INTRODUCTION

Most people spend a good deal of their adult lives in the workplace. For many, the workplace is a comfortable atmosphere where

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1. In a recent gallup poll of American workers, 84% of those polled said that they worked more than 35 hours per week, with a total of 39% saying they worked over 45 hours per week, and 12% over 60 hours per week. Job Dissatisfaction Grows: “Moonlighting on

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they can interact with colleagues and friends.\(^2\) It might be an exciting or mundane place, but when job dissatisfaction occurs it is generally tied to work related issues such as employee benefits, wages, work content, job security, work related stress, or lack of mobility.\(^3\) For some workers however, the workplace is a place of fear and emotional victimization, not based on any job related dynamic, but on reactions to their gender, race, color, religion, national origin, age, or disability.\(^4\) These individuals are forced to run a gauntlet of conduct aimed at harassing them based on traits beyond their control. It is to this situation that the evolving law of workplace harassment addresses.\(^5\)

Because the law regarding workplace harassment is still evolving, employees and employers alike face a huge burden with regard to proving and defending harassment claims. Employers are often held liable under a legal framework that does not clearly delineate their

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\(^1\) See the Rise," \(^2\) Id. (poll showing that four out of five people look forward to going to work).

\(^3\) Id. at 5 (summarizing polls which show that workers are most dissatisfied with health insurance, other benefits, chances for promotion, wages, and on the job stress, with health benefits and more interesting work topping the list of most desirable job characteristics).

\(^4\) Id. at 5-13 (several polls relating to job satisfaction).


\(^6\) See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993) (upholding actionability of sexual harassment regardless of the existence of tangible loss to victims and acknowledging applicability of the hostile work environment theory to other classes protected under Title VII); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-67 (1986) (same); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (comparing sexual and racial harassment, and holding that being forced to "run a gauntlet" of abuse in order to continue working is demeaning, disconcerting, and if it reaches the appropriate level, a violation of Title VII).
duties with regard to harassment, and which sometimes alters those duties once they are delineated.\textsuperscript{6} Likewise, employees who are harassed based on membership in a protected class have often been denied redress because their rights are not clearly defined.\textsuperscript{7} Thus, both employees and employers would benefit from the development of analytical structures for evaluating emerging concepts in the law of workplace harassment.

This paper focuses on an important issue raised by the evolving law applicable to workplace harassment -- how the recently recog-

\begin{itemize}
\item \textbf{6.} In \textit{Meritor}, the only Supreme Court case to address the standards to be applied to employer liability for workplace harassment, the Court failed to set forth a clear rule for determining such liability, but rather noted that general agency principles should apply to determine employer liability for hostile work environment claims:

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C.\textsuperscript{7} § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

\textit{Meritor}, 477 U.S. at 72. Prior to \textit{Meritor}, the EEOC had advocated strict liability for the acts of agents and supervisors. See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. \textsuperscript{7} § 1604.11(c) (1993) (employer is liable regardless of whether the acts complained of were authorized or forbidden by the employer, and regardless of whether the employer knew or should have known of their occurrence). Since \textit{Meritor}, the EEOC has altered its position. See EEOC: Policy Guidance on Sexual Harassment, 405 Fair Empl. Prac. Man. (BNA) 6681, 6693-99 (March 19, 1990) (applying agency principles to determine liability for acts of agents and supervisors, including whether the employer knew or should have known of the occurrences).

\item \textbf{7.} See, e.g., Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), \textit{cert. denied}, 481 U.S. 1041 (1987) (sexual harassment victim who worked in an office where pornographic pictures were sometimes displayed, and who was subjected to obscene and vulgar comments by a supervisory employee who did not supervise her, was denied relief because she could not demonstrate the conduct seriously affected her psychological well being); Turley v. Union Carbide Corp., 618 F. Supp. 1438, 1441-42 (S.D. W.Va. 1985) (interpreting Title VII concepts as applied to West Virginia law, and holding that a harassment victim alleging that she was constantly picked on by her foreman could not succeed on her harassment claim in the absence of conduct of a purely sexual nature). Significantly, under current law, both of these cases would likely have come out differently. In \textit{Harris}, 114 S. Ct. at 370-71, the Supreme Court specifically held that conduct need not seriously affect a victim's psychological well being or cause injury to be actionable, and several circuit courts of appeals have held that non-sexual, gender based conduct can create or contribute to a hostile work environment. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Hall v. Gus Constr. Co., 842 F.2d 1010, 1013-14 (8th Cir. 1988); McKinney v. Dole, 765 F.2d 1129, 1137-40 (D.C. Cir. 1985). See infra Parts I and III for a more detailed discussion of gender harassment.
\end{itemize}
nized concept of gender harassment should be treated in light of the existing concept of sexual harassment. The relationship between gender and sexual harassment is unique, because both are based on the same statutory mandate, yet, as the EEOC recently recognized, their underlying natures are different. Gender harassment is analogous to harassment aimed at other protected classes that are characterized by a single immutable trait, such as race or national origin, while sexual harassment is part of a related, but different,

(a) It shall be an unlawful employment practice for an employer-
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

Thus, both gender and sexual harassment arise from the same statutory prohibition of discrimination in the terms, conditions, or privileges of employment, and are based on the same protected classification.

9. See Supplementary Information to EEOC Proposed Guidelines, 58 Fed. Reg. at 51,266-68, withdrawn 58 Fed. Reg. 51,396-01 (1994) (noting that sexual harassment should be treated separately from gender harassment and harassment aimed at other protected classes, because sexual harassment raises unique issues about human interaction); See discussion infra Parts I and III which discusses the appropriate relationship between gender and sexual harassment. The withdrawal of the proposed guidelines does not vitiate the EEOC’s statement and acknowledgement that sexual harassment is unique and raises issues about human interaction not raised by other types of harassment, including gender harassment. That statement is also supported by social science data. See infra notes 11-13 and accompanying text. Nor does the withdrawal of the proposed guidelines vitiate the application of the standards set forth therein to harassment based on race, religion, gender, national origin, age, or disability. See EEOC: Enforcement Guidance on Harris v. Forklift Systems, 405 Fair Empl. Prac. Man. (BNA) 7165, 7170 (March 8, 1994) (noting applicability of standard virtually identical to hostile work environment standard set forth in the Proposed Guidelines to harassment based on race, religion, gender, national origin, age, and disability).

A fine line need not be drawn between gender and sexual harassment, as some conduct might qualify as both gender and sexual harassment. In this regard, the methods for determining the actionability of hostile work environments will help to clarify the nature of the harassment. See infra note 30 and accompanying text. Additionally, mixed gender/sexual harassment claims can be appropriately evaluated pursuant to the framework set forth infra Part III.D.

10. See McKinney, 765 F.2d at 1137-40 (finding gender harassment to be actionable, and holding actionable conduct that would not have occurred “but for” the sex of the victim, when it is sufficiently severe or pervasive to create a hostile work environment); EEOC Proposed Guidelines, 58 Fed. Reg. 51,266, withdrawn 58 Fed. Reg. 51,396-01 (included gender with other protected classes that were covered by guidelines which made hostile work environments based on membership in those protected classes actionable, but which excluded purely sexual harassment from coverage because it is covered under separate guidelines).
dynamic. It is aimed at the victim based on the harasser’s sexual needs and perceptions, the interpersonal relationship between the victim and the harasser as perceived by the harasser, sex role

Gender harassment is essentially a behavioral manifestation of misogyny, just as racial harassment is often a behavioral manifestation of racism.

