid claim? Every other day? Does the harassment she is subjected to have to be more objectionable than the harassment a woman working in the accountant's office sustains? The answers to these questions are not clear.

The problem with implying that victims will assume the risk by entering certain categories of work is that it focuses on the victim's conduct, rather than the defendant's conduct, to potentially relieve the defendant from liability. This is analogous to focusing on the behavior of a rape victim, rather than focusing on the behavior of the rapist himself. It is essentially the same as saying the woman asked for the harassment because she was willing to enter into a field that was traditionally male-dominated. This is misplacing the blame. A woman should not have to assume the risk when entering certain

141. *See Williams*, 187 F.3d at 570-71 (Ryan, J. dissenting). The dissent relies on Justice Scalia's opinion in *Oncale* too broadly.

142. *Oncale*, 523 U.S. at 81-82.

143. *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995).

144. *Id.* at 1537.

145. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

146. *Id.* at 21-22.

fields. That is not the purpose of Title VII. Title VII was enacted to thwart disparate treatment of women in the workplace and to provide equal employment opportunities for everyone.¹⁴⁷

It is illogical to assume that women can protect themselves from sexual harassment by not entering into certain areas of work. If women were not contemplated to work in certain fields, then the purpose of Title VII is paralyzed.¹⁴⁸ By holding that a woman assumes the risk, it indicates that the victim has consented to the conduct of the defendant and therefore the victim should not be allowed to complain at a later date.¹⁴⁹ But is this the social value we want to keep validating? Are these the same values that we want our sons to learn and our daughters to endure? Little girls grow up believing they can do anything. However, do we want to tell those same young girls that they can grow up to do anything they choose, yet they cannot complain about harassment or inequality later because they should have known what they were getting themselves into? Not only is Title VII paralyzed by this attitude, but there is also a social policy justification for not validating it.

B. The Sixth Circuit's Majority Approach

The Sixth Circuit took a different rationale; it expressly rejected the line of reasoning used in *Gross*.¹⁵⁰ The Sixth Circuit abandoned the Tenth Circuit's analysis after the plaintiff's attorney "asked the court whether the conduct alleged in this case would be tolerated in our courthouses."¹⁵¹ The Sixth Circuit agreed that the conduct Williams was subjected to would not be tolerated in the courtroom, and, consequently, it rejected "the view that the *standard* for sexual harassment varies depending on the work environment."¹⁵²

The Sixth Circuit majority believed that it was illogical for a woman to have to prove "more" in her sexual harassment claims even though the only difference between her and another is that she works in a blue collar environment:

We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment; indeed, we find this reasoning to be illogical, because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a

147. See Equal Employment Opportunity Act of 1972.

148. See *supra* notes 21-28 and accompanying text.

149. See Kelly Ann Cahill, *Hooters: Should There be an Assumption of Risk Defense to Some Hostile Work Environment Claims?*, 48 VAND. L. REV. 1107, 1135 (1995).

150. *Williams v. Gen. Motors*, 187 F.3d 553, 564 (6th Cir. 1999).

151. *Id.*

152. *Id.* (emphasis in original).

Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment.¹⁵³

The court's reasoning, while possibly problematic for employers, is a refreshing new look at Title VII's intent.¹⁵⁴

This decision can be problematic for employers because under *Faragher* and *Burlington Industries*, an employer can be held vicariously liable for discrimination and harassment caused by supervisors.¹⁵⁵ If the supervisor is the employee causing the hostile work environment, then the employer will be subject to vicarious liability.¹⁵⁶ This means that employers are forced to educate their employees regarding Title VII and the possible repercussions of their improper actions. But, unless the employer is resisting Title VII, this is not a bad thing. In fact, this is exactly what Title VII was meant to do.¹⁵⁷

Prevention is the best tool for the elimination of sexual harassment. An employer should take *all steps necessary* to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.¹⁵⁸

