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Sex in the Sexy Workplace

Lua Kamál Yuille*

ABSTRACT

This article presents yet another problem that cannot be addressed adequately either through an honest application of existing sexual harassment paradigm under Title VII of the Civil Rights Act of 1964 or through any of the solutions to that paradigm's deficiencies that have been proffered since its inception: hostile environment sexual harassment of the non-sexualized worker in the "sexy" workplace. It offers a comprehensive doctrinal illustration of how both existing sexual harassment doctrine and popular critiques of that doctrine fail to respond to the unique case of the sexual harassment of a non-sexualized worker in the sexual titillation industry (e.g. a secretary at a pornographic magazine publisher). The article offers a doctrinal fix that draws inspiration from the "bona fide occupational qualification" and "business necessity defense" exceptions to Title VII's prohibition on workplace discrimination. The "bona fide occupational requirement" offers a bifurcated work-related/non-work-related conduct analysis to provide a reasoned, if imperfect, way to narrow some of the gaps in hostile environment paradigm highlighted by the article's analysis. However, rather than suggest that narrowing the latest gap in sexual harassment doctrine is a necessary or sufficient solution, the article concludes that the sexy workplace illustrates a more foundational problem in sexual harassment law: the sex industry is fundamentally incompatible with the principles of Title VII's prohibition of gender discrimination.

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> "The rule of thumb at the end of the day is simple: sex bars can subordinate women, but airlines and restaurants may not." - Katharine T. Bartlett[1]

INTRODUCTION

Imagine a woman who goes to work every day and is confronted by a supervisor who regularly tells explicit, "dirty" jokes. She is constantly shown pornographic material—nude women, graphic pictures of sex, exposed genitalia—and her male colleagues discuss, analyze, and joke about the material in equally graphic language. Pictures of nude and partially nude women are displayed throughout the workplace. There are even varnished, wooden plaques onto which the pictures have been affixed and large posters in which the pornographic material is framed. Every day, suggestive comments are directed at her and others: "I'd like to get in bed with that!" "Come sit on my lap baby!" Coworkers' conversations center on the evaluation and grading of women's bodies, and male supervisors have suggested that they are interested in having sexual relations with women receiving high marks. Instead of using her name, coworkers and supervisors will sometimes call the woman "honey," "baby," or other diminutives. She is subjected repeatedly to uninvited touching, sometimes of her buttocks.[2] There is little doubt that the law of sexual harassment that has developed under Title VII of the Civil Rights Act of 1964 would provide relief to the woman working in this work environment.[3]

Now, consider less extreme facts. A woman finds her normal tasks supplemented by distasteful assignments. She is forced to act as a "look out" while the company president engages in extramarital liaisons with "special guests" whom she believes to be prostitutes. She is asked to rearrange schedules to accommodate these visits and ensure the president's wife does not interrupt. During these regular liaisons, extremely loud noises of sexual activity and gratification emanate from his office, disrupting business meetings in the surrounding offices. The president also has a habit of making sexually-charged remarks around and to the woman—asking another executive if the woman was the one "he was fucking"; telling a "sticky panties" joke; requesting hugs; commenting about the attributes of the prostitutes he invited to his office; announcing that he was "wearing an erection."[4] Even if the determination is less straightforward, it remains clear

[1] Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, And Workplace Equality*, 92 MICH. L. REV. 2541, 2579 (1994).
[2] This scenario borrows liberally from the facts in Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991) and Faragher v. Boca Raton, 524 U.S. 775 (1998).
[3] Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994).
[4] This hypothetical is based on the facts alleged in Raymond v. Flynt, 2010 WL 3751524 (Cal. Ct. App. Sept. 28, 2010), *reh'g denied* (Oct. 21, 2010), *review denied* (Dec. 15, 2010).

that Title VII's prohibition of sexual harassment in the workplace also catches this scenario. Regardless of whether one has any legal expertise, the sexual harassment paradigm has so permeated public consciousness that most people intuit the (legal) wrongness of these sexualized scenarios in almost any workplace.

But, imagine that the woman in question was a waitress or bartender at FlashDancers Gentlemen's Club. Imagine that she was an executive assistant at Swank Magazine.[5] Imagine that she was the telephone operator for Hot Talk or a sales manager for Platinum X. What if the woman was the webmaster for penthouse.com or an usher at Hot Flixx Theater?[6] What if, in other words, the woman was working in a "sexy workplace"—the workplace of a business in the sexual titillation industry whose products or services are of a patently sexual nature—but she, herself, was a non-sexualized worker?[7]

In the latter context, the immediate intuition raised by the two scenarios presented above fails. This failure raises several questions whose answers have serious implications. Is it likely that a court would look at the "obvious" cases above in the same light? Would the woman be entitled to the same protective shelter that Title VII offers to other "non-sexualized" workers? Should she be entitled to such protection? What would the overarching consequences be for sexy workplaces if she were? Considerable attention has been paid to these questions in evaluating the plight of the sexy worker in the sexual titillation industry,[8] but the non-sexualized worker has been overlooked.[9]

In the thirty years since courts first recognized sexual harassment as a form of sex

[5] In fact, the second scenario presented above involved an executive assistant at Larry Flynt Publications, which publishes the well-known adult magazine, Hustler, as well as other adult content including Hustler.com. The president against whom the action was lodged was Larry Flynt himself. *See id.*

[6] The preceding are all names of actual businesses and companies in the sexual titillation industry.

[7] The term "sexy workplace contemplates both those businesses that would qualify for the so-called bona fide occupational qualification (BFOQ) exception to Title VII in hiring some of its workers, as well as businesses that do not employ any workers providing direct sexual titillation services (i.e. lap dancers, strippers, etc.) but where the essence of product or service is, nonetheless, sexual.

[8] *See generally* Ann C. McGinley, Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments, 2007 U. Ill. L. Rev. 1229 (considering how Title VII rules should be applied to impose liability for hostile work environments created by customers in the highly sexualized environment of a Las Vegas casino); Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 Yale J.L. & Feminism 65 (2006) (critiquing the "good girl/bad girl" dichotomy that pervades consideration of hostile environment harassment claims by women in sex and sexualized industries); Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can it Support a Hostile Work Environment Claim Brought by a Nude Dancer?*, 24 N.Y.U. Rev. L. & Soc. Change 271 (1998) (analyzing the difficulties faced by nude dancers in proving hostile environment sexual harassment and suggesting a framework for providing protection); Jeannie Scalafani Rhee, *Redressing for Success: the Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 Harv. Women's L.J. 16 (1997) (proposing a framework for imposing employer liability for third-party harassment of Hooters waitresses); Kelly Ann Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 Vand. L. Rev. 1107 (1995) (analyzing employer liability for hostile environment harassment by customers in Hooters restaurants). *See also* Margot Rutman, *Exotic Dancers' Employment Law Regulations*, 8 Temp. Pol. & Civ. Rts. L. Rev. 515, 531-33 (1999) (summarizing the difficulties in applying Title VII to exotic dancers in strip clubs).

[9] For simplicity, the terms worker and woman will be used interchangeably throughout this article. For the most part, however, the same or similar considerations apply with equal force to potential male victims of hostile work environment sexual harassment in the sexy workplace.

discrimination under Title VII,[10] there has been a seemingly endless parade of criticisms from both supporters and opponents of this construal of Title VII. Such critiques are accompanied by proposed revisions to the law that tailor it to resolve the problems they highlight both through theoretical reformulations and clarifications of the underlying principles of the prohibition of sex discrimination and by recasting the legal elements and tests developed in the existing body of case law and administrative guidance.

Notwithstanding this work, sexual harassment remains not just "a seemingly unending source of controversy"[11] but also a seemingly intractable and evasive problem. Conundrums like hostile environment sexual harassment of the non-sexualized worker in the sexy workplace are inexorably present, resisting satisfactory resolution through an honest application of Title VII's existing paradigm or through any of the solutions that have been proffered since its inception. Such intractability is also evidenced empirically.[12] The available data suggests that sexual harassment has held fairly steady throughout the life of the law, even while its modalities have evolved.

These questions are the descriptive and doctrinal core of this article: can the sexual nature of a product or service so sexualize the workplace as to provide a defense against the hostile work environment sexual harassment claim? Implicit in the law of sex discrimination is an assumption that the sexy workplace *can* exist. This assumption is evidenced, most clearly, by the bona fide occupational qualification (BFOQ) exception to Title VII's prohibition of gender discrimination in the workplace. Courts have used the BFOQ exception to allow businesses the essence of whose service or products is sexual titillation to discriminate based on sex with regard to certain employees. The classic example of this special consideration is the Playboy Bunny: while at once intuitive and shocking in a Title VII indoctrinated society, it is long established that Playboy may hire only women to fill the Playboy Bunny position.[13] If sexy workplaces inherently and unavoidably violated Title VII, they would not be entitled to such consideration. The question asked here, then, goes a step further. Assuming that the sexy workplace may exist, how much latitude does the law allow such businesses? Can the sexy workplace expect its workers to endure sexualized treatment or behavior that would not be permitted in another work environment?

Part II of this article provides a doctrinal analysis of the sexy workplace scenario that illustrates the limited potential of both existing doctrine and theory to lead to

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[10] The U.S. Supreme Court first explicitly recognized the existence of a Title VII cause of action for sexual harassment in Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986). Before this case, however, the Equal Employment Opportunity Commission had previously promulgated guidelines having the same effect with which the lower federal courts complied. *See, e.g.*, Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

[11] Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 26 (Catherine A. MacKinnon & Reva B. Siegel, eds., 2004).

[12] *See*, *e.g.*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT STATISTICS, EEOC & FEPA'S COMBINED: FY 1997-FY 2011 (2012) (reporting the number of cases filed with EEOC and the state and local employment agencies); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT STATISTICS, EEOC & FEPA'S COMBINED: FY 1992-FY 1996 (1997), available at http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment-a.cfm (last visited September 23, 2013).

[13] *See, e.g.*, Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 301 (N.D. Tex. 1981); Guardian Capital Corp. v. N.Y. State Div. of Human Rights, 46 A.D.2d 832, 833 (N.Y. App. Div. 1974) (quoting Margarita St. Cross v. Playboy Clubs Intl. (Appeal No. 773, Case No. CSF 22618--70)).

consistently satisfactory outcomes for non-sexualized workers in the sexy workplace. The development of sexual harassment law by the courts indicates that there is a lower standard of protection for non-sexualized workers in a business the essence of whose product or services is sexual titillation. However, unlike strippers or "Hooters' Girls" (as has been argued elsewhere),[14] the secretary, the sales manager, the usher, and people in other non-sexualized positions do not fall as easily into the unsympathetic category of workers who are cast as the instruments of their own mistreatment because they chose to make themselves the object of the sexual titillation being sold. Nevertheless, the standards and rules that have developed to distinguish between unlawfully discriminating and merely inappropriate workplace behavior have created large holes in the Title VII canopy such that when it rains, non-sexualized workers in the sexy workplace are likely to get wet.

Part III illustrates the limited potential for existing theoretical and doctrinal critiques of sexual harassment to address the sexy workplace. It suggests that a change in the approach to hostile work environment sexual harassment, at least in this category, is warranted. Though concluding that no approach is capable of filling the holes in the Title VII canopy, a new model inspired by aspects of sex discrimination law (rather than more specific sexual harassment law)—the bona fide occupational qualification exception and the business necessity defense—provides the means of ratcheting up Title VII protection for non-sexualized workers in the sexy workplace.

Part IV contemplates the broader importance of addressing the sexy workplace scenario, concluding that the Title VII difficulties posed by the sexy workplace evidence the fundamental incompatibility between such businesses and the purpose of the statute.

