

William & Mary Journal of Race, Gender, and Social Justice

Volume 13 (2006-2007)
Issue 2 *William & Mary Journal of Women and
the Law*

Article 7

February 2007

Little Red Reasonable Woman and the Big Bad Bully: Expansion of Title VII and the Larger Problem of Workplace Abuse

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LITTLE RED REASONABLE WOMAN AND THE BIG BAD
BULLY: EXPANSION OF TITLE VII AND THE LARGER
PROBLEM OF WORKPLACE ABUSE

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INTRODUCTION

In a recent decision concerning a bullying boss and sexual harassment claims, the Ninth Circuit looked beyond whether the defendant boss treated men and women differently. In analyzing the claims, the court considered whether each sex *reacted* differently to the workplace abuse.¹ In doing so, the Ninth Circuit created a "Subjective Effects Test,"² stating that whether men and women react differently is indicative of differential impact and thus differential treatment.³ The Ninth Circuit saw this as a reasonable extension of the Reasonable Woman analysis, which asks what a Reasonable Woman would consider offensive and hostile.⁴ The Reasonable Woman standard, however, is traditionally reserved for cases of harassment of a sexually explicit nature, not cases of differential treatment.⁵ The Ninth Circuit's new application of this doctrine to disparate treatment claims is a significant departure from well-settled precedent. Furthermore, considering a gender's reaction to a given situation in an effort to determine disparate treatment not only misinterprets the Reasonable Woman standard but also erroneously applies the same standard to differential treatment claims. Such application is problematic because differential treatment claims are generally not based upon sexually explicit conduct.

This subjective effects test poses a number of troubling implications for Title VII claims. First, by expanding sexual harassment doctrine to target bullies who abuse male and female employees alike, the Ninth Circuit contravenes existing discrimination doctrine and offends the stated purpose of Title VII.⁶ As federal courts have stressed, "it is for Congress to decide whether to address bad workplace behavior that cannot be labeled discriminatory. It is not the province of federal courts to expand the language of a statute that is clearly limited. Title VII covers only sex discrimination."⁷ Second,

1. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 846 (9th Cir. 2005).

2. *Id.* at 845-46. "We now hold that evidence of differences in subjective effects . . . is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex or gender-specific." *Id.*

3. *Id.*

4. *Id.*

5. Differential treatment, also called disparate treatment, refers to discrimination in which one gender is treated differently, based purely on gender difference. Differential treatment generally does not include conduct that is sexually explicit in nature. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

6. Congress enacted Title VII "to provide injunctive relief against discrimination . . ." Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter Civil Rights Act of 1964].

7. *Holman v. Indiana*, 24 F.Supp.2d 909, 915 (N.D.Ind. 1998); *see also Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 89 (U.S. 1998).

employing a subjective effects test results in a move away from developing principles of equality and empowerment, and instead reinforces negative stereotypes of women as emotional, unstable, and unable to deal with workplace stress. Third, expansion of Title VII in this direction — to cover more of the ever-increasing claims of harassment — ignores the larger problem of general workplace harassment,⁸ leaving those claimants who are not members of a protected class without recourse.

This note evaluates the Ninth Circuit's addition of a subjective effects test to the standard analysis used by courts in disparate treatment claims. Part I reviews the progression of sexual harassment doctrine and its various claims, with particular emphasis on disparate treatment and the development of the Reasonable Woman standard. As discussed in Part II, the Ninth Circuit's use of an unprecedented subjective effects test in disparate treatment actions threatens to muddy the waters of sexual harassment doctrine by misapplying the Reasonable Woman standard. This expansion of sexual harassment doctrine ignores the larger problem of general workplace harassment, as further detailed in Part III. Part IV explores the scope and reality of workplace harassment and analyzes whether a separate cause of action under employment law might provide a more appropriate remedy.

I. TITLE VII AND TYPES OF SEXUAL HARASSMENT CLAIMS

In 1964, Congress passed the Civil Rights Act in an effort to combat discriminatory practices at work throughout the country.⁹ Title VII of the Act specifically provides a remedy to members of protected groups who have been subjected to discriminatory practices in the workplace.¹⁰ Prior to the ratification of this legislation, victims of sexual harassment could only find recourse by seeking legal remedy based on common-law tort claims.¹¹ In 1980, the Equal Employment Opportunity Commission (EEOC) created guidelines to process complaints filed under Title VII, officially putting the sexual harassment cause of action into effect.¹² These guidelines define sexual harassment

8. See GARY H. NAMIE, WORKPLACE BULLYING INSTITUTE, THE WBI 2003 REPORT ON ABUSIVE WORKPLACES 4 (2003), <http://www.bullyinginstitute.org/res/2003results.pdf> [hereinafter WBI REPORT].

9. Civil Rights Act of 1964.

10. *Id.*

11. Elizabeth Jubin Fujiwara & Joyce M. Brown, *Cause of Action for Post-Ellerth/Faragher Title VII Employment Sexual Harassment Claims*, in 27 CAUSES OF ACTION 2D 1, 42-43 (2005).

12. *Id.* at 38-40.

as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that occur when:

- (1) submission to such conduct is . . . a term or condition of an individual's employment,
- (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions . . . , or
- (3) such conduct [unreasonably interferes] with an individual's work performance or creat[es] an intimidating, hostile, or offensive working environment.¹³

In addition to setting forth a definition for sexual harassment, the EEOC went on to delineate how allegations of sexual harassment should be evaluated:

- (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at . . . the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.¹⁴

Soon after the EEOC set forth these standards, courts began to use them as the standard tool of analysis in deciding sexual harassment claims.¹⁵

A. Dichotomy of Sexual Harassment Claims: Quid Pro Quo and Hostile Environment

While the EEOC guidelines¹⁶ set forth three separate instances in which employer conduct constitutes sexual harassment, courts have typically dichotomized claims of sexual harassment into two separate camps: (1) "quid pro quo," which encompasses claims falling within the first two instances defined by the EEOC, and (2) "hostile environment" for the third.¹⁷ Although each cause of action contains different elements of proof, sexual harassment claims frequently include allegations of both "quid pro quo" and "hostile environment" harassment.¹⁸

13. 29 C.F.R. § 1604.11 (2006).

14. *Id.*

15. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986); *see also Henson v. Dundee*, 682 F.2d 902, 904 (1982).

16. Codified as 29 C.F.R. § 1604.11(a) (2006).

17. The Supreme Court first drew this distinction in the case of *Meritor Savings Bank v. Vinson*. 477 U.S. at 65.

18. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 11, 14 (1993) (citing Alba Conte, *Sexual Harassment in the Workplace: Law and*

Nevertheless, courts throughout the nation have consistently relied on this distinction between quid pro quo claims and hostile environment claims in deciding cases, and they employ different analyses for each claim.¹⁹

Quid pro quo claims are generally easier to prove; they rely heavily on whether the plaintiff can prove that she was denied a tangible employment benefit due to the fact that she refused to succumb to sexual advances or other sexually explicit harassment.²⁰ Hostile work environment claims, on the other hand, have a more in-depth analysis and require that certain malleable standards be met.²¹ First, the plaintiff must prove that she is a member of a protected class, as defined by Title VII.²² Second, she must prove that she was "subjected to unwelcomed [sic] sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature."²³ Third, the harassment must have been "based upon sex" and must have "had the effect of unreasonably interfering with the plaintiff's work performance, and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff."²⁴ Finally, the plaintiff must prove employer liability²⁵ under the doctrine of respondeat superior.²⁶

As quid pro quo and hostile environment claims contain different elements, each requires the court to use a different analysis.²⁷ The United States Supreme Court established separate tests for each claim in its 1998 decisions of *Burlington Industries, Inc. v. Ellerth*²⁸ and *Faragher v. Boca Raton*,²⁹ in an effort to fashion clear rules for determining employer liability in such claims.³⁰ For quid pro quo sexual harassment claims, the Court held that an employer is vicariously liable for unlawful sexual harassment by a supervisor that culminates in a tangible employment action taken against the victim. To succeed, the plaintiff must establish a nexus between the harassment

Practice §2.2, 150-57 (1990)).

19. Fujiwara & Brown, *supra* note 11, at 38.

20. George, *supra* note 18, at 14.

21. *Id.*

22. *Id.*

23. *Id.* (quoting *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986) (listing elements of a sexual harassment claim and finding that the plaintiff failed to sustain her burden of proving that she was a victim of Title VII sexual harassment)).

24. *Id.*

25. Title VII applies to all companies, both public and private, that have at least fifteen employees. 42 U.S.C.S. § 2000e (b) (2000).

26. George, *supra* note 18, at 14.

27. Fujiwara & Brown, *supra* note 11, at 58.

28. 524 U.S. 742, 751 (1998).

29. 524 U.S. 775, 785 (1998).

30. Fujiwara & Brown, *supra* note 11, at 34, 58-59.

and the denial of some tangible employment benefit.³¹ In cases of hostile environment claims, the Court held that the plaintiff must prove that the harassment was so "severe or pervasive" as to create a hostile work environment.³² In practice, this is typically a more onerous burden for the plaintiff to meet. Courts have uniformly used these tests to analyze sexual harassment stemming from lewd and lascivious employer actions, establishing consistent precedent.³³

B. Sexual Harassment Distinguished From Gender-Based Harassment and Disparate Treatment

As sexual harassment law has progressed, the doctrine has expanded to include discrimination that is not sexually explicit but is nevertheless based on sex.³⁴ This gender-based type of sexual harassment claim, known as disparate treatment, is distinguishable from the original sexual harassment claims that grew out of sexually explicit harassment. Thus, sexual harassment can best be understood by looking at sexual harassment in terms of two types of claims: 1) sexually explicit sexual harassment,³⁵ which includes quid pro quo and hostile environment claims, and 2) gender-based sexual harassment, known as disparate treatment.³⁶

Sexually explicit sexual harassment has long been recognized by the justice system, conforming to the definition of sexual harassment set forth by the Civil Rights Act of 1964.³⁷ Instead, disparate treatment harassment does not require that the employer engage in "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."³⁸ Disparate treatment sexual harassment refers to instances in which one gender receives unequal treatment based on gender.³⁹ Disparate treatment sexual harassment need not be sexual in nature. It requires no mention of gender or sex, nor does it require the harasser to engage in lewd or lascivious

31. *Burlington*, 524 U.S. at 753-54. "When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Id.*

32. *Id.* at 754; *see also* *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971) ("One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.").

33. *Fujiwara & Brown*, *supra* note 11, at 47-50.

34. *Id.* at 76.

35. For the remainder of this note, the term *sexual harassment* refers to this type of claim.

36. *Fujiwara & Brown*, *supra* note 11, at 72.

37. *See id.* at 42-43.

38. 42 U.S.C.S. § 2000e-2 (Interpretive Notes and Decisions).

39. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80-81 (1998).

affronts to the victim.⁴⁰ Disparate treatment sexual harassment refers to incidents in which one gender is treated differently, based purely on gender.⁴¹ While this differential treatment may be sexually explicit in nature, it need not be.⁴² For instance, a supervisor who calls female subordinates by sexually explicit nicknames but does not engage in similar mistreatment of male subordinates, would be committing disparate treatment sexual harassment that is *also* sexually explicit.⁴³ On the other hand, a supervisor who calls only female subordinates by rude titles, or insults that are not sexually explicit, commits disparate treatment sexual harassment because he is not affording female employees the same respect he affords male employees.⁴⁴

Courts have found that even when a work environment is generally hostile for all employees, plaintiffs may be able to distinguish their cases and bring suits for discrimination by showing a difference in the instances or severity of abuse as proof of disparate treatment. Federal laws have been revised to reflect courts' recognition of the disparate impact cause of action.⁴⁵

C. Codification of the Disparate Impact Cause of Action

In 1991, Congress made several changes to the Civil Rights Act of 1964 when it enacted the Civil Rights Act of 1991.⁴⁶ Among other things, the new Act added a section to the statute, defining disparate impact sexual harassment and delineating the requirements for legal action brought on this basis.⁴⁷ While courts had been grappling with disparate treatment for years, this Act marks the first time that legislation formally recognized the principle of disparate treatment.⁴⁸

The Civil Rights Act of 1991 addresses disparate impact by stating:

(k) (1) (A) An unlawful employment practice based on disparate impact is established under this title only if —

40. *See id.*

41. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 846 (9th Cir. 2005).

42. *Fujiwara & Brown, supra* note 11, at 39.

43. *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (discussing supervisor who referred to female employee as "dumb fucking broad").

44. *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 266-69 (1993) (discussing supervisor swore at female employees and used vulgar names).

45. *Raley v. Bd. of St. Mary's County Comm'rs.*, 752 F.Supp. 1272, 1280 (D. Md. 1990); *Laughinghouse v. Risser*, 754 F.Supp. 836, 840 (D. Kan. 1990).

46. 42 U.S.C. § 1981a (2000).

47. 42 U.S.C. § 2000e-2 (2000).

48. Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 256-57 (1993).

- (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related. . . ; or
- (ii) the complaining party makes the demonstration . . . with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.⁴⁹

Congress passed the Civil Rights Act of 1991 largely in response to five 1988 employment discrimination cases that garnered much media attention and greatly limited the reach of federal laws protecting workers.⁵⁰ In addition to providing protection to victims of disparate treatment abuse, the 1991 Act also allows for greater damages, including punitive fines.⁵¹ Although this Act uses the term "disparate impact," it may be more appropriate to refer to this cause of action as "disparate treatment" in light of the corresponding analysis and focus on employer conduct: the primary inquiry to determine "disparate impact" sexual harassment is whether an employer subjected members of only one sex to adverse terms or conditions of employment.⁵²

According to George Rutherglen, author of *Employment Discrimination Law: Visions of Equality in Theory and Doctrine*,⁵³ "the difference between these types of claims is significant, so much that constitutional law only recognizes claims of disparate treatment, not disparate impact."⁵⁴ While Rutherglen acknowledges that these claims are similar, he explains that claims of disparate treatment generally refer to intentional discrimination, while disparate impact relies on a showing of discriminatory impact, with no intention requirement.⁵⁵ This is an important distinction in terms of the factual and legal analysis taken by the court in addressing claims of disparate treatment.

The development of the disparate treatment sexual harassment action has clearly advanced the concept of equality in the workplace

49. Civil Rights Act of 1991, 42 U.S.C. § 1981a (2000).

50. Greenberger, *supra* note 48. See generally *Lorance v. AT & T Techs, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilkes*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio* 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The Civil Rights Act of 1991 reversed all five of these cases.

51. Civil Rights Act of 1991, 42 U.S.C. § 1981a (2000).

52. *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (1993) (citing *Harris v. Forklift*, 510 U.S. 17, 22 (1993)).

53. GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 74 (2003).

54. *Id.*

55. RUTHERGLEN, *supra* note 53, at 77.

and has been an imperative expansion of sexual harassment doctrine. Recognition of this type of claim, and the corresponding legal condemnation of differential treatment based on gender, has significantly leveled the playing field within the American workplace.⁵⁶ Title VII has appropriately served as the weapon of choice for many victims fighting gender-based sexual harassment. The disparate treatment harassment claim facilitated many sexual harassment actions that would have otherwise gone unpunished and unrecognized by the justice system.⁵⁷ Without this claim of action, courts would be forced to deny justice to many and reflect approval of — or at least acquiescence to — sexist work environments. With this development of law, female plaintiffs have made great strides toward achieving equal pay, equal advancement opportunities, and equal roles in the workplace. This result was precisely the intended effect of Title VII, which states:

- (a) It shall be an unlawful employment practice for an employer —
 - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
 - (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁵⁸

D. Sexual Harassment and the Objective Reasonable Woman/Person Standard

Before 1991, the standard for determining whether harassment was so severe or pervasive as to create a hostile environment was whether a reasonable *person* would find it to be so.⁵⁹ Courts established this standard to ensure that mild teasing and minor, unrepeatable incidents did not rise to the level of actionable harassment.⁶⁰ The Ninth Circuit re-evaluated the reasonable person standard in *Ellison v. Brady*, in which the court reasoned that a “Reasonable

56. *Id.*

57. Indeed, this was the very premise and policy behind the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(k)(1)(A).

58. *Id.* (emphasis added).

59. *Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir. 1991) (reasoning that “we [the court] . . . prefer to analyze harassment from the victim’s perspective” where a supervisor sent disturbing love letters to plaintiff).

60. *Id.*; see *Fujiwara & Brown*, *supra* note 11, at 82.

Woman" standard constitutes a more accurate measure of the abuse in cases concerning a female victim.⁶¹

The Reasonable Woman standard evolved as an element used in evaluating sexual harassment claims, applied by courts in cases involving explicitly sexual harassment, aimed toward women.⁶² In *Ellison v. Brady*, the Ninth Circuit explained its invocation of the Reasonable Woman standard:

[W]e believe that many women share common concerns which men do not necessarily share. For example . . . women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may [lack a] full appreciation of the social setting or the underlying threat of violence that a woman may perceive. . . . We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.⁶³

In this context, the Ninth Circuit made an important distinction by acknowledging that women have a different perspective on sexually explicit behavior.⁶⁴ Women, conscientious of the fact that they are far more likely to be victims of sexual assault than men,⁶⁵ are also more likely to view a man's unwelcome advances as potentially dangerous.⁶⁶ The Reasonable Woman standard is thus based on the need for sexually explicit harassment to be viewed from the woman's perspective to fully appreciate its significance.⁶⁷

Other courts have followed the Ninth Circuit's lead in implementing the Reasonable Woman standard. The Eighth Circuit utilized the Reasonable Woman standard in the case of *Burns v. McGregor Electronic Industries, Inc.*, in which a federal judge was instructed to compensate a plaintiff terrorized by a supervisor who continuously subjected her to rude and sexual comments and requested that she

61. *Ellison*, 924 F.2d at 879-80.

62. Fujiwara & Brown, *supra* note 11, at 81-83.

63. *Ellison*, 924 F.2d at 879-80.

64. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845-46 (9th Cir. 2005).

65. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); National Center for Injury Prevention and Control, *Sexual Violence: Fact Sheet* <http://www.cdc.gov/ncipc/factsheets/svfacts.htm>. "Women are more likely to be victims of sexual violence than men: 78% of the victims of rape and sexual assault are women and 22% are men[.]" *Id.* (citing NANCY THOENNES & PATRICIA TJADEN, NAT'L INSTITUTE OF JUSTICE, REPORT NCJ 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000)).

66. *Ellison*, 924 F.2d at 879.

67. *Id.*

watch pornographic movies with him.⁶⁸ The court held that such behavior would have a more harmful impact on women than men.⁶⁹ Following this line of reasoning, other courts continue to apply a Reasonable Person standard, some articulating that the measure of impact be from a similarly situated person's perspective to encompass the intentional focus on gendered perspective.⁷⁰

While courts do not always agree on whether to apply a reasonable woman standard to interpret hostile work environment claims, they do agree on one thing: the Reasonable Woman standard should be left to those cases involving sexually explicit discrimination cases. This sentiment is manifest in the noticeable and reasonable absences of the Reasonable Woman standard from disparate treatment jurisprudence. In its recent decision of *EEOC v. NEA-Alaska*,⁷¹ the Ninth Circuit departed from this well-established precedent by invoking the Reasonable Woman standard in a case lacking sexually explicit conduct.⁷² The Ninth Circuit currently stands alone in this, its newest endeavor to expand the reach of Title VII.

II. *EEOC v. NEA-ALASKA*

The case of *EEOC v. NEA-Alaska* presents an unprecedented expansion of the analysis used in disparate treatment cases of sexual harassment and application of the Reasonable Woman standard. In this case, the Ninth Circuit found an abusive boss to be guilty of disparate treatment sexual harassment.⁷³ In addition to the traditional test of looking to the harasser's behavior toward different sexes, the Ninth Circuit found the severity of victims' reactions to be indicative of whether they were treated differently within the meaning of Title VII.⁷⁴ The court reasoned that although the offending supervisor, Thomas Harvey, was hostile toward both men and women in the workplace, women experienced more harassment than their male counterparts and they could therefore claim sexual harassment for their abuse.⁷⁵ A closer look at this case suggests that the court used an improper method to reach a just result.

68. *Burns v. McGregor Electronic Indus., Inc.*, 989 F.2d 959 (8th Cir. 1993).

69. *Id.* at 965.

70. Jayne L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 162-68 (1994).

71. *Id.*

72. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 847 (9th Cir. 2005).

73. *Id.* at 847.

74. *Id.* at 843-46.

75. *Id.*

A. Employees Bring Title VII Claim to Punish Bullying Boss

The facts of the case are heated and poignant. Fed up with the yelling, screaming, and threatening behavior of their supervisor, several female subordinates, along with the EEOC, brought legal action against National Education Association of Alaska (N.E.A.-Alaska), alleging that their supervisor's misconduct was sexually motivated.⁷⁶ Harvey, the offending boss, had a bully's reputation and was known for habitually terrorizing subordinates and instilling fear in those who crossed his path.⁷⁷ While Harvey's mistreatment never included sexual innuendo or references to sexuality, the female plaintiffs raised a claim of disparate treatment, alleging that Harvey mistreated them because they were women.⁷⁸ Yet the record shows that Harvey engaged in similar behavior toward male subordinates: shouting, pumping his fists, and spitting in the faces of both male and female employees on a regular basis.⁷⁹ The women claimed that they were more *injured* by Harvey's actions and therefore should have standing to bring claims of sexual harassment.⁸⁰ In its decision, the Ninth Circuit court agreed, reasoning that the women manifested more severe reactions to Harvey's abuse than the similarly situated men, citing this as proof that the women were more affected by the abuse.⁸¹

A closer look at this case suggests that the Ninth Circuit used an unwarranted analysis to get to the right conclusion. In its decision, the court went beyond the traditional test of looking to the harasser's behavior toward different sexes; it made an additional finding that the severity of the plaintiff's reactions are indicative as to whether they are victims of sex-based discrimination within the meaning of Title VII.⁸² The case of *EEOC v. NEA-Alaska* presents an unprecedented expansion of the analysis used in disparate treatment cases of sexual harassment and application of the Reasonable Woman standard.

B. The Ninth Circuit's Creation of a Subjective Effects Test

The Ninth Circuit analyzed the case in such a way as to characterize the supervisor's harassment toward women as "different" and

76. *Id.* Carol Christopher, Julie Bhend, and Carmela Chamara filed charges against NEA-Alaska with the EEOC in April of 2000. The EEOC filed the initial suit in July of 2001. *Id.* at 842.

77. *Id.* at 843-44.

78. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845 (9th Cir. 2005).

79. *Id.* at 843.

80. *Id.* at 845.

81. *Id.* at 846.

