

THE “DELIBERATELY INDIFFERENT” EMPLOYER: SEXUAL HARASSMENT LAW IN ITS MATURITY

I. Introduction

Sexual harassment law has always struggled against the perception that it is more a product of invention than intention. It is not just that the law protecting women (and men) in the workplace from discrimination was intended as a poison pill when a few senators suggested its addition to the Civil Rights Act of 1964.¹ The real problem is that the law does not contain the words “sexual harassment,” and scholars argued for the claim before courts got around to recognizing it.² One thing is certain: Congress hardly had hostile working environments (at least on the basis of sex)³ in mind when it passed the law⁴ that has produced more than 10,000 sexual harassment claims every year since 1992.⁵

The words “disparate impact” appeared nowhere in the Civil Rights Act (Title VII), either.⁶ But in *Griggs v. Duke Power Company*,⁷ the Supreme Court recognized that even seemingly neutral acts (such as posting hiring qualifications) can have negative, discriminatory consequences.⁸ The Court concluded that federal common law was large enough to allow claims for such employer acts,⁹ and years later Congress caught up by at least implicitly recognizing the disparate impact claim.¹⁰ But today that claim differs from sexual harassment law in one important way: disparate impact theory, though nearly middle-aged, is mostly unchanged from its original form,¹¹ while sexual harassment theory, still a teen-ager of sorts,¹² is the sort of self-sustaining and nuanced child that reveals good parenting.

Though the laws of sexual harassment and disparate impact have developed at different paces, they will likely always prompt the feeling that they were unintended additions to the original employment law family.¹³ On this score, though, sexual harassment law has become the family favorite. Those who originally advocated for it¹⁴ have given way to a new generation of scholars¹⁵ who argue for its expansion even while others (a smaller set) argue that that it still does not belong.¹⁶ More curious is the family member these same scholars (and courts) have ignored. In the family photo of employment laws, disparate impact theory now stands anachronistically off to the side with an uneasy smile. Its place in contemporary employment law is, at best, uncertain.¹⁷

But it need not be. Indeed, disparate impact theory and sexual harassment law have more in common than their common law roots. And if they could somehow be combined – or at least could be made to work together – than it would result in two important accomplishments. First, the combination might convince commentators and courts that employment laws can be given their plain meaning and still mean plenty.¹⁸ That alone rules out the interpretive mischief which has taken hold in the family of employment law scholars.¹⁹ Second, the combination uses old (existing) law to breathe new life into workplace protections.²⁰ After all, if a textualist approach could result in greater employee protections without turning judges into managers of employee relations,²¹ then what could be the argument against it?

In truth, scholars certainly will marshal strong arguments against the disparate impact hostile environment claim described here.²² The evidence capable of proving the claim hardly seems self-evident.²³ And the standard of liability proposed below – one of deliberate indifference – is generous to defendants when compared to the negligence standard used in intentional discrimination (disparate treatment) cases.²⁴ But decades have passed without litigants taking advantage of the claim. If additional time would result in refinement, there should be no hurry.

The purpose of this paper is to establish that an unintended hostile environment – one not caused or motivated by a victim’s protected class but nevertheless uniquely injurious to members of that class – is unlawful.²⁵ As set out below, the claim already exists.²⁶ Less certain is the claim’s applicability to the modern workplace,²⁷ and the basis for an employer’s liability under the claim.²⁸ This paper advocates for a “deliberate indifference” standard and explains that the standard creates the best incentives under the law.²⁹ The paper also illustrates that liability under the “deliberate indifference” standard is limited.³⁰ The result – a disparate impact hostile environment claim -- makes the best possible use of existing law. Disparate impact theory is given a new purpose and with it a new relevance to the employment law family. The family itself matures without multiplying. And two Title VII children – sexual harassment law and disparate impact theory – unparented by the original law and adopted years later, prove how worthy common law can be created by combination.

II. Sexual Harassment as a Form of Disparate Impact, Not Disparate Treatment, Theory

In truth disparate treatment theory has always been an awkward home for the typical hostile environment harassment claim. Take the environment where male workers openly exchange pornographic materials and talk about sex acts.³¹ We can assume that the conduct is severe and pervasive – in other words, it is the type of “hellish” environment that ordinarily might rise to the level of an actionable claim.³² And assume that from a female employee’s perspective the sexualized atmosphere is unwelcome³³ and unavoidable.³⁴ Does this describe an actionable claim? Only if a court could also conclude that the bad actors in the workplace had changed the female employee’s working environment because of her sex. (Evidence that they are equal opportunity harassers,³⁵ or that they had always acted sexually in the workplace,³⁶ would doom the claim.)

The “because of sex” standard comes directly from the statute itself,³⁷ and while the words could not appear more unambiguous, they mean less with every passing year. Historically, the words mean that the employee’s workplace was changed “on account of” or “by reason of” her sex.³⁸ Put another way, a similarly situated man would not have experienced the same environment.³⁹ That describes a typical disparate treatment claim, which is defined as intentional discrimination.⁴⁰ In *Meritor Savings Bank v. Vinson*,⁴¹ the United States Supreme Court defined sexual harassment in disparate treatment terms.⁴² And while it was several years after *Meritor* before the Court reviewed another sexual harassment claim in *Harris v. Forklift Systems, Inc.*,⁴³ the Court clearly favored the same disparate treatment formula for harassment cases.⁴⁴ The federal courts of appeals have followed suit by distinguishing between cases prompted by the plaintiff’s sex and cases merely containing bad conduct.⁴⁵ Where the bad actor’s intent is personal, not discriminatory, these courts have not hesitated to throw the claims out in their entirety.⁴⁶

Formulating sexual harassment as an intentional discrimination claim makes sense for other reasons, too. The claim does not exist, at least textually, in the statute that gave birth to it,⁴⁷ which is why *Meritor* defined it as a subset of garden-variety sex discrimination.⁴⁸ Under that approach, it would be possible to commit sex discrimination without sexually harassing someone, but it would not be possible to commit actionable sexual harassment unless the conduct also could be labeled sex discrimination.⁴⁹

But if sexual harassment is both textually and logically an example of intentional discrimination, then how could it be redefined as large enough to also include a disparate impact claim? In other words, how could an employee like Lisa Ocheltree, who worked at a small company making game mascots in South Carolina,⁵⁰ avoid the argument that the men around did not target her with sexuality and simulated acts of oral sex because she was a woman, but rather because she was new to the workplace.⁵¹ She could avoid the argument if she could convince a court to interpret “because of sex” differently from the way courts typically have defined the term.⁵² She could argue that though the statute is written in the active voice, it allows for a passive voice interpretation. It would go like this: my coworkers did not target me “because of” my sex, but I (perhaps because of my femaleness) experienced a hostile environment precisely “because of” it.⁵³ In disparate impact terms, the words and conduct impacted me differently because of my sex.⁵⁴

A court might well buy that argument for two reasons. The first is that the Supreme Court, whether or not it has not done so intentionally, has left the door wide open for the argument to be made. In a little-noticed (at the time) concurrence to the *Harris*⁵⁵ case, Justice Ginsburg defined sexual harassment with broad, motivation-neutral language: “The critical issue, Title VII’s text indicates, 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.”⁵⁶ Lost on most lawyers and, indeed, scholars, is that Justice Ginsburg’s formulation of the “critical issue” leaves out any evidence of intent, making it little different from the case where an employer unnecessarily requires a high school diploma (in the historical race case⁵⁷), and thus little different from a disparate impact case.⁵⁸

In the federal courts, and especially at the Supreme Court level, Justice Ginsburg’s generous formula lay dormant until the Court repeated and embraced it in *Oncale v. Sundowner Offshore Services, Inc.*⁵⁹ The issue in *Oncale* was whether men could claim to be sexually harassed by other men (or women by other women).⁶⁰ The unanimous answer was a statutory no-brainer, as Title VII contains no such limiting terms.⁶¹ Even the Court’s succinct opinion appears to suggest curiosity with the hand-wringing lower courts and scholars brought to the same-sex harassment debate for years.⁶² But sometimes succinctness invites mischief. In what itself is an interesting curiosity, *Oncale*’s author and well-known textualist,⁶³ Justice Scalia, quoted Justice Ginsburg’s formula without making any attempt⁶⁴ to note that a sex-based difference in workplace conditions does not necessarily suggest unlawfulness (because it does not establish the reasons behind the difference).

The important point is that while on its face *Oncale* professed to answer the simple question (concerning the unlawfulness of same-sex harassment), its embrace of Justice Ginsburg’s formula unwittingly unloosed the disparate impact hostile environment claim.⁶⁵ After all, women (for example) may be subjected to “disadvantageous conditions” for many reasons (such as their sensibility) whether or not the bad actors behind the harassment intended it that way. So Justice Ginsburg’s formula does much more than replaces a finding of intent with a reasonable proxy (an inequality of workplace conditions). Rather, it removes the finding of intent entirely from the sexual harassment claim.⁶⁶

At first blush removing the issue of intent from sexual harassment cases may appear absurd. After all, *Oncale* itself underscored the importance of motivation, or intent, in discrimination cases.⁶⁷ Courts, too, have routinely reminded plaintiffs that they do not sit as super-personnel departments in discrimination cases, meaning their role is not to undo unfair decisions, or those made mistakenly or even baselessly, unless the decisions were tainted by a discriminatory motive.⁶⁸ The “critical inquiry” in disparate treatment cases is the real reason behind the employer’s decision,⁶⁹ and if the employer honestly believed in its (nondiscriminatory) reason,⁷⁰ then it is legally off the hook.⁷¹ A silly decision made in good faith dooms the theory that the same decision was made because of someone’s sex (or race, and so on).⁷² But if *Oncale* should not be read as a full-scale reversal of years of intent-laden harassment cases, then how should it be read? Simple: as directing lawyers and scholars to a claim that the Court embraced years earlier in *Griggs v. Duke Power*:⁷³ the disparate impact claim.

Combining disparate impact and sexual harassment theory should not be awkward in the least. Courts have never questioned applying disparate impact theory to the general sex discrimination case, and at times have even suggested it when parties have not. Take the issue of bathroom facilities for blue-collar workers. Eileen Lynch worked as a carpenter apprentice for the Tennessee Valley Authority.⁷⁴ Audrey Jo DeClue worked as the only female linesman for the Central

Illinois Light Company.⁷⁵ Lynch had no sanitary portable bathroom to use.⁷⁶ The lack of a toilet caused her urinary tract infections and tremendous discomfort.⁷⁷ But she still had it better than DeClue, who had no portable bathroom to use at all⁷⁸ and whose employer suggested that she relieve herself in the open (by the side of the road) just like her male counterparts did.⁷⁹ A federal appellate court affirmed the dismissal of DeClue's hostile environment claim,⁸⁰ while a different federal appellate court reversed a district court's judgment in favor of Lynch's employer.⁸¹ The difference? Lynch's attorney sued her employer under disparate impact theory,⁸² while, to the frustration of the *DeClue* appellate court, her attorney did not.⁸³

The lesson from the *Lynch* and *DeClue* cases is that, under the right circumstances, seemingly neutral workplace conditions (in *DeClue*, the lack of a bathroom for any employee, whether male or female) are unlawful if they disadvantage one sex in a way they do not disadvantage the other.⁸⁴ That sounds like Justice Ginsburg's Title VII formula in *Harris*,⁸⁵ a sexual harassment case.⁸⁶ If the standard to be used by courts in sex discrimination and sexual harassment cases is the same, then it should be no surprise that the disparate impact claim allowed in *Lynch* and invited by the court in *DeClue* is the same claim these employees would use if they claimed sexual harassment. Rather than contesting their workplace's sanitarness,⁸⁷ they would be questioning its sexuality. In neither case would they have to prove that their sex (here, female) prompted or caused their treatment, or that their employers intended them to suffer. The disparate impact claim – as reflected in Justice Ginsburg's formulation – is untethered by the statute's "because of sex" mooring and, in turn, is relieved of that evidentiary burden.⁸⁸

The bottom line is that while disparate impact theory traditionally has not been used in sexual harassment cases, that reflects a convention rather than a rule. Indeed, having created the disparate impact claim through federal common law⁸⁹ (though Congress has since written it into the statute),⁹⁰ courts would be hard-pressed to now limit its application to only certain kinds of discrimination cases. Sexual harassment -- it, too, a common law creation -- is unlawful not as a separate form of discrimination, but a subset of sex discrimination.⁹¹ If in other cases plaintiffs can prove sex discrimination by relying on disparate impact theory,⁹² then it would truly be odd to say that only one set of plaintiffs – those claiming harassment – cannot do the same. Indeed, it would be more than odd. It would be illogical, too.⁹³

III. How the Disparate Impact Hostile Environment Claim Fits The Modern Workplace

To be clear, the argument made here is not that the disparate impact sexual harassment claim is an advance in the law, nor that it is necessary to reflect the realities of the modern workplace. Rather, the argument here is that the claim logically and textually already exists in the law. Does that mean that judges and juries should expect to see a flurry of disparate impact hostile environment claims?