I. THE DOCTRINAL INVISIBILITY OF SEXUAL HARASSMENT IN THE SEXY WORKPLACE

Though framed by controversial academic and political discourse, the sexual harassment regime develops in the lives of real people. This development is pushed, shaped, and highlighted by contentious cases making their way to courts. A cycle of emerging perplexing problems not satisfactorily resolvable by the suggestions offered in the last round of advancement is a salient feature of this development and is integral to the continual reframing of the debate. The *quid pro quo* form of harassment, once accepted, became fairly easy to understand and detect.[15] Hostile environment sexual harassment has proven more difficult. Cases of bi-sexual harassment, equal opportunity harassment (i.e. targets both sexes with sexual behavior),[16] intersectional harassment (i.e.

[14] Rutman, *supra* note 8; Burstein, *supra* note 8; Scalafani Rhee, *supra* note 8; Cahill, *supra* note 8.
[15] Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 460 (2001).
[16] *See* Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (first framing the problem). *See also* Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) (stating equal opportunity harassment is not gender discrimination; Henson v. City of Dundee, 682 F.2d 897, 904 n.11 (11th Cir. 1982) ("Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex."); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("Only by a reductio ad absurdum could we imagine a case of harassment that is not sex discrimination– where a bisexual supervisor harasses men and women alike."); Raney v. District of Columbia, 892 F. Supp. 283, 288 (D.D.C. 1995) (stating that there is no discrimination in cases where a supervisor harasses both sexes equally).

is motivated by sex and some other characteristic),[17] same sex harassment,[18] non-sexualized harassment, and so forth represent significant challenges for the paradigm and are the factual pivots around which policy debates revolve. The sexy workplace scenario introduced here is an iteration of this cycle.

A. Hypothetical Applications

The history and purpose of Title VII is well known, but it is useful to recall exactly what the law prohibits:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's…sex.[19]

Though the prohibition of sexual harassment can be inferred from Title VII, the Equal Employment Opportunity Commission's guidelines make the concept of sexual harassment explicit:

> Harassment on the basis of sex is a violation . . . of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when [*inter alia*] such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[20]

From its earliest days, though, a claim of discrimination based on sexual harassment has never been an easy or uncontroversial means of legal protection. Women have always faced considerable obstacles in showing their workplace violates Title VII. That difficulty is both multiplied, through the delineation of particularized legal tests—where the sexual harassment claim is based not on *quid pro quo* harassment but on a hostile environment theory—and exacerbated, by cumbersome interpretations of those tests.[21] Even an abbreviated application of the content elements of prevailing hostile environment sexual harassment doctrine shows that Title VII is unlikely to give consistently satisfactory "coverage" to non-sexy workers in the sexy workplace. The obstacles presented by the core elements of a hostile environment claim make it easy to ignore or discount a broad range of discriminatory behavior. To illustrate, it serves to

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[17] *See generally* Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger, & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 Law & Soc'y Rev. 991, 992 (2011) (reviewing case statistics).

[18] *See, e.g.*, Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay:" Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 Yale J.L. & Feminism 155, 157 (1999); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After Oncale: Defining the Boundaries of Actionable Conduct*, 47 Am. U.L. Rev. 677, 678 (1998).

[19] 42 U.S.C.A. § 2000e-2(a).

[20] 29 C.F.R. § 1604.11 (2003).

[21] *See, e.g.*, Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 839-840 (1991).

examine briefly the difficulties posed by the three well-known elements of the hostile work environment claim: (1) the contested behavior was unwelcome;[22] (2) it was severe and pervasive;[23] and (3) it was based on sex.[24]

1. Unwelcomeness

In 1986, the Supreme Court first explicitly recognized the existence of a Title VII cause of action for sexual harassment, pronouncing its decision in *Meritor Savings Bank v. Vinson*.[25] There, the Court indicated that the "gravamen" of any sexual harassment claim was that the conduct was "unwelcome" and instructed lower courts to ask whether, in light of the nature of the contested actions and the context in which the incidents occurred, the claimant "by her conduct" indicated that the alleged behavior was unwelcome.[26]

The unwelcomeness requirement is the first hurdle over which a runner, the sexual harassment plaintiff, must jump. Its focus on a woman's conduct—mandated by *Vinson's* "totality of the circumstances" analysis—has long been recognized as problematic, particularly because the emphasis of courts has, at times, fallen on the plaintiff's dress, language, and private life.[27] Nevertheless, it is clear that the "use of foul language or sexual innuendo in a consensual setting does not waive her legal protections against unwelcome harassment"[28] just because courts often fixate on a woman's dress, language, and private life, but fail to address the true question: whether a particular set of circumstances was consensual.[29]

Consider the Eighth Circuit's fairly liberal application of the unwelcomeness inquiry, which is representative of many other jurisdictions.[30] In *Burns v. McGregor*, the court interpreted "unwelcome" to mean that the contested behavior was "uninvited and offensive." [31] Accordingly, it overturned a determination that a woman, by appearing nude in a magazine outside of work, welcomed the sexual advances and innuendo of which she complained. In making its determination, it made a very important distinction:

> [t]he plaintiff's choice to pose for a nude magazine outside work hours is not material to the issue of whether plaintiff found her employer's work-related conduct offensive. This is not a case where Burns posed in provocative and suggestive ways at work. Her private life . . . did not

[22] Meritor Savings Bank v. Vinson, 477 U.S. 57, 69 (1986).
[23] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).
[24] *See, e.g.,* Oncale v. Sundowner Offshore Services Inc., 523 U.S. 75, 80 (1998).
[25] 477 U.S. 57 (1986).
[26] *Id.* at 69.
[27] Estrich, *supra* note 21, at 828. *See also* Louise F. Fitzgerald et al., *Why Didn't She Just Report Him?*, 51 J. Soc. Issues 117, 134 (1995); Janine Benedet, *Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law*, 3 MICH. J. GENDER & L. 125 (1995).
[28] Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987).
[29] *See* Estrich, *supra* note 21, at 828; Fitzgerald et al., *supra* note 29, at 134; Benedet, *supra* note 29.
[30] *See*, *e.g.*, Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007 (7th Cir. 1994); Horney v. Westfield Gage Co., Inc., 77 Fed. Appx. 24, 2003 WL 22326558 (1st Cir. Mass. 2003); Rahn v. Junction City Foundry, Inc., 152 F. Supp. 2d 1249 (D. Kan. 2001); Nuri v. PRC, Inc., 13 F. Supp. 2d 1296 (M.D. Ala. 1998).
[31] 989 F.2d 959, 962 (8th Cir. 1993).

> provide lawful acquiescence to unwanted sexual advances at her work place by her employer. To hold otherwise would be contrary to Title VII's goal of ridding the work place of any kind of unwelcome sexual harassment.[32]

The court's decision suggests that sex-related conduct at work can be used to refute a woman's statement that the challenged conduct was unwelcome.

In a similar act of differentiating between the types of conduct that display welcomeness, a district court in the Eight Circuit determined that "[n]o female employee should be required to confront sexually suggestive language and noises from male employees, either individually or in groups."[33] Yet, it found women plaintiffs to have sufficiently indicated the unwelcomeness of the pervasive display of sexually oriented materials, use of "pet names," and physical acts,[34] only because:

> although [the] women . . . cursed, some freely, there was no evidence that women used language and epithets which were 'intensely degrading" to women, e.g., "bitch," "whore", and "cunt," . . . . In addition, women did not discuss their sex lives at work in front of men, nor did they, with the exception of one woman on one occasion, engage in questioning men about their sex lives or interest in sexual activities.[35]

A logical implication is that, had the women's work behavior gone beyond the mere use of milder forms of foul language or had they discussed their sex lives in "mixed company," their conduct could have manifested that the impugned conduct was welcome and, thus, not harassment.

The undeniable tenor and sway of this more liberal contingent of cases is to provide protection to women even when they engage in highly sexualized behavior.[36] Despite the Eighth Circuit's strong tone, however, these cases also make clear that not every female employee will be protected from sexually suggestive language, noises, and behavior. Under the analysis they mandate, a woman who works at a theater which shows pornographic films and regularly discusses the films on display with her male co-workers, may have expressed that she welcomes touching and targeted sexual pantomime.

These cases illustrate the difficulties the non-sexualized worker will face even under a liberal approach to unwelcomeness, especially because many courts have adopted similar approaches to the first prong of the hostile environment analysis.[37] She may participate regularly in sex-related conduct at work pursuant to her job responsibilities. A

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[32] *Id.* at 963.
[33] Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 880 (D. Minn. 1993).
[34] The physical acts included unwanted touching, the mock performance of oral sex on a sleeping female worker, and the presentation of a buffet of dildos to a woman worker. *Id.* at 883.
[35] *Id.*
[36] Indeed, reading the court's language, it is possible to get the impression that the Eighth Circuit is attempting to provide relief to the woman in question without eviscerating the "unwelcomness" inquiry.
[37] *See*, *e.g.*, Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007 (7th Cir. 1994); Horney v. Westfield Gage Co., Inc., 77 Fed. App'x. 24 (1st Cir. 2003); Rahn v. Junction City Foundry, Inc., 152 F. Supp. 2d 1249 (D. Kan. 2001); Nuri v. PRC, Inc., 13 F. Supp. 2d 1296 (M.D. Ala. 1998).

waitress at an exotic dance venue, competing for tips with a nude woman exposing herself to the crowd, may dress and behave in "provocative and suggestive" ways to attract the attention of customers. Will such conduct prove acquiescence to sexual advances? A woman working at a theater where pornographic films are shown may regularly discuss the films on display there with her male co-workers. Will she have expressed that she welcomes touching and targeted sexual pantomime?

Such obstacles are enhanced where courts have been more reluctant find that a woman sufficiently manifested her opposition. For example, the Seventh Circuit credited the following claims of a woman jailer:

> she was handcuffed to the drunk tank and sally port doors . . . physically hit and punched in the kidneys, that her head was grabbed and forcefully placed in members laps, and that she was the subject of lewd jokes and remarks . . . that she had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs, and that they frequently tickled her. She was placed in a laundry basket, handcuffed inside an elevator, handcuffed to the toilet and her face pushed into the water, and maced.[38]

It is difficult to imagine that any course of conduct could have manifested the welcomeness or, conversely, failed to manifest the unwelcomeness of such patently criminal abuse.[39] Nevertheless, the jailer was denied relief. The Court considered the woman a "willing and welcome participant" in the behavior who "relished reciprocating in kind" because she had been placed on probation for using offensive language, had been reprimanded for not wearing a bra to work, enjoyed showing her abdominal scars to coworkers, and had participated in suggestive gift giving.[40]

Adopting a similarly restrictive interpretation of the unwelcomeness requirement, an Eleventh Circuit court denied relief for what one woman claimed was a hostile environment created by sexual overtures, direct propositions, genital exposure, and sexual touching because she had participated in sexual banter, back scratching, and sitting on laps.[41] This woman's direct expressions of unwelcomeness were deemed insufficient because "when she did tell him 'no,' she also said such things as 'I'm busy,' or 'not now,' comments which tend to negate the effect of the initial 'no,' making her intentions less than clear."[42] What possible conduct in this situation could evidence that escalated

[38] Reed v. Shepard, 939 F.2d 484, 486 (7th Cir. 1991).

[39] The plaintiff testified that "[i]t was important for me to be a police officer and if that was the only way that I could be accepted." As a result, she did not complain about the conduct upon which she based her claim. In fact, the witnesses testified that "Reed reveled in the sexual horseplay, instigated a lot of it, and had 'one of the foulest mouths' in the department."

[40] *Id.* at 486-87.

[41] Mangrum v. Republic Industries, Inc., 260 F. Supp. 2d 1229, 1252-53 (N.D. Ga. 2003), *aff'd* 88 F.App'x. 390 (11th Cir. 2003).