82. *Id.*

“worse” and thus actionable under Title VII.⁸³ The record suggested more incidents of mistreatment of female subordinates than males, although the defense points out that women made up the majority of the office staff.⁸⁴ Furthermore, the defense pointed out that the men were frequently out of the office, leaving the women a captive audience for Harvey.⁸⁵ The court concluded that, even adjusting for these disparities, Harvey abused female employees more frequently than male employees.⁸⁶ Such characterization of differential treatment as sexual harassment is widely accepted under Title VII and well supported by precedent.⁸⁷

In its analysis, the Ninth Circuit opted not to stop at this quantitative examination but buttressed its finding with a determination that the women were more injured than male employees by similar mistreatment.⁸⁸ In reaching this conclusion, the court fashioned a new rule: “We now hold that the evidence of differences in subjective effects . . . is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific.”⁸⁹ To satisfy its rule, the court cited the women’s apparent heightened sensitivity to Harvey’s mistreatment as evidence of disparate treatment.⁹⁰

In determining whether Harvey harassed female subordinates more than male subordinates, the court reasoned that Harvey’s abuse “affected women more adversely than it affected men.”⁹¹ To make its point, the Ninth Circuit went on to say that “there is no evidence in the record that any male employee manifested anywhere near the same severity of reactions (e.g., crying, feeling panicked and physically threatened, avoiding contact with Harvey, avoiding submitting overtime hours for fear of angering Harvey, calling the police, and ultimately resigning) to Harvey’s conduct as many of the female employees have reported.”⁹² Based in part on this subjective analysis, the court determined that Title VII provided a viable cause of action for the women in this suit.⁹³ This secondary justification for finding disparate treatment, based upon comparing manifest reactions of

83. *Id.* at 845-46.

84. *E.E.O.C. v. Nat’l Educ. Ass’n, Alaska*, 422 F.3d 840, 846 (9th Cir. 2005).

85. *Id.*

86. *Id.* at 846-47.

87. *Fujiwara & Brown, supra* note 11.

88. *E.E.O.C. v. N.E.A.*, 422 F.3d at 845-47.

89. *Id.* at 845-46.

90. *Id.*

91. *Id.* at 834.

92. *Id.*

93. *Id.* at 847.

victims, transforms the analysis from differential treatment to one of differential response.

In an attempt to approve the claim of action, the court confused disparate treatment with differential experience of similar treatment. Disparate treatment is traditionally measured by the difference in treatment of different groups, such as men and women, not the difference of apparent impact such behavior has on different groups.⁹⁴ By measuring disparate treatment through the reactions of those victimized, the Ninth Circuit injects a subjective effects test into an otherwise objective analysis. Such use of a subjective effects test in a disparate treatment case is not only unprecedented but arguably unsound.

In its analysis of this disparate treatment action, the Ninth Circuit went beyond the cited precedent of *Oncale*,⁹⁵ the landmark case providing Title VII protection against sexual harassment based on disparate treatment. While *Oncale* recognized "direct comparative evidence about how the alleged harasser treated members of both sexes" as evidence of disparate treatment,⁹⁶ the Ninth Circuit mischaracterized this finding as "whether [the harasser's] behavior *affected women* more adversely than it *affected men*."⁹⁷ *Oncale* created an objective analysis of differential treatment, considering only whether the harasser's *treatment* of men and women was objectively different.⁹⁸ Implicit in this analysis is a determination based on the objective quality and quantity of the harasser's behavior; the court in *Oncale* gave no weight to the subjective *effect* of mistreatment on victims of different sexes.⁹⁹ Differential treatment has never before been evaluated on the same plane as differential experience of similar treatment. Nevertheless, the Ninth Circuit espouses differential reactions of victims as a central component of its finding in *EEOC v. NEA-Alaska*.¹⁰⁰

1. The Ninth Circuit's Misapplication of the Reasonable Woman Standard

In justifying this expansion, the Ninth Circuit points to the Reasonable Woman standard, a measure traditionally used by courts to determine what a "reasonable woman" would consider offensive or

94. Fujiwara & Brown, *supra* note 11.

95. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80-81 (U.S. 1998).

96. *Id.*

97. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845 (9th Cir. 2005).

98. *Oncale*, 523 U.S. at 81.

99. *Id.*

100. *E.E.O.C. v. N.E.A.*, 422 F.3d at 846.

hostile.¹⁰¹ The Reasonable Woman standard is used to evaluate certain situations in which the same behavior toward males and females may constitute sexual harassment against one sex.¹⁰² In such cases, courts use the Reasonable Woman standard to measure whether a "reasonable woman" would have considered the alleged misconduct against the female plaintiff to be "intimidating, hostile or offensive."¹⁰³ Courts have traditionally reserved the Reasonable Woman standard for only those cases involving sexually explicit sexual harassment stemming from derogatory language, comments about a specific sex, or sexually explicit behavior that may be considered harassment of the targeted sex, but not necessarily harassment of the other sex.¹⁰⁴ A closer examination of the Reasonable Woman standard and its proper application reveals that it is not applicable to cases of disparate treatment and was improperly invoked by the Ninth Circuit in *EEOC v. NEA-Alaska*.

2. Why Disparate Treatment Claims Do Not Invoke the Reasonable Woman Standard

Courts have stopped short of applying this gender-specific standard to evaluate abuse lacking a sexual nature. Instead, they use a different analysis for claims of disparate treatment. A review of the sexual harassment cause of action, along with the proper use of the Reasonable Woman standard, indicates that the courts have not used the subjective effects test to determine differential treatment where the alleged harassment is not facially sex-specific, and for good reason.

In disparate treatment actions, a court's determination of whether mistreatment qualifies as sexual harassment traditionally rests on whether victims were singled out because of their gender.¹⁰⁵ Disparate treatment is therefore determined by an examination of "direct comparative evidence about how the alleged harasser treated members of both sexes,"¹⁰⁶ ultimately asking whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹⁰⁷ To determine whether the harassment was actually attributable to discrimination, the Supreme Court held that a plaintiff may point to sexually explicit and deprecating language from the harasser or,

101. RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS*, 78 n.2e (8th ed., Aspen Publishers 2004).

102. *Id.*

103. *Id.*

104. Fujiwara & Brown, *supra* note 11, at 39.

105. Bolden v. PRC, Inc., 43 F.3d 545, 551 (10th Cir. 1994).

106. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80-81 (1998).

107. *Id.* at 80 (quoting *Harris v. Forklift*, 510 U.S. 17, 25 (1993)).

alternatively, may "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."¹⁰⁸ This analysis relies on an evaluation of the defendant's conduct toward similarly situated men and women, using an objective analysis of that behavior to reach a conclusion.¹⁰⁹

Ignoring this precedent, the Ninth Circuit proclaimed that "evidence of differences in subjective effects . . . is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific."¹¹⁰ Cases cited by the court concerning the Reasonable Woman standard addressed only harassment claims based on sexually explicit misconduct.¹¹¹ While the Ninth Circuit stated conclusively that the Reasonable Woman standard is applicable to disparate treatment claims of sexual harassment, the court neither cited any authority for this application nor offered any justification for this expansion based on law or policy.¹¹²

The Ninth Circuit's modification of the Reasonable Woman standard in *EEOC v. NEA-Alaska* to include a subjective effects test¹¹³ fails to follow the precedent of disparate treatment analysis or precedent of the Reasonable Woman standard. Furthermore, the court's application of the Reasonable Woman standard to a disparate treatment case¹¹⁴ threatens to fundamentally change the test of differential treatment: it would no longer be based on the objective amount and quality of the harasser's conduct but on a subjective evaluation of the victim's reaction.

Preceding cases have uniformly demonstrated that the test for determining whether one gender has received differential treatment is whether the harasser's treatment of men and women was objectively different. The victim's reaction to the harasser's behavior is generally not considered in determining whether the harasser discriminated against a protected class. By adopting this new test, the Ninth Circuit shifts the focus from the harasser's behavior to the victim's response.¹¹⁵

Invoking the Reasonable Woman standard for behavior that lacks sexual conduct leaves one wondering why the Ninth Circuit opted not to use a reasonable person standard. Gender-specific differences in visible reactions to hostility cannot support an argument that women were, in fact, more victimized by the harassment than

108. *Id.* at 80-81.

109. *Id.* at 81.

110. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 846 (9th Cir. 2005).

111. *Id.* at 845.

112. *See generally id.*

113. *Id.*

114. *Id.*

115. *Id.* at 846.

their male counterparts.¹¹⁶ To require as much not only perpetuates the female stereotype of women as the weaker sex but also leaves men without recourse for similar harassment. The opinion of the Ninth Circuit in *EEOC v. NEA-Alaska* threatens to contravene existing principles of sexual harassment law and policy. This use of the Reasonable Woman standard and creation of a subjective effects test should therefore be carefully analyzed before it is accepted as a suitable development of this doctrine.

C. Misapplication of the Reasonable Woman Standard

The Reasonable Woman standard does not fit with disparate treatment jurisprudence. The Reasonable Woman standard was not created to determine whether female claimants were treated differently *because of their gender*¹¹⁷ but only to determine whether their perception of certain behavior as "harassment" was accurate, as viewed from the female perspective.¹¹⁸ In *EEOC v. NEA-Alaska*, the Ninth Circuit used the Reasonable Woman standard to distinguish female reactions from the reactions of male counterparts in an effort to show disparate treatment.¹¹⁹ This subjective effects test is a deviation from the Ninth Circuit's previously stated purpose for the Reasonable Woman standard.¹²⁰

In *Ellison v. Brady*, the Ninth Circuit found that the Reasonable Woman standard should be used to determine whether conduct is perceived as offensive and hostile by considering how a reasonable victim of the same sex would view the conduct.¹²¹ The court reasoned that "conduct that many men consider unobjectionable may offend many women."¹²² This rationale of *Ellison* fails in *NEA-Alaska* when used to determine whether men and women were treated differently.¹²³ In *NEA-Alaska*, male workers testified that they too found

116. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 846 (9th Cir. 2005).

117. See *Ellison*, 924 F.2d at 879 (stating that the adoption of a reasonable woman standard did not equal greater protection for women).

118. See, e.g., Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207-08 (1990) (listing examples where men trivialize and downplay harassment whereas women view the conduct in a much more serious light).

119. *E.E.O.C. v. NEA*, 422 F.3d at 846.

120. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (noting the court adopts a reasonable woman standard to overcome the male-based, sex-blind reasonable person standard that "tends to systematically ignore the experiences of women.").

121. *Id.* at 880.

122. *Id.* at 878.

123. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 846 (9th Cir. 2005). (finding that Harvey raised his voice to both men and women and engaged in altercations with men).

Harvey's behavior objectionable.¹²⁴ Thus, while a court may appropriately use the Reasonable Woman standard to determine whether misconduct rises to the level of harassment,¹²⁵ it should not be used to determine whether women were treated differently.¹²⁶ To find otherwise would be to perpetuate outdated, negative stereotypes of women in the workplace.

1. The Reasonable Woman Standard Ignores Different Reactions of Men and Women When Applied to Disparate Treatment Claims

Even if one chooses to ignore the basic differences in how men and women display their reactions to stress, the court's attempt to justify a test based on the "differences in subjective effects"¹²⁷ while looking to whether "any male employee manifested anywhere near the same severity of reactions"¹²⁸ is fundamentally flawed.¹²⁹ This approach ignores basic cultural and biological differences in how men and women display their reactions to stress.

Americans live in a culture that embraces women as emotionally expressive and champions men as strong and steadfast in the face of hardship.¹³⁰ Women and men learn to exhibit different responses to stimuli, and it follows that the disparity often seen in male and female reactions does not necessarily correlate to the true subjective effect of harassment experienced by men and women.¹³¹ An unadjusted,

124. *Id.* at 846.