The honest answer is maybe as many frivolous claims are already brought under Title VII. Take the case of Diane Leibovitz, who worked as a supervisor for the New York City Transit Authority.⁹⁴ Leibovitz's job was to make sure subway cars were repaired properly.⁹⁵ She also supervised subway car cleaners.⁹⁶ In September 1993, Leibovitz learned from a car inspector that a female car cleaner was being sexually harassed by her male supervisor.⁹⁷ The inspector also told Leibovitz that another car cleaner – a female employee who had previously complained to Leibovitz about the same supervisor – had been transferred to another shop closer to her home.⁹⁸ According to the inspector, as relayed to Leibovitz, the supervisor engaged in a pattern of harassing women by making remarks, touching them and "coming on to them."⁹⁹

Leibovitz is short on facts but long on law,¹⁰⁰ as the district court not only found that Leibovitz had standing to bring her claim,¹⁰¹ but also that she had pointed to enough evidence to send her hostile environment harassment claim to a jury.¹⁰² That jury found in her favor and awarded her \$60,000 because the Transit Authority had "violate[d] . . . Leibovitz's rights by its deliberate indifference to widespread discriminatory practices and sexual misconduct against others."¹⁰³ Without drawing a direct comparison, the court invoked the horrors inflicted in Nazi concentration camps and in the Soviet Gulag to argue that injuries observed – even if not experienced first-hand – should be compensable.¹⁰⁴ "Does the law deny that an environment where a superior refers to co-workers in vulgar sexual terms, while studiously avoiding calling one favored female profane names, is demeaning, harassing, and incompatible with the dignity and well-being of all the women in the workplace?"¹⁰⁵ The court answered its own question, and did so in large terms: "The deterioration of the humanity, spirit, and dignity of a member of an abused class, granted personal immunity on her promise that she will remain silent – perhaps even that she will turn away and not see what is plain to see – is impermissible under fundamental ethics and law."¹⁰⁶

The problem with the district court's law is that Leibovitz was not asked to turn a blind eye to the abuse others experienced. She was not granted "personal immunity" in order to buy her silence. In fact, she did complain – many times and to many different people (though one manager suggested that her complaints could be detrimental to her career).¹⁰⁷ In fact, her claim for damages related to a "major depressive order" she developed "from her frustrated attempts to secure a remedy for the women alleging harassment."¹⁰⁸ So she was not silent, nor asked to be. The other problem with the district court's sweeping and provocative analogy to Nazi Germany and the Soviet Gulag is simple: unlike the "rare Jewish person in a Nazi concentration camp afforded privileged treatment,"¹⁰⁹ Leibovitz did not work alongside the women who claimed to have been harassed.¹¹⁰ She did not witness any of the incidents of harassment.¹¹¹ More than this: she conceded that she was unaware of the harassment when it was occurring.¹¹² So her claim is closer to someone who visits a battlefield after the battle has concluded and perhaps even after the casualties have been removed. She can sense the horrors that transpired, but so

could anyone – so should anyone – visiting the same scene. In that case she is upset not because she is a woman (after all, sexual harassment is sex discrimination), but because she could do so little for those injured.

In reversing the jury verdict (and the district court’s decision upholding it¹¹³), the Court of Appeals for the Second Circuit said an employee like Leibovitz was not injured in the way the law contemplated.¹¹⁴ The court concluded that a working environment at the Transit Authority may have been hostile (and actionable), but that if such a working environment existed, Leibovitz did not see it and certainly did not have to work in it.¹¹⁵ The court reminded her that she was not a target of the harassment, was not present when it occurred, and did not even know about it until long after the fact.¹¹⁶ In a nutshell, her case was closer to an individual aware of harassment “going on in a nearby office of another firm” or perhaps reported in a newspaper article.¹¹⁷ While the appeals court agreed with the district court that so-called second-hand harassment (harassment not targeted at the plaintiff) could be relevant to a plaintiff’s hostile environment case,¹¹⁸ it corrected the district court by noting that in that case the harassment might have limited probative value.¹¹⁹

Leibovitz does not describe a disparate treatment case. As the appeals court concluded, no one targeted Leibovitz because of her sex or even exposed her to hurtful working conditions because she was a woman.¹²⁰ But rather than leaving it at that, the Court of Appeals (unnecessarily) added one tantalizing sentence at the close of its opinion: “We do not consider whether, as the District of Columbia Circuit has suggested in dicta, ‘a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive.’”¹²¹ For that closing shot the court quoted *Vinson v. Taylor*,¹²² which of course landed in the Supreme Court’s lap under the name *Meritor Savings Bank v. Vinson*.¹²³ *Meritor* was a clear-cut disparate treatment case and the Supreme Court did not make (and never has made) the same suggestion that the Court of Appeals suggested at the close of *Leibovitz*. Fifteen years after *Meritor* gave birth to the harassment claim (at the Supreme Court level), the *Leibovitz* court turned back the clock and opened the door to its dramatic enlargement. In other words, this is one court that would at least entertain the disparate impact argument made in a hostile environment case.

And why not? Say that Leibovitz worked alongside the women who had been harassed. Say also that the sexuality hurled at the women (but not Leibovitz) was profane and vulgar (in other words, offensive under any reasonable test). If “because of sex” implies intent and motivation (as the Supreme Court has said it does),¹²⁴ then her claim could not be a disparate treatment one. The harassers did not target her because of her sex; indeed, they did not target her at all. Her claim in that case would be purely environmental, as in “my working conditions were adversely impacted because I am a woman and the words and profanity affected me because of my sex.”¹²⁵ Indeed, it might even be unnecessary to show that the employees targeted in that case objected to the treatment or took offense. A black employee surrounded by the pervasive use of the term “nigger” might have a claim that the term horrifically (and unlawfully) changed his working environment whether or not the term was directed at him¹²⁶ – or even used by his black coworkers (as sometimes the term is used).¹²⁷

The problem with Leibovitz’s case is that she was at least two steps removed from the harassment she complained about. The harassing parties did not target her. Nor did she even witness it. In truth, she set out to uncover the harassment and became an intra-organizational whistle-blower on behalf of the women subjected to it.¹²⁸ The unintended hostile environment claim comes closer to what Amaani Lyle experienced behind the “Friends” set.¹²⁹ The executive producers of the hugely popular television series hired Lyle as a “writer’s assistant.”¹³⁰ Her job was to sit in on lengthy writers’ meetings and take copious notes (she got the job because she claimed to type fast).¹³¹ Her notes freed the writers from the same task and enabled them to focus on writing dialogue for the show’s characters.¹³²

Lyle may have recorded some jokes, but what she remembered most was being forced to listen (and transcribe) hours of sexual profanity.¹³³ One writer spoke often about his oral sex experiences and his sexual fantasies involving female actors on the show.¹³⁴ He constantly sketched – and circulated – profane pictures of female cheerleaders during the writers’ meetings.¹³⁵ Two writers debated whether one of them could have “fucked” one of the female actors but had missed his chance.¹³⁶ The same two often referred to the alleged infertility of another female actor on the show and joked about her having “dried branches in her vagina” and a “dried up pussy.”¹³⁷ Lyle witnessed one writer pretending to masturbate while sitting at his desk¹³⁸; the same writer often walked around during the meeting while gesturing as if he were masturbating.¹³⁹ During his deposition, a writer conceded that he and the others would often tell “blowjob stories” in the writers’ room during their meetings.¹⁴⁰ They also openly discussed personal experiences with anal sex.¹⁴¹

It is a wonder they ever found the time to make the show funny. Lyle, who is African-American, did her job and transcribed what she heard. In fact, she was not free to leave the meetings.¹⁴² The writers wanted her there at all times because they “never knew when something was going to pop up.”¹⁴³ Lyle sued the show’s producer, Warner Brothers, for sexual harassment (and also race discrimination) under the California Fair Employment and Housing Act (FEHA),¹⁴⁴ which tracks the language used by Congress when it drafted Title VII and proscribes discrimination “because of” sex.¹⁴⁵ (FEHA actually goes a bit further than the federal law by explicitly proscribing harassment “because of” sex).¹⁴⁶

Not even Lyle argued that the writers targeted her because she was a woman, or that they took pleasure using profanity around her because of her sex, or that they used sexual vulgarity to relegate her to outsider status during the meetings. In other words, her case lacked any evidence that the writers set out to intentionally harass her, or to change her working conditions because she was a woman.¹⁴⁷ In fact, the writers claimed that they needed to be vulgar and profane because it was necessary creatively – the vulgarity sparked story lines, which often touched upon sexuality and sexual innuendo (and even infertility).¹⁴⁸ The trial court never tackled the writers’ defense.¹⁴⁹ The court found Lyle’s case to be

largely time-barred and entirely frivolous – so frivolous that in addition to ordering her to pay over \$20,000 in court costs, it ordered her to pay \$415,800 to the defendants for their attorneys' fees.¹⁵⁰

Plaintiffs often lose discrimination cases, which is why more than 90% of them are resolved before trial.¹⁵¹ Many are frivolous, or, more generously, brought by lawyers who misunderstand the high hurdle they must clear under federal and state discrimination laws.¹⁵² But it is the rare plaintiff who not only loses her case but who also must pay the fees incurred by her employer in defending against her suit. No matter. In Lyle's case, a California Court of Appeal saw to it that the extraordinary order to pay fees was short-lived.¹⁵³ In fact, the court found merit in the same case the trial court had labeled "unreasonable and without foundation."¹⁵⁴ The Court of Appeal reversed the trial court's summary judgment against Lyle on her sexual harassment claim.¹⁵⁵

The California Court of Appeal did not claim that the writers had targeted Lyle or that she could prove intentional discrimination (the disparate treatment case). But neither did it concede that such evidence was necessary: "Defendants contend in order for Lyle to establish the harassment she complains about was 'based on sex' she must be able to show the allegedly harassing conduct was directed at her personally. Not so. A woman may be the victim of sexual harassment if she is forced to work in an atmosphere of hostility or degradation of her gender."¹⁵⁶ The court sought to "clarify the 'based on sex' element of a harassment cause of action"¹⁵⁷ by ruling out any requirement that a plaintiff be a "direct victim"¹⁵⁸ of harassment, so long as the harassing conditions "disrupt[ed] her emotional tranquility in the workplace, affect[ed] her ability to perform her job as usual, or otherwise interfere[d] with and undermine[d] her personal sense of well-being."¹⁵⁹ In that case, the court allowed that the employee minimally must witness the harassment, which means it must take place in "her immediate work environment."¹⁶⁰

The appellate decision in *Lyle* is unfortunate both for the law that it distorts (disparate treatment) and the law that it neglects (disparate impact). The work of some scholars to the contrary¹⁶¹ (and to be fair, some judges),¹⁶² intent matters in disparate treatment cases because intent comes closest to the words that Congress used (the same words -- "because of . . . sex" -- used by the California legislature in enacting FEHA).¹⁶³ "Because of" means something less than intent and motive only when courts mutate or misquote the law and recite the law as requiring discrimination "based on . . . sex."¹⁶⁴ That is what the *Lyle* court did.¹⁶⁵ It is the same slight of hand performed by scholars who argue that sexual speech subordinates, or that all sex speech is harassing *per se*.¹⁶⁶ "Based on" implies an inquiry into the harassers' means, not their motive. In the *Lyle* case, the writers arguably harassed her "based on" her sex. Their give-and-take during the meetings could not have been more sexual and demeaning.¹⁶⁷ But they did not harass her "because of" her sex – in other words, because she was a woman.¹⁶⁸ The difference between means and motive matters.¹⁶⁹

Though the Court of Appeal never said so, it treated Lyle's claim as describing an unintended hostile environment.¹⁷⁰ That describes a disparate impact, not disparate treatment, case.¹⁷¹ Even the writers' defense – that "creative necessity" justified their vulgarity during the meetings¹⁷² – is analogous to the 'business necessity' defense recognized in disparate impact cases.¹⁷³ On remand, the writers must establish that denigrating women is within the scope of their job performance.¹⁷⁴ As the Court of Appeal noted, it is too late for them to argue that they targeted Lyle for reasons other than her sex – such as "for purely personal gratification or out of meanness or bigotry or other personal motives."¹⁷⁵ Those defenses would be relevant if she was claiming intentional discrimination motivated by her sex. In a disparate impact case, motive does not matter.¹⁷⁶

Lyle is noteworthy for two reasons. The first is that it so openly embraces disparate impact theory in a sexual harassment case.¹⁷⁷ The second is that Lyle worked in the white-collar, professional world (writing, after all, is a profession). Indeed, the facts may serve to disprove the theory that blue-collar work environments (like construction) are inherently more vulgar than white-collar ones.¹⁷⁸ Rather than underscoring a difference between professional and non-professional work environments, *Lyle* may in fact underscore the difference between men and women. Men, in fact, simply may be more vulgar and profane than women.¹⁷⁹ In all-male work environments, men often use sexual profanity as a means of emasculating each other.¹⁸⁰ In other words, sexuality is the language of insult.¹⁸¹ It is hard (though not impossible) to imagine that women in all-female working environments are as profane. (We may never know as there are so few of them.)