[42] *Id.* In *Mangrum,* the plaintiff, a used car salesperson, had alleged that once her colleague was promoted he "asked her for oral sex, said that she could make more money on her car sales if she would accept his sexual overtures, sexually propositioned Plaintiff's daughter in front of Plaintiff… patted her buttocks, and, on one occasion, exposed himself to her." Before these actions, however, the plaintiff had participated in office sexual banter, used foul language, sat on the laps of colleagues, scratched their backs, and allowed her back to be scratched. To the court, such anachronistic behavior acted as a general waiver.

sexual conduct was unwelcome? The only logical conclusion based on this stricter route is that, if any conduct is welcome, then no conduct (within some limits) is unwelcome.

At either pole, prevailing sexual harassment doctrine leaves all sexual harassment claimants at a disadvantage.[43] However, the totality of the circumstances analysis presents additional obstacles for non-sexy workers in the sexy workplace. For example, as the illustrative cases discussed above show, the status of work-related sexual conversation or behavior is unclear. Is it evidence that a woman welcomes or invites non-work-related behavior? Even more basically, what constitutes work-related behavior? The real difficulty lies in drawing the lines. What if a woman was constantly shown pornographic material because she was a copy editor at Hustler XXX magazine? Maybe she participated in the graphic discussions about the material with male colleagues. She may even have done so eagerly. All of the cases above permit sexual conduct at work—especially enthusiastic conduct—to evidence that the woman was not offended by or unreceptive to the acts of her colleagues. *Mangrum* even recognizes, frankly, that a woman's express statement that conduct is unwelcome is insufficient to manifest the unwelcomeness of harassment if her behavior otherwise indicates welcomeness under the rubric the court lays out.

Another problem presented by the unwelcomeness inquiry is its inordinate focus on the type of language used by the claimant. Where the plaintiff was unsuccessful, reference to her frequent use of vulgar language is almost always a factor in proving that she failed to manifest adequately the unwelcomeness of the harassing conduct. Even while recognizing that cursing is not an invitation to sexual harassment,[44] cases finding sexual behavior to be unwelcome noted the mild or limited nature of the language used by the victim.

What if, however, the woman works in an adult video or bookstore? In many sexy workplaces, vulgar and offensive language, even profanity that is "intensely degrading" to women, is widely used by women and men alike and forms part of the trade vernacular.[45] Similarly, in an environment inherently pervaded by sexuality, it may be common to discuss one's personal sex life. It would not be shocking (or offensive) for the employees of a sporting goods company to discuss their opinions of the different brands of tennis rackets based on their personal experiences with the rackets in various matches. The same intuition should hold if the woman works for Doc Johnson Sextoys. Is it unimaginable that individuals who sell sexual stimulation products will discuss their

[43] The problems presented by the welcomeness requirement have been well chronicled elsewhere: Elsie Mata, *Title VII Quid Pro Quo and Hostile Environment Sexual Harassment Claims: Changing the Legal Framework Courts Use to Determine Whether Challenged Conduct Is Unwelcome*, 34 U. Mich. J.L. Reform 791 (2001); Benedet, *Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law*, 3 Mich. J. Gender & L. 125, 174 (1995); Susan Deller Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. Cal. L. Rev. 1451 (1992); Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 Notre Dame L. Rev. 621, 626-28 (1997); Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. Rev. 499 (1994).

[44] *E.g.*, Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 883 (D. Minn. 1993). ("That women say 'f…' at work does not imply that they are inviting any and every form of sexual harassment.").

[45] For example, the titles of numerous adult films include terms that would generally be considered vulgar. While *Playboy* employs somewhat mild language, magazines like *Hustler* or *Swank* freely employ extremely sexually graphic words.

opinions of those products in the same way the sporting goods employees do?[46] In both instances, the woman working in the sexy workplace, by engaging in this normal workplace conduct, would jeopardize her protection against serious sex-based abuse under Title VII.

Most damaging is the implication that some willing sexualized conduct is a license for much more serious sexual harassment. The plaintiff in *Reed* may have, for example, given vulgar presents, but is that really reason to assume she consented to physical abuse? Similarly, the plaintiff in *Mangrum* sat on men's laps and scratched their backs. By doing so, did she invite them to request oral sex or expose themselves to her? Again, such assumptions will work against the claims of women in all fields who chose to participate in some sexuality at work. However, women who are not in the sexy workplace can avoid sexual behavior to preserve their legal remedies.[47] A woman in the sexy workplace may be unable to fulfill her job requirements without using some foul language, talking graphically about sex, or otherwise "contribut[ing] to creation of a sexually charged environment."[48]

If the idea that a woman would be required to behave in such ways seems unrealistic, consider the following statement of an employee of MyPleasure.com, an online adult toy company: "[t]here is no place else in the world where I could be sitting in my office and hear, 'Has anyone seen the pink dong with the enormous balls?'"[49] Similar issues would be faced by the employees in adult bookstores and theaters; the names of films and books (as well as the companies that produce them) are often explicit, and even a basic description of the material can be fairly graphic. Precedent supports a court concluding that, having used this graphic language, a woman must be interpreted to have said, "Please ask me for sexual favors" or "I don't object to physical abuse of a sexual nature."

The unwelcomeness analysis also raises this litmus issue: is accepting a job in a sexualized environment itself conduct that negates evidence of unwelcomeness? That is, does accepting a job in the sexy workplace indicate that a woman welcomes sexualized behavior and conversation? If provocative dress, dirty language, and vulgarity can be sufficient proof of welcomeness, it seems that actively seeking and, then, accepting a position the individual knows will be rife with sex and sexuality could be legally sufficient to indicate receptivity to a broad range of sexual behavior.

No courts have dealt with this question, but there is evidence that they might construe acceptance of a certain type of job as manifestation of welcomeness. For example, the Supreme Court has recognized that the nature of the job is an aspect of a

[46] The currently popular sex toy parties being organized by companies like Passion Parties or Edible Ecstasy most certainly require "sex-party consultants" to participate in many explicit conversation in order to be good sales people. *See* Heather Morgan, *Our Parties, Ourselves: The Next Generation's Avon Lady Is Calling—With Dildos and Lube! Ring Up Your Girlfriends*, TIME OUT NEW YORK, Oct. 2003, at 28.

[47] Whether or not a woman should be forced to avoid any or all sexual behavior in the workplace in order to be protected by the prohibition on sexual harassment under Title VII is debatable. However, that concern is not the subject of the current discussion. It suffices here to emphasize that women in the non-sexy workplace have the option to desexualize their behavior, which may not be available to the woman in the sexy workplace.

[48] Brassfield v. Jack McLendon Furniture, Inc., 953 F. Supp. 1438, 1450 (M.D. Ala. 1996).

[49] Trisha Hurlburt, "So, What Do You Do?" The Inside Scoop on Working for a Sex Toy Company, MYPLEASURE.COM, http://www.mypleasure.com/education/sexed/working_for_a_sex_toy_company.asp (last visited September 23, 2013).

sexual harassment claim.[50] Using that rationale, the Court denied a Title VII claim because "[t]he ordinary terms and conditions of [her] job required her to review the sexually explicit statement" that formed the basis of the suit.[51] A California court echoed the same rationale, finding "the nature of the work being performed is a factor to consider in evaluating the context of the alleged sexual harassment."[52]

Such language could be read broadly to mean that, by accepting certain jobs or jobs in certain industries, a person welcomes the behavior she claims was harassing. Since unwelcomeness is shown only when an employee neither solicits nor incites the impugned behavior,[53] a strong defense is that, by accepting a job in the sexy workplace, a woman "requested" or "roused" at least some sexual conduct. At first, this assertion seems asinine, but consider a different example. By accepting a job at a school, a teacher may be said, uncontroversially, to have requested that the school assign students to her and engage in at least some pedagogical conduct. Similarly, a woman who accepts a job filling the orders received by a company that distributes adult paraphernalia may be said to have requested that the company expose her to a wide variety of sexual devices and (at least some) discussion of them. Based on prevailing interpretations, courts would then be perfectly reasonable to conclude that, having invited such exposure and discussion, the woman opened the door to a wide range of sexualized conduct unrelated to the narrow scope of sexual conduct that could be deemed part and parcel of her job.

2. Severe and Persuasive

The next hurdle in the race toward a Title VII victory is that the allegedly harassing behavior must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[54] It serves as a *de minimis* test, embedding an analysis of subjective and objective work expectations. If the victim does not subjectively perceive the environment to be abusive, there cannot have been any actionable alteration in the conditions of employment.[55] Additionally, the conduct must be of the kind that a reasonable person would have considered hostile.[56] In *Oncale v. Sundower Offshore Services, Inc.*, the Supreme Court explained that this "common sense" inquiry into the severity of harassment "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target."[57] It should be obvious that the victim of sexual harassment in the sexy workplace

[50] Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).
[51] Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).
[52] Lyle v. Warner Bros. Television Prod., 117 Cal. App. 4th 1164 (2004), *review granted and opinion superseded sub nom.* Lyle v. Warner Bros. Television Prod., 94 P.3d 476 (Cal. 2004). In *Lyle*, the court determined that the inquiry regarding the "nature" of the employment is relevant to the "severe or pervasive" prong of the sexual harassment claim, which will be discussed below. Nothing in the Supreme Court's language necessitates that conclusion or discourages courts from taking the nature of the employment into account at all stages of the inquiry.
[53] *Henson*, 682 F.2d at 903 ("In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive").
[54] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).
[55] Oncale v. Sundowner Offshore Services Inc., 523 U.S. 75, 81-82 (1998).
[56] Dey v. Colt Const. & Development Co., 28 F.3d 1446, 1449-1450 (7th Cir. 1994).
[57] *Oncale*, 523 U.S. at 81-82.

would encounter difficulty in proving either sides of the severe and pervasive requirement.

The same credibility issues that dilute evidence of unwelcomeness negate claims of subjective perception of hostility. Regardless of whether a reasonable person would consider working conditions to be substantively altered if the workplace were pervaded by overtly sexual comments like "girls are only good for one thing," "there is a girl in my office going down on me," or "[I] would eat [her] no matter how [she] smelled,"[58] a negative reaction may seem incredulous from, say, the set dresser on pornographic film. It is easy to believe that an accountant at Google would be subjectively dismayed by the extensive posting of explicit calendars with nude women featured in every month, "a picture in which a nude woman was bending over with a buttocks and genitals exposed to view,"[59] or "a picture of a woman's pubic area with a meat spatula pressed on it."[60] But, courts might intuit that a fetish toy assembler would not be. More likely, the court would find that, at most, she "experienced th[e] depravity with amazing resilience,"[61] thereby defeating her claim.