11. See Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (harassment was based on conduct related to the harasser’s attraction to the victim, and the hope that he could enter into a relationship with her). See also Supplementary Information to EEOC Proposed Guidelines, 58 Fed. Reg. 51,266-68, withdrawn 58 Fed. Reg. 51,396-401 (sexual harassment should be treated separately from gender harassment because sexual harassment raises unique issues about human interaction). The idea that sexual harassment is based upon needs and perceptions different than other forms of harassment is also demonstrated by sociological and psychological research which evaluates the role of sexual attraction in the workplace setting or distinguishes sexual harassment from gender harassment. See Susan T. Fiske, Controlling Other People: The Impact of Power or Stereotyping, 48 AM. PSYCHOL. 621, 625-26 (1993) (discussing the effect of sexual attraction or the expectancy of a romantic relationship on evaluations of opposite sex subordinates by supervisors in the context of a study discussing the relationship of power and stereotyping); James E. Gruber, A Typology of Personal and Environmental Sexual Harassment: Research and Policy Implications for the 1990’s, 26 SEX ROLES 442, 458 (1992) (in assessing what types of remarks constitute sexual harassment, purely gender based remarks should not be considered because “only those [remarks] that are sexually based are technically instances of sexual harassment”); L. Fitzgerald and M. Hesson-McGinnis, The Dimensions of Sexual Harassment: A Structural Analysis, 35 J. VOC. BEHAV. 309 (1989) (subjects who were presented with misogynist comments and gender favoritism perceived such conduct as distinct from sexual conduct).

stereotypes and power roles,13 in addition to the immutable trait of the victim’s sex.14

13. See Anne C. Levy, Sexual Harassment Cases in the 1990’s: “Backlashing” the “Backlash” Through Title VII, 56 ALB. L. REV. 1, 40-49 (1992), which discusses the relevance of sex role stereotypes and male perceptions of women in relation to sexual harassment, but which characterizes gender and sexual harassment as distinct ramifications of the same psychological phenomenon, primarily male power roles which cause males to utilize stereotypes, etc. However, power role perceptions alone do not completely account for the type of harassment seen in Ellison, where a romantic interest by a male employee caused him to terrorize a co-employee who clearly was not interested. As Levy suggests, the power role perceptions of those who want to keep or gain power do underlie most forms of harassment and discrimination, be it sexual, gender, racial, etc., but in the sexual harassment context, the infusion of sexuality is also based on needs, stereotypes, and perceptions of a different nature than those involved in other forms of harassment. See Fiske, supra note 11, at 621 (discussing the relationship between power and stereotyping in the context of a sexual harassment and a sex discrimination case, and noting that power can facilitate stereotyping and reactions to it, but the discriminator’s personal motivations also play a role, as does his or her perception of the victim as a romantic or work related interest).

In Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (Minn. 1993), the court addressed expert psychological testimony regarding the inherently sexual nature of sexual stereotyping, and the results of its occurrence in the workplace, including sexual harassment. Jenson, 824 F. Supp. at 847. The court relied in part on the testimony of Dr. Eugene Borgida, the plaintiff’s expert witness, who has done extensive research and written several articles on the topic of sexual stereotyping. Dr. Borgida’s testimony regarding the nature and effects of sexual stereotyping was summarized as follows:

Sex stereotyping, specifically male sex stereotyping of women, involves the thought process whereby “women are perceived in categorical terms, in terms of a stereotype of what women are like, how they think and what their attributes are. It’s a thought process whereby women are considered in generalized terms. . . .” Dr. Borgida concluded that the major effect of sex stereotyping was “sexual spillover,” which is the idea that “the sexual dimension that characterizes male-female relationships outside of a work environment spills over . . . , and . . . becomes part of the working environment.” Sexual spillover creates a sexualized work environment which Dr. Borgida found to be represented by sexual photographs, cartoons, and jokes, as well as sexual language directed at women. Id. at 881 (citations omitted). Additionally, the court discussed the concept of “‘priming,’” which in the sexual harassment context is tied to sexual material in the workplace. Studies evaluating the concept demonstrate that males exposed to sexual materials tend to view women as sex objects. Id. at 882-83. The court concluded: “In addition sexual stereotyping generally, and “priming” research specifically, provide a framework for understanding why consistent and pervasive acts of sexual harassment occur in work environments similar to Eveleth Mines.” Id. at 883 (citation omitted). Concepts such as “priming” do not discount the ideas set forth in the Levy article, rather they acknowledge that in the context of sexual harassment, the unique factor of sexuality augments the power role perceptions of the dominant group in a given workplace, and results in the manifestation of a type of harassment that is not applicable to other protected classes. See Fiske, supra note 11, at 625-26.

14. Of course, some of these factors are relevant to gender harassment as well, but
As a result of this dichotomy, and the differing nature of the conduct involved in sexual and gender harassment, the hostile work environment cause of action which is applicable to both sexual and gender harassment,15 will likely apply differently to sexual and gender-based claims. Of particular concern is the possibility that triers of fact will not find allegations of gender harassment sufficiently severe or pervasive to be actionable because gender harassment does not usually involve the type of vulgar, overtly sexual conduct generally associated with sexual harassment.16 In such situations, a gender harassment victim might be subject to a level of conduct which would support a hostile work environment claim such as that based on race or national origin, but would be denied relief because that conduct seems mild compared to the public or judicial perception of sexual harassment. Significantly, if gender harassment was appropriately contextualized with regard to other types of harassment, judges would have an appropriate analytical framework to look to in evaluating gender harassment claims, and juries could be appropriately instructed regarding that framework. Thus, the odd relationship between gender and sexual harassment makes the development of such an analytical framework, which appropriately contextualizes gender harassment claims, essential to protecting the rights of gender harassment victims.

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15. See Harris, 114 S. Ct. at 370-71 (hostile work environment applicable to sexual harassment); McKinney, 765 F.2d at 1129 (hostile work environment applicable to gender harassment).

16. The idea that harassing conduct must be sufficiently severe and pervasive to be actionable is central to the hostile work environment cause of action and is discussed in depth infra Part II.A.
Part I of this Article discusses the nature of gender harassment, and sets forth the proposition that gender harassment has more in common with racial, religious, and national origin harassment, than it does with sexual harassment. It also delineates three hypotheticals which are utilized in Part III to demonstrate the unfair consequences that could result from analyzing gender harassment claims in the wrong context.

Part II discusses the history, basis, and structure of the hostile work environment cause of action, which is the cause of action applicable to gender harassment under Title VII. It also discusses quid pro quo harassment which is relevant in the sexual harassment context, but not to gender harassment.

Part III provides a context for gender harassment claims and sets forth an analytical framework to be applied to such claims. The potential results of analyzing gender harassment claims in relation to sexual harassment is discussed, and it is argued that the appropriate context for analyzing gender harassment claims is provided by racial, religious, and national origin harassment. This is demonstrated by looking at cases that have upheld claims for sexual, gender, racial, religious, and national origin harassment, and by an analysis of the hypotheticals set forth in Part I. Finally, a method is delineated for analyzing mixed gender/sexual harassment claims in light of their differing contexts.

17. See Harris, 114 S. Ct. at 367 (noting applicability of hostile work environment to classes protected under Title VII); McKinney, 765 F.2d at 1129 (applying hostile work environment cause of action to gender harassment claim); Delgado v. Lehman, 665 F. Supp. 460 (E.D. Va. 1987).


19. See discussion infra Part II.B.
I. UNDERSTANDING GENDER HARASSMENT

Title VII provides:

(a) It shall be an unlawful employment practice for an employer -
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to
   discriminate against any individual with respect to his compensation, terms,
   conditions, or privileges of employment, because of such individual’s race,
   color, religion, sex, or national origin . . . .

Workplace harassment violates Title VII’s prohibition of discrimi-
nation in the terms and conditions of employment when it is aimed at
an employee, or group of employees, based on membership in a
protected class. Sex is specifically delineated as a protected
class. Thus, harassment aimed at an employee because of his or
her sex is actionable under Title VII.

Such harassment can take the form of overt sexual conduct, but
conduct need not be overtly sexual to violate Title VII so long as it
is aimed at an employee because of his or her sex. The latter type
of conduct, which in recent years has been termed “gender harass-
ment,” is essentially the same as harassment based on race, religion,
and national origin, because it is aimed at an individual, or individuals, solely because of a negative perception of the
victim’s class. The former, which is considered to be “sexual

22. See supra note 20, and accompanying text.
24. See Joseph M. Pellicciotti, Sexual Harassment in the Workplace: A Consideration
   of Post-Vinson Approaches Designed to Determine Whether Sexual Harassment is Sufficiently
   Severe or Pervasive, 5 DePaul Bus. L.J. 215, 226-28 (1993) (recognizing the emergence
   of gender harassment).
   Reg. 51,396-01 (same standards applicable to workplace harassment based on race and
gender).
26. Id.
27. Id.
   that harassing conduct not specifically relating to gender stereotypes, and negative comments
   which were aimed at female employees, could create a hostile work environment based on
   gender) with Boutros v. Canton Regional Transit Auth., 997 F.2d 198 (6th Cir. 1993) (der-
   ogatory conduct and conduct that caused an Arab employee to be unnecessarily disciplined
   because of his national origin, contributed to a hostile work environment based on national
   origin); Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503,1510-11 (11th Cir. 1989),
harassment,"\(^{29}\) is similar to other types of harassment, but has some aspects that are uniquely tied to the sexual nature of the conduct.\(^{30}\) Individual instances of harassing conduct need not be categorized as either sexual or gender harassment because, as will be discussed in the next section of this paper, it is the totality of conduct that determines whether harassment is actionable under Title VII.\(^{31}\) In this regard, there will likely be cases where the allegations could support both sexual and gender harassment claims.\(^{32}\)

In evaluating claims of "gender harassment," it is essential to analyze them in the same way as racial, religious, and national origin

\(^{29}\) See Meritor, 477 U.S. at 57 (noting actionability of overtly sexual conduct as sexual harassment); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (adopting standards for "sexual harassment").