Though the evidence is anecdotal, the difference in the way men and women use language is hard to ignore. The legal consequence is also significant. If women are less likely than men to use profanity in the workplace (at least for the reason that they do not choose to use it as the language of insult), is it such a stretch to say that they are also more likely to be offended by it when they witness it? Or is that conclusion the very sexist paternalism that offended Judge Williams (a woman) in the case of *Ocheltree v. Scollon Productions*?¹⁸² Lisa Ocheltree is a woman who, like Amaani Lyle and unlike Diane Leibovitz, worked *inside* a profane and sexually vulgar work environment.¹⁸³ Scollon Productions hired Ocheltree to help make game mascots in South Carolina.¹⁸⁴ Ocheltree's all-male coworkers regularly used vulgar and profane language and told sexually-oriented jokes.¹⁸⁵ They mimicked having sex with mannequins; on occasion she witnessed the simulated sex acts.¹⁸⁶ The men talked about having sex with their wives and girlfriends and described whether their partners "gave good head," "swallowed," or "liked it from behind."¹⁸⁷ They sang songs with verses such as "come to me, come to me, your breath smells like cum to me," and showed her a picture of a man with pierced genitalia.¹⁸⁸ Even her supervisor contributed to the vulgarity. The supervisor displayed a photograph of a nude woman and engaged in severely sexually explicit conversations with Ocheltree's coworkers.¹⁸⁹ He once stated that he enjoyed having sex with young boys.¹⁹⁰

Ocheltree won her case before a jury, which awarded her \$400,000 in punitive damages.¹⁹¹ Scollon appealed. What troubled the original panel on the United States Court of Appeals for the Fourth Circuit (in an opinion authored by Judge Williams) was the evidence missing from Ocheltree's case -- evidence that Ocheltree's coworkers engaged in such profanity because she was a woman.¹⁹² For the most part the point of the harassment appeared to be to witness her reaction.¹⁹³ Other evidence suggested that the environment pre-dated her arrival as the first woman in the shop¹⁹⁴ and that it affected men who worked there, too.¹⁹⁵ Ocheltree's working environment may have deteriorated a bit during her employment, but that only returned the court to the familiar causation issue: did the environment worsen because she was a woman (i.e., "because of sex") or because she had complained?¹⁹⁶ In a 2-1 decision, the United States Court of Appeals concluded that Ocheltree's working conditions, however profane, simply could not be tied to her sex.¹⁹⁷

Judge Michael's dissent argued that Ocheltree needed no evidence of causation to win her claim.¹⁹⁸ There was no doubt that the environment affected her greatly – and differently – than the men who worked there. For Judge Michael, the lopsided effect of the sexuality mattered more than exactly why or when it started.¹⁹⁹ "[A] workplace environment could be abusive 'because of' a plaintiff's sex even if the environment was essentially the same before and after the plaintiff entered the workplace."²⁰⁰ Perhaps, but only under disparate impact theory, and with proof that the workplace conditions were, in fact, "disproportionately more offensive and demeaning to one sex."²⁰¹ Shifting the focus from a harasser's intent to the harassment's impact (here, on women) would altogether relieve a plaintiff from establishing the motivation behind her treatment. Nevertheless, the dissent (citing scholars who curiously have charted the same awkward path)²⁰² chose to force the square peg (Ocheltree's evidence of a disparate impact) into the round hole (her claim of disparate treatment). According to the dissent, discussions of oral sex subordinate women to men, thereby satisfying the statute's requirement that a successful plaintiff be treated differently "because of" her sex.²⁰³ The awkwardness did not bother Judge Michael, who read Title VII's "because of" language as "allow[ing] for . . . interpretive flexibility."²⁰⁴ In other words, a statute that circumscribes bad motives does not have to mean what it says.

No matter. Ocheltree won her case when the Fourth Circuit reheard it en banc.²⁰⁵ Judge Michael wrote the decision of the nearly unanimous court, though in his second take on the case he largely steered clear of disparate impact theory and proof.²⁰⁶ Instead, he pointed to the incidents surrounding Ocheltree and concluded that "a jury could reasonably find that the men engaged in this conduct largely because they enjoyed watching and laughing at the reactions of the only woman in the shop."²⁰⁷ In other words, they wanted to provoke her not because she was new to the scene, but because she was a woman. Fair enough, though Judge Williams, left alone this time to write the dissent, saw the same facts very differently.²⁰⁸ For Judge Williams, the environment at Scollon was rough for everybody – both men and women – and it contained no overt hostility toward women.²⁰⁹ Tales of sexual exploits are not abusive, she argued, and contemporary women are not so delicate that they need a court's – indeed, a federal law's – protection:

In modern times, there is nothing particularly derogatory, demeaning, or subservient about a woman participating in consensual heterosexual sex. As women have sought and achieved sexual equality in this society, and as moral beliefs and taboos about oral sex have broken down, it seems illogical to assert that comments about consensual sex between adults necessarily imply male dominance or power.²¹⁰

Taken together, *Leibovitz*, *Lyle*, and *Ocheltree* tell us that Title VII, though written forty years ago and in important respects unchanged since that time, continues to evolve. *Leibovitz* is the easy case. Hers is not a hostile environment that she experienced first-hand, or even witnessed, but one that she heard about.²¹¹ One hopes that even scholars and courts pushing for "interpretive flexibility" would rule out her claim. But even in dismissing it, the Second Circuit allowed that it would be a different case if Leibovitz had worked alongside the women she sought to help -- in other words, had she worked in an environment filled with innuendo and profanity,²¹² as Amaani Lyle²¹³ or Lisa Ocheltree²¹⁴ did. *Lyle* and *Ocheltree* suggest, if not prove, that the nature of the work has little to do with the level of vulgarity women sometimes encounter.²¹⁵

Lyle is the easier case to classify. At best it must be an unintended hostile environment case, grounded in disparate impact theory. After all, unlike Ocheltree, Lyle had no evidence that her coworkers engaged in such profanity in order to see how a woman would react.²¹⁶ Ocheltree's case straddles the divide between disparate treatment and disparate impact theory, and after winning at trial, losing on appeal, and then finally winning en banc (though even that victory was partial),²¹⁷ the difficulties posed by the case should come as no surprise. Judge Williams is correct that many contemporary women are not offended by discussions laced with sexuality.²¹⁸ And, unlike racial epithets or the use of the term "nigger" by African-Americans around other black workers who take offense,²¹⁹ the words describing sexual exploits and sex itself may not be objectively demeaning to anyone. But for many sex remains a private matter, and sexuality a deeply personal issue, and if women are, in fact, more offended than men when workplaces debase both sex and sexuality, then that may be the kind of gender difference the law proscribes and Ocheltree and Lyle the kind of women the law protects.

The answer given by the Supreme Court is that context matters,²²⁰ and that workplace conduct should not be measured in isolation, apart from its surrounding circumstances, expectations, relationships, and setting. The coach's pat on the player's buttocks is not abusive, though a similar pat given to the coach's secretary would be.²²¹ Without more, the Court instructed judges and juries to be reasonable in these cases and to allow that "social context" is the key.²²² Again, *Leibovitz* is the easy case. Her injury was purely vicarious.²²³ Lyle's writers claim that, in the context of their work, their profanity and sexuality should have been expected by Lyle and should be excused.²²⁴ On remand, a jury may well agree. Ocheltree's

coworkers and supervisors would have a tougher time making the same case. In context, Ocheltree's work environment was blue-collar and rough, and while there is support for men using sexuality to emasculate each other,²²⁵ *Lyle* suggests that the nature of the work has little to do with it. Indeed, the social context of Lyle and Ocheltree may well work in their favor in one important way: they worked alone, as the only women, in their environments. It would be fair to count that in their favor. Harassment in the same-sex workplace is unlikely (though not impossible) in part because same-sex attraction and hostility is unusual and the men have little to gain by subordinating their own sex.²²⁶ Introducing a woman into an all-male environment raises the possibility that some men will use sexual profanity to exclude them²²⁷ and that some women will be more threatened (and therefore affected) because they are (literally) so one-sidedly outnumbered.

Whether the lawyers for Lyle and Leibovitz – and similarly situated plaintiffs in the future – can make the disparate impact argument on their behalf is not just a function of the law. It is also a function of their advocacy. DeClue's lawyers missed the clear disparate impact caused by not having a toilet for a female linesman to use.²²⁸ For good or bad, men are simply more comfortable relieving themselves in public. (As a matter of fact, it is easier for them to do it, too.)²²⁹ If DeClue can make a disparate impact argument in her case, then at least in theory, Ocheltree and Lyle can make it in theirs. All three cases allege sex discrimination involving their workplace conditions. The fact that DeClue's conditions are unsanitary and Ocheltree's and Lyle's are overly-sexual hardly seems to distinguish the cases in any important way.

The advantage to the unintended hostile environment (disparate impact) claim is that it relies on the text of the statute Congress wrote. In other words, it does not call for “interpretive flexibility” when reading statutory terms. For courts, the hard part may well be deciding whether a law which seeks to level the workplace playing field between men and women is large enough to allow that differences still exist, most notably in the way that the sexes react to sexual profanity and vulgarity. The danger for paternalism (suggested by Judge Williams in her *Ocheltree* dissent)²³⁰ has always existed and is not made worse by the disparate impact claim. Harassment as a claim itself recognizes that some workplace conditions can be discriminatorily altered, in the typical case by speech, and that working conditions are as important as terms of employment, compensation, hirings, firings, and the like. Having to work for an employer tolerant of those conditions would seem to be as meaningful (in a negative sense) to the goal of equal opportunity as an employer’s overt decision to discriminate on the basis of sex. But “tolerance” can mean many things, only one of them being awareness. As discussed in Part IV, courts also will struggle in settling upon the right rule for liability in unintended hostile environment cases.

IV. Deliberate Indifference: It’s About Incentives

Identifying and demonstrating the disparate impact hostile environment claim may be the easy part. Settling upon a standard of liability in which employers would be liable for the claim is a more delicate issue. The standard of liability in disparate impact cases is not often contested. Despite the fact that the Supreme Court has – to a degree – disfavored strict liability in sexual harassment cases,²³¹ an employer’s liability in a disparate impact case is, in fact, nearly automatic.²³² Of course, the damages available to a plaintiff are limited by the terms of the statute, which allow only for injunctive relief (and attorneys’ fees) in disparate impact cases.²³³ In a hiring case, that means the employer might be ordered to stop its discriminatory practices and reconsider the applicants previously denied consideration.

But the disparate impact hostile environment claim appears to be a different animal. It is not a typical disparate impact claim because it relates to an employee’s working conditions and her (in the typical case) treatment. It may well result from a workplace culture that has evolved over years, and, accordingly, cannot be eradicated overnight. That characteristic alone distinguishes it from a hiring policy or weight-lifting requirement that can be shredded by management fiat. Imposing strict liability in the case of a hiring policy is offset by the relatively simple task of reviewing job postings and interview questions to make sure they do not unintentionally cause harm. A similarly unforgiving standard of liability in a sexual harassment case (grounded in disparate impact theory) would place well-intentioned employers at the mercy of employees they cannot constantly supervise and workplaces they cannot wholly sanitize. In other words, it is not a fair balance.

Strict liability in the case of Lyle or even Ocheltree (if their claims were disparate impact ones) may also be impossible after the Supreme Court’s decisions in *Faragher v. City of Boca Raton*²³⁴ and *Burlington Indus., Inc. v. Ellerth*.²³⁵ The Supreme Court did not address coworker harassment in those cases, but imposed strict liability in hostile environment cases caused by supervisors only when the harassment was coupled with a tangible job action, such as a threat of a firing tied to the performance of a sexual act or sexual favor.²³⁶ According to the Court, the *Restatement (Second) of Agency* could be dusted off to provide the basis of liability in what has come to be known as the “aided by the agency relation” standard.²³⁷ In other words, because the employer placed the supervisor in a special position of power and authority, it facilitated the accomplishment of the bad acts (such as sexual harassment) that followed.²³⁸ Like the telegraph company whose operator is sending false and injurious messages by wire,²³⁹ the supervisor’s employer is liable not because it is morally culpable, but because its supervisors are its agents and, at the moment of the bad act, indistinguishable from the employer itself. The recipient of the telegram is in no position to know that it is a hoax. Similarly, the employee is in no position to draw a distinction between the supervisor who wields his authority in corrupt ways and the employer who hired him. They are one in the same.