The subjectivity requirement can be seen as a particularly effective gatekeeper filtering frivolous or abusive claims.[62] The possibility that courts may intuit that a person who accepted a job in a sexy workplace was not subjectively bothered by the sexually charged work conditions would ensure that only women with genuine claims sought Title VII redress. But, however attractive an outcome this may be, there is reason to believe that such an intuition insufficiently approximates universal truth. For example, one woman, described the environment of the strip club where she worked as differing from her expectations, explaining, "You feel like you're just a piece of meat…it's like pick which piece looks best."[63] Certainly some non-sexy workers might experience the same discomfort. Indeed, the complainant in the only reported hostile environment sexual harassment case involving a non-sexy worker in the sexy workplace reported being "disgusted" by the presence of sex toys in the offices of a Larry Flynt company, which in addition to publishing Hustler Magazine sells such toys.[64]

Moreover, the court's intuition would sound very similar to the district court's determination overruled in *McGregor*.[65] There, the district judge noted that the plaintiff twice appeared nude in Paisano Publications[66] magazines, and in the photographs "she

[58] Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1495-99 (M.D. Fla. 1991) (describing in detail the various pornographic material on display).
[59] Reed v. Shepard, 939 F.2d 484, 486 (7th Cir. 1991).
[60] *Id.*
[61] *Id.*
[62] *Cf.*, E. Christi Cunningham, *Preserving Normal Heterosexual Male Fantasy: The "Severe or Pervasive" Missed-Interpretation of Sexual Harassment in the Absence of A Tangible Job Consequence*, 1999 U. Chi. Legal F. 199 (1999) (arguing that the severe or pervasive standard constitutes a reification of sex inequality in the workplace).
[63] Burstein, *supra* note 8, at 274.
[64] Raymond v. Flynt, 2010 WL 3751524 (Cal. Ct. App. Sept. 28, 2010)., reh'g denied (Oct. 21, 2010), review denied (Dec. 15, 2010).
[65] Burns v. McGregor, 989 F.2d 959, 963-64 (8th Cir. 1993).
[66] Paisano publishes motorcycle magazines for men. As its website described, "[e]very issue features the best custom bikes, babes, runs, true road tales and madcap humor." *See* EASYRIDERS, available at http://www.paisanopub.com/easyriders/index2.cfm (last visited September 23, 2013). While employed at McGregor, Burns appeared in Paisano's flagship magazine, *Easyriders*, which features nude models posing

had ornaments or earrings attached to her nipples. One picture revealed a tatoo [sic] in the pelvic region."[67] These facts regarding the plaintiff's character demonstrated that "testimony that she was offended by sexually directed comments and Penthouse or Playboy pictures [wa]s not credible."[68] As compelling as the district court's intuition may have been, it was unfair. Obviously, what may or may not offend one in her private life is inapposite to determine what offends that same person at work. In the same way, permitting courts to follow such instincts for non-sexualized workers in the sexy workplace would create an unfair, *de facto* bar to a plaintiff's claim. Not only could performing her job become character evidence rendering her testimony less credible, but use of that evidence would not be prohibited by the precedents set in cases like *McGregor* because the behavior would have occurred at work.[69]

The objective prong of the severe and pervasive analysis considers whether a reasonable person would find that sexual conduct in an inherently sexualized atmosphere changed the terms and conditions of her employment. It also puts the non-sexy worker in a bind. First, accounts from within the sexy workplace weigh against her. One exotic dancer explained, "I work in an environment that invites what could be called sexual harassment from almost everyone in the workplace: customers, managers, bouncers, even, in many cases, other dancers."[70] Stating that it would be "ridiculous" to bring a sexual harassment suit, she continued that some "behaviors are clearly more acceptable in a strip club than in, say, a newsroom . . . if a bouncer or DJ tells me I have a great ass I'm not likely to take offense . . . . A lot of friendly sexual banter in our club helps keep the atmosphere charged."[71]

It is not only sexualized workers who feel that the sexual nature of their workplace necessarily invites behaviors with which they are comfortable but that others could consider harassment. In the editorial department of a pornographic magazine, individuals frequently discussed the sexual content of the magazine, as well as their own personal experiences, yet, the employees did not seem bothered by this behavior. One employee reported:

> There's very little sexual harassment that does go on . . . . I mean, that's not to say, I don't observe like "Troglodytes speaking coarsely with their women." . . . . There's a couple of guys that roam around the office that are real sort of pigs, and classic male chauvinists, but because the company is so upwardly mobile, it's just sort of like, "Ahh, he's just a retrograde."[72]

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on bikes, as well as its "lifestyle" magazine, *In the Wind*, which features nude photographs submitted by readers. Burns v. McGregor Electronic Industries, Inc., 807 F. Supp. 506, 512 (N.D.Iowa,1992). Both magazines include nude or partially nude women on virtually every page.

[67] *Burns,* 807 F. Supp. at 512.

[68] *Id.* at 509, 514.

[69] *See supra* note 21 and accompanying text. Estrich discusses more fully the difficulties credibility questions cause in the general field of sexual harassment. Such difficulties, as discussed here, are exacerbated in the sexy workplace. Estrich, *supra* note 21, at 847-58.

[70] Burstein, *supra* note 8, at 299.

[71] *Id.*

[72] Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2148 (2003).

In the same way, an employee of MyPleasure.com described what would be evidence of sexual harassment in most other contexts as a positive characteristic of the work environment, saying, "I mean, honestly, we have lube in our candy jar and a clock made of vibrators, but that's part of what makes working here so great."[73] She seemed to feel such behavior was part of the job, stating, "you have to realize that going into a line of work such as this. You are dealing with sex, and people who are having sex . . . and people who want to improve their experiences with sex—what I'm getting at is that you can't get away from sex as the bottom line."[74]

These examples do not evidence that every non-sexualized worker welcomes the sexual behavior that will almost always pervade the sexy workplace or that non-sexualized workers believe that such behavior should not give rise to sexual harassment claims.[75] Nevertheless, it supports the strong presumption that disfavors the victim seeking redress. Furthermore, special differentiated standards like the "reasonable woman" or the "reasonable victim," which have been promoted by various courts and scholars in order to concentrate on the perspective of women rather than men,[76] would do little to make the standard of proof less burdensome for the employee of the sexy workplace. All of the statements related above were made by women working in sexy workplaces.

Evidence suggesting that a reasonable person may conclude that sexuality is part of the terms and conditions of employment in the sexy workplace is compounded by *Oncale*, which seems to foreclose the possibility altogether by linking the reasonableness standard to the type of workplace:

> A professional football player's working environment is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary…back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.[77]

Just as a football player's workplace will not be rendered hostile by certain types of conduct seen to "come with the territory," explicit sexual language and imagery, regardless of whether it is degrading or insulting, come with the territory of the sex titillation industry. The sexually charged circumstances, the clear expectations of sexuality, and the unambiguously sexual aspect of relationships between individuals will each prescribe a heightened standard for determining the objective reasonability of a woman's discomfort with the impugned conduct.

Taken together, these considerations seem to indicate that protections of Title VII, though arguably displaying serious deficiencies in the protection of the victims of sexual harassment, in general, create a standard of proof that, indirectly, progressively defines

[73] Hurlburt, *supra* note 49.
[74] *Id.*
[75] *See supra* notes 65-67 and accompanying text.
[76] Ellison v. Brady, 924 F.2d 672 (9th Cir. 1991).
[77] Oncale v. Sundowner Offshore Services Inc., 523 U.S. 75, 81-82 (1998).

workers in the sexy workplace out of the sphere of possible hostile environment claimants.

3. Because of Sex

The final element of a hostile environment sexual harassment claim—that the contested behavior was predicated on her sex—is the linchpin of sexual harassment law's anti-discrimination hinge. This "because of sex" element requires a motivational or causation inquiry.[78] It constitutes a uniquely high hurdle for employees of the sexy workplace because the nature of those businesses makes the motivation for the conduct impossible to assume and hard to determine.

Under the prevailing approach to sexual harassment law, referred to derisively as the sexual desire-dominance paradigm,[79] courts assume the "because of sex" requirement is met whenever the contested behavior is sexual in nature.[80] As the court in *McGregor* explained, "sexual behavior directed at a woman [by a man] raises the inference that the harassment is based on her sex."[81] Whatever its merits or demerits,[82] the approach is inapposite where the workplace is inherently sexualized. Unlike the first woman police officer,[83] or the only woman operator in a shoe production shop,[84] the first woman working for Phallix Manufacturers simply cannot assume that the pervasive sexual conduct in the sex toy plant is aimed either at excluding her or maintaining a sex segregated workplace.

Since the motive cannot be assumed, courts will subject the sexy workplace case to a motive inquiry. In other words, a victim must actually prove the contested actions were based on sex. Once the motivation inquiry is triggered, "sex" is taken to mean not sex (i.e. sexual activity) but gender (the focus of Title VII's anti-discriminatory purpose). Courts have been satisfied with evidence that shows "gender is a substantial factor in the

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[78] *See generally* Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?*, 81 NEB. L. REV. 1152, 1154 (2003); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1699 (2002); William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 489 (2011); Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151, 1156 (2008); Ann C. McGinley, !Viva La Evolucion!: Recognizing Unconscious Motive in Title VII, 9 Cornell J.L. & Pub. Pol'y 415, 416 (2000).

[79] The term "desire-dominance" paradigm was first used by Vicki Schultz. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, passim (1998). It has been widely adopted, *see*, *e.g.*, Ann C. McGinley, *supra* note 78, at 1152.

[80] *See, e.g.*, Kristin H. Berger Parker, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment*, 102 Nw. U. L. Rev. 945, 956 (2008) (providing a thorough summary of the evolution of the "because of sex" requirement); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. Pa. L. Rev. 1697, 1719 (2002) (offering a detailed analysis of the requirement). However, the "based on" or "because of" sex requirement attaches to every claim of hostile work environment sexual harassment. *Oncale*, 523 U.S. at 80.

[81] *McGregor*, 955 F.2d 564.

[82] Schultz, among others, has criticized this tendency—the "sexual desire-dominance paradigm" and the disaggregation of sexual conduct from other discriminatory behavior—as a significant deficiency in sexual harassment law, which makes it insensitive to the wider range of sex discrimination that occurs in non-sexual forms of harassment. *See* Schultz, *supra* note 79, at 1692-1755.

[83] Mancini v. Township of Teaneck, 794 A.2d 185 (N.J. Super. Ct. App. Div. 2002).

[84] Ocheltree v. Scollon Productions, Inc., 335 F.3d 325 (4th Cir. 2003).

disparate treatment, and that if the plaintiff had been a man she would not have been treated in the same manner."[85]

Even assuming a non-sexy worker is subject to different treatment, proving motive may be exceedingly difficult because alternative motivations are easily identifiable. *McWilliams v. Fairfax County Bd. of Supervisors*, a Fourth Circuit same-sex harassment case illustrates the difficulty.[86] There, finding incredible the claim that a man had been sexually harassed by heterosexual males,[87] the court posited the following explanations for the ruthless behavior exhibited by the victim's co-workers:

> Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually-focused speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity. Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of" the victim's sex.[88]

The type of reasoning employed by the Fourth Circuit would be attractive in cases where courts seek some alternative motivation for the inappropriate conduct of which the plaintiff complains. In some clear sense, the claim of a sexy workplace employee is very susceptible to a *McWilliams*-type argument. It would not be difficult for a court to conclude that sexually-oriented acts of a worker in the sexy workplace were, fundamentally, based on some obsession or insensitivity on the part of the harasser. Simpler still, maybe the harasser's behavior was triggered by the sexually charged nature of the workplace itself. Maybe the woman was targeted for her dislike of certain sexualized activities, which is seen as preposterous given her choice of the sexy workplace. Maybe the use of obscene language was unintentional, benign mimicry of the products being sold in the workplace. Maybe this. Maybe that. There are numerous very plausible explanations for harassing behavior that, in the sexy workplace, provide comfortable and potentially persuasive alternatives to a finding of gender animus.

A wealth of academic and practical literature has analyzed the difficulties presented by the "because of sex" requirement of sexual harassment canon. Such work generally concludes that, even if such a requirement is essential to an anti-discrimination framework, as construed it has the effect of rendering invisible a potentially large quantity of discrimination. That erasure seems to shield all but the most egregious case of sexual harassment in the sexy workplace.

B. Some Favorable Precedent

The obstacles that the three elements of a hostile environment claim present make it easy to ignore or discount a broad range of potentially discriminatory and harmful behavior. Nevertheless, there are indications from the only two reported cases involving

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[85] Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 (3d Cir. 1977).

[86] 72 F.3d 1191, 1196 (4th Cir. 1996).

[87] Note that the Supreme Court's decision in *Oncale* overturned the Fourth Circuit's holding that same-sex harassment was only a viable claim for sex discrimination where the perpetrator was homosexual. However, the reasoning highlighted here remains illustrative.

[88] *McWilliams* 72 F.3d at 1196.

non-sexualized workers in sexy workplaces that, in the most egregious cases, the worker in the sexy workplace would not be without remedy.