125. See *Ellison*, 924 F.2d at 879-80 (adopting the Reasonable Woman standard to better determine how an objective person of the same sex would view a situation more effectively neutralizes gender differences on harassment to place both genders on equal footing in the work place).

126. See JEFFREY A. KOTTLER, *THE LANGUAGE OF TEARS* 126 (1996) (noting that when males and females are faced with similar emotions they react differently based on gender).

127. *Id.* at 845-46.

128. *Id.*

129. See Shelley E. Taylor et al., *Biobehavioral Responses to Stress in Females Tend-and-Befriend, not Fight-or-Flight*, 107 *PSYCHOL. R.* 411, 421-22 (2000) (research indicated women are more likely to care for offspring and join social groups to combat stress while the fight-or-flight syndrome is a response activated in part by testosterone, the predominant male hormone).

130. KOTTLER, *supra* note 126, at 156-57 (discussing how women and girls are encouraged to cry in response to sadness and as a means of expression while men and boys are told not to cry, moan, or act like a girl).

131. *Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir. 1991) (noting that men and women view rape and sexual assault differently with the former assessing it in a vacuum, whereas the latter are most often victims); Angelo Soares, *Tears at Work: Gender, Interaction, and Emotional Labour*, 2 *JUST LABOUR* 36, 38-39 (Spring 2003) (indicating that women tend to cry more than men for a variety of reasons such as biology, hormones, and socializing rules that do not necessarily indicate that men and women view conduct differently); Lorna

side-by-side comparison of male and female reactions to identical behavior is often not indicative of male/female perceptions. As one expert notes, "[w]omen may cry more often on the outside but we all feel like crying about the same number of times. It is gender training that molds us to express ourselves in particular ways."¹³²

In terms of socially acceptable behavior in today's workplace, women tend to be more expressive and demonstrative.¹³³ Men, however, tend to internalize stress and refrain from emotional displays.¹³⁴ A reasonable woman may thus perceive a female worker's tears as evidence that she felt more victimized than a male counterpart who makes no comparable emotional display.¹³⁵ A reasonable man may, however, find that male subordinates who refrained from emotionally reacting nevertheless "perceived [the environment] as hostile or abusive."¹³⁶ This difference demonstrates that an unadjusted comparison of male and female reactions to identical behavior may not accurately reflect male/female perceptions. While women may manifest more severe reactions, both women and men may perceive the environment as equally hostile or abusive.

Research and reports in the fields of medicine, psychology, business, and law recognize that men and women react differently to workplace stress.¹³⁷ According to such authority, women tend to have more visible reactions to stress; they tend to cry more than men, to appear visibly shaken, and to manifest visible reactions in general, more so than men.¹³⁸ On the other hand, research indicates that men tend to suppress reactions to stress, manifesting more subtle reactions to stressful situations.¹³⁹ "Suppressing feelings and internalizing stress are learned, male traits," says Glenn E. Good, Associate Professor of Education and Counseling Psychology at the University of Missouri, Columbia.¹⁴⁰ Dr. Good maintains that these learned traits

Collier, *When a Good Cry Just Doesn't Work*, CHICAGO TRIBUNE, Oct. 6, 2004, at 24 (explaining that women cry more frequently than men when faced with stress at work and fear being viewed as weak).

132. See KOTTLER, *supra* note 126, at 125-26.

133. See generally *id.* at 122 (noting that women are more likely to cry both in frequency and duration than men); *id.* at 135 (noting women are forced to abandon emotions and reactions to gain respect in a working world dominated by men).

134. Cathy Lu, *Male-Specific Problems When Dealing with Workplace Stress*, WEBMD, http://www.webmd.com/content/article/11/1685_50102.htm (last visited Feb. 15, 2007).

135. See KOTTLER, *supra* note 126, at 125-26.

136. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

137. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); Soares, *supra* note 131 (indicating that women cry more than men and explaining the role of tears in the workplace); Collier, *supra* note 131.

138. *Id.*

139. Lu, *supra* note 134.

140. *Id.*

prevent men from speaking up about workplace stress.¹⁴¹ He comments: "On some inner level, it comes down to: If I can't tough it out, then I'm not much of a man."¹⁴²

Research indicates that men and women manifest different visible reactions to stress,¹⁴³ men being more prone to stifle visible signs of stress¹⁴⁴ and women tending to react to stress in more visible ways.¹⁴⁵ According to psychological reports, women are more prone to crying and tend to do so more often than men.¹⁴⁶ Dr. William H. Frey II, Professor of Pharmaceutics in the neurology department at the University of Minnesota,¹⁴⁷ reports that women cry four times more often than men.¹⁴⁸ Furthermore, he states that while six percent of women do not cry at all, fifty percent of men never cry.¹⁴⁹ Both sociology and biology are cited as the responsible sources for this gendered difference.¹⁵⁰ Professor Frey cites "culture and socialisation [as playing] a crucial role in the determination of who cries and why."¹⁵¹ Men and women are socialized to react differently to the onset of emotions.¹⁵² Society teaches men that they should not cry; boys often hear the term "big boys don't cry" and are scorned or teased when they do.¹⁵³ Girls are more likely to be comforted when they cry, and they experience tears as a normal reaction to emotional upset.¹⁵⁴ This disparity continues into adulthood, and men and women often cry for

141. *Id.*; see also TOM LUTZ, *CRYING: THE NATURAL & CULTURAL HISTORY OF TEARS* 180-81 (1999). During the Industrial Revolution of the eighteenth and nineteenth centuries, new ideas regarding masculinity emerged, especially in the business world. Specifically, men were encouraged to stifle emotional expression and maintain the appearance of composure to maximize productivity. *Id.*

142. *Id.*

143. See Taylor et al., *supra* note 129, at 421-22.

144. Lu, *supra* note 134.

145. See generally KOTTLER, *supra* note 126, at 122.

146. Soares, *supra* note 131, at 39 (citing A. Vingerhoets & J. Schiers, *Sex Differences in Crying: Empirical Findings and Possible Explanations*, in *GENDER AND EMOTION: SOCIAL PSYCHOLOGICAL PERSPECTIVES* 143 (Agneta H. Fischer ed., 2002)).

147. Collier, *supra* note 131.

148. *Id.* (reporting that women, on average, cry about 5.3 times in a month, while men only cry about 1.4 times a month).

149. *Id.*

150. See Soares, *supra* note 131, at 39.

151. *Id.*; see also KOTTLER, *supra* note 126, at 7 ("There is a syntax and grammar to the language of tears, a set of cultural, gender, familial, genetic, and interactional rules for when and where this behavior is permitted."); Collier, *supra* note 131 (reporting that Tom Lutz, author of *Crying: A Natural and Cultural History of Tears*, points to social conditioning in explaining why women cry more frequently: "Since women are conditioned to be more subservient than men, they are 'allowed' to cry more often").

152. Soares, *supra* note 131, at 38.

153. *Id.*; Collier *supra* note 131; KOTTLER, *supra* note 126, at 17 ("For many people, especially those of the male persuasion, crying . . . was teased out of us by our parents and peers when we were much younger.").

154. KOTTLER, *supra* note 126, at 157.

different reasons.¹⁵⁵ Women are more likely to cry when they experience anger, and most often when they experience anger that is brought on by humiliation, unfair treatment, or personal misunderstandings.¹⁵⁶ A qualitative study focusing on gender, tears, and the workplace, found that infliction of different types of violence at work triggered tears.¹⁵⁷ Not surprisingly, the study found bullying to be "the most insidious form of violence at work."¹⁵⁸ The severe anxiety experienced was the result of repeated intentional abuse, designed to anger and weaken the target.¹⁵⁹

Some experts point to the large role biology plays when explaining why women cry more than men. Dr. Frey points out that women's tear ducts are anatomically different from men's.¹⁶⁰ Differences in the construction of tear ducts make it more likely for tears to spill out of a woman's eyes and roll down her cheeks, and more likely for tears to drain through the tear ducts of men, never making an appearance on the face.¹⁶¹ Women are therefore more likely to engage in visible crying than men.

Regardless of whether biology or sociology is responsible for the more frequent tear-shed seen in women, this emotional reaction should not be viewed as an indication of greater emotional distress. Instead it should be acknowledged as one type of reaction to stressful stimuli, but not necessarily indicative of more severe emotional trauma. Crying, while often a symptom of stress, cannot be relied upon as an accurate indicator of the severity of stress experienced.

Dr. Jeffrey A. Kottler is one of the foremost authorities on human relationships and interaction.¹⁶² In his book, *The Language of Tears*, Kottler makes an important distinction between the impact felt by individuals faced with stress and the manifest reactions to that emotional distress.¹⁶³ To demonstrate the point, Kottler poses a hypothetical of two people who have both just received news that they have been denied an important business partnership that would

155. Collier, *supra* note 131 (noting that Tom Lutz attributes crying by men primarily to pride).

156. Soares, *supra* note 131, at 39 (citing J. M. PLAS & K. V. HOOVER-DEMPSEY, *WORKING UP A STORM: ANGER, ANXIETY, JOY AND TEARS ON THE JOB* (1998)).

157. *Id.* at 42 (citing D. G. Williams & G. M. Morris, *Crying, Weeping, or Tearfulness in British and Israeli Adults*, 87 *BRITISH J. PSYCHOL.* 479-505 (1996)).

158. *Id.*

159. *Id.*

160. Collier, *supra* note 131.

161. *Id.*

162. Dr. Kottler is currently the Professor and Chair of the Department of Counseling at California State University. For a biography and links to related works, visit <http://www.jeffreykottler.com/links/bio.html>.

163. See KOTTLER, *supra* note 126, at 7-8 (noting the need to cry occurs when an individual reaches a breaking point, but that this point can vary by person).

have resulted in financial stability, a promotion at work, and an opportunity to partner with a motivating, encouraging friend and partner.¹⁶⁴ Kottler notes that both individuals would experience the same emotional impact upon hearing this news: "If there was a way to measure the physiological arousal going on in their endocrine systems, the hypothalamic and cortical regions of their brains, their sympathetic nervous systems, and their corresponding internal reactions, you would find virtually identical levels of stimulation."¹⁶⁵ Both would have substantially increased heart rates, breathing patterns, and blood pressure.¹⁶⁶ Both would be experiencing emotional upset, mentally straining in an effort to understand what went wrong.¹⁶⁷

Despite these similarities, Kottler points out that "you would be puzzled at how each of them is revealing so differently the overflow of emotion that is going on inside of them."¹⁶⁸ He goes on to explain that one is crying audibly and visibly, her emotional despair evident by the tears on her face.¹⁶⁹ The other sheds no tears or cries, but instead scowls and remains reserved.¹⁷⁰ Although these individuals are experiencing the same emotional impact from the distress they experienced, according to Kottler their learned behaviors and unique individual traits dictate how they will react.¹⁷¹ Kottler's hypothetical demonstrates how outward appearances can be deceptive and inaccurate measures of actual experience. The biological and cultural differences in male/female reactions will largely dictate how an individual outwardly reacts to internal turmoil.

In *EEOC v. NEA-Alaska*, the court took note of the different reactions of men and women.¹⁷² Yet instead of recognizing basic differences in male/female behavior, the court used this distinction as evidence of disparate treatment, even though the record indicated that male subordinates received their share of bullying.¹⁷³ To the point, the court emphasized the tears and avoidance behavior of women while downplaying the emotional turmoil of men. One male victimized by Harvey's mistreatment, Jeff Cloutier, offered testimony about

164. *Id.* at 8.