The Supreme Court’s “aided by the agency relation” is hardly the type of clean craftsmanship that could be credited with bringing simplicity and predictability to employment law. (It is scarcely more “manageable” than the confusing legal landscape the Court set out to fix.)²⁴⁰ In *Meritor*, the Supreme Court referred judges to common law agency principles to resolve the thorny issue of liability.²⁴¹ Not even academics long on both time and space (as in law review pages) read as much complexity into that reference as the Supreme Court did twelve years later in *Ellerth* and *Faragher*. If the *Restatement (Second) of Agency*, written in 1958, was capable of providing so little clarity to the typical harassment case, then it is a wonder why the Supreme Court felt constrained to use it. Common law agency principles, after all, are not codified. So *Ellerth* and *Faragher* are, at the very least, lost opportunities. The law that emerged from these twin cases is little more navigable than the maddening circuit split²⁴² that begat them.

Six years later, it is water under the bridge. The Supreme Court is unlikely to abandon *stare decisis* and formulate a more coherent standard.²⁴³ And, truth be told, the Court got one thing right: the standard of liability in sexual harassment (indeed, in discrimination) cases must serve a purpose. The purpose the Court chose is one of deterrence.²⁴⁴ Employers understand that strict liability is a risk when it comes to supervisors who have authority to hire, fire, demote, and so on.²⁴⁵ The result is an incentive to monitor and review those decisions to ensure that they are bona fide.²⁴⁶ Providing employers with an affirmative defense²⁴⁷ in cases of supervisors who create hostile work environments (harassing in that case just like coworkers do) gives those same employers an incentive to publish strong anti-harassment policies and grievance mechanisms.²⁴⁸ Many include harassment training.²⁴⁹ For these employers, the upside is two-fold. These efforts make the defense both available and, hopefully, unnecessary.

There is nothing wrong with law-makers keeping in mind the incentives their laws create. (Regrettably, courts have become frequent law-makers in the area of employment law.)²⁵⁰ That said, some courts retain an almost Dickensian view of employers when it comes to predicting how they will react to new law. In *Suders v. Easton*, the United States Court of Appeals for the Third Circuit recently held on to that image in deciding that a constructive discharge is a tangible job action such that employers who leave victims of harassment no recourse but to resign their employment are strictly liable.²⁵¹ The court worried that any other holding would tempt employers to wait until harassed employees resigned.²⁵² After all, a resignation preserves the employer’s affirmative defense in these cases. A firing triggers strict liability. The court concluded that when faced with a hostile environment, the temptation would be too great for an employer to do nothing and to root for a resignation.²⁵³ Some employers “might even tacitly approve of increased harassment to achieve that result.”²⁵⁴

More likely is a result that flows from this reality: business is unlikely to stomach a long winter of harassment (and low productivity) simply to make a legal case marginally more winnable in the spring. That said, the *Suders* court was correct to think about incentives, and, on its face, there is much to be said for the court’s conclusion. In terms of injuries, there is little difference between an employee fired for not having sex with a supervisor (an obvious strict liability case) and another employee not fired but compelled to resign rather than continue to work in hell. Applying the same strict liability standard to both cases makes sense so long as the second employee’s working conditions are truly hellish (not merely hostile).²⁵⁵ And, in truth, it is unlikely that forfeiting the affirmative defense in that case costs the employer much. Employers with hellish workplaces are unlikely to benefit from an affirmative defense that rewards effective anti-harassment mechanisms.

So what incentives should be created in fashioning a standard of liability in disparate impact hostile environment cases? The same ones that the Supreme Court considered in *Ellerth* and *Faragher*: an employer’s incentive to watch the workplace and to remedy harassment at the earliest possible moment.²⁵⁶ But employers are only half the equation, and employees are capable of helping themselves, too. Indeed, in the language of torts, they often have the last, best chance to avoid the harm altogether by complaining about it.²⁵⁷ They do neither themselves nor their employers any favors when keeping silent about harassment, especially incidents that are not open and obvious. That describes truly threatening episodes that are undetectable by employers.²⁵⁸

One standard of liability is consistent with these incentives: a standard of deliberate indifference. An employer should be liable for an unintended hostile environment causing a provable disparate impact on a protected group if it was both aware of the environment and willfully indifferent to it. Proof of awareness could come in many forms, such as – in the best case – an employee who has complained about the environment to responsible parties (such as supervisors). But the employer who is aware of the hostility for any other reason – perhaps by observing it or because a third party has complained – must choose either involvement or indifference. Indifference equates to doing nothing, or nearly nothing. A good faith attempt to stop the harassment (perhaps by counseling the offenders) would disprove indifference, but transferring an employee into the same plant where a coworker who had harassed her was recently transferred describes doing nearly nothing.²⁵⁹ It describes indifference.

The deliberate indifference standard is not unique to the area of harassment law. The Supreme Court uses the same standard in determining whether schools should be liable for student-on-student sexual harassment.²⁶⁰ The principle provisions of Title IX, the law governing educational opportunities and guaranteeing a non-discriminatory school environment, read differently from Title VII.²⁶¹ But the denominators are common:²⁶² both laws forbid sexual harassment in environments where employers (or educators) sometimes have little control. If anything, the deliberate indifference standard imposed on schools is even more generous than the one contemplated here. The school standard contemplates a case of

intentional harassment.²⁶³ In intentional cases of co-worker harassment, most courts use a negligence standard,²⁶⁴ though the Supreme Court has never ruled on its appropriateness.

The negligence standard imposes liability even if the employer did not actually know about the coworker-created hostile environment so long as it should have known about it.²⁶⁵ Why complicate matters by establishing a different standard – one of deliberate indifference – in cases of coworker-created hostile environments proven by disparate impact theory? Two considerations counsel against using the same negligence standard. First, intentional and unintentional harassment are not moral equivalents. Other laws recognize the difference between voluntary and involuntary acts.²⁶⁶ In context, employees may even be able to spot the difference between the two. The risk of an employer’s liability should track its moral culpability – hence, a more generous (deliberate indifference) standard in the unintended hostile environment case. It is worth noting that the same parallelism rules out a strict liability standard. If employers are liable for intentional coworker harassment only when they have acted negligently, then it is hard to justify a less generous standard where the injurious treatment is unintended.

The second argument against imposing liability on negligent employers is more practical. Employers told that they are liable even though they were not aware – but should have been aware – of harassment, are compelled to police the workplace like hall monitors. Employee privacy, already a scarce workplace commodity, would become legally foolish. Employers would be well-c counseled to review electronic transmissions and everyday employee interactions. After all, if an unintended hostile environment claim were grounded in emails distributed through a company server, then expect this argument from a plaintiff’s lawyer: a reasonable employer would be reading the emails, too.

Undoubtedly, some employers already monitor employee interactions.²⁶⁷ Perhaps they expect to limit their liability or to root out harassment before it ripens into a lawsuit.²⁶⁸ *Faragher* and *Ellerth* – and, indeed, *Suders* – remind us that the law is about creating incentives and balancing interests. The negligence standard encourages employers to balance an employee’s interest in privacy with its own interest in avoiding litigation. A rational employer will strike that balance in its own favor.²⁶⁹ The deliberate indifference standard comes with no such trade-off. Gone is the employer’s incentive to invade workplace privacy. It is replaced with the employee’s incentive to complain on her (or his) own behalf.

Ultimately, the deliberate indifference standard is a necessary, limiting force on the unintended hostile environment claim. An employer successfully sued under disparate impact theory for hostile environment sexual harassment is not vicariously liable, and certainly not liable unfairly. It is liable because its willful indifference to an employee’s working conditions in fact was a contributing force to those injuries,²⁷⁰ no less so than the employer who allows employees to work around exposed wires or other openly dangerous conditions. Doing nothing despite full appreciation of a danger describes an employer either strangely uninvolved or risk-loving – in other words, a defendant.

But the deliberate indifference standard is also a limiting force on the unintended hostile environment claim. An employer who investigates and responds to a hostile environment cannot be termed indifferent to it even if the response fails and the hostility continues. Indifference means taking no action at all, or at the very least engaging in such a low-level response to a problem that no reasonable person would distinguish it from being indifferent. Whether that describes the employers of Diane Leibovitz, Amaani Lyle, or Lisa Ocheltree remains to be seen.

V. The Deliberate Indifference Standard Applied to *Leibovitz*, *Lyle*, and *Ocheltree*

Once again *Leibovitz* presents the easy case. Leibovitz apparently complained to numerous Transit Authority officials about the harassment relayed to her.²⁷¹ According to the district court, those officials did very little.²⁷² The court concluded that a jury easily could have determined that the Transit Authority was “deliberately indifferent” to the sexually harassing actions of its supervisors.²⁷³ Because the Court of Appeals threw out Leibovitz’s hostile environment claim, it had no chance to comment upon the trial court’s unusual “deliberate indifference” standard (though the Authority raised the issue in its appellate briefs). But in getting Leibovitz’s underlying claim so wrong (harassment of others not even observed by the plaintiff can hardly support a hostile environment claim),²⁷⁴ it is possible the district court stumbled upon the correct standard of liability to be used.

Even so, it is a stretch to say that the Transit Authority was deliberately indifferent to Leibovitz’s complaints. In its opinion, the Second Circuit concluded that after her complaints “[a] lengthy investigation ensued,”²⁷⁵ though the court also allowed that Leibovitz considered the investigation to have lacked energy.²⁷⁶ It might be more accurate to say that Leibovitz was displeased with the *results* of the Authority’s investigation. Whatever the Transit Authority’s ultimate conclusion about the harassment charge, it can hardly be said that by investigating it did nothing about the complaints, or nearly nothing (the deliberate indifference standard).²⁷⁷ An employee like Leibovitz is not entitled to the *best* investigation of her complaints, nor the type of investigation that she would have mounted had she been in charge. The law should require only a reasonable investigation, and reasonableness in this context also should take into account that Leibovitz’s complaints were on behalf of others – in other words, second- or third- hand.

Amaani Lyle worked around sexual vulgarity for four months before the *Friends*’ producers fired her, ostensibly because she could not keep up with their jokes by typing fast enough during their meetings.²⁷⁸ The Court of Appeal decision reinstating her lawsuit reflects her frequent complaints to the show’s producers concerning the lack of black characters on the sitcom.²⁷⁹ But the court makes no mention that she complained about the profanity during her meetings. Perhaps she

complained to the offending writers but the opinion does not reflect it. Perhaps she complained to producers about the profanity at the same time she complained about the lack of black characters, though if true that would seem a curious omission by the Court of Appeal. Equally likely is that in complaining about the lack of black characters, she did not complain about the sexuality and vulgarity. That scenario would doom any disparate impact claim under the deliberate indifference standard, even if she could establish that the producers were generally aware that the writers' sessions were fairly rough stuff. How so? Because the standard of liability proposed here would require proof that the employer was aware of the workplace conditions *and* the plaintiff's injuries. Rough workplaces are not unlawful *per se*. They are only unlawful – even under the disparate impact proof model – if they cause injury, and an employer can hardly be called indifferent to injuries that are unknown.

Awareness of injury further limits the unintended hostile environment claim. The case filed by Dennis Vaughn illustrates the limitation nicely.²⁸⁰ Vaughn worked as an oil rig roustabout on an offshore rig off the Louisiana coast in the Gulf of Mexico.²⁸¹ The rig belonged to Marathon Oil Company, but Vaughn worked for a different company which provided crew complements on the rig.²⁸² Roustabouts such as Vaughn were at the bottom rung of employment ladder on oil rigs.²⁸³ They mostly cleaned and painted the boats.²⁸⁴ They worked seven days at a time in close and cramped quarters, which were rough, to say the least.²⁸⁵ Within a month of beginning his job, Vaughn was hazed by his coworkers. They stripped him and had his genitals covered with grease.²⁸⁶ But his real complaint, which he made for the first time after quitting his job, was the racially charged treatment he received. According to Vaughn, his coworkers called him "nigger," "coon," and "black boy."²⁸⁷ After one near-accident on the rig, a Marathon employee called him racial epithets.²⁸⁸ Marathon kept a toolshed on the rig which had "KKK Headquarters" written across its facade.²⁸⁹ Finally, on the day he resigned, the crew watched a news report that a black man had shot several individuals in New Orleans. The crew laughed when one coworker exclaimed, "That's just like a nigger; give him a gun and he shoots anything that moves."²⁹⁰

Vaughn's case sounds strong, either as a disparate treatment claim or a disparate impact one. He certainly thought so, as he sued his employer for racial harassment under Title VII. But in truth he had neither claim. Vaughn participated in the rough atmosphere and apparently gave as good as he got from his coworkers.²⁹¹ Life on the rig was unpleasant, but it was that way for everyone.²⁹² And, importantly, even Vaughn agreed at his deposition that the pranks and the hazing were not race-motivated.²⁹³ He endured them just as new white workers did. That fact was enough to doom most of his disparate treatment claim, leaving the abusive, racist remarks used by his coworkers. In affirming summary judgment for Vaughn's employer, the court of appeals quoted its earlier decision in *Rogers v. Equal Employment Opportunity Commission*:²⁹⁴ "A discriminatory and offensive work environment, 'so heavily polluted with discrimination so as to destroy completely the emotional and psychological stability of minority group workers' in itself may constitute a Title VII violation."²⁹⁵ The court then found that Vaughn's working environment did not satisfy this test; rather, he had described "an atmosphere replete with instances of humiliating acts shared by all."²⁹⁶

The problem with *Vaughn* is that by focusing exclusively on the effect Vaughn's workplace would have on "minority group workers," the court has described a disparate impact, not disparate treatment, case. So it should not be a surprise that, in addition to citing *Rogers*, the court also cited the Supreme Court's famous disparate impact opinion in *Griggs v. Duke Power Co.*,²⁹⁷ and then criticized the district court for focusing too much "on the intent of those who created [Vaughn's] environment."²⁹⁸ *Rogers*, which "was apparently the first case to recognize a cause of action based upon a discriminatory work environment,"²⁹⁹ also heavily relied on *Griggs* and disparate impact theory.³⁰⁰ Both the *Rogers* and *Vaughn* courts have obvious trouble distinguishing between disparate treatment and disparate impact proof models. Hostile work environments are only unlawful under disparate treatment theory (Vaughn's theory) if the plaintiff has evidence of bad intent (such as racial animus). Vaughn lacked that evidence.