\(^{31}\) As will be discussed in Part II., the primary cause of action for workplace harassment under Title VII is "hostile work environment," which is evaluated based on the severity and pervasiveness of alleged conduct, and generally requires more than one discriminatory incident. Harris v. Forklift Sys. Inc., 114 S. Ct. 367, 370 (1993) (noting that a single racial epithet is insufficient to create a hostile work environment). It is possible that a single extremely harsh incident could create a hostile work environment. However, the conduct involved would have to be especially egregious. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (noting that the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct); King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) (one incident can be enough to create a hostile work environment, but repeated incidents are generally necessary to create a strong hostile work environment claim). As noted above, however, a single slur is clearly insufficient to establish a hostile work environment claim. Harris, 114 S. Ct. at 370. In addition to hostile work environment, quid pro quo harassment, which requires the linking of employment or an emolument of employment to sexual favors, has been recognized under Title VII, but only in regard to sexual harassment. See, e.g., Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir.), cert. denied, 113 S. Ct. 831 (1992) (discussing quid pro quo harassment). Because of the overtly sexual nature of quid pro quo harassment, it will not be categorized as gender harassment, and thus is irrelevant to this part of the discussion.

\(^{32}\) Such cases are discussed infra Part III.D. It is suggested that they should generally be treated like mixed racial/sexual harassment cases.
harassment. However, there is a risk that gender harassment claims will not be appropriately evaluated because they might be compared to sexual harassment. This could cause a trier of fact to minimize gender harassment claims by analyzing them in light of the often lewd or shocking allegations involved in sexual harassment cases.\(^{33}\) To understand the appropriate context and treatment of gender harassment claims in light of sexual harassment and harassment aimed at other protected classes, it is helpful to consider the following three hypotheticals.

1. Ms. R is a clerical worker in a police department. From her first day at work she was subjected to overtly sexual comments such as, “Hey baby, you have a great body,” and “Come sit on my lap and feel my nightstick.” She was frequently pinched on the buttocks by the sergeant in charge of her work station. One day, when she was bending over to do some filing, he walked up behind her and pressed his genitals against her, and said, “Let’s go in the back and fool around.” Ms. R replied, “No! I’m not interested, I have a boyfriend,” and ran out of the room. A few days later, pornographic magazines were left on her chair depicting explicit acts with an unsigned note attached saying, “My place at nine.” Later that day, her supervisor cornered her in a small office, grabbed her breast, and tried to reach up her skirt. She escaped before he could. Since then, her supervisor and co-workers have left vibrators and other sex toys on her desk, and the conduct continues to occur. Other women in the office are not subjected to the same type of conduct, but have been present when Ms. R was so subjected.

2. Ms. T is a government employee who processes documents for an agency. She is the only female employee in a small department. From her first day at work, her supervisor told her regularly, “Women don’t belong in the workplace, why don’t you go home and have

\(^{33}\) One of the most stunning examples of a sexually hostile work environment is provided by the facts underlying the *Meritor* case. The plaintiff in that case alleged that her supervisor engaged in sexual intercourse with her, made repeated demands for sexual favors, fondled her in front of other employees, followed her into the ladies’ restroom, exposed himself to her, and forcibly raped her. *Meritor*, 477 U.S. at 60-61. However, conduct need not be so egregious to constitute sexual harassment. In *Harris*, the Court addressed the egregiousness of the conduct alleged in *Meritor*, and held that conduct need not be so appalling to be actionable: “the appalling conduct alleged in *Meritor*, and the reference in that case to environments ‘so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority workers,’ merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.” *Harris*, 114 S. Ct. at 371 (citations omitted).
some kids?” He also yelled at her more than the male employees and hid documents which would help her to do her job. On several occasions he said, “Women are only good for looking at and bearing children, and I only like looking at them if they have big breasts, which you don’t.” No adverse employment action, such as demotion or termination was taken against Ms. T, but she overheard her supervisor tell another employee, “I wish I could get rid of that damn woman, they have no place in a man’s office.” The conduct and remarks continue to occur.

3. Mr. H is an African-American equipment serviceman working for a telecommunications company. His boss and co-workers regularly refer to him as “little sambo,” and say that he should “go back to pickin’ cotton where he belongs.” They regularly hide his equipment and take reports from his desk. His supervisor gives him orders which violate company policy, and then disciplines him for following those orders. On one occasion, an advertisement for a Ku Klux Klan rally was left on his chair, and the next day a note saying, “Missed you at the rally, sure could have had fun if you came.” The conduct and comments continue to occur.

As we explore the law relating to workplace harassment, and analyze the emerging concept of gender harassment, keep these hypotheticals in mind. They will be discussed further in Part III.

II. CAUSES OF ACTION FOR WORKPLACE HARASSMENT RECOGNIZED UNDER TITLE VII

A. Hostile Work Environment

Understanding the structure for hostile work environment claims is essential to analyzing the emerging concept of gender harassment. This is because the application of that structure to gender harassment will have a substantial impact on the ability of gender harassment victims to obtain redress. Since the application of the hostile work environment cause of action can have such profound effects on gender harassment claims, hostile work environment must be understood in light of its statutory and historical bases in order to appropriately apply it to gender harassment claims.

Hostile work environment is a cause of action unique to anti-discrimination law. It was initially recognized by the Fifth Circuit
Court of Appeals in *Rogers v. EEOC*, a 1971 case brought under Title VII involving race discrimination aimed at a Hispanic employee.

The Supreme Court addressed the issue of workplace harassment for the first time in 1986 in *Meritor Savings Bank v. Vinson*, a case involving sexual harassment. In *Meritor*, the Supreme Court set forth a general standard to be applied to hostile work environment claims. The Court held that a sexually hostile work environment exists when an employee is subjected to, because of his or her sex, unwelcome conduct which is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. The Court also held that Title VII's protection is not limited to pecuniary interests.

After *Meritor*, courts disagreed over the application of the general framework set forth by the Supreme Court. Divergent views

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34. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).
36. The *Meritor* Court acknowledged, but did not discuss, quid pro quo sexual harassment. *Meritor*, 477 U.S. at 65. Despite the fact that the case involved only sexual harassment, the Court acknowledged and approved of lower court decisions which held that harassment aimed at other classes protected under Title VII can be actionable. *Id.* at 66.
37. *Id.* at 66-68. Although *Meritor* dealt with a sexually hostile work environment, the Court implied that the standards set forth therein are equally applicable to anyone protected under Title VII. *Id.* at 66.
38. *Id.* at 64. In response to the petitioner's argument that Title VII only protects against "tangible loss" of an "economic character," and not "purely psychological aspects of the workplace environment," the *Meritor* Court held: "the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a Congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.*
39. Several cases dealing with sexual harassment illustrate the variety of interpretations given the *Meritor* framework. See *Burns v. McGregor Elec. Indus.*, Inc., 955 F.2d 559, 564 n.3 (8th Cir. 1992) (a hostile work environment exists when the complainant can show that she belongs to a protected class, was subjected to unwelcome harassment, the harassment was based on sex [but need not be clearly sexual in nature], the harassment affected a term, condition, or privilege of employment, and the employer knew or should have known of the harassment, and failed to take appropriate remedial action); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (a hostile work environment exists where an employee is subject to unwelcome conduct of a sexual nature which a reasonable woman would consider sufficiently severe and pervasive to alter the conditions of employment and create a hostile or abusive working environment); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990) (a hostile work environment claim can be successful when the employee can show that he or she suffered intentional discrimination because of sex, the discrimination was pervasive and regular, the discrimination detrimentally affected the plaintiff, the discrimination would have detrimentally affected a reasonable person of the same sex in that position, and as to employers, the existence of respondeat superior liability); *Rabidue v. Osceola Ref.*
emerged regarding the appropriate objective reasonableness standard -
the standard under which the severity or pervasiveness of the
conduct is evaluated;\(^{40}\) whether the victim must demonstrate that the
harassment seriously affected his or her psychological well-being or
led the victim to suffer injury;\(^{41}\) and whether a harassment victim
must demonstrate he or she subjectively perceived the work environ-
ment to be hostile.\(^{42}\) The confusion over these issues meant that
employers and employees could not know the full extent of their
rights and duties, and that particular conduct could be actionable in
one circuit, but not in others.