165. *Id.*

166. *Id.*

167. *Id.* at 8-9.

168. *Id.* at 9.

169. *Id.*

170. *Id.*

171. *Id.*

172. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 846 (9th Cir. 2005) (noting that the women froze when subjected to Harvey's harassment, broke down in tears, and generally tried to avoid him while the men "talk[ed] it out" with Harvey and "rolled with the punches" because it was part of "being with the boys").

173. *Id.* at 846.

a stressful encounter that “scared the hell out of him.”¹⁷⁴ He stated that Harvey “instantly was three inches from my nose [and] chin, he’s a fairly short guy . . . [and] I don’t even remember what he was saying — very loud, spitting in my face, accusing me of being insubordinate.”¹⁷⁵ A number of other men within the workplace also reported regular mistreatment from Harvey.¹⁷⁶ The court intimated that because the men did not manifest visible reactions to the same degree as women, they must not have been similarly affected.¹⁷⁷ From the facts presented in the case, however, there is little doubt that the office culture required the men to roll with the punches and to externally brush off Harvey’s harassment, no matter how they felt inside.¹⁷⁸

Essentially, Cloutier’s experiences of workplace harassment were discounted because they were the subtle, suppressed reactions to stress typically exhibited by men.¹⁷⁹ Instead of focusing on such outward appearances, courts should follow well-established precedent, evaluating hostile work environment claims by determining whether the conduct was “intimidating, hostile or offensive”¹⁸⁰ to the reasonable person, not on whether female reactions to office-wide harassment were more intense than the reactions of males. While the men in the office may have summed up Harvey’s hostile behavior as part of a “we’re all guys here” relationship,¹⁸¹ this toleration and dismissal does not render Harvey’s behavior towards men benign. The court’s assumption that the men’s muted responses meant they were not equally harassed arguably frustrates the Ninth Circuit’s effort to address the basic workplace harassment issue it attempts to cure. This decision acts only to further the original problem by codifying differences between sexes.

2. A Step Backward from Harris: Victims Need Not Manifest Psychological Damage to Bring Suit

The Ninth Circuit’s measure of victims’ reactions to perceived harassment is not an entirely new analysis. The United States

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 834.

178. See generally *E.E.O.C. v. Nat’l Educ. Ass’n, Alaska*, 422 F.3d 840 (9th Cir. 2005) (noting at the end of the day the men would collect in an office to laugh and talk, regardless of the day’s events).

179. GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK AND WHAT YOU CAN DO TO STOP THE HURT AND RECLAIM YOUR DIGNITY ON THE JOB* 271 (2000) (noting that harassment unrelated to gender, race, age, or some other Title VII protected category is unprotected by the law).

180. EPSTEIN, *supra* note 101, at 381, n.30.

181. *E.E.O.C. v. N.E.A.*, 422 F.3d at 846.

Supreme Court addressed a similar analysis in *Harris v. Forklift Systems, Inc.*¹⁸² and found such an analysis impermissible. In that case, the Court noted that requiring psychological injury to maintain a Title VII claim was untenable, as it violated the purpose of Title VII.¹⁸³ The Court found that while psychological injury may be evidence of a hostile work environment, it is not a requirement.¹⁸⁴ In removing the requirement for a plaintiff to show such injury, the Court created a rule effectuating justice and consistent with the purpose of Title VII.¹⁸⁵

In *Harris*, the requirement that the victim actually perceive an abusive environment was not conditioned on any manifestation of severe psychological reactions.¹⁸⁶ To the contrary, this court held that "Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably *be perceived, and is perceived*, as hostile or abusive, there is no need for it also to be psychologically injurious."¹⁸⁷ The Court further stated that "[if] the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation,"¹⁸⁸ yet such perception need not rise to the level of psychological injury to constitute sexual harassment.¹⁸⁹

Despite this precedent, in *EEOC v. NEA-Alaska*, the Ninth Circuit added an analysis of psychological injury, considering the manifest reactions of workers.¹⁹⁰ In essence, the Ninth Circuit held that the fact that the women displayed greater psychological damage was relevant to determining whether they were treated differently than the men.¹⁹¹ By basing the plaintiff's claim, in part, on manifestations of reactions that were more severe than those of male co-workers, the Ninth Circuit returns to an analysis that requires a showing of psychological abuse to demonstrate injury. By reinstating an analysis that adds manifest psychological damage to the

182. 510 U.S. 17, 22 (1993).

183. *Id.*

184. *Id.*

185. Liesa L. Bernardin, Note, *Does the Reasonable Woman Exist and Does She Have Any Place in Hostile Environment Sexual Harassment Claims Under Title VII After Harris*, 46 FLA. L. REV. 291, 313 (1994).

186. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 846 (9th Cir. 2005).

187. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) (emphasis added) (citation omitted).

188. *Id.* at 21-22.

189. *Id.* (noting Title VII is relevant prior to an individual suffering a nervous breakdown caused by the harassment).

190. *E.E.O.C. v. N.E.A.*, 422 F.3d at 846.

191. *Id.* at 856-46.

determination of disparate treatment, the Ninth Circuit takes a step backward from the Supreme Court's finding in *Harris*. Just as the Supreme Court held that psychological damage need not be shown to support a Title VII action,¹⁹² such consideration of whether women manifest greater psychological damage than men is also unnecessary to reach a finding of sexual harassment.

D. Confusion of Doctrine: Where the Ninth Circuit Went Wrong

Legal precedent clearly indicates that the measure of harm required in sexual harassment is perceived abuse.¹⁹³ Precedent also confirms that the measure of disparate treatment required is an objective difference in the perpetrator's behavior towards each sex.¹⁹⁴ The Ninth Circuit confuses these separate analyses in two ways. First, the Ninth Circuit aims to measure whether women perceived more abuse than men, in an effort to prove disparate treatment.¹⁹⁵ As previously stated, perception of abuse should only be used to indicate whether a victim was actually injured, not to indicate more injury than another sex experienced. Second, the Ninth Circuit looks to the manifest reactions of men and women to measure perceived abuse.¹⁹⁶ Basing the right to recover on a finding that women were more psychologically affected than men by similar treatment reinforces stereotypes of women as the weaker sex, less emotionally stable, and less capable of dealing with stress. Furthermore, psychological and medical research indicates that men and women generally do not react outwardly to stress in the same manner.¹⁹⁷ Taking into account manifestations of more severe reactions, such as displays of greater psychological damage, is repugnant to the concept of sexual equality. The Ninth Circuit's subjective effects analysis assumes that an outward display of emotional stress is indicative of abuse, whereas lack thereof would suggest an absence of abuse. In truth, neither is sufficient to determine the true effect of mistreatment.

Had the women in this case tried to "talk it out" with Harvey, had they shrugged off his abuse in the same manner as male coworkers, there would be no evidence of "sex-specific differences in the subjective effects of objectively identical behavior,"¹⁹⁸ an element the Ninth Circuit held to be indicative of disparate treatment.¹⁹⁹ While the

192. *Harris*, 510 U.S. at 22.

193. *Id.*

194. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845 (9th Cir. 2005).

195. *Id.* at 846.

196. *Id.*

197. See Taylor et al., *supra* note 129, at 421-22.

198. *E.E.O.C. v. N.E.A.*, 422 F.3d at 840.

199. *Id.*

victims of sexual harassment must, of course, actually perceive an abusive environment,²⁰⁰ a quantitative analysis of whether women were subjected to different treatment than men should suffice to determine disparate treatment. Rather than determining whether women manifest more severe reactions to harassment, public policy should allow women to stand up to workplace bullies when faced with such dominating behavior. If the women had stood up to Harvey's threats and intimidation instead of succumbing to their tears and worries, would they forfeit their claim for remedy?

In analyzing a hostile work environment claim that lacks sexual animus, the Ninth Circuit not only requires that women be the brunt of bullying more than their male counterparts, but also that the women's outward reactions be more severe than men's.²⁰¹ Basing recovery on a standard that expects women to experience greater subjective injury not only assumes that women are less capable of standing up to a bully, but also requires as much. While men and women are certainly different in countless ways, this requirement only perpetuates the stereotype that women are simply the more vulnerable sex.

E. Impact of the Ninth Circuit's Subjective Effects Test on Legal Doctrine

Although the Ninth Circuit decided the *EEOC v. NEA-Alaska* case quite recently, court opinions, legal publications, and employment guides have already incorporated this decision and the subjective effects test.²⁰² The Ninth Circuit's emphasis on the subjective effects experienced by the female plaintiffs in *EEOC v. NEA-Alaska* cannot be dismissed as dicta or supporting detail. It is the unqualified creation of a new subjective effects test to determine disparate treatment, an extension of the Reasonable Woman standard into disparate treatment claims. Others within the legal community are clearly placing weight on the Ninth Circuit's use of this subjective effects test, incorporating it into existing legal doctrine and employment

200. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

201. *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845-46 (9th Cir. 2005).

202. *See, e.g.*, *Pappas v. J.S.B. Holdings, Inc.*, 329 F. Supp. 2d 1095, 1103 (D. Ariz. 2005); HON. MING W. CHIN ET AL., CALIFORNIA PRACTICE GUIDE: EMPLOYMENT LITIGATION § 10:202 (2005); James O. Castagnera et al., *Ninth Circuit Allows Hostile Environment Sex-Based Claim Against Abusive Supervisor*, TERMINATION OF EMPLOYMENT BULLETIN, Nov. 2005, at 5. The *California Practice Guide* cites *EEOC v. NEA-Alaska* to justify the use of a subjective effects test to discern disparate treatment, noting that "[u]nder [the Reasonable Woman] approach, evidence of differences in the subjective effects on women of the same behavior toward men and women is relevant in determining whether the workplace was objectively hostile to women." CHIN ET AL., *supra* note 202, § 10:02 (citing *E.E.O.C. v. N.E.A.*, 422 F.3d at 845-46).

practices.²⁰³ The creation of a subjective effects test should be carefully analyzed before being accepted as a suitable development of the Reasonable Woman Standard.

III. MANIPULATING A GENERAL HARASSMENT CLAIM TO FIT A TITLE VII ACTION IGNORES THE REAL PROBLEM: THE BIG BAD BULLY

Like many defendants in similar situations, Harvey claimed to be an Equal-Opportunity Harasser, a bully who abused all subordinates without regard for gender differences.²⁰⁴ Surprisingly, the Equal-Opportunity Harasser defense, if proven, often results in the bully's triumph, leaving the plaintiff without a method of recovery.²⁰⁵ To recover under Title VII, the plaintiff must prove that the alleged harassment was motivated by the victim's gender, race, country of origin, or religion.²⁰⁶ A plaintiff who complains of general harassment that lacks such motivation has no comparable legal protection.²⁰⁷

This is where Title VII fails victims of workplace harassment.²⁰⁸ In effect, Title VII creates somewhat of a quandary, offering protection from workplace harassment only if it is directed at certain classes of people.²⁰⁹ As the Washington Post so aptly stated, "what bothers people about abusive workplace conduct, after all, is not the fact that it may be discriminatory but that it is abusive in the first place."²¹⁰ Some bullies have no discriminatory purpose behind their bad behavior; their harassment is not based on characteristics of the victim and does not qualify as discrimination.²¹¹ Title VII, however, is reserved to those plaintiffs who can show that their victimization was motivated by discriminatory factors.²¹² Allowing, in fact requiring,

203. See *Pappas*, 392 F.Supp.2d at 1103; CHIN ET AL., *supra* note 202.

204. *E.E.O.C. v. N.E.A.*, 422 F.3d at 845-46 (denying allegations that Harvey treated women differently than men, while stating that the difference was incidental because he interacted more frequently with women).