Still, despite doing so unwittingly, *Vaughn* remains one of the first cases to allow a plaintiff to prove an actionable hostile environment through disparate impact proof. That may be a historical footnote, and it fails to help Vaughn where it counts. Like Lyle, Vaughn never claimed to be injured by his environment and rough, racially-charged workplaces – especially all-male ones³⁰¹ – are not necessarily unlawful. They are unlawful under the deliberate indifference standard described here if they are severe enough to injure a protected class or its representative (Vaughn) and the injury is unmistakable. Not even when resigning did Vaughn complain about his working conditions,³⁰² making it possible (if not likely) that his employer concluded they affected him little. It may not matter. Vaughn's supervisor stuck up for him on at least two important occasions,³⁰³ demonstrating how difficult it would (and should) be for disparate impact plaintiffs to establish true indifference.

Once again, *Ocheltree*³⁰⁴ presents the case with the chance to test the limits of the deliberate indifference theory. Assume for the moment that Ocheltree's real claim is, as the dissent in *Ocheltree I* argued, one grounded in disparate impact – not disparate treatment – theory. Under the test set out here, her employer would be liable only if it was both aware of Ocheltree's working conditions and indifferent to it. Ocheltree tried to complain several times to Bill Scollon, the company president, and Ellery Locklear, its vice president.³⁰⁵ But several forces worked against her. First, the company had no real anti-harassment policy, though the company handbook did forbid "verbal abuse" in a section entitled "Talking."³⁰⁶ Second, the handbook's "open door policy" concerning employee complaints directed employees to seek out their immediate supervisors to resolve any problems.³⁰⁷ Only problems not resolved by supervisors could be directed to Scollon or Locklear.³⁰⁸

Complaining to one's supervisor makes sense, except in Ocheltree's case, where her supervisor was a full participant in the rough working environment. The company's "open door policy" did not instruct an employee like Ocheltree what to do in that case. Setting aside the company's ineffective policies, Ocheltree did try to contact Scollon and Locklear. She visited Scollon in her office several times but in each instance he waved her off and directed her to see Locklear.³⁰⁹ She did just that and even passed Locklear a note that she needed to speak to him about something "very important."³¹⁰ She underlined those words. Locklear did nothing.³¹¹ But her supervisor did. He made a routine out of following her to the bathroom whenever he suspected that she was about to go over his head with her complaints.³¹² When she emerged from the bathroom, he would tell her to go back to work.³¹³

When an employee makes a hostile environment claim grounded in disparate impact theory (little of Ocheltree's evidence showed treatment motivated by her sex), the deliberate indifference standard would apply. While that standard requires actual knowledge of the offensive working conditions, a "see no evil, hear no evil" strategy changes the calculation.³¹⁴ The Fourth Circuit concluded that Ocheltree's employer should be liable because it acted negligently in establishing woefully poor avenues of complaint.³¹⁵ Scollon Productions should have known about the harassment, the court argued, and should be charged with constructive knowledge of the conditions.³¹⁶ Constructive knowledge describes what Scollon possessed, but finding only negligence in the company's conduct is too generous. Where an employee does, in fact, attempt to complain on numerous occasions, but is not given an audience by company officials (or, in Ocheltree's case, is turned away), the company can be imputed with the information it would have learned had it listened. This result is only underscored when one of the company's own supervisors (its agent for Title VII purposes) aggressively obstructs and interferes with the employee's ability to complain. In lying in wait outside the women's restroom, Ocheltree's supervisor did exactly that. The sum total of these activities describe affirmative conduct on Scollon's part. In other words, it describes deliberateness, not negligence.

That said, neither deliberateness nor indifference should be found simply because a company's anti-harassment mechanisms are poor, or even non-existent. These days most, if not all, employees understand that coworkers or supervisors do not have the authority (or legal right) to harass them. It is hard to imagine that they have to be told they can complain, or that they complain to upper-level company officials only because a company handbook allows them to. The lack of reasonable anti-harassment mechanisms should matter in a disparate treatment case (where the standard is, in fact, negligence). But in the general disparate impact hostile environment case, poor policies should not be used to justify an employee's decision not to complain, and the fact that policies are altogether missing should not invite a court to find constructive knowledge of workplace harassment.³¹⁷ Lisa Ocheltree's case is special because she did complain, or at least attempted to, but her efforts were either thwarted or ignored.³¹⁸

VI. Conclusion

In truth, the disparate impact hostile environment claim is special, too. It stands at the intersection of the law that Congress wrote and the way that some scholars and judges would like the law of disparate treatment discrimination to be. Congress protected employees from discrimination "because of" their sex (among other characteristics), and the Supreme Court has correctly – and consistently – determined that these are words of intent. In the cases described in this article,³¹⁹ that means the plaintiff must at the very least point to evidence that the "harassers" intended to treat her differently because of her sex. They need not intend that the harassment cause injury (they receive no advantage if they prove to be unrefined or simply obtuse), but their motive must be tied to a protected class they have set out to demean or otherwise treat differently.

The textualist approach – reading the words Congress wrote and giving them their plain meaning – comes with the advantage that it respects the role traditionally given to the judiciary. That some courts and scholars would approach those words ("because of") with "interpretive flexibility,"³²⁰ should be no source of pride. Some scholars even openly concede that they would approach all sex speech in the workplace as necessarily motivated by gender or, at the very least, contributing to sexist norms and a general "heteropatriarchy."³²¹ Statutes are not like rubber bands. They are not meant to be stretched in all directions so as to satisfy the personal preferences of either law-makers or legal commentators. Their necessary tautness rules out more claims than it rules in, as Dennis Vaughn (ruled out) and Lisa Ocheltree (ruled out by two courts before ruled in by a third) can attest.

Rather than stretching the law, disparate impact theory reflects it. Courts allowed for the theory before Congress did, but legislators embraced the theory and wrote it into the law when they amended the Civil Rights Act in 1991.³²² Disparate impact theory has always provided a legitimate legal claim in sex discrimination law. An employer's senseless requirement that its employees lift a minimum quantum of weight is only one example. And courts have always approached sexual harassment as a form, or subset, of sex discrimination. What is good for the goose is good for the gander. If disparate impact theory works in sex discrimination cases in general, then it must work in sexual harassment cases in particular.

This is not to say that the disparate impact hostile environment claim would be a picnic to prove. The plaintiff would have to point to treatment that, while not animated by animus, polluted the workplace and affected her greatly because of her sex. Her reaction would have to be reasonable and would have to represent the reaction a jury could reasonably expect from any member of her class (that is, the same reaction other women would give). At that point she would be only half-way home. The burden would also be hers to prove that after learning of her injury, her employer was deliberately indifferent to

it. The deliberate indifference standard is necessary to rein in a legal claim that must strike the right balance between the incentives the law wants to provide (encouraging employers to rid their workplaces from pernicious working conditions) and the ones it wants to avoid (encouraging employees to sue for less-than-hellish working conditions).³²³ And if she can do all of this, the reality is there is no payday awaiting her. Congress provided only for equitable relief in successful disparate impact cases, meaning she might get an injunctive remedy and her attorneys' fees, but no money damages.

Diane Leibovitz did not suffer an unintended hostile environment. Actually, she sued on behalf of others, ruling out both a disparate treatment and disparate impact claim. Amanni Lyle's workplace may have been hostile but not sex-based. Even the California Court of Appeal used the language of disparate impact theory (ruling out a requirement that the plaintiff be a "direct victim" of harassment) to resurrect the claim the district court dismissed. But whether she complained to the *Friends*' producers about the harassment is less clear. One thing is certain: her complaints about the lack of black characters on the show has nothing to do with her working conditions and, thus, would hardly mean much under the "deliberate indifference" standard. And Dennis Vaughn? He never claimed to have been injured by the rough language (and epithets) used around him. Again, the Court of Appeals used disparate impact language (even citing disparate impact cases) before concluding that Vaughn did not appear very affected by the conditions surrounding him.

Based on the fullness of the record, Lisa Ocheltree's treatment was more sexual than sex-based. That should have ruled out a disparate treatment claim. But instead of approaching her environment as unintendedly hostile, the Court of Appeals (en banc) salvaged her intentional discrimination claim. The court's decision was a lost opportunity because it sent a message that "because of sex" means less than it says. Indeed, taken together (and chronologically), *Vaughn*, *Leibovitz*, *Ocheltree*, and *Lyle* send the message that disparate impact theory – and case law – can support an employee's *intentional* sexual harassment claim. They cannot.³²⁴

One day a true disparate impact claim will be brought in a sexual harassment case. Under the right circumstances (and a deliberate indifference standard),³²⁵ it may even be won. In that case the claim could be criticized fairly for many reasons, one of them that it contributes to a perception that women must be protected from certain kinds of speech.³²⁶ But the criticism cannot be that a court recognized a novel new claim or invented new law. The victory in that case will lay in old law and, as is often, good lawyers.

¹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989) (discussing the "somewhat bizarre path by which 'sex' came to be included as a forbidden criterion for employment" and noting that the term was added to defeat the bill).

² See CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 50-70 (1979) (proposing and discussing the hostile environment sexual harassment claim under Title VII of the Civil Rights Act of 1964).

³ Arguably Congress had racially hostile working environments in mind, though more likely its concern was garden-variety race discrimination.

⁴ 42 U.S.C. § 2000e-2(a) (2000). Passed as the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253.

⁵ See Sexual Harassment Charges, EEOC & FEPA's Combined: FY1992-FY2003, available at <http://www.eeoc.gov/stats/harass.html>.

⁶ 42 U.S.C. § 2000e-2 (2000).

⁷ 401 U.S. 424 (1971).

⁸ *Id.* at 431 (outlining the disparate impact case and noting that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

⁹ The Court explained that the federal common law should track Congress' intent in passing Title VII into law:

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

Id. at 429-30.

¹⁰ See 42 U.S.C. § 2000e-2(a)(2) (2000)(making it an unlawful employment practice "to limit . . . employees . . . 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 . . . sex"). Passed as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075.

¹¹ That "original form" can be traced back to *Griggs* and, years later, *Watson v. Fort Worth Bank Trust Company*. 487 U.S. 977, 986-87 (1988) ("In certain cases, facially neutral employment practices that have significant adverse effects on protected groups have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent.") (emphasis in original).

¹² Sexual harassment law is a "teenager" if its birth is traced to *Meritor Savings Bank v. Vinson*. 477 U.S. 57, 65-66 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s] on the basis of sex.'"). In fact, *Meritor* merely ratified a cause of action (sexual harassment) that lower federal courts had recognized years earlier. *See id.* at 66 ("Since the [Equal Employment Opportunity Commission's 1980

Sexual Harassment] Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”). *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (comparing sexual harassment to unlawful racial harassment and concluding that “[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality”); *see also* Katz. v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983). The EEOC’s Guidelines officially defined sexual harassment as a form of sex discrimination. *See* 29 C.F.R. § 1604.11(a) (2003). Courts had held hostile work environments to be unlawful even before the EEOC issued its *Guidelines*. Within the federal courts, *Rogers v. EEOC* “was apparently the first case to recognize a cause of action based upon a discriminatory work environment.” *See Meritor*, 477 U.S. at 65 (citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971)). *Rogers*, though, was a racial harassment case.