In a 1990 case involving the sexual harassment claims of a Penthouse Pet against the company, a New York court held that the:

> offensiveness of defendants' conduct [wa]s not mitigated by the fact that plaintiff's job as a model and actress for Penthouse involved, in part, the commercial exploitation of her physical appearance . . . . The fact that plaintiff accepted employment which exploited her sexuality does not constitute a waiver of her right to be free from sexual harassment in the workplace.[89]

Thoreson's broad holding would seem to work in favor of the worker in the sexy workplace. If sexy workers in the sexy workplace do not lose their rights to be free from sexual harassment, non-sexualized workers will certainly be afforded the same level of protection. However, *Thoreson* involved *quid pro quo* harassment, and the court placed significant emphasis on the similarity of the defendant's behavior—forcing the plaintiff to have sex with investors—to sexual slavery.[90] The court made no intimation that other forms of "verbal or physical conduct of a sexual nature" could arise to the level of abuse necessary to violate the law in the case of the Penthouse Pet.

The more prominent of the two reported cases of non-sexualized workers in a sexy workplace, *Schonauer v. DCR Entertainment*,[91] is similarly ambiguous. In denying summary judgment to the defendant, the court explained how the plaintiff could prove either hostile work environment or *quid pro quo* sexual harassment based on a Washington statute identical to Title VII. Though the court found that the evidence presented was sufficient for a jury to find either type of harassment, the proffered facts resembled the type of *quid pro quo* demands presented in *Thoreson*.

The plaintiff, Schonauer, was hired at Fox's Topless Entertainment as a "beverage server" rather than as a topless dancer. Nonetheless, she was constantly pressured to participate in the club's "All Nude Review," a weekly nude waitress contest. The behavior about which Schonauer complained included being asked on several occasions to complete an information card as a part of the contest that asked personal questions of a sexual nature. In one instance, as one of the club's managers tried to persuade Schonauer to participate in the contest, he put his arm around her. When Schonauer would refuse to participate in the contest, the manager would glare at her or otherwise become angry. The only behavior she alleged that was not related to Fox's attempts to convince her to appear nude was the intrusive behavior of one manager who "had a habit of regularly entering into the women's bathroom/locker/dressing room area." After one month of consistently refusing to perform nude, Schonauer was fired.[92]

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[89] Thoreson v. Penthouse Intern., Ltd., 563 N.Y.S.2d 968, 976 (N.Y. Sup. 1990).
[90] *Id.* at 977 ("Conduct of the sort committed by defendants represents the quintessential violation of our constitutionally-based relational norms of equality. Defendants used the plaintiff in furtherance of their business as if she were property owned by them. Although the plaintiff's employment enabled the defendants indirectly to profit from her physical appearance and acting abilities, it did not render her a commodity to be leased, sold, traded or exploited because of her womanhood.").
[91] Schonauer v. DCR Entertainment, Inc., 905 P.2d 392 (Wash. Ct. App. 1995).
[92] *Id.* at 396-397.

The limited value of *Schonauer* is evident. Apart from the fact that the court did not decide the merits of the case, it is far from clear that it would have held that the facts could support a verdict of hostile environment sexual harassment if the persistent behavior of which the plaintiff complained had not also been *quid pro quo* demands of sexual or sexualized activity:

> A jury could reasonably infer that [the managers'] conduct created a hostile and offensive work environment. According to [Schonauer], she wished only to wait tables . . . . [The managers] nonetheless pressured her, repeatedly and intentionally, to provide fantasized sexual information and to dance on stage in sexually provocative ways . . . . [This situation] arguably created a hostile working environment for someone hired to wait tables, and the hostile and offensive nature of that environment was arguably intensified by [the manager's] intrusions into the women's dressing room and bathroom.[93]

In the absence of the particular hybrid facts of this case, courts will likely fall back on the general analyses of hostile work environment claims presented above. And, the result will be less favorable to plaintiffs because the questions asked and evidence required by courts to determine whether a claimant has proved her allegation of harassment will make it nearly impossible for the non-sexualized worker in the sexy workplace to prevail in a Title VII action.

The upshot of the preceding discussion is familiar in sexual harassment discourse. The difficulties in establishing the required elements of a hostile work environment claim make it easy to dismiss conduct that is discriminatory within the meaning of Title VII as inconsequential solely because the conduct occurred in the sexy workplace. This is the case even though such behavior can be as discriminatory and harmful as the same behavior in non-sexually charged environments, if not more so.[94] Despite indications from *Thoreson* and *Schonauer* that, in the most egregious (i.e. *quid pro quo*) cases, the worker in the sexy workplace could successfully claim Title VII protection, as implemented today, the law of sexual harassment will not protect the non-sexualized worker in the sexy workplace from the broader range of behavior against which Title VII protects other women.

In short, Title VII and sexual harassment case law does not provide sexy workplace employers with an explicit affirmative defense to hostile work environment claims. In fact, what is available suggests that the sexy workplace is equally subject to the scrutiny of Title VII as any other business. However, the relevant hostile environment tests work as an implicit defense of just that sort. An employer in the sexual titillation industry has wide latitude to argue that, even if everything a woman claims were true, (1) the conduct was not unwelcome because it was naturally associated with working in a sexually charged atmosphere indicate welcomeness; (2) the conduct was not severe or

[93] *Id.* at 400.

[94] For example, Anne McGinley attributes the tendency for women in Las Vegas casinos to be seen as sexually available to male patrons and employees to factors not generally present in non-sexualized workplaces. Ann C. McGinley, *Trouble in Sin City: Protecting Sexy Workers' Civil Rights,* 23 Stan. L. & Pol'y Rev. 253, 268-269 (2012).

pervasive because a reasonable person would not find sexual conversation and touching hostile in a sexy workplace; and/or (3) the conduct was not based on sex because the alleged discriminatory behavior was motivated, instead, by the sexualized nature of the work.

II. SEARCHING FOR ALTERNATIVES

One court explained that a "[h]ostile work environment is characterized by a workplace pervaded with sexual slur, insult and innuendo, verbal sexual harassment, or extremely vulgar and offensive sexually related epithets."[95] But, the sexy workplace may be necessarily or un-antagonistically characterized by just those qualities. A sexual harassment paradigm so parochially construed cannot provide adequate protection of women working in the sexy workplace. If the predictions made above are accurate, a new approach to the sexual harassment of non-sexualized workers in the sexy workplace is necessary.

A. Insufficiency of Existing Solutions

Of course, to cast the plight of the non-sexy worker in the sexy workplace as intractable by reference to enforceable doctrine alone is to raise a house of cards. Volumes of critiques suggesting significant modifications to that doctrine have been written and not implemented. It is possible that an adequate approach lies within this work, so it serves to address the most likely contenders.

The most obvious candidates are the risk approaches to sexual harassment, which consider whether women who voluntarily put themselves in situations where there is a heightened likelihood of potentially discriminatory sexualized conduct should be afforded the same protection as women who do not make that inherently risky decision. Generally, these approaches conclude that they should not and maintain that the equality afforded by Title VII can only be effectively and reasonably achieved if women, viewed as responsible actors, are held accountable for the decisions they make. In what has become the standard text on the subject, Kelly Ann Cahill argues that employers of sexualized workers in sexy workplaces like Hooters Restaurants should have the opportunity to prove that, by accepting a certain job, the employee consented to hostile environment-type sexual harassment.[96]Another approach aligned with the view that workers in the sexy workplace should not receive the same Title VII protection given to other workers is the proposal of Robert Aalberts and Lorne Seidman to locate jobs along a spectrum of risk.[97] "High risk occupations" (e.g. topless dancer) would permit

[95] Walker v. Sullair Corp., 736 F. Supp. 94, 100 (W.D.N.C. 1990), *aff'd in part, rev'd in part*, 146 F.2d 888 (4th Cir. 1991).

[96] Cahill, *Hooters, supra* note 8. Cahill's proposition is based on an evaluation of the Hooters restaurant chain and the claims of its waitresses that the restaurants had created hostile environment through its name, its required uniform, and other sexually charged aspects of its operations. She also limits her claim to the employees of the sexy workplace who have sex appeal as a "substantial part" of their particular job. However, Cahill's analysis provides no convincing reason to limit the "assumption of risk" defense in that way.

[97] Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447 (1994). The stricter route of welcomeness

reasonably expected sexual harassment, "mid-level risk occupations" (e.g. conventional cocktail waitress) would permit attention and occasional inappropriate behavior, and "low risk occupations" (e.g. conventional bookstore clerk) would not tolerate any harassment.[98]

The logic of risk approaches is attractive because they make central respect for women's agency.[99] If agency is to mean anything, women must be seen as capable of accepting the natural consequences of its exercise. When a woman takes a job at Loews Cineplex, she has no reason to believe that she will be subjected to pornographic material or conversations, so if she is subjected to them she may have a claim for sexual harassment. A woman who takes an equivalent position at Kitty Kat Adult Theater knows that pornography is the essence of the business where she is accepting a position and that the consumers and her co-workers will likely discuss and joke about the images and "dialogue" of the films being shown. She knows she might be forced to watch or inadvertently see and hear some of the graphic depictions that define pornography. She realizes that the clientele of adult movie theaters is dominated by people interested in the kind of behaviors they see in the films. And, she understands, because of those circumstances, that some of them may behave towards her in ways that would be outlandish in Loews. So, she should bear the consequences of that decision. This logic, however, ultimately undermines Title VII's anti-discrimination objective by categorically excluding from its protective sweep entire classes of women, potentially requiring them to endure unwanted and degrading conduct based on sex in order to earn a living.

The assumption of risk theory gives the sexy workplace license to exceed the boundaries of the sexual behavior reasonably expected to "come with the territory."[100] Recall the decisions in *Reed* and *Mangrum* discussed above. In some sense, the courts found that having opened the door to certain sexual behavior, the women had assumed the risk of all other sexual behavior. Is it reasonable to determine that the clerk at the adult bookstore or video shop, by agreeing to see, discuss, and stay informed of graphic pornography with customers and co-workers, has assumed the risk that her discussion will prompt unwanted physical contact? To do so, would crystallize a disregard for the rights of individuals and become the equivalent of a "requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living" in the sexy workplace.[101]

Aalberts' and Seidman's approach is equally flawed in the sexy workplace context examined here. Their risk continuum takes into account the expectations of the

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analysis implicitly adopts this approach by finding that, having opened the door to certain sexual behavior, the women had assumed the risk of other sexual behavior.

[98] *Id.* at 470-72.

[99] Not everyone feels this intuitive attraction. *See, e.g.*, Burstein, *supra* note 8, at 306 ("[Accepting the assumption of risk theory for Hooters waitresses is] like saying women construction workers assume the risk of being harassed when they take a job in construction. The premise of our non-discrimination law is that women should not have to choose between having a job and being treated with dignity.") (quoting Deborah Ellis, former legal director of the National Organization for Women Legal Defense Fund).

[100] Although the distinction has not been emphasized here, assumption of the risk approaches to sexual harassment tend to be confined to determining employer liability for customer and third party harassment.

[101] Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1892)).

employee.[102] Of certain behaviors, it allows the employer to defend a sexual harassment claim with "well what did she expect." It avoids the overbreadth of the Cahill assumption of the risk approach because it does not deprive certain employees of protection across the board; rather, both the nature of the job and the nature of the workplace are taken into account. Despite its additional nuance, the Aalberts and Seidman approach creates opportunities for abuse in which employers in the sexy workplace could tailor aspects of the employment to ratchet up the risk level of the occupation. In general, a technology assistant at Playboy may expect a minimum level of sexual content in her day-to-day activities. What if the technology department is subsumed in a broader department that includes web designers who are responsible for creating the companies pornographic internet website? Would this increase the risk of unwelcome sexual content? Moreover, the approach, again, requires at least some employees of the sexy workplace (high and mid-level risk) to submit to unwanted and possibly degrading conduct based on sex in order to earn a living, defeating one of the principal purposes of Title VII.