205. See, e.g., *Holman v. Indiana*, 211 F.3d 399, 401-07 (7th Cir. 2001) (the Seventh Circuit permitted Equal Opportunity Harassment when it affirmed a district court opinion holding that equal, albeit harassing, treatment of both sexes failed to rise to the level of a Title VII violation as it does not show the harassment was based on one of the protected categories of Title VII).

206. Civil Rights Act of 1964.

207. Gary Namie & Ruth Namie, The Workplace Bullying & Trauma Inst., *Workplace Bullying: Introduction to the 'Silent Epidemic,'* available at <http://www.bullybusters.org/advocacy/pdf-docs/overview.pdf> (last visited Feb. 15, 2007) (noting the majority of bullying is same sex, normally excluded from workplace policies, and outside the law's protection).

208. *Id.*

209. *Id.* (acknowledging that the law ignores the majority of bullying).

210. Editorial, *Justice Scalia and Mr. Oncale*, THE WASHINGTON POST, Mar. 8, 1998, at C6.

211. Namie & Namie, *supra* note 207.

212. Civil Rights Act of 1964.

plaintiffs to characterize harassment as status-based has resulted in the muddling of Title VII doctrine, the justification of the Equal-Opportunity Harasser, and the lack of legal recourse for victims of general workplace harassment.

Congress wrote Title VII of The Civil Rights Act of 1964 to combat discrimination based on race, national origin, religion, or sex.²¹³ This legislation was never intended to remedy general workplace harassment.²¹⁴ Courts have consistently made efforts to protect the intent of this doctrine by reserving it for those intended purposes.²¹⁵

The Supreme Court has cautioned that Title VII does not protect against commonplace offenses that happen in the workplace and do not rise to the level of severe or pervasive.²¹⁶ In *Faragher v. Boca Raton*,²¹⁷ the Court found that "ordinary tribulations of the workplace" do not fall within the ambit of Title VII.²¹⁸ Ten years later, the Supreme Court reiterated that Title VII should not be expanded into "a general civility code."²¹⁹ The Tenth Circuit endorsed this view, stating that "incidents of rudeness" are insufficient to succeed on a claim for retaliation under Title VII.²²⁰ The Eastern District of Pennsylvania came to a similar conclusion in *Acosta v. Catholic Health Initiatives, Inc.*, denying a male employee's claim of sexual harassment predicated on typical difficulties experienced in the workplace.²²¹ Although courts should not attempt to operate as a super human resources department for all workplaces, there is good reason to outlaw those incidents that rise above rudeness to the level of substantial harassment.

By providing widespread legal protection from workplace harassment, federal courts can remedy each component of the tri-fold problem. Providing this recourse under federal law would remove the motivation for plaintiffs to unduly characterize general harassment claims as motivated by discrimination, thus leaving intact the Title VII discrimination doctrine. The Equal-Opportunity Harasser would no longer walk free. Most importantly, all victims would have legal recourse against the Big Bad Bully.

213. *Id.*

214. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 102 (1998).

215. *See id.* at 1002-03 (noting how both *Meritor Savings Bank v. Vinson* and *Harris v. Forklift Systems Inc.* worked to prevent Title VII from becoming a general civility code by rejecting interpretations of Title VII as encompassing routine work interactions).

216. *Oncale*, 523 U.S. at 1003 (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993)).

217. 524 U.S. 775, 788 (1988).

218. *Id.*

219. *Oncale*, 523 U.S. at 81; *see also* *Burnett v. Tyco Corp.*, 203 F.3d 980, 982 (6th Cir. 2000) ("Title VII is not 'a general civility code for the American workplace.'").

220. *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1265 (10th Cir. 1998).

221. No. 02-1750, 2003 U.S. Dist. LEXIS 1079, *31-32 (E.D. Pa. 2003).

A. *The Equal Opportunity Harasser: A Vile but Valid Defense*

One shocking reality of sexual harassment law is that a supervisor who admittedly harasses both men and women has a solid defense against a disparate treatment charge in many jurisdictions, known as the Equal Opportunity Harasser.²²² Without a disparate treatment claim, the plaintiffs are left without evidence that the harassment was “because of sex” and therefore cannot support their claim.²²³ This legal gap in the protection of victims against sexual harassment exists in state law, as well as in most federal circuits.²²⁴ Courts accepting this defense rationalize that male and female employees subjected to the same hostile workplace face no sex-based discrimination, but they are instead treated equally.²²⁵ Ironically, by abusing more employees, the offending supervisor escapes legal consequences for his actions.²²⁶

In *Holman v. Indiana*, a classic example of the “Equal Opportunity Harasser,” a husband and wife both brought sexual harassment claims against their supervisor under Title VII.²²⁷ The plaintiffs alleged that their supervisor propositioned each for sex on several occasions.²²⁸ When both the husband and wife rebuffed the supervisor’s advances, he retaliated by depriving each of them of certain workplace benefits.²²⁹ The district court held that because the defendant had harassed both a male and a female, there was no disparate treatment and therefore no discrimination.²³⁰ As *Holman v. Indiana* demonstrates, plaintiffs must differentiate themselves from other harassed employees in the workplace to bring a successful claim.²³¹ Without such differentiation, plaintiffs have little hope of prosecuting their harassers. This requirement of differentiation encourages plaintiffs to characterize workplace harassment as discrimination, even when a more general charge of workplace harassment may be

222. See Shylah Miles, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603, 615 (2001) (examining two circuit court decisions that found equal treatment of both sexes would defeat a Title VII claim).

223. *Id.*

224. *Id.* at 604 (indicating the State of Washington also has a legal gap in the protection of victims of sexual harassment).

225. *Id.* at 614-15.

226. See *Holman v. Indiana*, 211 F.3d 399, 401 (7th Cir. 2001).

227. *Id.*

228. *Id.*

229. *Id.*

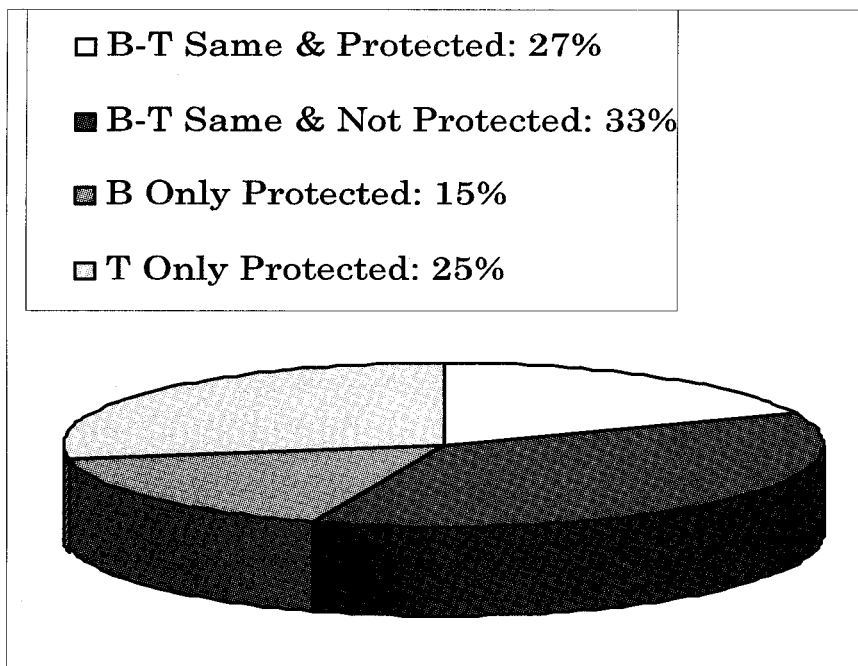
230. *Id.*

231. See *id.* at 405 (affirming the district court’s denial of plaintiff’s claim even though both husband and wife were subject to sexual harassment; because they suffered similarly, they are outside of Title VII protections).

appropriate. Including the discrimination requirement in such claims ignores the growing epidemic of workplace harassment.²³²

B. Workplace Harassment: A Widespread Problem Beyond Discrimination

According to a study conducted by the Workplace Bullying & Trauma Institute (WBTI), general workplace bullying is a problem far more common than illegal discrimination.²³³ Illegal discrimination refers to harassment in which the victimized employee, or "target," is a member of a protected class under Title VII.²³⁴ The WBTI study indicates that "[b]ullying . . . is three times more prevalent [than the] illegal variety, which itself is a subset of the more general variety."²³⁵



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232. Namie & Namie, *supra* note 207 (claiming bullying affects twenty-six million workers a year and occurs three times more than illegal harassment).

233. WBI REPORT, *supra* note 8.

234. *Id.* at 4 (noting that only twenty-five percent of the cases in the study involved members of a group protected by civil rights legislation).

235. *Id.*

236. See Namie & Namie, *supra* note 207 for data contained in graph (referencing state-wide Michigan study reported in Keashly, L. & Jagatic, K., *The Nature, Extent, and Impact of Emotional Abuse in the Workplace: Results of a Statewide Survey*, paper presented at the Academy of Management Conference, Toronto, Canada (Aug. 4-9, 2000)).

A number of studies concerning workplace harassment show that between one-in-fourteen to one-in-five employees have experienced substantial workplace harassment,²³⁷ yet bullying without a discriminatory animus is generally not actionable within the court system.²³⁸ While anti-discrimination laws provide recourse for discriminatory harassment, there is no legal protection specifically targeting generalized workplace bullying.²³⁹ Without such protection, employees are left with only a handful of possible claims under which they may sue for workplace harassment. Aside from Title VII discrimination, employees may cite 1) intentional infliction of emotional distress, 2) interference with one's employment relationship, 3) harassment that follows "whistle-blowing," the reporting of an employer's actions, or, in some cases, 4) defamation of character.²⁴⁰

While these legal remedies provide relief in a number of workplace harassment suits, they are only appropriate for specific types of harassment and leave many victims of workplace harassment without an appropriate cause of action. To qualify as intentional infliction of emotional distress, a bullying supervisor's conduct "would have to be repeated, severe and pervasive. . . . It would have to create essentially a hostile work environment."²⁴¹ Similarly, a claim of interference with one's employment relationship requires that the plaintiff prove that the harassment not only occurred but also altered the working environment to such a degree as to interfere with the working relationship.²⁴²

A variety of United States laws assert that stress and humiliation are routine parts of the normal work environment and maintain

237. Margarita Bauza, *What To Do About A Really Bad Boss*, DETROIT FREE PRESS, May 1, 2005, available at <http://www.workdoctor.com/press/detfreep050105.html> ("One of 14 people in Michigan say they regularly experience aggression at the hands of a boss."); Loreleigh Keashly & Joel H. Neuman, *Bullying in the Workplace: It's Impact and Management*, 8 EMPLOYEE RTS. & EMP. POL'Y J. 335, 339-40 (2004) (presenting empirical and conceptual data on workplace bullying and aggression); Namie & Namie, *supra* note 207 (extrapolating that "about one in six American workers is bullied"); NAMIE & NAMIE, *supra* note 179, at 271 (noting that seventy-five percent of the sample left their jobs to escape bullying).

238. NAMIE & NAMIE, *supra* note 179 (noting that harassment unrelated to the protected categories of Title VII is generally unprotected by the law).

239. Penelope W. Brunner & Melinda L. Costello, *When the Wrong Woman Wins: Building Bullies and Perpetuating Patriarch*, ADVANCING WOMEN IN LEADERSHIP (Spring 2003), <http://www.advancingwomen.com/awl/spring2003/BRUNNE~1.HTML>.