In an attempt to clarify some of these issues, the Supreme Court
again addressed the issue of workplace harassment in \textit{Harris v.
Forklift Systems, Inc.}\(^{43}\) The Court granted certiorari to determine
whether injury to a victim’s psychological well-being is necessary for
harassment to be actionable.\(^{44}\) The Court held that such injury was
not necessary for harassment to be actionable.\(^{45}\) In addition, the
Court addressed the objective and subjective reasonableness ques-

\(^{40}\) See \textit{Ellison}, 924 F.2d at 872 (severity and pervasiveness should be evaluated
from the perspective of a reasonable woman); \textit{Andrews}, 895 F.2d at 1469 (severity and
pervasiveness should be evaluated from the perspective of a reasonable person of the same
sex as the victim); \textit{Rabidue}, 805 F.2d at 611 (severity and pervasiveness should be evaluated
from the perspective of a reasonable person).

\(^{41}\) See \textit{Ellison}, 924 F.2d at 877-78 (no requirement that the victim show serious
effect on psychological well being); \textit{Rabidue}, 805 F.2d at 620 (requiring such showing);
\textit{Vance v. Southern Bell Tel. and Tel. Co.}, 863 F.2d at 1503 (11th Cir. 1989), \textit{cert. denied},
115 S. Ct. 1110 (1995). The term “suffer injury” most likely refers to physical manifesta-
tions of psychological injury or actual physical harm caused by an act of harassment.
Otherwise there would be no need to refer to it separately from the term “seriously affect
psychological well being.” This interpretation is consistent with the tort of intentional
infliction of emotional distress, which also requires emotional harm, and recognizes that
bodily injury can result from such harm. \textit{RESTATEMENT (SECOND) OF TORTS § 46(1)} (1965).

\(^{42}\) See \textit{Ellison}, 924 F.2d at 872 (no subjective prong required, although the issue of
whether victim welcomed the conduct should be considered); \textit{but see Andrews}, 895 F.2d at
1469 (subjective prong must be considered).


\(^{44}\) \textit{Harris}, 114 S. Ct. at 370.

\(^{45}\) \textit{Id.} at 370-71.
tions,\textsuperscript{46} holding that the severity or pervasiveness of harassing conduct should be evaluated under a reasonable person standard, and that a victim of workplace harassment must also subjectively perceive the working environment as abusive.\textsuperscript{47} Significantly, in regard to the objective reasonableness standard, the Court may have created more questions than it answered.\textsuperscript{48}

The Court held that conduct is sufficiently severe or pervasive to create an objectively hostile work environment when a reasonable person would find the working environment to be hostile or abusive.\textsuperscript{49} However, the meaning of "reasonable person" under this standard is unclear. In this regard, the Court attempted to provide some guidance.

First, the Court noted that its test for hostile work environment cannot, by its nature, be mathematically precise.\textsuperscript{50} Thus, the Court implicitly acknowledged that given the nature of hostile work environment claims, there must be some flexibility in the structure applied to those claims to account for the wide variety of situations which the courts will face. Such flexibility could include consideration of the perspective of a reasonable member of the victim’s protected class. Second, the Court held that "whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances."\textsuperscript{51} Such circumstances may include the severity and frequency of the conduct alleged, whether it involves physical threats or humiliation as opposed to a mere offensive utterance, and whether it “unreasonably interferes with” the victim’s work performance.\textsuperscript{52}

The Court’s mandate to consider the totality of the circumstances in a hostile work environment case reinforces the flexibility of the

\textsuperscript{46.} Id.

\textsuperscript{47.} Id.

\textsuperscript{48.} See Frank S. Ravitch, \textit{Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans With Disabilities Act}, 15 CARDOZO L. REV. 1475, 1478-79 n.21, 1480 n.24, 1483 n.37 (the Court set forth a reasonable person standard, but implied in dicta that it could mean reasonable person of the alleged victim’s class, and expressly refused to address the EEOC proposed guidelines applicable to non-sexual harassment which apply a different standard).

\textsuperscript{49.} Harris, 114 S. Ct. at 370. In Harris, the Court stated, “conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” Id.

\textsuperscript{50.} Id. at 371.

\textsuperscript{51.} Id.

\textsuperscript{52.} Id.
hostile work environment standard and lends support to the position that the perspective of the victim may indeed be an important factor to consider among all of the circumstances.\footnote{53}{See Ellison, 924 F.2d at 878-81 (adopting the victim's perspective, because otherwise the standard applied might simply reinforce the "prevailing level of discrimination," and because certain classes have different life experiences and thus different perspectives on harassing conduct).}

Finally, the Court expressly refused to consider the EEOC Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, which were issued in October 1993,\footnote{54}{See supra note 9 (for a discussion of EEOC guidelines). These guidelines were withdrawn in 58 Fed. Reg. 51,396-01 (1993). However, that withdrawal does not affect the relevance of the \textit{Harris} Court's refusal to address those guidelines since the guidelines were not withdrawn because the standards they proposed were invalid. The \textit{Harris} Court's refusal to consider the objective reasonableness standard that the proposed guidelines set forth, which included consideration of the victim's perspective, demonstrates the Court was not willing to preclude such an interpretation of the reasonable person standard it had set forth. This is further supported by the fact that in \textit{Steiner v. Showboat Operating Co.}, a post-\textit{Harris} case, the Ninth Circuit Court of Appeals applied a reasonable woman standard in a sexual harassment case. \textit{Steiner v. Showboat Operating Co.}, 25 F.3d 1459, 1462-64 (9th Cir. 1994), \textit{cert. denied}, 115 S. Ct. 733 (1995). EEOC interpretive guidance on the \textit{Harris} case likewise supports the application of a standard which includes consideration of the victim's perspective. EEOC: Enforcement Guidance on \textit{Harris v. Forklift Systems}, 405 Fair Empl. Prac. Man. (BNA) 7165 (March 8, 1994).} and noted, "we need not answer today all the potential questions it [the Court's test] raises."\footnote{55}{\textit{Harris}, 114 S. Ct. at 371.} The Court's refusal to consider the proposed guidelines is significant because the proposed guidelines applied a reasonable person under the same or similar circumstances standard, which included consideration of the perspective of members of the alleged victim's protected class.\footnote{56}{The EEOC Proposed Guidelines state: The standard for determining whether verbal or physical conduct relating to race, color, religion, gender, national origin, age, or disability is sufficiently severe or pervasive to create a hostile or abusive working environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive. The "reasonable person" standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability. It is not necessary to make an additional showing of psychological harm.} By refusing to consider the EEOC Proposed Guidelines despite the objective reasonableness standard they proposed, the Court left open the possibility that it would support an interpretation of the "reasonable person" standard which means reasonable woman when the
victim is female, reasonable African-American, when the victim is black, etc.\textsuperscript{57}

Significantly, the EEOC recently issued interpretive guidance regarding \textit{Harris}, and its effect on the EEOC guidelines applicable to sexual harassment.\textsuperscript{58} That guidance takes the position that the reasonable person standard set forth in \textit{Harris} does allow for consideration of the perspectives of members of the victim’s class.\textsuperscript{59} The EEOC’s position in this regard is consistent with the language of \textit{Harris} as discussed in this Part.

Consideration of the victim’s perspective is essential to carrying out the purposes of Title VII, because a strict reasonable person standard could lead to the perpetuation of the prevailing level of discriminatory attitudes and conduct in the workplace.\textsuperscript{60} It is quite likely that, in the context of both sexual and gender harassment, many courts will continue to apply a standard which acknowledges the victim’s perspective. In fact, the Ninth Circuit has already done so in a post \textit{Harris} case.\textsuperscript{61} In light of the concerns raised in Part III of this article, it is particularly important that the victim’s perspective be applied in gender harassment cases.

In addition to the recent developments involving the test applied to hostile work environment claims, there have been some develop-
ments over the last few years relevant to the dichotomy between gender and sexual harassment. As discussed above, the EEOC issued proposed guidelines dealing with harassment based on race, color, religion, gender, national origin, age, and disability in October of 1993. While those guidelines have since been withdrawn, the principles underlying them are still significant in the gender harassment context. For example, the proposed guidelines applied to gender harassment, but did not supersede the guidelines applicable to sexual harassment. Therefore, the EEOC apparently recognized a dichotomy between gender and sexual harassment, as it applied different guidelines, and, to some extent, different standards to gender and sexual harassment. In fact, in the supplementary information to the EEOC Proposed Guidelines, the EEOC states that sexual harassment raises unique issues about human interaction, and thus “may warrant separate emphasis.” The proposed guidelines were withdrawn under circumstances which do not affect the viability of this statement or the EEOC’s decision to keep the sexual harassment guidelines similar to, but separate from, the proposed guidelines.