¹³ Judge Robert Bork believed that Congress “was not thinking of individual [sexual] harassment at all but of discrimination in conditions of employment because of gender.” *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (per curiam) (Bork, J., dissenting), *aff’d sub nom. Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). Judge Bork’s dissent was joined by Kenneth Starr and then-Circuit Judge Antonin Scalia. *See also* Richard A. Epstein, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 357 (1992) (“The early cases under Title VII did not regard sexual harassment as a form of sex discrimination because acts of harassment did not reflect official firm policy but were only the individual actions of company personnel exercised for their own benefit.”); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 346 (1990) (arguing that “Congress would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination – especially since the term ‘sexual harassment’ did not come into currency until the late 1970s”). Similarly, there is much to suggest that disparate impact theory was unenvisioned by Congress. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 517 (2003) (“an honest appraisal of the 1964 text and context of Title VII could easily conclude that Congress did not intend to prohibit disparate impact [discrimination] at all”).

¹⁴ *See MACKINNON, supra* note 2, at 116-18.

¹⁵ *See generally* David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1784 (2002) (arguing for a “sex per se” rule in which all sexual conduct is interpreted as “because of sex”); Katherine M. Franke, *What’s Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 772 (1997) (arguing that “sexual harassment is sex discrimination precisely because its use and effect police hetero-patriarchal gender norms in the workplace”).

¹⁶ *See, e.g.*, Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1821 (1992) (arguing that workplace harassment laws violate First Amendment principles and Supreme Court precedent).

¹⁷ One scholar has dismissed disparate impact theory as a basis for liability “not on the ascendancy in Title VII jurisprudence.” *See Schwartz, supra* note 15, at 1773.

¹⁸ In general a “plain meaning” reading of statutes is the textualist’s approach. Textualism is not the same as literalism, which, though generally useful as a mode of statutory interpretation and true to Congress’ chosen words, is also capable of producing strange – if not “[p]erverse and absurd” – statutory interpretations. *See Twisdale v. Snow*, 325 F.3d 950, 953 (7th Cir. 2003).

¹⁹ *See, e.g.*, Schwartz, *supra* note 15, at 1773 (arguing that all sexual conduct should be interpreted as “because of sex”); *see also* Brian Lehman, *Why Title VII Should Prohibit All Workplace Sexual Harassment*, 12 YALE J. L. & FEMINISM 225 (2000) (arguing that courts should prohibit all sexual harassment – even if the conduct is not “because of” sex – simply because overinclusive rules are easier on courts than case-by-case decision-making).

²⁰ Title VII itself protects employees by constituting a “broad rule of workplace equality.” *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

²¹ In general courts prefer not to oversee management decisions as superpersonnel departments. Historically, the Seventh Circuit has been particularly reluctant to take on such oversight. *See, e.g.*, Kariotis v. Navistar Int’l Transp. Corp., 131 F.3d 672, 678 (7th Cir. 1997) (“a court must observe its limitations and ‘not sit as a super-personnel department that reexamines an entity’s business decisions. . . no matter how mistaken the firm’s managers’”) (quoting McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992)).

²² See Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?*”, 81 NEB. L. REV. 1152, 1253 (2003) (“Arguing that non-targeted sexual conduct in the workplace has a disparate impact on women, however, reinforces the stereotype that sex and sexual expression are bad for women, which has disadvantaged women in the past.”). *See also* Ocheltree v. Scollon Prods, Inc., 308 F.3d 351, 365 (4th Cir. 2002) (labeling as “paternalistic” the dissent’s notion that some language left women particularly vulnerable and any notion that imagined “tender sensitivities of contemporary women”), *vacated*, 335 F.3d 325 (4th Cir. 2003) (en banc).

²³ Most disparate impact claims are grounded in evidence of statistical disparities between a policy or practice’s affect on the majority group and a protected class. “The statute [Title VII] does not describe the degree of disparity needed to trigger disparate impact liability.” Primus, *supra* note 13, at 518. The Supreme Court has stated that “rigid mathematical formula[s] are not helpful in determining a disparate (or disproportionate) impact of an employment practice or policy on a protected

group, but that evidence rooted in statistics must indicate disparities “sufficiently substantial” to raise an inference of causation. *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 995 (1988). The EEOC has adopted a rule under which an adverse impact is not ordinarily inferred unless the members of a particular group are selected at a rate that is less than four-fifths of the rate at which the group with the highest rate is selected. *See EEOC’s Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.4(D) (2003).

²⁴ *See, e.g.*, *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001) (“Even after the advent of the affirmative defense outlined in [*Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)], the negligence standard still applies to sexual harassment by coworkers.”); *Courtney v. Landair Transport Inc.*, 227 F.3d 559, 564 (6th Cir. 2000) (The victim of coworker sexual harassment must therefore prove negligence by the employer.”); *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) (stating that the “law of the circuit” in coworker harassment cases is negligence, not strict liability).

²⁵ Disparate impact theory is based on evidence of unique injury. After all, if the injury caused by an employment practice were evenly distributed over protected classes, there would be no basis for a disparate impact claim.

²⁶ *See infra* Part II.

²⁷ *See infra* Part III.

²⁸ *See infra* Part IV.

²⁹ *See id.*

³⁰ *See infra* Part V.

³¹ As one federal court of appeals has noted, this is not uncommon:

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.

Johnson v. Hondo, Inc., 127 F.3d 408, 412 (7th Cir. 1997).

³² “The workplace that is actionable is the one that is ‘hellish.’” *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) (citing *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430, (7th Cir. 1995)).

³³ “The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’” *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (explaining that acts may be unwelcome and yet performed voluntarily by victim of harassment).

³⁴ Vulgar or profane speech is often unavoidable in the workplace because workers are “captive,” in the sense that they are not free to leave. *See Avis Rent-A-Car Sys., Inc. v. Aguilar*, 120 S. Ct. 2020, 2031 (2000) (“[We] have occasionally stated that speech may be more readily restricted when the audience is ‘captive’ and cannot avoid the objectionable speech.”) (Thomas, J., dissenting from denial of writ of certiorari).

³⁵ *See, e.g.*, *Holman v. Indiana*, 211 F.3d 399, 404 (7th Cir. 2000) (stating that is not “anomalous for a Title VII remedy to be precluded when both sexes are treated badly” because “Title VII is predicated on discrimination”).

³⁶ *See, e.g.*, *Ocheltree v. Scollon Prods, Inc.*, 308 F.3d 351, 359 (4th Cir. 2002) (“The uncontested evidence demonstrated that the men engaged in the same type of behavior before Ocheltree began working at Scollon Productions.”), *vacated*, 335 F.3d 325 (4th Cir. 2003) (*en banc*).

³⁷ Title VII of the Civil Rights Act of 1964 prohibits discrimination “because of . . . [an] individual’s . . . sex” (or race, color, religion, or national origin). 42 U.S.C. § 2000e-2(a)(1) (2000).

³⁸ That describes the typical dictionary definition of the term “because of.” *See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY* 194 (1993). *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (“The critical inquiry, the one commanded by the words of [the statute], is whether gender was a factor in the employment decision *at the moment it was made.*”) (emphasis in original).

³⁹ Evidence that a similarly situated employee was treated more favorably is crucial to the plaintiff’s case. “If a district court determines that a plaintiff has failed to identify a similarly situated co-worker outside of her protected class, or that the co-worker identified by the plaintiff, while similarly situated, was not treated in a more favorable manner, it need not address any of the underlying allegations of disparate treatment.” *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 331 (7th Cir. 2002); *see also Los Angeles Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978) (finding that an employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, “does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”) (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971) (unauthored)).

⁴⁰ *See Price Waterhouse*, 490 U.S. at 250 (“In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.”).

⁴¹ 477 U.S. 57 (1986).

⁴² *Id.* at 64 (stating that Title VII “evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment”) (internal citation omitted).

⁴³ 510 U.S. 17 (1993).

⁴⁴ *Id.* at 21 (quoting *Meritor*’s language and adding that in a sexual harassment case, the unlawful “disparate treatment of men and women in employment . . . includes requiring people to work in a discriminatorily hostile or abusive environment”).

⁴⁵ Compare *La Day v. Catalyst Technology, Inc.*, 302 F.3d 474, 490 (5th Cir. 2002) (reversing summary judgment in same-sex harassment case where evidence suggested harasser may have been homosexual and interested in plaintiff) with *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1064-65 (7th Cir. 2003) (affirming summary judgment in same-sex harassment case where the incidents directed at plaintiff implied he was either a poor performer or gay).

⁴⁶ See *Davis v. Coastal Int’l Sec. Agency*, 275 F.3d 1119, 1124 (D.C. Cir. 2002) (determining that vulgarity exchanged between two male coworkers involved “a gross workplace dispute” and not one consisting of unlawful sex discrimination); *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 261 (4th Cir. 2001) (acknowledging that comments directed at the plaintiff were sexual, but not uttered because of the plaintiff’s sex); *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997) (determining that vulgarity described by plaintiff, such as “suck my dick,” were profane but not prompted by plaintiff’s sex).

⁴⁷ Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a) (2000).

⁴⁸ “In sum, we hold that a claim of ‘hostile environment’ sex discrimination is actionable under Title VII.” *Meritor*, 477 U.S. at 73.

⁴⁹ This conclusion follows from the Court’s decision to term the cause of action “hostile environment sex discrimination,” *id.*, and from the Court’s holding that a hostile environment is actionable because it is *caused by* sex discrimination. See *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”).

⁵⁰ See *Ocheltree v. Scollon Prods, Inc.*, 308 F.3d 351 (4th Cir. 2002), vacated, 335 F.3d 325 (4th Cir. 2003) (en banc). For simplicity, the original Fourth Circuit decision found at 308 F.3d 351 will be referred to as *Ocheltree I* and the en banc decision found at 335 F.3d 325 will be referred to as *Ocheltree II*.

⁵¹ In a nutshell, this fairly summarizes the *Ocheltree* case, which is discussed in detail in Part III, *infra*.

⁵² See, e.g., *Ocheltree v. Scollon Prods, Inc.*, 308 F.3d 351, 375 (4th Cir. 2002) (Michael, J., dissenting) (“I believe, however, that the ‘because of sex’ requirement allows for more interpretive flexibility than the majority recognizes.”), vacated, 335 F.3d 325 (4th Cir. 2003) (en banc).

⁵³ See *Franke, supra* note 15, at 772 (“The wrong of sexual harassment must consist of something more than that the conduct would not have occurred ‘but for’ the sex of the target [S]exual harassment is sex discrimination precisely because its use and effect police heteropatriarchal gender norms in the workplace.”).

⁵⁴ See *Ocheltree*, 308 F.3d at 376 (Michael, J., dissenting) (“[T]here is an . . . obvious sense in which women in an atmosphere saturated with remarks demeaning to women are ‘exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed’ precisely because the language heard by both women and men is more demeaning to women than to men.”).

⁵⁵ 510 U.S. 17 (1993).

⁵⁶ *Id.* at 25 (Ginsburg, J., concurring).

⁵⁷ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁵⁸ After all, *Griggs* was, in fact, a disparate impact case.

⁵⁹ 523 U.S. 75 (1998).

⁶⁰ *Id.* at 76.

⁶¹ As the Court explained, “[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.” *Id.* at 79.

⁶² The Court referred to the lower courts’ decisions on the same-sex harassment issue as reflecting “a bewildering variety of stances.” *Id.*

⁶³ Justice Scalia’s textualism in the Title VII context is reflected in his preference to use the term “sex” rather than “gender.” *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) (criticizing the Court’s interchangeable usage of the terms “sex” and “gender”).

⁶⁴ See *Oncake*, 523 U.S. at 80.

⁶⁵ It should be no surprise that Judge Michael, the dissenter in *Ocheltree I*, found Justice Ginsburg’s formula to support his argument that Ocheltree had a viable disparate impact claim. 308 F.3d at 375-76 (arguing that his belief that Title VII’s “because of sex” language allows for “interpretive flexibility” is “inherent” in Justice Ginsburg’s formulation). Judge Michael concedes that both men and women at Scollon were exposed to vulgar and profane language. “Yet there is an equally obvious sense in which women in an atmosphere saturated with remarks demeaning to women are ‘exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed’ precisely because the language heard by both women and men is more demeaning to women than to men.” *Id.* at 376.

⁶⁶ For Judge Michael, “workplace comments portraying women as sexually subordinate to men qualify as harassment ‘because of sex’ even absent any evidence of intent. *Id.*

⁶⁷ *Oncake* allowed that in a same-sex (female) context, “[a] trier of fact might reasonably find . . . discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is *motivated* by general hostility to the presence of women in the workplace.” 523 U.S. at 80 (emphasis added).

⁶⁸ See, e.g., *Brill v. Lante Corp.*, 119 F.3d 1266, 1272 (7th Cir. 1997) (“Courts refuse to sit in judgment as super-personnel departments overseeing corporate decisions, even if some judges think the decisions to be mistaken or perplexing or silly.”). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (explaining that Title VII’s prohibitory language “describes only one aspect” of the statute and that “[t]he other important aspect of the statute is its preservation of an employer’s remaining freedom of choice”).