240. *Id.*; see also Diane E. Lewis, *Bullying Bosses*, BOSTON GLOBE, June 5, 2005, available at <http://www.bullyinginstitute.org/press/globe060505.html>; Catherine Saillant, *A Bulwark Against Bullies*, LOS ANGELES TIMES, Dec. 5, 2005, available at <http://www.bullyinginstitute.org/press/latimes120505.html>.

241. Saillant, *supra* note 240.

242. Lewis, *supra* note 240.

our legal system cannot and should not punish them all.²⁴³ Accordingly, only intentionally inflicted emotional distress that rises to the level of "outrageous" and harmful is considered unlawful.²⁴⁴ Harassment following an employee's attempt to report a supervisor's illegal activity is prohibited by law and requires a certain set of circumstances for a successful cause of action. To prove a case of retaliation following an employee's act of whistle-blowing, the plaintiff employee must prove three elements: (1) the employee engaged in conduct protected by statute; (2) the plaintiff was subjected to adverse employment action; and (3) the adverse action was causally related to the protected whistle-blowing action taken.²⁴⁵ The Eleventh Circuit court has noted that "[a]t a minimum, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took the adverse employment action. The defendant's awareness of the protected statement, however, may be established by circumstantial evidence."²⁴⁶

Although this cause of action may at first appear somewhat removed from sexual harassment, it is a complaint that commonly accompanies such claims. In a case against the City College of New York, three women brought both claims against their bullying boss.²⁴⁷ To make their sexual harassment claim, the women alleged that while their supervisor bristled at dissension from male employees, he was intolerant of any disagreement from women.²⁴⁸ The plaintiffs further alleged that their boss showed no support for the female staff and passed them over for promotions based on gender, yet these plaintiffs could not convince the court to prove that they were mistreated on the basis of sex.²⁴⁹ Along with their harassment complaint, the women also alleged that after they filed the complaint of sexual harassment, their boss retaliated against them.²⁵⁰ The United States District Court found that the retaliation claim alone violated federal law, noting that the plaintiffs had significant evidence to prove this

243. Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 73 (2001).

244. *Id.* (referencing RESTATEMENT (SECOND) OF TORTS §46 (1965)).

245. *Farley v. Nationwide Mutual Ins. Co.*, 197 F.3d 1322, 1336 (11th Cir. 1999) (referencing *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11th Cir. 1997)).

246. *Roberts v. Rayonier, Inc.*, 135 Fed. App. 351, 358 (11th Cir. 2005).

247. Catriona Stewart, *HEO Lawsuit nets \$1 Million*, CLARION (Bullying Institute, New York, N.Y.), May 2005, at 4.

248. *Id.*

249. *Id.* ("Judge Buchwald ruled that there was not a clear enough pattern 'to conclude that the work environment plaintiffs faced was made so due to their gender[. . .]'").

250. *Id.*

second point.²⁵¹ This case demonstrates several points: first, that sexual discrimination is difficult to prove in this type of "he said, she said" situation;²⁵² second, that discrimination must fall within the boundaries of statutory protection to be actionable;²⁵³ and third, that these women may have been left without a cause of action had they not filed a complaint alleging retaliation, one of the narrow protected areas of workplace harassment.²⁵⁴ Indeed, while there was no question that the plaintiffs experienced pervasive, ongoing harassment at work, their harassment action failed for want of a nexus with gender. The plaintiffs only succeeded on their subsequent claim of retaliation.

The expansion of sexual harassment doctrine into disparate treatment sexual harassment has allowed many women to sue bullying bosses, a serious problem within the workplace, in which eighty percent of the targets tend to be women.²⁵⁵ Plaintiffs, men and women alike, are able to recover for workplace bullying when targeted on the basis of sexual discrimination.²⁵⁶ Stated differently, plaintiffs can only succeed in such a claim if able to prove that they are bullied more than coworkers of the opposite sex.²⁵⁷ Equally troubling is the truth that only a fraction of workplace abuse is covered under Title VII. According to one study, employees are most often bullied because the employee asserted independence and refused to be controlled by the bully.²⁵⁸ This distinction had little to do with whether the victim of abuse was male or female.²⁵⁹ One study ranked fourteen reasons why bullies target certain individuals, none of which pointed to gender as a motivating factor.²⁶⁰ This finding could indicate that laws

251. Stewart, *supra* note 247.

252. *Id.*

253. *Id.*

254. *Id.*

255. WBI REPORT, *supra* note 8, at 3.

256. See Miles, *supra* note 222, at 604 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 82 (1998)).

257. *Id.* at 606.

258. WBI REPORT, *supra* note 8, at 8.

259. Interestingly, this statistic was marginally affected by whether the *bully* was male or female: seventy-five percent of male bullies versus sixty-one percent of female bullies targeted employees for this reason. *Id.*

260. The investigator found that the following reasons motivated workplace harassment:

- (1) I remained independent, refused to be controlled or to be subservient (70%)
- (2) My competence and reputation were threatening (67%)
- (3) The bully's personality (59%)
- (4) My being liked by co-workers and customers (47%)
- (5) In retaliation for my reporting unethical or illegal conduct, whistle-blowing (38%)
- (6) I was focused solely on work and ignored the politics (36%)

banning discriminatory harassment fail to address much of workplace harassment.

Although harassment claims are actionable under Title VII with an animus based on "race, color, religion, sex, or national origin,"²⁶¹ the overwhelming majority of workplace harassment claims do not fall within the scope of Title VII. Workplace bullying is becoming less socially tolerable and a more common basis for legal action. To recover from a bully, however, plaintiffs must carefully shape their arguments to fit the mold of Title VII.²⁶² In many cases, however, workplace bullying is not based on the target's gender but on some other attribute of the target or bully in question.²⁶³

1. Gender and Bullying: Women Most Often Selected as Targets

The Workplace Bullying & Trauma Institute²⁶⁴ highlights how gender affects who is bullied and why.²⁶⁵ Although this study shows little direct relationship to gender in terms of why victims believe they are singled out for harassment, it notes an interesting phenomenon: bullies tend to be male and female in equal proportions, yet both male and female bosses tend to select female victims most of the time.²⁶⁶ Specifically, men are selected as victims of workplace harassment twenty percent of the time, while women are bullied an astonishing eighty percent of the time.²⁶⁷ Even more surprising, female bosses tended to victimize female subordinates more often than male subordinates.²⁶⁸

(7) Bully had personal problems (35%)

(8) I am nonconfrontive [sic] and easily overrun by others (33%)

(9) It was at a time of personal med or life vulnerability or changes (30%)

(10) I could not afford to leave the job and the bully knew it (30%)

(11) It was my turn in the rotation among co-workers (29%)

(12) No apparent reason; I do not know (28%)

(13) Result of the bully's promotion or newness to my workplace (25%)

(14) The bully was following either explicit or 'understood' instructions from boss above (19%)

Id. at 8.

261. Civil Rights Act of 1964.

262. Lewis, *supra* note 240.

263. See generally WBI REPORT, *supra* note 8, at 8.

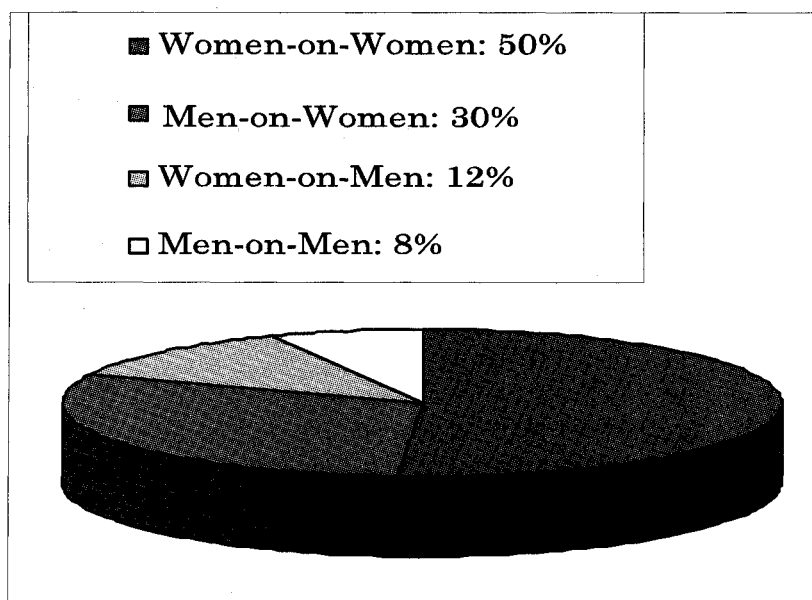
264. Workplace Bullying Institute, <http://www.bullyinginstitute.org/index.html> (last visited Feb. 15, 2007).

265. See WBI REPORT, *supra* note 8, at 10.

266. *Id.* at 4.

267. *Id.*

268. *Id.*



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In a society that strives to achieve equal treatment and the promotion of women to gain equal footing with men within the workplace, this phenomenon raises a number of concerns for women in the workplace.

The bullying of women in the workplace may be partially responsible for perpetuating the so-called glass ceiling that women often face. In her book, *Why So Slow? The Advancement of Women*,²⁷⁰ author Virginia Valian asserts that stereotypes and biases of gender, particularly differences in workplace evaluation and treatment, continue to perpetuate this glass ceiling.²⁷¹ For men, this stereotype schema includes “being capable of independent, autonomous action . . . assertive, instrumental, and task-oriented.”²⁷² For women, the schema is described as “being nurturant, expressive, communal, and concerned about others.”²⁷³ Both men and women may express all of these behavioral traits to some degree; men traditionally exhibit more of the “masculine” traits while women present more of “feminine” traits.²⁷⁴

269. See *id.* for data used in graph.

270. VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 1-3 (1998).

271. *Id.* at 3.

272. *Id.* at 13.

273. *Id.*

274. *Id.*

This distinction becomes important when viewed in terms of the behavior that corporate America tends to value most. Corporate culture is often defined in masculine terms, and "feminine attributes are valued only in the most marginal sense."²⁷⁵ The criteria for advancement established in corporate America is often based on stereotypical male characteristics such as aggressiveness, competitiveness, and autonomy.²⁷⁶

The Workplace Bullying & Trauma Institute's study echoes this dichotomy of feminine and masculine traits, as it describes how male and female bullies differ in their bullying style.²⁷⁷ Generally, the male bullies in this study tended to utilize the business place hierarchy, while female bullies tended to manipulate the social network within the workplace to effectuate bullying.²⁷⁸ Male and female bullies also engaged in different bullying behaviors. Specifically, male perpetrators more often used bullying techniques such as: public screaming; illegal verbal insults based on gender, race, accent or disability; sabotaging a worker's contribution; retaliation following complaints of harassment; threatening physical harm; and engaging in physical sexual aggression.²⁷⁹ Male perpetrators tended to choose their targets based on a target's asserted independence and a target's failure to recognize and follow workplace politics.²⁸⁰

Female perpetrators were more likely to use the silent treatment to punish targets, ice out and separate targets, and encourage colleagues and other subordinates to turn against the target.²⁸¹ Female perpetrators were most likely to choose targets based on a perceived threat posed by the target's competence and reputation, newness of the perpetrator's relationship with the target, and passivity or subservient demeanor from the target when bullied.²⁸²

In her article, *When the Wrong Woman Wins: Building Bullies and Perpetuating Patriarch*, Penelope Brunner contends that workplace bullying is "the amplified acting out of masculine behaviors that range from blatant demonstrations such as aggressively screaming, yelling, and threatening dismissals to subtle, underhanded

275. ROBIN J. ELY & DEBRA E. MEYERSON, THEORIES OF GENDER IN ORGANIZATIONS: A NEW APPROACH TO ORGANIZATIONAL ANALYSIS AND CHANGE 109 (2000).