Prior to the issuance of the EEOC Proposed Guidelines, courts had increasingly begun to recognize the actionability of non-sexual, gender-based conduct. Several courts, including at least three federal courts of appeal, have recognized the actionability of such conduct. While it is true that a few courts have held that conduct must be of a sexual nature to be actionable,

62. See supra note 54 and accompanying text.
63. See supra notes 9 and 54.
65. See infra Parts II.A. and III (for the dichotomy between sexual and gender harassment and the treatment of those forms of harassment by the courts and the EEOC).
67. See supra notes 9 and 54.
68. See, e.g., Andrews, 895 F.2d at 1482, 1485 (case involving both sexual and non-sexual conduct aimed at women which acknowledged that gender based harassment is actionable). See also Hall v. Gus Constr. Co., 842 F.2d 1010, 1013-14 (8th Cir. 1988); McKinney v. Dole, 765 F.2d 1129, 1137-40 (D.C. Cir. 1985).
69. Andrews, 895 F.2d at 1482; Hall, 842 F.2d at 1013-14; McKinney, 765 F.2d at 1137-40.
of recent appellate court opinions recognizing the actionability of non-sexual gender-based harassment,\(^{71}\) that position no longer seems viable.

B. Quid Pro Quo

Quid pro quo harassment is a distinct theory from hostile work environment. Unlike hostile work environment which can be applied in several contexts, such as race, color, gender, religion, national origin, age, and disability,\(^{72}\) quid pro quo is only applicable to sexual harassment. This is due to the nature of the cause of action, which requires the conditioning of employment, or the emoluments of employment, on sexual favors.\(^{73}\)

To set forth an actionable claim under the quid pro quo cause of action, the victim must demonstrate: (1) that he or she is a member of a protected class; (2) he or she was subjected to unwelcome harassment in the form of sexual advances or requests for sexual favors; (3) that the harassment was based on sex; and (4) that submission to the unwelcome advances was an express or implied condition for the receipt of job benefits, or that refusal to submit to the sexual demands resulted in a tangible job detriment.\(^{74}\) The Supreme Court recognized the quid pro quo cause of action, without addressing its structure, in \textit{Meritor}.\(^{75}\)

In the absence of explicit sexual demands or advances, quid pro quo is inapplicable. It is the conditioning of job benefits or detriments on the provision of sexual favors or submission to sexual advances that creates the quid pro quo.\(^{76}\) Thus, the quid pro quo harassment cause of action is inapplicable in the gender harassment

\(^{71}\) See supra notes 9 and 54.

\(^{72}\) See \textit{Meritor}, 477 U.S. at 66 (indicating applicability of hostile work environment cause of action to classes protected under Title VII). See also \textit{Harris}, 114 S. Ct. at 371; \textit{Ravitch}, supra note 48 (hostile work environment cause of action is applicable to disability); EEOC: Enforcement Guidance on \textit{Harris} v. \textit{Forklift Systems}, 405 Fair Empl. Prac. Man. (BNA) at 7170 (hostile work environment cause of action is applicable to race, gender, religion, national origin, age and disability).


\(^{74}\) \textit{Kauffman}, 970 F.2d at 186.

\(^{75}\) \textit{Meritor}, 477 U.S. at 65 (noting that sexual misconduct can be actionable whether or not it is linked to an economic quid pro quo, thus acknowledging both hostile work environment and quid pro quo).

\(^{76}\) \textit{Kauffman}, 970 F.2d at 185-86.
context, because it requires overtly sexual conduct, and as a result, can only be cognizable as a form of sexual harassment. Therefore, hostile work environment is the only cause of action currently available under Title VII in regard to the theory of gender harassment.

III. ANALYZING GENDER HARASSMENT CLAIMS

A. Placing Gender Harassment in the Appropriate Context

In evaluating gender harassment claims there is a risk triers of fact will automatically analyze the severity and pervasiveness of the allegations by consciously or unconsciously comparing them to sexual harassment claims, which generally involve incidents of overtly sexual conduct that would be considered lewd or shocking. Significantly, psychological evidence shows that when people evaluate examples of non-sexual, gender-based harassment along with examples of sexual harassment, the sexual harassment incidents are viewed as more severe. Thus, gender harassment claims would not likely be

77. Id.


79. Of course, individual incidents of gender harassment can also be lewd or shocking, but it is the totality of the conduct which determines the actionability of claims for workplace harassment. See supra note 31, and accompanying text. In the sexual harassment context, the whole pattern of alleged conduct tends to be lewd or shocking. See infra Part III.B.1. In the gender harassment context, the totality of the conduct alleged is more likely to evince misogynist or misandryist attitudes, and less likely to demonstrate repeated acts of vulgarity. See infra Part III.B.2.

80. Social psychology research has demonstrated this phenomenon in evaluators' perceptions of incidents that could be characterized as sexual or gender harassment. The results of research into the perceptions of those evaluating incidents of sexual harassment were tested by David E. Terpstra & Douglas D. Baker, A Hierarchy of Sexual Harassment, 121 J. PSYCHOL. 599 (1987). Male and female college students, along with working women, were exposed to a variety of scenarios which depicted eighteen categories of sexual harassment behaviors, and were asked to determine whether each category constituted sexual harassment. The results demonstrated that sexual propositions, touchings, and sexual remarks were the behaviors the largest number of evaluators considered to be sexual harassment,
appropriately redressed if they were analyzed on a continuum with
sexual harassment.

However, it would distort Congress’ mandate as expressed in Title
VII, and the Supreme Court’s interpretation of that mandate in regard
to hostile work environment as set forth in *Meritor Savings Bank v.
Vinson*,81 and *Harris v. Forklift Systems, Inc.*,82 to minimize or
deny redress in hostile work environment claims based on non-sexual
contact which interferes with a term or condition of employment,
simply because the conduct alleged was not as shocking or lewd as
overtly sexual conduct. To do so would deny to victims of gender
harassment a right which is available to all other classes protected
under Title VII, simply because their class can also be subjected to
sexual harassment.

Moreover, sexual harassment is not the only possible analogue for
gender harassment claims. Racial, religious, and national origin
harassment have also been recognized under Title VII.83 In these
contexts, overtly sexual conduct is not required. Rather, such claims
are generally based on hateful conduct that occurs because of an
employee’s membership in a protected class.84 Likewise, the key to
a gender harassment claim is that the conduct alleged would not have
occurred but for the victim’s sex.85 These claims are basically the

while gender related conduct such as “coarse language” and gestures not directed at a female
subject, were among the behaviors least likely to be considered sexual harassment. *Id.* at
602-04. *See also* Tricia S. Jones & Martin S. Rumland, *Survey of Variability and
Perceptions of and Responses to Sexual Harassment*, 27 *SEX ROLES* 121, 123-24 (1992)
(noting that behavior evaluated as severe will be perceived as more harassing than behavior
not so perceived and that severity is often defined by the explicitness of the conduct or a
tangible job related cost). Some case law also supports this concern. *See* Turley v. Union
contribute to a hostile work environment based on sex).

83. *See* Boutros v. Canton Regional Transit Auth., 997 F.2d 198 (6th Cir. 1993)
(harassment aimed at an individual because of his national origin can be actionable under
Title VII and § 1983); Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir.
1989), cert. denied, 115 S. Ct. 1110 (1995) (instances of racial harassment can contribute to
a racially hostile work environment in violation of Title VII); Turner v. Barr, 811 F. Supp.
1 (D.D.C. 1993) (harassment aimed at an individual because of his religion and race created
a hostile work environment based on religion and race).
84. *Boutros*, 997 F.2d at 201.
85. *See, e.g.*, McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985); Campbell v. Board
460 (E.D. Va. 1987). *See also Meritor*, 477 U.S. at 64 (“[w]ithout question, when a
supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor
result of misogyny or misandrony in the workplace, and the severity or pervasiveness of such conduct should be evaluated like conduct occurring in a workplace charged with racism or anti-semitism. Whether based on racism or misogynist and misandrynist attitudes, the underlying cause of actionable non-sexual harassment is dislike or disapproval of an individual on the basis of his or her membership in a protected class, and the goal of the harassment is not to satisfy sexual needs or relieve sexual tension, but to hurt or get rid of an employee because he or she is perceived as an outsider. 86

Thus, the need to compare gender harassment to non-sexual harassment does not arise from any significant difference in the structure of the hostile work environment cause of action in the sexual and non-sexual harassment contexts, 87 but from the application of that structure, as well as evaluations of the kind of conduct necessary to prevail on a harassment claim. Essentially, if a judge can instruct a jury not to view gender harassment incidents in light of the common perception of sexual harassment, but rather as though the conduct was occurring on the basis of race, etc., the jury would be less likely to devalue the allegations by comparing them to sexual harassment incidents they have heard about. 88 Likewise, plaintiffs' attorneys can remind judges of this dynamic when cases are being decided at a bench trial or on a motion. By altering the context in which the

discriminates on the basis of sex.