The arguments of the proponents of the defenses like the assumption of risk or the risk continuum is that the equality afforded by Title VII can only be effectively and reasonably achieved if women, viewed as responsible actors, are held accountable for the decisions they make. At the other end of the spectrum are those that argue that true freedom for women means being able to choose where to work—including sexy workplaces—and being ensured equality in that workplace by laws like Title VII. To effect this strong protection, such freedom approaches often propose modifications to the existing evidentiary standards that loosen the strict requirements. When applied to the sexy workplace, such evidentiary modifications replicate the difficulties plaguing the prevailing paradigm.

For example, reasonable woman/victim alternatives posit that women/victims experience sexualized behavior distinctly from men/harassers. Such disparate experiences of sexualized behavior makes it disingenuous to imagine that there could be a "neutral" conception of what any person would consider objectionable or unobjectionable sexuality.[103] Instead, they suggest a variety of ways the inquiry can be refined to diminish

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[102] Aalberts & Seidman, *supra* note 97, at 470 ("[T]he standard applied when non-employees are involved must be keyed to the reasonable expectations of the employee in her particular employment environment.").

[103] *E.g.*, Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 ILL. L. REV. 769, 771-786 (1994); Robert S. Adler Ellen, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 774 (1993); Carol Sanger, *The Reasonable Woman and the Ordinary Man*, 65 S. CAL. L. REV. 1411,1413-17 (1992); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. OF WOMEN & L. 95, 95 (1992), Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1178 (1990). For more detailed treatment of the debate, see generally, L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 742 (2007); Caroline A. Forell & Donna M. Matthews, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 6-7 (2000); Barbara A. Gutek et. al., *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCHOL. PUB. POL'Y & L. 596, 598 (1999); Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 49-52 (1993).

male- or harasser-normativity.[104] Modifications of the welcomeness inquiry also seek to neutralize superordinate normativity.[105] For example, burden-shifting proposals question the heteropatriarchal premise,—embedded in the welcomeness inquiry—of women's sexual availability. They recommend the opposite presumption, so "the burden falls on the defendant to demonstrate how he knew he was welcome."[106] Likening welcomeness to the consent standard in rape law, Estrich proposes that the "doctrinally gratuitous and personally humiliating" inquiry be eliminated altogether.[107] She recommends, instead, that a woman's subjective experience of harassment be sufficient to establish her case.[108]

Notwithstanding their general remedial value, standards like these do little to make sexual harassment coverage in the sexy workplace more available, satisfactory, or consistent. Reasonability modifications trigger the same "what did you expect" perspectives that render risk approaches attractive.[109] For example, the sexy workplace employees quoted above as cheerfully accepting the harassment concomitant with their jobs were women, and by their own accounts, frequently the targets (i.e. victims) of the conduct they claimed was not harassment.[110] Burden shifting will not make it less difficult for a woman to recover because there will still be ample evidence that she did welcome the challenged conduct to rebut her showing. Eliminating the welcomeness and objectivity analyses leaves in place the significant hurdles of subjectivity and "based on sex." As explained above, in many circumstances, the non-sexualized worker will have behaved in ways that will convince a court that she was impervious to the sexually charged work environment, and gender discriminatory or discriminating intent is particularly difficult to show in the sexy workplace.

Sex/gender approaches to sexual harassment law fall somewhere between the poles represented by the risk and freedom approaches described above. They propose shifting the focus of sexual harassment law from pure sexuality, framed as merely symptomatic of discrimination, to its underlying causes. Such proposals have the potential to capture a broader range of sex discrimination in the sexy workplace. Ultimately, they are also problematic because they undermine the foundation of the sexual titillation industry.

For example, Katherine Franke casts sexual harassment as the technology of heteropatriarchal subordination and sexism, which constructs and enforces gender

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[104] For a summary review of the perspectives on which these alternatives rely, see Ann C. McGinley, *Reasonable Men?*, 45 Conn. L. Rev. 1, 34-38 (2012) (suggesting a reasonable man standard for male victims of sexual harassment).

[105] *See* Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII's Transformative Potential*, 20 YALE J.L. & FEMINISM 131, 144-48 (2008) (reviewing primary proposals on unwelcomeness).

[106] Fitzgerald, et al., *supra* note 27, at 134. *See also* Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 522-33 (1994) (suggesting burden shifting combined with a narrower conception of welcomeness in which "extraneous factors" are excluded from the analysis).

[107] Estrich, *supra* note 21 at 858.

[108] *Id*.

[109] For a discussion of the reasonable woman standard, see, e.g., Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 48 (1998); Anita Bernstein, Treating Sexual Harassment with Respect, 111 Harv. L. Rev. 445, 477-83 (1997).

[110] *See supra* notes 73-77 and accompanying text.

identities, masculinities, and femininities according to fundamental gender stereotypes of male as sexual subject and female as sexual object.[111] This concept is plainly incompatible with the fundamental nature of the archetypal sexy workplace, the products or services of which regulate and enforce just those heteropatriarchal gender norms she finds objectionable.

Vicki Schultz advocates a "sex segregation" approach to sexual harassment, whereby women in sex segregated settings would benefit from a presumption that any harassment suffered was on the basis of sex and women in integrated environments would face, basically, the opposite presumption.[112] In a move that seems very beneficial to the worker in the sexy workplace, she seeks to take much of the focus off of sexuality in the workplace. However, because she promotes a view that "our society needs to embrace a new ethics of sexuality,"[113]Schultz's sex segregation approach would have the strange effect of dealing a significant blow to the sex in the industry. Not only are many of these workplaces segregated, but they are necessarily so.[114] For example, the result of the bona fide occupational qualification exception—accepted for strippers on the grounds that only women provide the titillation service effectively—means that there can be pervasive sex segregation in a strip club. Of course, then, the standard for proving sexual harassment would be lower in the sexy workplace, and under Schultz's own argument, difficulties would rise. Either the sexy workplace would seek to "sanitize" itself by limiting the sex-related conduct that would be permitted, or it would eliminate the segregated nature of the environment. Either way, many sexy workplaces could not continue to provide their services or products in the way that has made those businesses successful. Even if these strange effects did not result, the worker in the sexy workplace would still be required to prove at least some of the most difficult elements of the hostile environment claim, namely that it was unwelcome.[115] In the case of non-sexual harassment this may not present a large problem, but if the claim were based primarily on sexual conduct, the plaintiff would face all difficulties described above.

Putting aside the general merits of the Schultz and Franke proposals, it is clear that they would not work as they envision for the employee in the sexy workplace. It is possible to continue to identify how theoretical and doctrinal reformations of sexual harassment law are incapable of providing stable groundwork from which to attack sexual harassment in the sexy workplace. However, this brief survey suggests that there is no holistic approach that adequately accounts for the unique position of the sexy workplace.[116]

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[111] *See also* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1-2 (1995)(providing sustained analysis of the deficiencies of the sex-gender dichotomy).

[111] *Id.* at 762-71. *See also* Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139 (1998) (expanding the technology as sexism argument).

[112] Schultz, *supra* note 72, at 2176.

[113] *Id.* at 2167.

[114] For a critique of this legal assumption, see Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, And Workplace Equality*, 92 Mich. L. Rev. 2541, 2579 (1994).

[115] Schultz, *supra* note 72, at 2175-76.

[116] The author recognizes that the preceding review of alternatives was incomplete and may have glossed over some of the nuances in each commentator's approach. However, it adequately paints a general picture of some pertinent parts of a vast body of proposals for the reform of sexual harassment law, which suffices for the present discussion.

B. The Bona Fide Occupational Requirement: A Good Approach?

There is something about the sexy workplace that makes it difficult to distill an approach that might be appropriate for the workplace in general. The basic problem is that society has conflicting intuitions about the law and the sexy workplace. On the one hand, the sexy workplace, as stated above, fits (or, rather, is) the classic example of a hostile work environment—so permeated by sexual innuendo and vulgarity that it affects every aspect of one's job. But on the other hand, not all sexy workplaces need to or do conform to this standard idea. There is a nearly universal perception of the sexy workplace based on the nature of the sexual titillation industry that it is per force an atmosphere rife with the sort of behaviors and beliefs against which the law has pitted itself. Even without explicit sexuality, people in the business of selling sex—sex that frequently displays or suggests (in words, pictures, or games) violence towards women, submissiveness of women, dehumanization of women—are seen to adopt the attitudes their products are said to promote. When a worker in the sexual titillation industry—normally assumed to be a stripper or a performer in pornography—is mistreated or harassed, it is seen as the natural and foreseeable result of having made the decision to work there. In short, the sexy workplace and its employees are very unsympathetic litigants.

On the other hand, the limits to these "un-sympathies" are palpable. The sex titillation industry may widely be seen as unsavory, but it is also very popular. Many (if not most) Americans disagree with the radical feminist position that pornography is, by its very nature, discriminatory and, to a certain extent, respect the freedom of people to make their livings through sex and to be consumers of the products and services provided by the titillation industry. In the same way, few would argue that workers in these industries have placed themselves in such a vulnerable position that they must accept the entire menu of objectionable and criminal behavior.

The problem, then, is determining how to square these competing views within one test for any Title VII violation, particularly hostile environment sexual harassment. Ultimately, there is no way to adequately account for the entire sexual titillation industry within the Title VII framework, which incontestably seeks to "guarantee women and men equal work roles."[117] The best way, however, to narrow the inevitable gaps in protection for victims of harassment in the sexy workplace is to modify the current three-part test for hostile work environment by addressing the concerns highlighted by the proponents of alternative models discussed above.

1. Unwelcomeness Revisited

As demonstrated above, current tests of the unwelcomeness standard would place upon the worker in the sexy workplace an undue, possibly impossible, burden of non-sexualized conduct if she seeks to maintain Title VII protection. To account for the sexually charged nature of the sexy workplace, it would make sense to differentiate between work-related and non-work-related workplace conduct. The examination of a worker's conduct exhibiting welcomeness to non-work-related behavior would be limited to her own non-work related behavior. So, if an employee discusses sex in general or

[117] Schultz, *supra* note 72, at 2131.

personally or is otherwise "provocative" in connection with her work responsibilities, that work-related conduct would not be evidence that she welcomed any other sexual conduct. In other words, if the defendant mounts a defense of welcomeness, there must be a clear nexus between the conduct of the plaintiff and the alleged harassment.

This bifurcated examination would also be limited by a rule of construction requiring courts to interpret welcomeness narrowly and unwelcomeness broadly. In other words, any manifestation that certain behaviors are welcome should be limited to the narrow set of circumstances in which that behavior occurs. Conversely, courts must presumptively consider a women's expression of unwelcomeness to be a general assertion that sexual (or other improper) behavior is unwanted. This means that a woman like the victim in *Mangrum*[118] cannot be determined to welcome sexual invites if her behavior was limited to back scratching. And, her statements like "not right now," would be construed to indicate a general expression of unwelcomeness to continued or further sexual conduct.

It may be appropriate to refine the bifurcated approach using principles derived from discrimination law. In particular, the bona fide occupational qualification (BFOQ) exception permitted in Title VII provides a useful framework for determining how courts should distinguish between work-related and non-work-related conduct.

The sex BFOQ exception, which must be interpreted narrowly,[119] permits employers to discriminate intentionally in employment decision-making "in those certain circumstances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[120] To that end, in *International Union v. Johnson Controls*,[121] the Supreme Court promulgated the "essence of the business" test to determine whether an employer could shield itself from Title VII with a sex BFOQ: based on a reasonable factual inquiry, the essence of the business must be undermined by non-discriminatory behavior. Subsequent developments in sex discrimination jurisprudence have made it clear that this test requires courts to determine the "primary function" or "main duties" of a business,[122] focusing either on the business as a whole[123] or on the particular job being performed.[124] The BFOQ is used as a justification for single-sex hiring in various areas including hospitals, strip clubs, penitentiaries, and the performing arts.