When reading this section, particular emphasis should be placed on "all steps necessary." These three words indicate that employers have an affirmative duty to raise the bar in their work environments and to make sure that their employees are willing to keep that bar raised. If they are not, then the employer should be subject to liability.¹⁵⁹

The Sixth Circuit recognized that it must look at the totality of circumstances¹⁶⁰ and the context of the harassment.¹⁶¹ But it was also aware that those two requirements did not "mean that courts can point to long-standing or traditional hostility toward women to excuse hostile-work environment harassment."¹⁶² The Sixth Circuit held that by

153. *Id.*

154. 42 U.S.C. § 2000e-2 et seq. (1994).

155. See generally *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). This same vicarious liability standard was codified in the Code of Federal Regulations: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d).

156. See generally *Faragher*, 524 U.S. 775; *Burlington Indus.*, 524 U.S. 742. See also 29 C.F.R. § 1604.11(d).

157. See 29 C.F.R. § 1604.11(f) (1998).

158. *Id.* (emphasis added).

159. See generally *Faragher*, 524 U.S. 775; *Burlington Indus.*, 524 U.S. 742.

160. See *Harris v. Forklift System, Inc.*, 510 U.S. 17, 23 (1993).

161. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998).

162. *Williams v. Gen. Motors*, 187 F.3d 553, 564 (6th Cir. 1999).

raising the standard for women in these professions—in essence, requiring that they prove conduct that goes well beyond what is considered objectively hostile in other work environments—is unnecessary, because the objective and subjective tests set forth in *Harris* sufficiently ‘prevent Title VII from expanding into a general civility code.’¹⁶³

The court went on to hold that Williams must still establish objectively that the work environment was hostile and that subjectively she perceived it to be hostile.¹⁶⁴ Furthermore, the court also said that

[w]hile ‘[c]ommon 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,’ *judgments by the court as to a woman’s assumption of risk upon entering a hostile work environment are improper.*¹⁶⁵

The court recognized that it is imperative to use the totality of circumstances test and the objective and subjective tests regarding hostile work environments, but it was also cognizant that courts should not be placed in a position to judge a woman’s decision to work in a traditionally male-dominated field.¹⁶⁶

In a sense, *all* jobs are traditionally male-dominated, because women have not always had the opportunity to work outside the home.¹⁶⁷ And if this is true, then all women are subjecting themselves to a potentially hostile work environment. If courts follow this traditional logic underlying sexual harassment and a woman works in a traditionally male-dominated field, then either 1) that woman is assuming the risk by working in that field, and therefore loses her right to make a claim about it; or 2) she can still file a sexual harassment claim, but she must prove “more” than another woman in the same position who works in a white collar field. This “traditional” logic would then mandate that women in virtually all fields, be it white collar or blue collar, would face this double-edged sword. However, this line of reasoning doesn’t follow the purpose of Title VII—to eliminate the disparate treatment of women in the workplace.¹⁶⁸ In fact, this type of reasoning disables the lofty goals of Title VII.

If we continue to follow this logic, women will not have an honest freedom to choose their employment because they will be faced with the conception

163. *Id.* (citing *Oncale*, 523 U.S. at 81).

164. *Id.*

165. *Id.* (citing *Oncale*, 523 U.S. at 82) (emphasis added).

166. *Id.*

167. *See* Schultz, *supra* note 128, at 1918 (“After 35 years of civil rights enforcement, many women are still scrambling for low-paying, often temporary or part-time, jobs that don’t come close to providing a living wage or decent benefits.”).