86. This is evidenced by the types of allegations often involved in gender, and other non-sexual, harassment claims. See, e.g., Bell v. Crackin Good Bakers, Inc., 777 F.2d 1497, 1499-1500, 1502-03 (11th Cir. 1985) (supervisor told co-employee he would get rid of complainant, who was female, so that a male co-employee could have the job; the complainant was denied a promotion which was given to a male employee; a co-employee overheard the supervisor say he did not want female employees; the supervisor tried to make it rough on the complainant so she would leave by giving her orders and then contradicting himself, forcing her to do multiple tasks while providing insufficient time, speaking to her like a child and waving her paycheck in other employees' faces); Boutros, 997 F.2d at 198 (conduct aimed at Syrian employee included repeated statements that he should not be working at the Transit Authority, placing his name on a "hit list" of those whose employment was to be terminated, and other national origin based harassment). Of course, hurting those perceived as outsiders may be a goal of sexual harassment, but there are other motivations and goals involved, such as "sexual spillover" and other issues of sexuality that change the nature of the harassing conduct and reactions to it. Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 881 (Minn. 1993). Additionally, in many sexual harassment situations, it is likely that the harassers do not want the victim to leave, because that would take away the object of their conduct.

87. See supra Part II.

88. Studies show that people generally view sexually charged conduct as more severe then non-sexual, gender based conduct. See supra note 80 and accompanying text.
conduct giving rise to the claim is viewed, situations where gender harassment claims are unjustly minimized because of a lack of overtly lewd sexual behavior can be avoided. Of course, there must be a sound basis for contextualizing gender harassment in this way. Looking at cases representing the various forms of actionable harassment is instructive in this regard. 89

B. Comparing Gender Harassment With Other Forms of Harassment Recognized Under Title VII

In demonstrating the commonality between gender harassment and other forms of non-sexual harassment recognized under Title VII, it is helpful to compare situations which courts have found sufficient to maintain claims for sexual, gender, racial, religious, and national origin harassment. After looking at those cases, they will be compared with the hypotheticals set forth in Part I, and this article will determine whether it is more appropriate to view Ms. T’s case in light of Ms. R’s or Mr. H’s.

1. Sexual Harassment

Sexual harassment cases often involve conduct that many people would find lewd or shocking. For example, in Burns v. McGregor Electronic Industries, Inc., 90 the complainant, who had posed nude in a magazine, was subjected to lewd comments by a manager-trainee from the beginning of her employment, including comments implying she had been masturbating in the bathroom, did not douche, and was having an affair with the owner of the company. 91 Additionally, the owner of the company showed her advertisements for pornographic movies contained in a pornographic magazine, talked about sex, asked her to watch pornographic movies with him, suggested she perform oral sex on him, asked her out on dates, asked her to pose nude for him, and made lewd gestures to her such as imitating masturbation. 92

89. Of course, common sense, as well as the studies discussed note 80 supra, and accompanying text, provide a basis for concern if gender harassment is contextualized on a continuum with sexual harassment. However, the cases discussed in the following section help to illustrate why gender harassment should be appropriately contextualized on a continuum with other forms of non-sexual harassment such as racial harassment.

90. 955 F.2d 559 (8th Cir. 1992), rev’d, 989 F.2d 959 (8th Cir. 1993).
91. Burns, 955 F.2d at 560.
92. Id. at 560-61.
She was the subject of plant gossip, subjected to obscene comments by a co-worker, and asked by a supervisor to sit on the owner's lap, go out with him, or up to his apartment. The complainant was forced to quit her job three times as a result of the conduct. The court remanded the case, holding that the conduct alleged could constitute a hostile work environment, and that the fact the complainant had posed for nude pictures was not a bar to a finding that she found the environment to be hostile or abusive.

In Brooms v. Regal Tube Co., the complainant, an African-American female, alleged racial and sexual discrimination, including sexual harassment by her supervisor. The allegations of sexual harassment included that her supervisor made numerous sexual propositions, remarks, and innuendos toward her, that he showed her a pornographic picture depicting an African-American female being sodomized by a white male, telling her that it demonstrated the "talent of black women," and that she was hired for the purpose indicated by the picture. Later he showed her a photograph depicting an African-American woman engaged in an act of bestiality and told her that it showed how "she was going to end up," and when she reached for the picture, he grabbed her arm and threatened to kill her if she moved. The court affirmed the district court's holding that the alleged conduct created a sexually hostile work environment in violation of Title VII.

One of the more vulgar examples of sexually explicit conduct in the workplace is provided by the allegations in Hall v. Gus Construction Co., Inc. In that case, three female flag persons were harassed by co-workers while working at construction sites. The conduct alleged included verbal abuse, such as referring to the complainants as "fucking flag girls," nicknaming one of the complainants "herpes," writing "cavern cunt" and "blond bitch" on complainants' vehicles, and asking complainants to engage in sexual inter-

93. Id. at 561.
94. Id. at 560-63, 566. The complainant returned to work the first two times she quit because she needed the money. Id. at 560-63.
95. Id. at 566.
96. 881 F.2d 412 (7th Cir. 1989).
97. Brooms, 881 F.2d at 416-17.
98. Id.
99. Id. at 418-20, 427. The court also held for the complainant regarding employer liability for the harassment and her claim of constructive discharge. Id. at 420-23, 427.
100. 842 F.2d 1010 (8th Cir. 1988).
101. Hall, 842 F.2d at 1010.
course and oral sex with them. It also included physical and visual abuse, such as cornering the complainants between two trucks and rubbing their thighs through open windows, grabbing one complainant's breasts, picking that same complainant up against a truck so that other men could fondle her, mooning them, flashing pictures of couples engaged in oral sex at them, and urinating in one complainant's water bottle, and in the gas tank of complainants' vehicle. The court held for the complainants, and noted that the non-sexual acts, such as urinating in the gas tank and water bottle, could contribute to the hostile work environment.

2. Gender Harassment

Compared to the allegations involved in sexual harassment cases, such as those discussed above, the type of conduct often alleged in gender harassment cases might seem mild. Many cases involving gender harassment also involve allegations of sexual harassment, and thus, it is hard to determine what the result would have been if only the incidents of gender harassment were considered. It is quite possible that without the sexual harassment allegations, the courts would have evaluated the severity and pervasiveness of the misogynist conduct in light of the common perception of sexual harassment allegations, and found no hostile work environment existed. The test for mixed sexual/gender harassment claims is addressed in Part III.D.

A case providing one of the most stunning examples of pure gender harassment among published opinions is Delgado v. Lehman. In Delgado, the complainant alleged that she and other female personnel in her office were harassed by a male supervisor. Her allegations included the following: the supervisor interfered with the performance of her duties because she was female by locking the door to his office which contained materials necessary to her job, by holding back mail addressed to the staff, by losing reports prepared by her and other female subordinates, by providing

102. Id. at 1012.
103. Id. at 1013-16. See also supra notes 9 and 54 and accompanying text (addressing the relevance of this case in the gender harassment context).
104. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Hall, 842 F.2d at 1010.
inadequate guidance, by subjecting her to unwarranted criticism and by threatening her for leaving the office. Additionally, the supervisor directed comments and abuse at her, such as addressing her by “okay babe” and “listen here woman,” being loud and abusive towards her, telling her “I’ll fix you,” kicking open her office door, physically preventing her from leaving her office, blowing cigar smoke in her face, harassing and criticizing other female employees, stating to a member of upper management that the female employees behave like children, referring to female employees as “dumb females working for him who couldn’t read or write,” engaging in inappropriate conduct aimed at women from outside the office, and eventually recommending that the complainant be removed. The court found for the complainant on her harassment claim, holding that she was subjected to a pattern of harassment and discrimination “directed at her because of her female gender,” and that as a result of that harassment her ability to perform her job was significantly impaired.