Translated into the hostile environment harassment context, the BFOQ would become an exception for bona fide occupational requirements—the BFOR. In order to claim the exception, the employer would have to show first that the essence of its business, in general, was sexual titillation. Doc Johnson Sextoys, Hustler XXX, Kitty Kat Adult Theater, and Flashdancers Gentlemen's Club would likely pass this threshold test,

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[118] *See supra* notes 44-45 and accompanying text.
[119] Dothard v. Rawlinson, 433 U.S. 321, 333-334 (1977); Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a) (2004).
[120] 42 U.S.C. § 2000e-2(e)(1).
[121] 499 U.S. 187 (1991).
[122] Katherine Kruse, *The Inequality Approach and the BFOQ: Use of Feminist Theory to Reinterpret the Title VII BFOQ Exception,* 1993 WIS. L. REV. 261, 277 (1993).
[123] Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir.), *cert. denied* 404 U.S. 950 (1971) (holding that the essence of an airline was providing air travel, not sympathy or reassurance).
[124] Wilson v. Southwest Airlines 517 F. Supp. 292, 302 (1981) (finding that the essence of the position of flight attendant was not sexual titillation).

while the Hooters restaurants, Dirty Girls Housekeeping,[125] and even Playboy magazine, based on its self-professed image as a men's magazine comparable to Esquire, GQ, or Maxim,[126] might not.

Second, the employer would have to show that the primary function of the job or the main duties of the employee necessitated each category of conduct—vulgar speech, display of pornographic images, sexual innuendo, etc.—included in the complaint. The fact finder would then disregard those categories related to the essence of the business, evaluating the claim only on the evidence of non-work-related behavior. The "creative necessity" defense claimed by Warner Brothers in *Lyle v. Warner Bros.*,[127] looks very similar to the BFOR contemplated here. There, a female writer's assistant for the then-popular situation comedy, *Friends*, claimed that the writers created a hostile environment by making lewd, crude, vulgar jokes while discussing ideas for story lines, jokes, and dialog for the show. Warner Brothers claimed and a California court implicitly agreed that sexual innuendo and vulgarity unrelated to the show formed part of the nature of the writers' work requiring their assistant or scribe to endure it because "the show revolved around a group of young, sexually active adults, featured adult-oriented sexual humor, and typically relied on sexual and anatomical language, innuendo, wordplay, and physical gestures to convey its humor."[128].

The business necessity defense (BND) supplies another refinement of the bifurcation concept. Under the Supreme Court's interpretation of Title VII in *Griggs v. Duke Power Co.*, employers are allowed to maintain facially neutral policies that have a discriminatory disparate impact only if the policy has a "manifest relationship to the employment in question."[129] Lower courts have supplemented that basic condition with the requirements that the policy serve a "compelling need"[130] and that there are "no acceptable alternative policies or practices"[131] that would avoid or minimize the disparate impact. Adding the additional stricture of the BND to the BFOR would make explicit the need for employers to have considered ways to eliminate the harassing conduct before determining that it was part of the essence of the business.

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[125] Dirty Girls Housekeeping (http://dirtygirlshousekeeping.com) is an example of the latest in "sex-plus" business endeavors. Such companies provide traditional, topless, and nude housekeeping services. Another such business was Hooters' short-lived Hooters Air. Rather than market its flight attendants as providing sexual titillation, which was found inconsistent with Title VII in *Wilson*, Hooters' airline sent two of the restaurants waitresses on each flight to chat and play games with passengers. *See* Sean Daly, *Leave It to Cleavage: The Restaurant that Serves Titillation with its Burgers takes to the Skies with Hooters Air, Nonstop to Myrtle Beach*, THE WASHINGTON POST, June 25, 2003, at C02.

[126] *See* PLAYBOY ENTERPRISES, ANNUAL REPORT, at 8 (March 12, 2010) (describing the domestic publication as a "general-interest magazine, targeted to men, with a reputation for excellence founded on its high-quality photography, entertainment, humor, cartoons and articles on current issues, interests and trends. Playboy magazine consistently includes in-depth, candid interviews with high-profile political, business, entertainment and sports figures, pictorials of famous women, content by leading authors, and the work of top photographers, writers and artists. Playboy magazine also features lifestyle articles on consumer electronics and other products, fashion and automobiles and covers the worlds of sports and entertainment.").

[127] Lyle v. Warner Bros. Television Prods., 12 Cal. Rptr. 3d 511, 512 (Ct. App. 2004) *review granted and opinion superseded sub nom.* Lyle v. Warner Bros. Television Prod., 94 P.3d 476 (Cal. 2004).

[128] Lyle v. Warner Bros. Television Prods., 132 P.3d 211, 215 (2006).

[129] 401 U.S. 424, 432 (1971). *See also* EEOC Guidelines, 29 C.F.R. § 1604.10 (c) (2004).

[130] *See, e.g.*, Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 701 (8th Cir. 1987).

[131] *See, e.g.*, *Lyle*, 412 Cal. Rptr. 3d at 520 (internal quotation marks omitted).

Concisely, the BFOR/BND exception suggested here means that if an employee can perform the job in dispute or properly carry out the functions of the business without sexual conduct, then the exception does not apply.[132] Of course, no real world circumstances would lend themselves to analysis under a rule read so rigidly. It is probably more precisely stated as follows: if an employee cannot perform the job in dispute or properly carry out the functions of the business without the particular sexual conduct, then that conduct is work-related and must be excluded from the determination of the employee's Title VII claim. Defined in this way, the BFOR/BND exception serves both employers and employees because the conduct excluded as work-related could also not be used against the woman claiming sexual harassment.

2. Severe and Pervasive Revisited

The BFOR/BND exception would result in a simpler modification of the "severe or pervasive" prong of the hostile environment analysis. The most difficult aspect of that analysis was the assumption that certain activities cannot be said to be objectively or subjectively severe or pervasive enough to constitute a hostile environment if one works in a sexy workplace, so the standards of severity are inherently raised. This impossibility is an unavoidable difficulty for the worker in the sexy workplace, which is necessarily integrated into the BFOR/BND paradigm. Its debilitating effect, however, can be mitigated by clarifying that the higher standard applies only to work-related conduct—conduct manifestly related to the essence of the business and the job. So, a copy editor at *Swank* magazine may be required to look at graphic photos and hear graphic language but only within the scope of her employment. By contrast, if business meetings or outings are always held, for no purpose, at a local topless bar, the analysis of whether the conduct was sufficient to create a hostile environment should be conducted as if she did not work in the sexy workplace.

Simply, the BFOR/BND exception allows employers operating sexy workplaces to insulate themselves from liability for the sexual behavior absolutely necessary to or inherent in the normal functioning of a business in the sexual titillation industry. It redefines harassment such that work-related conduct, within this small subset of cases, does not and cannot be harassment. But outside of the narrowly defined work context, the bifurcated approach gives non-sexualized sexy workplace employees the level of Title VII protection to which other women are entitled.[133]

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[132] Rachel L. Cantor, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 493, 499 (1999).

[133] Ann McGinley seems to suggest, without elaboration, a similar approach to workers in sexualized workplaces. As she explains, "If the employer in a sexualized environment has explicitly or implicitly communicated to its employees that certain customer behavior and environmental conditions are necessary to the job performed and relate to the essence of the business, and the employees agree, these behaviors and conditions form part of the terms or conditions of employment in the workplace, and cannot create a legally cognizable hostile working environment." Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 Yale J.L. & Feminism 65, 108 (2006). Of course, it is readily accepted that both the protection offered by the bifurcated approach suggested here and the more ad hoc analysis proposed by McGinley fall short of the mark. But the goal here is to reduce the disparate treatment of non-sexualized workers in the sexy workplace, not reform the all sexual harassment jurisprudence.

3. Because of Sex Revisited

The bifurcated approach contemplated by the BFOR/BND exception must be bolstered by a modification of the "because of sex" test. As has been argued elsewhere, with respect to this prong of the hostile environment analysis, more evenly distributing the burdens of proof would improve the ability of the plaintiff to establish this element.

Under the approach suggested here, the plaintiff would have to come forward with some credible evidence that the requirement was met, even if that evidence would not necessarily be sufficient to prove by a preponderance of the evidence the "because of sex" element. Then, the burden shifts to the defendant, *not* to disprove the plaintiff's claim but to prove by a preponderance of the evidence that the conduct was based on other factors.

This adaptation of the "because of sex" requirement would certainly have salutary effects within the general hostile work environment framework, and it need not be limited to the sexy workplace subset. In particular, the proposed change might create more favorable prospects for victims of same-sex harassment than has been left for them by *Oncale*.[134] Regardless of the accuracy of the claim to its broader utility, the diluted burden shift proposed here would temper the severity of the loss of favored status many non-sexualized employees would face in bringing a Title VII action solely because of the nature of the sexy workplace.[135]

4. The Bifurcated Approach in Context

These modifications take into account the concerns suggested in the alternatives discussed above. Consideration is given to the responsibility of individuals working in the sexy workplace, so they cannot expect a sex-free environment. The approach also takes an important step towards the construction of a reasonable mechanism for providing comparable protection from "because of sex" harassment to all women, no matter where they work.

What is more, the BFOR/BND exception provides a framework applicable to both employee and customer behavior. Recall, for example, the waitress in *Schonauer*.[136] The facts of that case reveal that Fox's Topless Entertainment, where Schonauer worked, was a fairly lowbrow establishment, and it is easy to imagine the bar's patrons behaving raucously, making lewd gestures and remarks. One might even imagine some of those remarks or gestures, especially on Mondays, when waitresses were expected to perform nude, might be directed toward Schonauer even if she never performed. In that case, the employer could argue that maintaining a rowdy atmosphere where customers felt free to direct sexual jokes toward the staff was part of its business. It could also argue that some such behavior was inherent to nude dancing and that there was no policy it could enforce

[134] *Oncale* seems to eliminate the only sexual harassment theories—notably, harassment based on gender stereotyping—under which same-sex plaintiff's had been successful where the harasser was not homosexual. *See* Nailah A. Jaffree, *Halfway out of the Closet: Oncale's Limitations in Protecting Homosexual Victims of Sex Discrimination*, 54 FL. L. REV. 799, 822-23 (2002); David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PENN. L. REV. 1697, 1747 (2002). *Cf.* Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257, 1259 (1998).

[135] *See* Part II(A) *supra*.

[136] *See supra* notes 94-96 and accompanying text.

that would suppress the conduct. For more aggressive behavior, like touching or stalking, it may be harder to maintain that a lowbrow strip club could not exist without such behavior.[137] Under the same test, however, Fox's Topless Entertainment could not argue that employees pressuring waitresses, hired with no expectations to perform nude, to provide intimate sexual information and participate in the revue was necessary to its business. Neither could it successfully maintain that allowing manager access to dressing rooms was so connected with the business or the job as to form part of its essence.

While the proposed changes improve upon the current hostile environment framework, the resulting model is imperfect. It borrows its main principles from a standard—the "essence of the business"—that courts have been notoriously inconsistent in applying. It provides more protection to workers in least sexy workplaces than in the sexiest workplaces—the more sexualized the particular workplace, the more conduct is excludable under the BFOR/BND exception. Further, it inherently differentiates between the level of sexual conduct related to the job. The Hustler magazine editor is likely less protected than the Hustler secretary.

There is no reason, however, to believe that these differences in protection actually track the actual need for protection and actual experiences of harassment by individuals working in the sexy workplace. Yet, to take the opposite approach would negate the assumption made in the foregoing discussion, as well as in the law, that the sexy workplace does not violate Title VII per se.