168. *See* Civil Rights Act of 1964; *see also supra* notes 21-22.

that some workplaces are traditionally “rough hewn and vulgar”¹⁶⁹ and therefore they must accept that interpretation. In today’s society, it is more sensible to recognize that women do not assume the risk by entering traditionally male-dominated fields. It is not logical to assume that a woman working in a blue collar environment should have to prove more harassment than a woman working in the white collar environment. It should not be the court’s role to judge a woman’s choice to enter into a traditionally hostile work environment.¹⁷⁰ The goal of Title VII was to eliminate discrimination in employment, not to justify it.¹⁷¹

C. *The Sixth Circuit’s Dissenting Opinion*

The dissenting opinion in *Williams*, while very similar to the Tenth Circuit’s reasoning in *Gross*, deserves its own analysis. By quoting Justice Scalia’s language from *Oncale*, the dissent misconstrued what the Supreme Court intended.¹⁷² It appears that Justice Scalia was merely pointing out the difference between one set of behavior with two different meanings. But the dissent in *Williams* was not urging that the statements “fucking women” and “slut” take on a different meaning in a factory than they would in an office.¹⁷³ In fact, those words are disturbing no matter what context they are uttered under. It appears that the dissent is essentially saying that behavior in a factory is crude and that the people who work there are used to it, so the intensity of the crude behavior must meet a higher threshold in a factory than in an office.¹⁷⁴ But this is not what Justice Scalia was arguing; the dissent’s reliance on Justice Scalia’s language is misplaced. To equate the two arguments would be to say that Justice Scalia meant that the coach could express sexual desire or lack of respect for a player by smacking him on the bottom because that was just part of the game, but the same coach would be prohibited from using the same behavior on a secretary because it is somehow less acceptable.¹⁷⁵ This interpretation is probably not what Justice Scalia intended his example to mean.

Another troubling aspect of the dissent (and the Tenth Circuit’s rationale) is that a woman who decides to enter a traditionally male-dominated environment will have to tolerate more harassment than she would if she had remained in a traditionally female-dominated field.¹⁷⁶ The assumption is that

169. *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995) (citing *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

170. *Williams*, 187 F.3d at 564.

171. See Civil Rights Act of 1964.

172. See *supra* note 120 and accompanying text.

173. See *Severity of Harassment and Economic Class*, *supra* note 140.

174. *Id.*

175. *Id.*

176. *Id.*

blue collar workers are in some way less enlightened than their white collar counterparts.¹⁷⁷ Accordingly, it follows that blue collar workers should have “thicker skins” when it comes to insulting or harassing behavior.¹⁷⁸ However, this line of reasoning seems both antiquated and highly prejudicial. It is unfair to require a woman in a male-dominated field to put up with more harassment than other women simply because she has exercised her freedom to choose her work environment pursuant to Title VII. A woman should not have to be more understanding or forgiving of abusive behavior in her work environment simply because she has made the conscious, legal choice to be there.¹⁷⁹

D. *The Circuit Split*

It is clear why the two circuits have split on this matter. While the Tenth Circuit’s decision in *Gross* was handed down in 1995, it is not so antiquated to be considered outdated. In fact, it is probably the prevailing view in light of the *Oncale* decision.¹⁸⁰ However, the Sixth Circuit’s reasoning is probably the more favored one by women because it does not punish women for working in a blue collar or traditionally male-dominated field.

While the Supreme Court has hinted at its feelings on the subject matter,¹⁸¹ it most certainly has not addressed them fully enough to be meaningful to lower courts. At this point, there appears to be only a circuit split between two circuits.¹⁸² While perhaps this matter might be viewed as trivial in the grand scheme of sexual harassment claims, most victims of sexual harassment will not regard it that way. In fact, most women who work in a blue collar or traditionally male-dominated environment would probably see this as a massive inconsistency. It is not logical or fair to point to a long-standing tradition of harassment towards women to excuse, justify or sanction the continuation of the same thing. If a woman wants to work in a factory, or construction, or the fire department or as a truck driver, she should be able to do so without fear of harassment. She should not have to prove “more”

177. *Id.*

178. *See Severity of Harassment and Economic Class, supra* note 140.

179. *See* 42 U.S.C. § 2000e-2 et seq. (1994). This statute gives a woman the legal freedom to work where she chooses.

180. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). Even though *Gross* was decided four years before *Oncale*, the cases take similar approaches to their reasoning. The troubling part of the *Oncale* decision is that it is not clear to what “appropriate sensitivity to social context” is referring. *Id.* at 82. There are at least two possible interpretations of this: 1) the Court simply meant the social context of *actions* taken in the workplace, or 2) the Court meant the social context of the *entire workplace*. Under either interpretation, it is easy to see how lower courts could misconstrue or overanalyze the Court’s opinion. *See also* text accompanying notes 77-78.

181. *Id.* at 81-82.

182. *Compare* *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531 (10th Cir. 1995), *with* *Williams v. Gen. Motors*, 187 F.3d 553 (6th Cir. 1999).

harassment in her sexual harassment claims than a woman who works in a bank, a school or Congress. It is critical for courts to address this problem if Congress or the EEOC will not. Where work environments are traditionally male-dominated and obscene language has always been prevalent, courts are effectively saying that any woman who chooses to work in that field will assume the risk of the harassment that may inevitably follow.¹⁸³ Essentially, without further action, it appears that there is no incentive to change and workplaces that are currently “rough hewn, vulgar and crude” will continue to be “rough hewn, vulgar and crude.”

V. CONCLUSIONS

A. Proposed Solutions

1. Reasons for not looking at the work environment in sexual harassment claims

When a woman needs to file a sexual harassment claim against an employer and she works in blue collar field, it is unclear what she needs to prove. All lower courts have consistently applied the “totality of circumstances” test, as well as the objective and subjective tests of hostile work environments.¹⁸⁴ However, it is less than clear if the courts will look at the work environment to determine if the standard should vary when analyzing the claim.¹⁸⁵ Because the two tests are thresholds in evaluating sexual harassment claims, courts should not make it their practice to look at whether a woman has assumed the risk by entering into a male-dominated field. This is the Sixth Circuit’s approach.¹⁸⁶

Critics of this approach may think it subjects employers to even higher standards, ones that may be inherently unfair. However, employers are already subject to vicarious liability when their employees commit sexual harassment.¹⁸⁷ Is it not in their best interest to follow the guidelines codified by the EEOC in the Code of Federal Regulations (C.F.R.)¹⁸⁸ and prevent the harassment in the first place, regardless of the type of work environment?

183. See Cahill, *supra* note 149, at 1135.

184. See generally Harris v. Forklift System, Inc., 510 U.S. 17 (1993).

185. Compare Gross, 53 F.3d at 1538, with Williams, 187 F.3d at 564. There is conflict between the Sixth and Tenth Circuits regarding whether there should be a sliding scale in evaluating sexual harassment claims depending upon the work environment.

186. See generally Williams, 187 F.3d 553.

187. See generally Faragher v. Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

188. See 29 C.F.R. § 1604.11(f) (1998).

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as

It is not logical to make it more difficult for women who work in blue collar environments to prove they have been subjected to a “more” hostile work environment than their female counterparts who work in white collar environments. They, more than most, should have it easier in proving their work environment was hostile for the exact reason that courts hesitate to let them do so. There is something inherently prejudicial in the assumption that women who work in the blue collar industry are more callous than other women, therefore they can handle the harassment better. It makes no sense to subject them to “more” harassment, simply because they may be better equipped to deal with it. Obscene language in an office is still the same obscene language in a factory. Simply because a woman works in a factory does not mean that being called a “slut” is somehow more justifiable. Title VII was enacted to even the playing field.¹⁸⁹ Accordingly, the Sixth Circuit’s reasoning that the standard for evaluating sexual harassment claims should not vary depending upon the work environment is in the true spirit of Title VII and should be the standard that all courts follow.