⁶⁹ In the words of the Supreme Court, the reason the employer would give “at the moment of the [employment] decision,” assuming a truthful response. *See id.* at 250.

⁷⁰ See *Brill*, 119 F.3d at 1271 (explaining that “[t]he question is not whether Brill [the plaintiff] actually referred to a client as an ‘idiot’ and suggested that he be shot; what is important is Lante’s *honest belief* that she said those things”).

⁷¹ See, e.g., *id.*; see also *Kariotis v. Navistar*, 131 F.3d 672, 676 (7th Cir. 1997) (affirming summary judgment in case where court criticized employer’s investigation of employee while she was off-duty but nevertheless held that the “honest belief” rule doomed plaintiff’s case).

⁷² “In other words, arguing about the accuracy of the employer’s assessment is a distraction, because the question is not whether the employer’s reasons for a decision are ‘right’ but whether the employer’s description of its reasons is *honest*.⁷³” *Sweeney v. West*, 149 F.3d 550, 557 (7th Cir. 1998) (internal citations omitted).

⁷³ 401 U.S. at 429-30. As the Supreme Court explained in *Griggs*, “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” *Id.*

⁷⁴ See *Lynch v. Freeman*, 817 F.2d 380, 381 (6th Cir. 1987).

⁷⁵ See *DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 436 (7th Cir. 2000).

⁷⁶ *Lynch*, 817 F.2d at 381-82.

⁷⁷ *Id.*

⁷⁸ *DeClue*, 223 F.3d at 436.

⁷⁹ *Id.*

⁸⁰ *Id.* at 437.

⁸¹ *Lynch*, 817 F.2d at 389.

⁸² *Id.* at 383.

⁸³ *DeClue*, 223 F.3d at 437 (“But this case has not been litigated as a disparate-impact case.”).

⁸⁴ See *Lynch*, 817 F.2d at 387 (explaining that “[w]hen it is shown that employment practices place a heavier burden on minority employees than on members of the majority, and this burden relates to characteristics which identify them as members of the protected group, the requirements of a Title VII disparate impact case are satisfied”).

⁸⁵ 510 U.S. at 25 (Ginsburg, J., concurring).

⁸⁶ The president of Harris’ company often insulted her because of her sex and made her the target of unwelcome sexual innuendoes. 510 U.S. at 19. At one point he suggested that the two of them “go to the Holiday Inn to negotiate [Harris’] raise.” *Id.* On other occasions he asked Harris and her female coworkers to get coins from his front pants pocket. *Id.*

⁸⁷ The *Lynch* court found that Title VII’s language “is clearly broad enough to include working conditions that have an adverse impact on a protected group of employees.” 817 F.2d at 387. The court noted that unsanitary toilets limited female employees “in a way that adversely affected their status as employees based solely on their sex.” *Id.*

⁸⁸ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (in a disparate impact case a court is concerned with “the consequences of employment practices, not simply the motivation”) (emphasis in original). Of course, there is no reason that a plaintiff could not bring *both* disparate treatment and disparate impact claims against her employer. Eileen Lynch did just that. 817 F.2d at 380. The trial court treated her claims separately and rejected them both. *Id.* The Sixth Circuit rejected Lynch’s appeal of the trial court’s decision on her disparate *treatment* claim. *See id.* at 386.

⁸⁹ Technically, in allowing for the disparate impact claim, the Supreme Court interpreted – not added to – Title VII’s terms. *Griggs*, 401 U.S. at 431; see also *Connecticut v. Teal*, 457 U.S. 440, 448 (1982).

⁹⁰ See 42 U.S.C. § 2000e-2(a)(2) (making it an unlawful employment practice “to limit . . . employees . . . 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 . . . sex”). Passed as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075.

⁹¹ See *Meritor Saws. Bank v. Vinson*, 477 U.S. 57, 65-67 (1986).

⁹² See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977) (determining that district court was not wrong “in holding that [Alabama’s] statutory height and weight standards [for correctional officers] had a discriminatory impact on women applicants”).

⁹³ Here I am appealing to the same logic that the Supreme Court correctly applied in *Oncale* in determining that same-sex harassment was unlawful under Title VII. *See Oncale*, 523 U.S. at 79 (finding no justification in “the statutory language” for a “categorical rule excluding same-sex harassment claims”).

⁹⁴ *See Leibovitz v. New York City Trans. Authority*, 252 F.3d 179, 182 (2nd Cir. 2001).

⁹⁵ *See id.*

⁹⁶ *See Leibovitz v. New York City Trans. Authority*, 4 F. Supp. 144, 146 (E.D.N.Y. 1998), *rev'd*, 252 F.3d 179 (2nd Cir. 2001).

⁹⁷ 252 F.3d at 182.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 182-83.

¹⁰¹ 4 Supp. 2d at 150 (“Plaintiff suffered emotional trauma . . . directly traceable to the sexually harassing environment in her workplace.”).

¹⁰² 4 Supp. 2d at 152 (finding “sufficient evidence of widespread gender-based harassment for the jury to find a hostile work environment”).

¹⁰³ *Id.* at 146.

¹⁰⁴ *Id.* at 152.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See id.* at 147.

¹⁰⁸ 252 F.3d at 182.

¹⁰⁹ 4 F. Supp. 2d at 152.

¹¹⁰ 252 F.3d at 183.

¹¹¹ At oral argument before the federal appeals court, Leibovitz’s attorney conceded that her injury rested solely on the alleged harassment of other women out of her presence. *Id.*

¹¹² *See id.*

¹¹³ *See Leibovitz v. New York City Transit Auth.*, 4 F. Supp. 2d 144 (E.D.N.Y. 1998).

¹¹⁴ *See Leibovitz v. New York City Transit Auth.*, 252 F.3d 179, 189 (2nd Cir. 2001).

¹¹⁵ *See id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See id.* at 190.

¹¹⁹ *Id.*

¹²⁰ *See id.* at 189.

¹²¹ *Id.* at 190.

¹²² 753 F.2d 141 (D.C. Cir. 1985).

¹²³ 477 U.S. 57 (1986).

¹²⁴ *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

¹²⁵ *But see Leibovitz*, 252 F.3d at 189 (characterizing Leibovitz’s environment as hostile “by expanding the concept of environment to include venues in which she did not work” is not the answer because it would “open the door to limitless employer liability, and allow a recovery by any employee made distraught by office gossip, rumor or innuendo”).

¹²⁶ *Compare Rodgers v. W.S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (“Perhaps no single act can more quickly ‘alter the conditions of employment and create an abusive working environment’ than the use of an unambiguously racial epithet such as ‘nigger’ by a supervisor in the presence of his subordinates.”) (citing *Bailey v. Binyon*, 583 F. Supp. 923, 927 (N.D. Ill. 1984) (“The use of the word ‘nigger’ automatically separates the person addressed from every non-black person; this is discrimination *per se*.”)), *with Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 552 n.14 (7th Cir. 2002) (noting that in the case before it the use of the word ‘nigger,’ while “highly offensive” was made only once, was made by a coworker and not a supervisor, and management suspended the employee involved).

¹²⁷ *See Amy Adler, What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV.

1499, 1553 (1996) (“Blacks also debate the resurgent appropriation of the word ‘nigger’ within their community. While some maintain that the co-option of this term can be empowering, others mourn the reemergence of the word and its hateful connotation.”).

¹²⁸ *See supra* text accompanying notes 114-117.

¹²⁹ *See Lyle v. Warner Bros. Tele. Prods.*, 12 Cal. Rptr. 3d 511 (Cal. Ct. App. 2004).

¹³⁰ *See id.* at 512-13.

¹³¹ *Id.* at 513.

¹³² *Id.*

¹³³ *Id.* at 515.

¹³⁴ *Id.* at 516.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 517.

¹⁴¹ *Id.*

¹⁴² *Id.* at 518, 520.

¹⁴³ *Id.* at 520.

¹⁴⁴ CAL. GOVT. CODE ANN. § 12900 et seq. (West 1992).

¹⁴⁵ 42 U.S.C. § 2000e-2(a)(1) (2000).

¹⁴⁶ CAL. GOVT. CODE ANN. § 12940(h) (West 1992).

¹⁴⁷ *Id.* at 515.

¹⁴⁸ *Id.* at 519-20.

¹⁴⁹ *Id.* at 514.

¹⁵⁰ *Id.*

¹⁵¹ See *Brill v. Lante Corp.*, 119 F.3d 1266, 1270 (7th Cir. 1997).

¹⁵² *See id.*

¹⁵³ 12 Cal. Rptr. 3d 511.

¹⁵⁴ *See id.* at 514.

¹⁵⁵ *Id.* at 517.

¹⁵⁶ *Id.* at 514.

¹⁵⁷ *Id.* at 515.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 514-15.

¹⁶⁰ *Id.* at 515.

¹⁶¹ See Franke and Schwartz, *supra* note 15.

¹⁶² See *Doe v. City of Bellevue*, 119 F.3d 563, 593 (7th Cir. 1997) (questioning “whether it makes a whit of difference why [the plaintiff] was singled out for abuse” considering the fact that his genitals were grabbed to determine his gender and a coworker regularly threatened to sexually assault him).

¹⁶³ See *supra* text accompanying notes 144-46.

¹⁶⁴ Compare *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) (Scalia, J., writing for the Court) (“The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace.”); *with Oncale*, 523 U.S. at 82 (Thomas, J., concurring) (“I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII’s statutory requirement that there be discrimination ‘because of . . . sex.’”). Some scholars mischaracterize the law, too. See Franke, *supra* note 15, at 772 (urging renewed attention “to the ‘based on sex’ element of the plaintiff’s case”).

¹⁶⁵ See *Lyle*, 12 Cal. Rptr. 3d at 515 (seeking to “further clarify the ‘based on sex’ element of a harassment cause of action”).

¹⁶⁶ See Franke and Schwartz, *supra* note 15.

¹⁶⁷ See *supra* text accompanying notes 133-141.

¹⁶⁸ Based on Lyle’s reported evidence, there is no reason to believe that the writers would have acted any differently in the meetings had Lyle been a man.

¹⁶⁹ See *Oncale*, 523 U.S. at 80 (rejecting *Doe*’s “suggest[ion] that workplace harassment that is sexual in content is always actionable, regardless of the harasser’s . . . motivations” by saying that “[w]e have never held that workplace harassment . . . is automatically discrimination because of sex merely because the words used have sexual content or connotations”).

¹⁷⁰ See *Lyle*, 12 Cal. Rptr. 3d at 515 (“Because the FEHA, like Title VII, is not a fault based tort scheme, unlawful sexual harassment can occur even when the harassers do not realize the offensive nature of their conduct or intend to harass the victim.”).

¹⁷¹ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (“Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

¹⁷² See *Lyle*, 12 Cal. Rptr. 3d at 518.

¹⁷³ *Id.* at 520.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988) (“In certain cases, facially neutral employment practices that have significant adverse effects on protected groups have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent.”).

¹⁷⁷ See Lyle, 12 Cal. Rptr. 3d at 514-15.

¹⁷⁸ See, e.g., Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997) (allowing that plaintiff’s claim of harassment must be evaluated in the context of his all-male, blue-collar work environment, because “unfortunately, expressions such as ‘fuck me,’ ‘kiss my ass,’ and ‘suck my dick,’ are commonplace in certain circles”); Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537-38 (10th Cir. 1995) (evaluating plaintiff’s harassment claim in the context of his “real world of construction work,” where “profanity and vulgarity are not perceived as hostile or abusive,” as opposed to “a prep school faculty meeting or on the floor of Congress”).

¹⁷⁹ See Johnson, 125 F.3d at 412 (concluding that, more often than not, some vulgar and profane expressions are not uttered because of sex “particularly when uttered by men speaking to other men”).

¹⁸⁰ See id.; compare Franke, *supra* note 15, at 759 (“Workplace sexual conduct may injure women because it objectifies them as sex objects, and it may injure men because it assumes that all men conform to and join into a kind of sexualized hetero-masculine culture.”).

¹⁸¹ Perhaps it is a generational problem, too. See Galloway v. General Motors Serv. Parts Oper., 78 F.3d 1164, 1168 (7th Cir. 1996) (“some heterosexual male teenagers have taken recently to calling each other ‘bitch’”). Children are becoming sexualized at an earlier age. See Gary W. Harper, *Contextual Factors That Perpetuate Statutory Rape: The Influence of Gender Roles, Sexual Socialization, and Sociocultural Factors*, 50 DEPAUL L. REV. 897, 913 (2001).

¹⁸² Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 354 (4th Cir. 2002), vacated, 335 F.3d 325 (4th Cir. 2003) (en banc).