Ultimately, there is no "good" approach to hostile environment sexual harassment in the sexy workplace. The changes suggested here, however, soften the harsh light that Bartlett's rule of thumb shed upon the law and the sexy workplace. Under the current approach, "the rule of thumb at end of the day is simple: sex bars can subordinate women, but airlines and restaurants may not."[138] As modified, the rule of thumb becomes this: sex bars can subordinate women (but only slightly), but airlines and restaurants may not.

The easiest response to this admission is to embrace a refrain sounding throughout sexual harassment discourse: law is an inherently inadequate, inappropriate, or limited tool for the type of social change that would be necessary to address the sexy workplace problem and other issues that plague the hostile environment paradigm in theory and in practice. The response adopted here, however, is to view the intractability of sexual harassment problems as suggesting the potential for further analysis.

III. IMPLICATIONS AND RESEARCH AGENDA

This article began with a narrative about the non-sexy worker in the sexy workplace. But from a conventional legal perspective, the immediate practical relevance

[137] Even if that claim were true, those behaviors, as well as certain obscene behaviors (like masturbation in public) are, generally, illegal. Obviously, no business could maintain that it was required to permit illegal behavior. Those customer acts would fall, clearly within the range of non-work-related conduct for which the employer would be held liable according to the current standards set forth in *Faragher v. City of Boca Raton,* 524 U.S. 775 (discussing employer liability generally), and cases like *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981) and EEOC Guidelines 29 CFR § 1604.11(e) (employer may be responsible for acts of non-employee where the employer knows or should have known of the conduct and fails to take remedial action).

[138] Bartlett, *supra* note 111.

of the discussion that followed is limited. The reason for this rather incongruous pronouncement is not that the sex titillation industry, on which this article is focused, is not very important. Some estimates conclude that Americans spend as much as 14 billion dollars[139] a year on "hard-core videos, peep shows, live sex acts, adult cable programming, sexual devices, computer porn, and sex magazines."[140] More public forms of adult entertainment like strip clubs, pornography theaters, and gentlemen's clubs have also increased in popularity, as evidenced not only by the reports of people in and around the industry—one gentlemen's club founder described ideal customer as a "high-powered attorney who needed some safe way to recharge his batteries"[141]—but also in the significant number of sexual harassment cases predicated, in part, on the use of these venues for business purposes.[142] Sexual titillation is big business, and it cannot survive without the services of non-sexualized employees. Someone has to answer the phones, package the products, sell the tickets, rent out the videos, serve the drinks, write the HTML code, inspect the merchandise, clean up after the show, and do all of the tasks the essence of which is not sex. Those people cannot be the dancers, the "bunnies," the "pets," and the film performers—at least, not always.

The limited application of this article's doctrinal insight is not the result of the illusory nature of the problem posed. The real issue is this: despite its rapid and continual growth and the mainstreaming and social acceptance of its products and services, the sexual titillation industry has been and continues to be insulated from formalized legal mechanisms. The BFOQ exception, permitting sexy workplaces to discriminate in hiring, is just one example of the liberty that comes with selling sex.[143] But, there are other examples, as well.

Strip clubs and other establishments offering live adult entertainment cut themselves off from many of the regulations between themselves and their sexualized employees by labeling those workers "independent contractors," thereby creating barriers to the scope of legal liability an establishment might incur.[144] Most important, however, there is still a social and legal stigma attached to the sexual titillation industry making it difficult for workers—sexualized and non-sexualized alike—to utilize the mechanisms available to regulate employment conditions. "The borderline-legal status of the industry makes many . . . reluctant to seek redress,"[145] and as a result of these realities, individuals

[139] Dennis McAlpine, *American Porn*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/porn/interviews/mcalpine.html (last visited September 23, 2013) (estimating between one and 14 billion dollars in porn-related profits).
[140] Rutman, *supra* note 8, at 516.
[141] Burstein, *supra* note 8, at 273.
[142] *See, e.g.*, E.E.O.C. v. Custom Companies, Inc., No. 02 C 3768, 2004 WL 765891, (N.D.Ill. Apr. 07, 2004); Dickerson v. SecTek, Inc., 238 F. Supp. 2d 66 (D.D.C. 2002); Jones v. Rent a Ctr., Inc., No. 01-2320-CM, 2002 WL 924833 (D. Kan. May 02, 2002); Pilla v. Delaware River Port Auth., No. CIV. A. 98-5723, 1999 WL 345918, (E.D.Pa., May 07, 1999); Maldonado v. Esmor Corr. Servs., Inc., No. 97 CIV. 7087 (HB), 1998 WL 516118, (S.D.N.Y. Aug 19, 1998); Chisholm v. Foothill Capital Corp., 3 F. Supp. 2d 925 (N.D. Ill. 1998); Dorn v. Astra U.S., Inc., No. CIV. 96-11124-MEL, 1997 WL 258491 (D. Mass. Apr 02, 1997).
[143] *See* Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 301 (N.D. Tex. 1981); Guardian Capital Corp. v. N.Y. State Div. of Human Rights, 46 A.D.2d 832, 937 (N.Y. App. Div.).
[144] Rutman, *supra* note 8, at 520-552.
[145] Eric Schlosser, *The Business of Pornography: Who's Making the Money?*, U.S. NEWS & WORLD REP., Feb. 10, 1997, at 47.

working in the sexy workplace do not bring sexual harassment claims at the rate of their peers in non-sexualized workplaces.[146] A cluster of claims by non-sexualized employees against Larry Flynt Publications Inc., the publisher of Hustler Magazine, may indicate a change in the trend.[147] Until such a change, however, there will be little doctrinal value of the concrete suggestions proffered in this paper—one cannot use legal theories without cases in which to apply them. Nevertheless, the narrow discussion of the difficulties faced by non-sexualized workers in businesses selling sex has broader implications that raise important questions about the nature of sexual harassment under Title VII. It seems appropriate, now, to ground the claims made throughout this article in their significance, not only for the law of sexual harassment more generally, but also for all laws seeking to transform society in emancipatory ways.

In *Thoreson*, the court noted that "[a]nti-discrimination laws are designed to eliminate the misguided notion that fundamental rights and liberties of certain classes of people need not be respected. The resulting harm to society inheres in the potential creation or perpetuation of a subclass . . . denied the means to participate equally in the social order."[148] But many more courts have emphasized that this provision of equal opportunities for women and other protected classes does not mean that Title VII was "designed to bring about a magical transformation in the social mores of American workers."[149]

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[146] In the nine-year germination of the ideas explored in the article, there have been only two reported cases of a non-sexy worker in the sexy workplace. As discussed above, the first involved conduct that also consituted *quid pro quo* demands of sexual (or sexualized) activity, and the second did not decide the merits of the case, and the persistent behavior of which the plaintiff complained also constituted *quid pro quo* demands of sexualized activity. *See* Schonauer v. DCR Entertainment, Inc., 905 P.2d 392 (Wash. Ct. App. 1995). The most recent sexy workplace case is both unpublished and non-citable, and its analysis of sexual harassment law was not dispositive of the case. *See Raymond*, *supra* note 4. An additional complaint was filed arising out of substantially similar facts of *Raymond*. *See* Oldham v. Flynt, 2006 WL 4664720 (Cal. App. Dep't Super. Ct. Jun. 6, 2006), other than the fact that Oldham was required by a California court to arbitrate her claim, Oldham v. Flynt, B195911, 2008 WL 4276535 (Cal. Ct. App. Sept. 18, 2008), the final outcome and status of this dispute are unknown. However, according to media reports the initial arbitration award was granted in favor of Flynt denying Oldham's sexual harassment claims. http://www.mercurynews.com/california/ci_20038847. The outcome and status of a third complaint filed against Hustler (this time for conduct of Larry's daughter, Theresa Flynt), *see* Prescott v. Flynt, 2011 WL 2590627 (Cal. App. Dep't Super. Ct. July 1, 2001), is also unknown. Media sources have reported a number of allegations too, though whether they materialized into legal complaints is unclear. In total, there are fewer than ten reports of such harassment from any source. An increasing number of sexual harassment cases involving sexy workers are being reported in the media. For example, a legal columnist who modeled nude for the magazine filed suit against Playboy. S*ee* Fetman v Playboy, 2009 WL 4074321 (N.D. Ill. Nov. 9, 2009). And at least one California and one New York law firm are touting expertise in strip club sexual harassment cases. *See* http://www.exoticdancerrights.com/stripper-sexual-harassment.html; http://www.nydailynews.com/new-york/strippers-flocking-matthew-blit-sexual-harassment-lawsuits-article-1.165503.

[147] *See* Reuters, *Larry Flynt Sued for Washing Sex Toys*, BOSTON.COM (Aug. 6, 2003), http://www.boston.com/news/daily/06/odds_flynt.htm; Laura Wides, *Hustler Magnate Enters Governor's Race*, U-T SAN DIEGO (Aug. 5, 2003), http://legacy.utsandiego.com/news/politics/recall/20030804-1654-ca-recall-flynt.html.

[148] Thoreson v. Penthouse Intern., Ltd., 563 N.Y.S.2d 968, 975 (N.Y. Sup. 1990).

[149] Rabidue v. Osceola Refining Co., 805 F.2d 611, 620-621 (6th Cir. 1986) ("[I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes,

The case of the sexy workplace demonstrates that the latter claim is not true. To the extent that Title VII is supposed to provide an equal opportunity and freedom from discrimination in the workplace, it must also change the social mores of the American workforce. The task of Title VII, like so much other civil rights law, is to transform, not reflect, the underlying belief systems and behaviors of society.

This observation helps explain why the sexy workplace is not easily amenable to either the judicial versions of the Title VII analysis or any of the analyses proposed in academia. It is, in many respects, the embodiment of the mores sought to be changed by anti-discrimination law. As a whole, the sex titillation industry is characterized by strict, hierarchical sex segregation, the objectification and exploitation of women, and the reinforcement of certain sex stereotypes.[150]

Since this tension cannot be reconciled, it is impossible to develop a test or analytical framework that adequately accounts for: (1) the unique situation of the sexy workplace as bastion of what Title VII stands against; (2) the general principles protecting individuals from sexual harassment in other fields; and (3) the acceptance of the sexual titillation industry as a legitimate presence. The only way to resolve the conflict is to recognize that the sexy workplace, as it is popularly conceived, is by its very nature a violation of Title VII. The basic idea is that a woman cannot be treated fairly and equally at work—the goal of Title VII—if her co-workers and employer have stereotyped views of gender roles and the status of women. To the extent that the sexy workplace perpetuates such views in its operation, products, and services, it infringes the law. The violation is most powerful from a teleological perspective, but it is also normatively in breach. The purpose of Title VII may have been the rather immeasurable goal of equalizing employment opportunities for men and women and other protected groups, but it does this by prohibiting discrimination. When employers do not check the expression of stereotypes but promote or operate according to them, they violate Title VII.

Of course, recognizing the incompatibility of the sexy workplace with Title VII cannot be equated with support for that position. Realizing that Title VII was meant to fundamentally alter the social mores of society does not mean that one cannot challenge the extent to which the law should be allowed to do this. It may be that the law can only have limited influence over certain basic aspects of an individual's moral code. Moreover, other values, like the freedom of speech, are implicated in the decision to legislate the moral code. Conversely, it may be that the only way the basic rights enshrined in the constitution can be promoted is through laws aimed at affecting our social mores. The discussion of sex in the sexy workplace encourages a fuller examination of this final question: if "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult,"[151] should the law permit business endeavors which, by their very nature, hinder the full realization of that right? If the answer is yes, what higher value—higher than equality—is being pursued by that policy?

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sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this.").

[150] There are other descriptors of the sexual titillation industry, and there is no consensus about whether these characteristics are necessary to the industry. Nonetheless, they stand out as central to the industry, as a whole, as it exists today.

[151] Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986).

Seen in this way, sexual harassment law becomes as important for the people who do not “use it” as it is for those who do.