In *Bell v. Crackin Good Bakers, Inc.*, the plaintiff alleged a pattern of harassment aimed at her by her supervisor because of her gender. The alleged conduct included a statement by the supervisor to a male employee that he would get rid of the complainant, and that they “could make it rough enough on her for her to leave.” In an attempt to make it rough on the complainant, the supervisor gave her orders and then contradicted himself, told her to do many things in an insufficient amount of time, spoke to her like she was a child, waved her paycheck in co-employees’ faces, called her the “pimp of the office,” and interrupted her break periods. Additionally, a co-employee testified in a deposition that the supervisor told her that if it were up to him he would not have female employees in the complainant’s department, and would have all males out there, because men could do a better job than women. She also testified that the supervisor constantly tried to belittle the complainant in front of other employees, and that he treated her differently from the

107. *Id.* at 463-65.
108. *Id.*
109. *Id.* at 467-69.
110. 777 F.2d 1497 (11th Cir. 1985).
111. *Bell, 777 F.2d* at 1499.
112. *Id.*
113. *Id.* at 1500.
male employees he supervised. The complainant was also denied a promotion which was given to a male employee. The Court of Appeals for the Eleventh Circuit recognized that the claim was not for sexual harassment, but for gender-based harassment, and reversed the trial court’s order granting summary judgment to the defendants since the evidence alleged was sufficient to overcome a motion for summary judgment.

In McKinney v. Dole, the court found that it was improper to grant summary judgment for the defendants when the complainant’s primary allegation of harassment was a non-sexual physical assault by a male supervisor. The court held instead that non-sexual gender-based conduct, if sufficiently “patterned or pervasive,” can be actionable under Title VII. The case also involved allegations of sexual conduct, but the alleged assault was the allegation upon which the parties focused. Significantly, in a footnote, the court acknowledged the difficulty in proving the severity or pervasiveness of the type of gender-based harassment alleged in that case, as compared to sexual harassment:

It is true that proving that a pattern of physical force is illegally discriminatory might be significantly more difficult than proving that a pattern of explicitly sexual advances is illegally discriminatory because the latter are more obviously caused by the sex of the employee. That, however, is simply an evidentiary problem going to one factual component of discrimination.

By appropriately contextualizing gender harassment claims, this article attempts to clarify this “evidentiary problem” in light of the substantive law applied to gender harassment claims. As the psychological studies discussed above demonstrate, the fact that appellate courts have recognized the actionability of gender harassment claims, does not preclude such claims from being minimized by a trier of fact.

114. Id.
115. Id. at 1499-1500.
116. Id. at 1502-03.
117. 765 F.2d 1129 (D.C. Cir. 1985).
118. McKinney, 765 F.2d at 1137-38.
119. Id. at 1132, 1136-37.
120. Id. at 1139 n.21.
121. See supra note 80 and accompanying text.

Racial, religious, and national origin based harassment, like gender harassment, often involves allegations that an employee or employees were tormented because of membership in a protected class. This is demonstrated by the parallels between the gender harassment cases cited above, and cases involving allegations of racial, religious, or national origin harassment as set forth below.

In *Boutros v. Canton Regional Transit Authority*, a Syrian immigrant alleged that he was harassed based on his national origin while working as a bus driver for the transit authority. He alleged that the Director of Transportation, and later that director's replacement, made ethnic slurs when referring to him such as, “camel jockey,” “rug peddler,” and “heeb.” The first Director also made remarks directly to him, such as,

> where you come from ... you are a rich Arab. You own a restaurant and all sort of things and you don't need RTA and you should go back to Syria and fight the Israel Army and kill the Jews, ... where you came from, you have no vehicles, you don't know what a bus is, and you don't know what cars are.

The replacement director put the complainant’s name on a “hit list” of individuals he wanted terminated from employment, and told another employee “we are going to get rid of that camel jockey.” Additionally, Mr. Boutros was sometimes instructed to depart from standard procedures, and was then disciplined for following the instructions. The court of appeals reversed a district court order dismissing the claim, noting that the alleged conduct was sufficient to support a claim of harassment based on national origin.

In *Daniels v. Essex Group, Inc.*, the claimant alleged that he was racially harassed by co-workers, and that management did nothing to stop the harassment. Mr. Daniels was nicknamed “Buckwheat,” subjected to jokes about his race, and teased if he spoke with

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122. See supra Part III.B.2.
123. 997 F.2d 198 (6th Cir. 1993).
124. *Boutros*, 997 F.2d at 201.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 202-04.
129. 937 F.2d 1264 (7th Cir. 1991).
a white woman.\textsuperscript{130} After several years of such treatment, the harassment intensified. A dummy with a black head and fake blood dripping was hung from a doorway, graffiti was written in the bathroom in his department saying, “KKK,” and “niggers must die,” and messages directly aimed at him, such as “Hi Bob KKK,” were written on the walls of a toolhouse.\textsuperscript{131} A co-worker repeatedly called him “nigger” and threatened to whip him or hurt his son.\textsuperscript{132} Additionally, a bullet was fired at a wall in his house, although he could not prove that it was fired by an Essex Group employee.\textsuperscript{133} Mr. Daniels finally resigned because of the conduct.\textsuperscript{134} The court of appeals upheld the district court’s award in favor of Mr. Daniels on his racially hostile work environment claim.\textsuperscript{135}

In \textit{Turner v. Barr},\textsuperscript{136} a white Jewish Deputy United States Marshall sued the United States Marshall Service alleging a hostile work environment based on religion and race. The court found that Mr. Turner was subjected to a harsh comment relating to the Holocaust by a supervisor, who said that the cost of Germany’s reconstruction after World War II was high because of its high gas bill during the war.\textsuperscript{137} Additionally, he faced other religiously and racially motivated conduct. When he tried to collect money for a charity drive, he was subjected to comments implying it was not appropriate for him to collect money because Jews could not be trusted to deal with money. Furthermore, he was told by a co-worker while on assignment at a jewelry store, that he should be running the store, implying that selling jewelry was a Jewish occupation. He was also inappropriately disciplined for an incident after an inadequate investigation.\textsuperscript{138}

Additionally, he was denied the opportunity to work as much overtime as other deputies who were not white or Jewish, was forced, along with the other white deputies, to sit in the back of the squad room in an area referred to by the African-American deputies as “Georgetown,” and when he sat at another desk was instructed to “get

\textsuperscript{130} \textit{Daniels}, 937 F.2d at 1266.
\textsuperscript{131} \textit{Id}.
\textsuperscript{132} \textit{Id} at 1267.
\textsuperscript{133} \textit{Id}.
\textsuperscript{134} \textit{Id}.
\textsuperscript{135} \textit{Id} at 1268-76.
\textsuperscript{137} \textit{Turner}, 811 F. Supp. at 3.
\textsuperscript{138} \textit{Id} at 4-5.
back to Georgetown.139 White deputies were referred to as “white boys” and “white asses,” Mr. Turner was told by an African-American deputy that he “should get his white ass out of the office because this is a black office, for blacks, supervised by blacks,” he was given the nickname “turnkey” despite his objections, and a poster with his picture superimposed next to a set of keys and the word “turnkey” was hung in the office.140 The court found that the allegations were sufficient to support Mr. Turner’s claim based on religious and racial harassment.141

4. Conclusions Derived From the Comparison of Sexual, Gender, Racial, Religious, and National Origin Harassment

By comparing the cases described above, one can see the similarity in the types of conduct alleged in gender, racial, religious, and national origin harassment. The conduct is not based on any attraction or sexual need, but rather upon hatred or disapproval of an individual or individuals because of membership in a protected class. Conversely, sexual harassment is not aimed at an employee or employees based solely on their membership in a protected class, although the conduct underlying the harassment would not occur were the employee or employees not of a particular sex.142 Rather, sexual harassment is based on the harasser’s sexual needs and perceptions, a specific set of sex stereotypes which define the harasser’s perceptions of the relationships between the harasser and the victim, and between the sexes in general.143 Even in the severest sexual harassment case, the harasser need not express misogynist or misandrynist attitudes.144

139. Id. at 4.
140. Id.
141. Id. at 5.
142. Justice Ginsburg succinctly addressed this point in her concurring opinion in Harris where she stated, “[t]he 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 others sex are not exposed.” Harris, 114 S. Ct. at 372 (Ginsburg, J., concurring) (citation omitted).
143. See supra notes 11-13. All discrimination and harassment is based to some extent on power roles, hatred and stereotypes; however, it is the infusion of sexuality and sexual stereotypes, which are not based solely on the victim’s membership in a protected class, but also on perceptions of human sexual interaction, which distinguish sexual harassment from other forms of harassment and discrimination. See supra note 13.
144. See Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (where harassment was based
C. Analyzing Some Hypothetical Hostile Work Environment Claims: The Cases of Ms. R, Ms. T, and Mr. H

Now that gender harassment has been considered in light of the other types of harassment recognized under Title VII, the claims raised by the hypotheticals set forth in Part I can appropriately be addressed. When this is done, it becomes apparent that gender harassment claims must be analyzed in the same way as other non-sexual harassment claims in order to fulfill Title VII's mandate against discrimination in the terms and conditions of employment. In reaching this conclusion and analyzing the hypotheticals, several questions present themselves: (1) what type of harassment does each hypothetical represent?; (2) should any of the hypotheticals be analyzed in relation to each other?; (3) what is the likely result of analyzing Ms. T's claim in light of Ms. R's?; and (4) Mr. H's?