¹⁸³ 335 F.3d at 328-29.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 328-29.

¹⁸⁶ *Id.* at 328.

¹⁸⁷ *Id.* at 329.

¹⁸⁸ *Id.* at 328.

¹⁸⁹ This fact comes from the original panel’s opinion in *Ocheltree I*. Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 354 (4th Cir. 2002), vacated, 335 F.3d 325 (4th Cir. 2003) (en banc).

¹⁹⁰ 335 F.3d at 329.

¹⁹¹ *Id.* at 330.

¹⁹² See *Ocheltree I*, 308 F.3d at 359.

¹⁹³ *Id.* at 358-59.

¹⁹⁴ *Id.* at 357 (“[T]he uncontested evidence demonstrated that the men’s behavior did not begin or change as of the date Ocheltree began working with Scollon Productions but had been ongoing before she came to work for Scollon Productions.”).

¹⁹⁵ *Id.* at 358 (noting that “Ocheltree conceded that the conduct was equally offensive both to men and women” and that two of her coworkers “complained to management about the other workers’ behavior”).

¹⁹⁶ The court noted that one coworker testified during the trial that the men’s behavior “worsened after Ocheltree complained.” *Id.* at 359.

¹⁹⁷ *Id.* (“[T]here is no evidence that those participating in the offensive conduct were attempting to bother [Ocheltree] because of her gender.”).

¹⁹⁸ *Id.* at 372 (Michael, J., dissenting).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 374.

²⁰¹ *Id.* at 372.

²⁰² Such as Schwartz, *id.* See *supra* note 15.

²⁰³ *Ocheltree*, 308 F.3d at 375 (arguing that “pervasive workplace comments depicting women as sexually subordinate to men constitute harassment ‘because of sex’”).

²⁰⁴ *Id.*

²⁰⁵ See *Ocheltree v. Scollon Prods.*, 335 F.3d 325 (4th Cir. 2003).

²⁰⁶ See *id.* at 331-36.

²⁰⁷ *Id.* at 332.

²⁰⁸ See *id.* at 337 (Williams, J., dissenting).

²⁰⁹ *Id.* at 341-42.

²¹⁰ *Id.* at 342.

²¹¹ See *supra* text accompanying notes 115-17.

²¹² See Leibovitz v. New York City Transit Auth., 252 F.3d 179, 190 (2nd Cir. 2001) (allowing that evidence of harassment directed at coworkers may be relevant to an employee’s own claim of hostile work environment discrimination).

²¹³ See *supra* text accompanying notes 133-41.

²¹⁴ See *supra* text accompanying notes 185-90.

²¹⁵ After all, Lyle worked in a professional environment while Ocheltree worked in the blue-collar world.

²¹⁶ See *supra* text accompanying notes 133-41.

²¹⁷ The victory was partial because the court set aside the jury's punitive damages award. *Ocheltree v. Scollon Prods.*, 335 F.3d 325, 336 (4th Cir. 2003) (en banc).

²¹⁸ See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. REV. 1683, 1795 (1998) (citing research suggesting that "where men and women work alongside each other in balanced numbers . . . sexual talk and joking occurs with frequency, but is not experienced as harassment").

²¹⁹ See Adler, *supra* note 127.

²²⁰ See *Oncale v. Sundowner Offshore Servs, Inc.*, 523 U.S. 75, 82 (1998).

²²¹ See *id.* at 81.

²²² *Id.* at 82.

²²³ See *supra* text accompanying notes 115-19.

²²⁴ See *supra* text accompanying notes 172-74.

²²⁵ See *supra* notes 178-79 and accompanying text.

²²⁶ Cf. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 593 (2001) (studying reported federal court cases involving sexual harassment and finding that male victims comprised less than 6% of the cases).

²²⁷ See, e.g., Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2154 (2003) (citing social science research indicating that sexual and sexist jokes, and other "inside humor" shared by men, are harmful not because of their sexuality but because they relegate women to outsider status).

²²⁸ See *DeClue v. Central Ill. Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000).

²²⁹ See *id.* at 438 (Rovner, J., dissenting) (arguing that "[i]f men are less reluctant to urinate outdoors, it is in significant part because they need only unzip and take aim").

²³⁰ See *supra* text accompanying note 210.

²³¹ See *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 72 (1986) (holding that Title VII does not make employers "always automatically liable for sexual harassment by their supervisors").

²³² Liability follows unless the employer can establish that its challenged practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

²³³ See 42 U.S.C. § 1981a(a)(1) (2000).

²³⁴ 524 U.S. 775 (1998).

²³⁵ 524 U.S. 742 (1998).

²³⁶ See *Faragher*, 524 U.S. at 807-08 (adopting the rule that an employer is vicariously liable for supervisory sexual harassment that is accompanied by a tangible job action, but may raise an affirmative defense in other cases); *Ellerth*, 524 U.S. at 765 (articulating the same standard).

²³⁷ See RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958) (noting that generally a master is not subject to liability for the torts of his servants acting outside the scope of their employment but could be liable if the servant "was aided in accomplishing the tort by the existence of the agency relation"). See also *Faragher*, 524 U.S. at 792 (noting that *Meritor* cited the RESTATEMENT "with general approval").

²³⁸ See *Faragher*, 524 U.S. at 802 (agreeing with Faragher that "it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority").

²³⁹ See RESTATEMENT, § 219(2) Comment e.

²⁴⁰ See *Faragher*, 524 U.S. at 785.

²⁴¹ *Meritor*, 477 U.S. at 72.

²⁴² See *Faragher*, 524 U.S. at 785 (citing the Courts of Appeals' "different approaches" on the employer liability issue).

²⁴³ See *id.* at 804 n.4 (determining that *stare decisis* commanded it to follow *Meritor*, but also drawing meaning from Congress' "decision" to leave *Meritor* intact after enacting the Civil Rights Act of 1991).

²⁴⁴ *Id.* at 805-06 (noting that while Title VII seeks to make injured individuals whole, its "primary objective . . . is not to provide redress but to avoid harm").

²⁴⁵ Cf. Juliano & Schwab, *supra* note 226, at 593 (reporting that 80% of the cases in their study involved supervisory harassment at least in part).

²⁴⁶ See *Faragher*, 524 U.S. at 803 (finding it important in establishing a standard of employer liability that employers have the "opportunity and incentive to screen [their supervisors], train them, and monitor their performance").

²⁴⁷ *Id.* at 807-08.

²⁴⁸ See *id.*

²⁴⁹ See Schultz, *supra* note 227, at 2090-2100 (describing Corporate America's anti-harassment efforts).

²⁵⁰ *Brill v. Lante Corp.*, 119 F.3d 1266, 1270 (7th Cir. 1997).

²⁵¹ See Suders v. Easton, 325 F.3d 432, 461 (3rd Cir. 2003).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ “The workplace that is actionable is the one that is ‘hellish.’” Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997).

²⁵⁶ See *Faragher*, 524 U.S. at 806 (discussing standards of liability in the context of creating incentives for employers and “giv[ing] credit to employers who make reasonable efforts” to deter harassment).

²⁵⁷ *Id.* at 807 (holding that no liability should be found against the employer “[i]f the victim could have avoided harm”); *Ellerth*, 524 U.S. at 764 (“As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.”) (internal citation omitted).

²⁵⁸ In an increasingly high-tech world, many incidents of harassment may be undetectable by employers despite their keeping a look-out.

²⁵⁹ See *Frazier v. Delco Elec. Corp.*, 263 F.3d 663, 665 (7th Cir. 2001) (reversing summary judgment against employee on her harassment claim in case where coworker stalked and terrorized employee).

²⁶⁰ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999) (“[schools] may be liable for their deliberate indifference to known acts of peer sexual harassment”); see also *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274, 290 (1998) (making school districts liable for damages in cases where they are deliberately indifferent to teacher-student harassment).

²⁶¹ Compare 20 U.S.C. § 1681(a) (Title IX) with 42 U.S.C. § 2000e-2(a)(1) (Title VII).

²⁶² See *Davis*, 526 U.S. at 651 (using *Meritor* and *Oncake* – Title VII opinions – to inform the Court’s decision in case at hand).

²⁶³ *Id.* at 643 (concluding that, in certain circumstances, deliberate indifference to known acts of harassment amounts to an intentional violation of Title IX).

²⁶⁴ See *Faragher*, 524 U.S. at 799 (noting that federal courts “uniformly judg[e] employer liability for coworker harassment under a negligent standard”).

²⁶⁵ See *id.*; see also Equal Employment Opportunity Commission Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(d) (2003) (employer is liable for co-worker harassment if it “knows or should have known of the conduct”).

²⁶⁶ Tort law certainly distinguishes between intentional and unintentional acts, as does criminal law.

²⁶⁷ See Frances E. Zollers & Elletta Sangrey Callahan, *Workplace Violence and Security: Are There Lessons For Peacemaking?* 36 VAND. J. TRANSNAT'L L. 449, 470 (2003) (noting that many employers “have decided to monitor the workplace to determine if harassment is taking place”).

²⁶⁸ See *id.* at 470-71 (suggesting that the fear of liability has caused employers to monitor emails and other worker interactions).

²⁶⁹ See *Faragher*, 524 U.S. at 799-801 (rejecting adoption of negligence standard in case before the Court).

²⁷⁰ Cf. *Davis*, 526 U.S. at 645 (clarifying that the deliberate indifference “must, at a minimum, ‘cause students to undergo’ harassment or ‘make them liable or vulnerable’ to it”).

²⁷¹ *Leibovitz v. New York City Trans. Auth.*, 4 Supp. 2d 144, 147 (E.D.N.Y. 1998).

²⁷² *Id.* at 153-54.

²⁷³ *Id.* at 153.

²⁷⁴ “Such a characterization would open the door to limitless employer liability, and allow a recovery by any employee made distraught by office gossip, rumor or innuendo.” *Leibovitz v. New York City Trans. Auth.*, 252 F.3d 179, 189-90 (2nd Cir. 2001).

²⁷⁵ *Id.* at 183.

²⁷⁶ *Id.*

²⁷⁷ According to the district court, the Transit Authority “did ultimately investigate the complaints and reach internal determinations on their merits.” 4 Supp. 2d at 147.

²⁷⁸ See *Lyle v. Warner Bros. Tele. Prods.*, 12 Cal. Rptr. 3d 511, 513 (Cal. Ct. App. 2004).

²⁷⁹ *Id.*

²⁸⁰ See *Vaughn v. Pool Offshore Co.*, 683 F.2d 922 (5th Cir. 1982).

²⁸¹ *Id.* at 923.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 924.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at n.2.

²⁹⁰ *Id.* at 924.

²⁹¹ See *id.* (“Vaughn used racial slurs along with his co-employees.”).

²⁹² *Id.* at 925 (“nearly all rig employees were victims of the pranks at one time or another”).

²⁹³ *Id.* (testifying that “its just what they [his coworkers] did, you know”).

²⁹⁴ 454 F.2d 234 (5th Cir. 1971).

²⁹⁵ 683 F.2d at 924.

²⁹⁶ *Id.*

²⁹⁷ 401 U.S. 424 (1971).

²⁹⁸ 683 F.2d at 925 n.3.

²⁹⁹ Meritor Savs. Bank v. Vinson, 477 U.S. 57, 65 (1986).

³⁰⁰ 454 F.2d at 238-39.

³⁰¹ It is fair to take the single-sex makeup into account because *Oncale* directs courts to consider the plaintiff’s “social context” in these cases. 523 U.S. at 82.

³⁰² *Vaughn*, 683 F.2d at 924.

³⁰³ See *id.* (describing incidents in which the toolpusher supported Vaughn).

³⁰⁴ *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc).

³⁰⁵ See *id.* at 329-30.

³⁰⁶ *Id.* at 329.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 330.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 334.

³¹⁵ *Id.* at 334-35.

³¹⁶ *Id.* at 335.

³¹⁷ But see *Lyle v. ESPN Zone*, 292 F. Supp. 2d 758, 765 (D. Maryland 2003) (finding that a “dysfunctional” anti-harassment policy justifies imputing constructive notice of harassment to employer) (citing *Ocheltree*, 335 F.3d at 334).

³¹⁸ See *supra* text accompanying notes 309-13.

³¹⁹ See *supra* Parts III-IV.

³²⁰ See *supra* note 204 and accompanying text.

³²¹ See Schwartz and Franke, *supra* note 15.

³²² See *supra* Part I.

³²³ See *Faragher*, 524 U.S. at 805 (rejecting one formula for employer liability because “the temptation to litigate would be hard to resist”).

³²⁴ See *supra* Part III.

³²⁵ See *supra* Parts IV-V.

³²⁶ See Schultz, *supra* note 227, at 2163 (“We should ask ourselves: Is this really the world we want to inhabit? Has feminism really nothing better to offer than an impoverished vision of a workplace sanitized of all sexuality and passion, in the name of protecting women?”)