2. Means of implementing the Sixth Circuit approach

Because there is a circuit split, the Supreme Court will have to address this problem before any of the lower courts can apply the standard meaningfully and consistently. The EEOC or Congress can also address this problem by codifying it. It might be said that the EEOC has already codified its opinion in the C.F.R. by stating that it will look at the context in which the harassment occurred.¹⁹⁰ However, the EEOC’s codification is simply a restatement of the totality of circumstances test and does not fully address the issue of the varying standards for different workplaces.

Once the Sixth Circuit’s standard has been implemented, women in blue collar work environments will know whether their particular work environment will dictate a stricter standard, and thus they will understand what they must prove in order to make a successful sexual harassment claim under Title VII. Until that time, there will remain the question of whether a woman working

affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

189. Indeed, the true purpose of Title VII was to eliminate discrimination and to promote equal employment opportunities for all American citizens. *See* Civil Rights Act of 1964 and Equal Employment Opportunity Act of 1972.

190. *See* 29 C.F.R. § 1604.11(b).

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

and living in a “man’s world” will need to prove more than a woman working and living among the rest of the world.

B. Conclusion

Courts should not make it their business to determine whether a woman has assumed the risk by entering into a blue collar or traditionally male-dominated environment.¹⁹¹ Where a woman chooses to work should not enter into the equation at all. To vary the standard for analyzing sexual harassment claims depending on the type of work environment is an inequitable and unjust result.

One of the biggest problems with justifying a varying standard depending upon the context of the work environment is that most work environments cannot be forced into categorical assumptions of “blue collar” or “white collar.” Most fields today incorporate blue collar and white collar traditions into one setting. An extremely educated person may work next to an uneducated person. Part of a business may be unionized while the other is not. It is virtually impossible in today’s diversified business environments to separate out the two different categories of individuals: the blue collar workers whose crude or vulgar behavior is somehow more justified because of their circumstances, and the white collar workers who are more fortunate because they have chosen to work in a field that does not sanction a hostile work environment.

If courts follow the logic of the Tenth Circuit, then all women are subjecting themselves to a potentially hostile work environment because *all* jobs are traditionally male-dominated. This then means that if a woman works in a traditionally male-dominated field, then either 1) that woman is assuming the risk by working in that field, and therefore loses her right to make a claim about it; or 2) she can still file a sexual harassment claim, but she must prove “more” than another woman in the same position who works in a white collar field. Hopefully, this is not the result that Title VII was meant to achieve.

A more just result for women who exercise their freedom to choose their work environment would be for courts to follow the Sixth Circuit’s approach.¹⁹² Courts should not sanction a hostile work environment in some blue collar or traditionally male-dominated fields simply because that is the way it has always been and that is the way it will always be. The standard for evaluating sexual harassment claims should not vary depending upon the work environment. Women are given the freedom to choose their work environments under the mandate of Congress.¹⁹³ But how free are women to choose their work environment if they are faced with the dilemma posed by the

191. *See Williams*, 187 F.3d 553.

192. *Id.*

193. *See* 42 U.S.C. § 2000e-2 et seq. (1994).

Tenth Circuit?¹⁹⁴ Only if courts embrace the Sixth Circuit's reasoning can women really be free to decide for themselves where they want to work.¹⁹⁵

It should not be presumed that women who choose to work in male-dominated or blue collar fields are more callous or better equipped to deal with harassment. Being called a "bitch" or a "slut" in a factory still holds the same meaning to a woman who works in an office. If those words mean the same thing in the two different environments, why should courts try to justify or make a distinction between the two situations? There really is no difference. And to continue to make the distinction undermines Title VII. Courts should not make it their role to determine if a woman has assumed the risk of sexual harassment by entering a male-dominated or blue collar field. Discrimination and harassment are still discrimination and harassment, regardless of where they happen and the circumstances under which they happen.

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194. *See generally* Gross v. Burggraf Constr. Co., 53 F.3d 1531 (10th Cir. 1995).

195. *See generally* Williams, 187 F.3d 553.

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