The first question is the easiest to answer. Ms. R's claim would be for sexual harassment because the conduct alleged was of an overtly sexual nature. Ms. T's claim would be for gender harassment since the incidents she complains of were aimed at her because she is a woman and the totality of her allegations demonstrate that the conduct she faced was based on a negative perception of women in the workplace, and not an attempt to bring sexuality or sexual conduct into the workplace. Mr. H's claim, which was based on conduct aimed at him because he is an African-American, is for racial harassment.

The second question is harder to answer. In a sense, all of the hypotheticals can be analyzed in relation to each other because the structure for the hostile work environment cause of action is roughly the same for sexual, gender, and racial harassment. However, when applying that structure to the pattern of conduct underlying those claims, it becomes apparent that Ms. T's claim is similar to Mr. H's claim. The severity and pervasiveness of the conduct alleged is similar; each alleges insults based on stereotypes of the proper work roles for individuals in their respective classes, conduct which interferes with their job functions, and an attitude that they have no place in a "male" or "white" workplace.

Ms. R's claim, on the other hand, involves overtly sexual conduct such as touching of private parts, sexual propositions, and references solely on conduct related to the harasser's attraction towards the victim and not on a generally negative attitude about women).

145. See supra Part II.
to sexual acts. The goal of the conduct is not simply to send a message that women do not belong in the workplace, despite the fact that the male co-workers seem to view Ms. R as a sex object because other women in the office are not treated in the same way. In fact, if Ms. R left the workplace, it would appear that the male employees would not be happy because they get some kind of pleasure out of subjecting her to the conduct. Thus, it would be inappropriate to analyze the facts underlying Ms. T’s and Mr. H’s claims on a continuum with Ms. R’s because the conduct is of a different nature.

In this regard, the answers to the third and fourth questions are instructive. If Ms. T’s gender harassment claim is viewed in light of Ms. R’s sexual harassment claim, it is quite possible that the trier of fact will determine that an objectively reasonable person/woman would not feel that the conduct Ms. T alleged is sufficiently severe or pervasive to alter a term or condition of employment and create an abusive working environment because Ms. T was not subject to sexual touchings or vulgar and shocking language. That concern is bolstered by the psychological data demonstrating that people evaluating sexual conduct along with non-sexual gender-based conduct view the overtly sexual conduct as substantially more severe. Considering the major attention sexual harassment has received in the media and the resulting common perceptions of the nature of such harassment, judges and juries might intentionally or unintentionally compare the severity of gender-based conduct to the common perceptions of sexual harassment, and conclude that gender-based conduct is not sufficiently severe to create a hostile work environment.

Therefore, comparing Ms. T’s claim to Ms. R’s would not serve the purposes of Title VII. Title VII mandates that conduct which would not have occurred but for the victim’s sex is actionable if it alters a term or condition of employment. Title VII’s requirements do not apply only to overtly sexual harassment that is shocking or lewd, but rather to any conduct that alters a term or condition of employment based on an individual’s sex. In Harris, the Supreme Court instructs that even in the absence of tangible effects on job performance or benefits, “the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or

146. See supra note 80.
147. See, e.g., McKinney, 765 F.2d at 1138; Campbell, 770 F. Supp. at 1485-86; Delgado, 665 F. Supp. at 460.
148. Harris, 114 S. Ct. at 370-71; McKinney, 765 F.2d at 1137-40.
national origin offends Title VII’s broad rule of workplace equality.”

There is little question that the psychological result of gender-based harassment can be devastating, and can create an abusive working environment.

The story is quite different if gender harassment claims were analyzed like racial, religious, and national origin harassment claims. For example, Mr. H’s claim is similar to the non-sexual harassment cases set forth above, and thus he would probably prevail. If the severity and pervasiveness of Ms. T’s allegations were analyzed in light of Mr. H’s, using the same criterion, she too would likely prevail. Both claims involve remarks and conduct aimed at the victims because of their membership in a protected class, and triers of fact have found such claims to be objectively reasonable. Significantly, this is not a proposal that a judge or jury must compare gender harassment allegations with racial harassment allegations, but rather that they view the severity and pervasiveness of the misogynist or misandryist conduct as determined by the objective and subjective reasonableness standards in the same way they would view racist conduct. Further, gender-based conduct should not be compared to that alleged in sexual harassment cases in determining the severity and pervasiveness of the conduct. Juries should be appropriately instructed, and judges reminded, of this in gender harassment cases.

D. Mixed Gender/Sexual Harassment Claims

It is not uncommon for a hostile work environment claim to involve allegations of both overtly sexual conduct and non-sexual gender-based harassment. Fortunately, guidance on how to deal

149. Harris, 114 S. Ct. at 371.

150. See Louise F. Fitzgerald, Sexual Harassment: Violence Against Women in the Workplace, 48 AM. PSYCHOL. 1070, 1072 (Oct. 1993) (discussing the consequences of sexual harassment); See also Levy, supra note 13, at 42-49 (describing some of the psychological impact of gender-based harassment).

151. See supra Part III.B.3.

152. See supra Parts II, III.B.2., and 3.

153. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (allegations included pornography, displaying of sexual objects on desks, use of obscene language towards female officers, name calling, taking female officers’ files and work product, destruction of property, anonymous phone calls and the placement of a lime substance in a female officer’s clothing); McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) (allegations included a non-sexual physical assault on a female employee, a supervisor exposing himself to her, rubbing up against her and asking her for sexual favors in addition
with such claims is provided by the courts which have addressed mixed gender/sexual harassment or mixed racial/sexual harassment claims. Those courts have looked to the totality of the conduct alleged, and asked whether it rises to the level necessary to create a hostile work environment.\footnote{In Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987), the court held:}

\begin{quote}
The third question is whether, in determining the pervasiveness of the harassment against a plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility. We conclude that such aggregation is permissible. . . . Title VII prohibits an employer from discriminating against any individual because of race or because of sex. The use of the word 'or' evidences Congress' intent to prohibit employment discrimination based on any or all of the listed characteristics.
\end{quote}

\textit{Hicks}, 833 F.2d at 1416.

Likewise, in \textit{Andrews}, the court addressed the issue of how mixed gender/sexual harassment allegations should be evaluated, holding:

\begin{quote}
[T]he trial judge should look at all of the incidents to see if they produce a work environment hostile and offensive to women of reasonable sensibilities. The evidence in this case includes not only name calling, pornography, displaying sexual objects on desks, but also the recurrent disappearances of plaintiffs' case files and work product, anonymous phone calls, and destruction of other property. The court should view this evidence in its totality, as described above, and then reach a determination.
\end{quote}

\textit{Andrews}, 895 F.2d at 1486.

\footnote{\textit{Id.} See also Turner v. Barr, 811 F. Supp. 1 (D.D.C. 1993) (recognizing the actionability of conduct aimed at an employee because of his religion and race).}

CONCLUSION

As the field of employment discrimination law evolves, we will consistently be faced with new concepts, arguments, and theories. It is essential to define the law in this area as precisely as possible given to other verbal abuse. However, because of the timing of the other incidents, the assault was the primary incident the court considered in evaluating her harassment claim).
its complexity and the wide variety of situations to which it applies. The reason for this is simple: employees and employers need to understand their rights and duties so that employees do not feel that they have to put up with discriminatory conduct, and employers can take actions to prevent discrimination and the liability and economic losses associated with it.

One emerging employment discrimination theory is the concept of gender harassment. It has already been recognized by the EEOC and some courts, but its nature and structure require in depth exploration. Unfortunately, because of the pervasiveness of sexual harassment in the courts and the media, gender harassment might not receive the treatment it should from judges and juries, despite the fact that it can cause great harm to its victims. This article has addressed this growing legal theory, by assessing its nature and structure, comparing it to other forms of harassment actionable under Title VII, and addressing the importance of analyzing gender harassment claims in the appropriate context.

By providing an analytical framework now, while the concept of gender harassment is in the early stages of evolution, a clarification of some of the issues raised by such claims will hopefully result. Only by exposing and discussing such concerns can a useful body of law be provided for employers and employees to use. Hopefully, that body of law will contribute to the eradication of discrimination in the workplace.