276. LOTTE BAILYN, BREAKING THE MOLD: REDESIGNING WORK FOR PRODUCTIVE AND SATISFYING LIVES 28 (2006) (explaining how gender inequality and ineffectiveness are perpetuated through the machine of corporate America).

277. WBI REPORT, *supra* note 8, at 5.

278. *Id.*

279. *Id.* at 6.

280. *Id.* at 8.

281. *Id.* at 7.

282. *Id.* at 8.

displays.”²⁸³ Yet this characterization of bullying as amplified masculine traits fails to recognize that women tend to bully differently and more in line with traditionally feminine behavioral traits.²⁸⁴ While the targets of workplace harassment are overwhelmingly female employees, those perpetuating this harassment are almost equally male and female.²⁸⁵

Bully bosses *do* share certain characteristics, without regard for gender. Business experts say that many bullying bosses are highly motivated, high-performance individuals with successful track records, characteristics that make them attractive choices for leadership positions.²⁸⁶ While effective, it is *how* bullies accomplish these goals that is problematic, as bullies tend to “motivate” by way of intimidation and inappropriate use of power.²⁸⁷ According to David Sirota, author of *The Enthusiastic Employee: How Companies Profit by Giving Workers What They Want*, bullying bosses tend to exhibit the same general tactics: they are usually deferential to their superiors and vicious to their subordinates.²⁸⁸ Sirota notes that “[t]heirs is a personality that is clicking heels with their bosses and stomping on anyone who is in any way weaker, and certainly with subordinates.”²⁸⁹

One expert differentiates between bullies along behavioral traits, as opposed to gender traits. Arthur Bell, a business professor at the University of San Francisco and consultant and author of *You Can't Talk to Me that Way*, describes three different kinds of bully bosses based on particular behavioral traits.²⁹⁰ First, the “sarcastic boss” is one who verbally assaults employees, humiliating them by making derogatory remarks about them or their work.²⁹¹ Second, Bell describes the “assassin boss,” one who degrades employees through gossip or criticism among others.²⁹² Finally, “bosses who prey on worker’s vulnerabilities” are those who criticize employees’ individual qualities, such as physical appearance or behavior.²⁹³ No matter what

283. Brunner & Costello, *supra* note 239.

284. WBI REPORT, *supra* note 8, at 7.

285. *Id.* at 4.

286. Blanca Torres, *Beastly Bosses*, BALTIMORE SUN, July 6, 2005, available at <http://www.workdoctor.com/press/baltsun070605.html>.

287. *Id.*

288. Bauza, *supra* note 237.

289. *Id.*

290. Torres, *supra* note 286; see also ARTHUR H. BELL, *YOU CAN'T TALK TO ME THAT WAY! STOPPING TOXIC LANGUAGE IN THE WORKPLACE* (Christopher Carolei ed., 2005).

291. *Id.*

292. *Id.*; Torres, *supra* note 286 (“A lot of bully bosses lower productivity.”).

293. *Id.*

tactics bullies employ to harass subordinates, the effects can be debilitating for employees and businesses.

2. *Effects of Bullying on Employees*

Loraleigh Keashly, academic director of the Dispute Resolution program at Wayne State University, states that “[workplace harassment] has implications on productivity.”²⁹⁴ She explains the severity of this impact: “People who are exposed to chronic workplace problems have similar symptoms as those who suffer from post-traumatic stress disorder. They have anxiety [and a] depressed mood.”²⁹⁵ These symptoms of workplace harassment can affect workers’ productivity levels at the workplace.²⁹⁶ Furthermore, studies indicate that a positive correlation exists between employment mistreatment and employee theft, sabotage, and tardiness.²⁹⁷ “There’s a slew of studies that show how you treat people has a major effect on how committed people feel to an organization,” says Mike Roehling, a labor relations professor at Michigan State University.²⁹⁸ He says further that studies consistently show that treating people well is essential to retaining good employees.²⁹⁹

Although the bullying boss is clearly the source of trouble in such who is fired instances, the victim, the target of harassment, is usually the person or feels forced to quit.³⁰⁰ According to the Workplace Bullying and Trauma Institute, targets of harassment are four times more likely to be fired than their bullying boss.³⁰¹ In fact, eighty-seven percent of the time, victims of harassment “pay by losing their once-cherished positions” to put an end to the bullying.³⁰² All too often, supervisors who manage with bully power are considered effective and are therefore rewarded for what is perceived to be assertive, direct management.³⁰³

294. Bauza, *supra* note 237.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

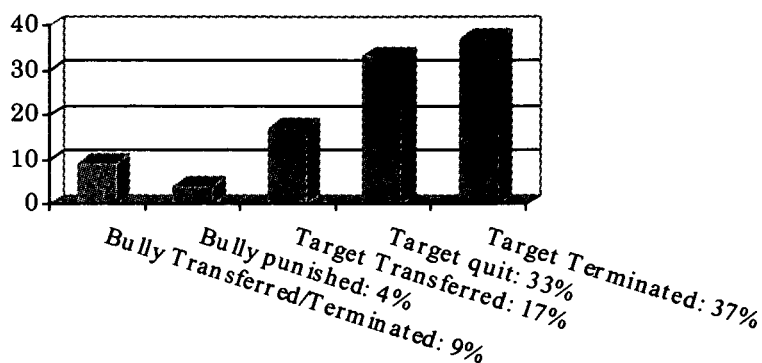
299. WBI REPORT, *supra* note 8, at 3.

300. *Id.*

301. *Id.*

302. *Id.*

303. Brunner & Costello, *supra* note 239 (citing J.D. Russell, *Bully in the Office*, VARBUSINESS, Mar. 5, 2001, available at http://web.lexis-nexis.com/universe/document?_ansset=GeHauKO-EVYRMSeVYRUUWR).



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For those employees who keep their jobs and endure ongoing bullying, the trauma caused does not stop at the workplace.³⁰⁵ Strong evidence suggests that stress from workplace harassment spills over into people's lives outside of work, affecting marriages and family life.³⁰⁶ Harassment has many secondary victims, including families and coworkers.³⁰⁷

3. Effects of Bullying on Companies

Although anti-bullying policies face much opposition from employers,³⁰⁸ the cost of bullies to companies can be extraordinary. The expense of bullies may seem minimal on the surface, but this volatile liability has many hidden costs for employers.³⁰⁹ Businesses pay the price when good employees, unwilling to deal with a bully, decide to leave the company.³¹⁰ By harassing those who stay, bullies cost companies millions by distracting others from their work.³¹¹ According to a 2002 study of nine thousand government employees, workplace bullies caused \$1.5 million in lost time and productivity.³¹²

304. See WBI REPORT, *supra* note 8, at 3, for data used in graph.

305. Bauza, *supra* note 237.

306. *Id.*

307. *Id.*

308. Saillant, *supra* note 240.

309. *Id.*

310. *Id.*

311. Liz Urbanski Farrell, *Workplace Bullying's High Cost: \$180M in Lost Time, Productivity*, ORLANDO BUS. J., Mar. 15, 2002, available at <http://orlando.bizjournals.com/orlando/stories/2002/03/18/focus1.html>.

312. *Id.*

When a harassed employee seeks legal action, the cost of defending a harassment lawsuit can be staggering, often costing employers anywhere from thousands to millions of dollars.³¹³ Workplace stress created by bullies results in increased health insurance costs, additional absenteeism, and more workers' compensation claims.³¹⁴ The cost of providing health insurance, already a sizable expense for employers, has a positive correlation to stress endured by employees.³¹⁵ The physical and physiological side effects caused by workplace stress are quite serious and expensive.³¹⁶ A 1994 landmark study indicated that companies need to focus on creating a healthy corporate culture to minimize healthcare costs and increase the health of workers.³¹⁷ Employers would do well to take note of how bullying affects workers, the workplace, and ultimately the bottom line.³¹⁸

IV. A CALL FOR A DIFFERENT STANDARD

Current research clearly indicates that general workplace harassment is a widespread problem that warrants judicial and Congressional attention.³¹⁹ Our current laws provide remedies for harassment that rises to the level of intentionally inflicted emotional distress and assault and battery. This well-established body of law, however, invariably fails to cover the gaping hole of workplace harassment.³²⁰ By overlooking workplace harassment that falls short of such torts, our justice system fails to recognize the debilitating effects of bullying on a large portion of the country's working class.³²¹ Some plaintiffs have found refuge in Title VII, succeeding when harassment stems from a discriminatory animus.³²² Yet for many bullies the motive to

313. Stewart, *supra* note 247; Sarah Rohrs & Kenneth Brooks, *Bullied Teacher Wins \$225,000 Bully Principal and District Supporters Costs Employer Over \$545,000, Total!*, TIMES-HERALD, Feb. 13, 2006, available at <http://www.bullyinginstitute.org/bbstudies/northcutt.html>.

314. Press Release, Luminari Inc., New Study Links Workplace Gender Issues to Stress, Health Risks, and Rising Health Care Costs (June 3, 2004), available at <http://www.embracingwomenshealth.com/about/press/luminari/LandmarkStudyLeadRelease.pdf>.

315. *Id.*

316. *Id.* at 3 (Marianne Legato, M.D., founder and director of the Partnership for Gender-Based Medicine at Columbia University, reports that "[t]he incidence of cardiovascular disease almost doubles, as does the use of potentially addictive substances like alcohol, tranquilizers and mood elevators, if an employee is uncomfortable or not really at ease in a workplace and if he or she feels stressed in a workplace").

317. *Id.*

318. Torres, *supra* note 286.

319. See WBI REPORT, *supra* note 8.

320. *Id.*

321. Fisk, *supra* note 243, at 73.

322. *Id.*

mistreat stems from other grounds,³²³ and Title VII provides no answer. Rather than extending the doctrine of Title VII to include claims of general workplace harassment, a clearer and more effective development would be to create legal protection for all workers from workplace harassment.

A. The Need for Anti-Bullying Legislation

One could assert that employers should be obligated to protect all employees from abusive supervisors. As previously discussed, however, employers often fail to stop bullying without a legal obligation. An opposite argument exists, that the law has no business regulating worker interactions and that the corporate world should bear the burden of self-regulation.³²⁴ To their credit, some businesses, both public and private, already have guidelines in place prohibiting workplace bullying, and these organizations strive to inculcate workplace culture with policies of respect and an intolerance for abuse.

The Peralta Community College District Board is one such organization that has made significant strides in this direction after experiencing the effects of workplace bullying first-hand.³²⁵ In 2002, a math teacher victimized by a workplace bully brought his complaints before the District Board, asking for the Board to act on his behalf.³²⁶ Instead of offering assistance, the Board took the side of the harasser, a common response to reports of workplace bullying,³²⁷ and punished the math teacher for his allegations.³²⁸ The Board eventually reversed its decision two years later, vindicating the wronged math teacher.³²⁹ This complaint inspired the Board to enact an anti-bullying policy in 2004, complete with seminars to educate employees about the policy.³³⁰ The Peralta Community College Board's anti-bullying policy serves as an example to other public organizations looking to protect workers with written policies.³³¹

Many private companies also have policies against workplace harassment, but without a self-governing mechanism to deal with resulting claims, such policies have little, if any, bite. "Most company

323. WBI REPORT, *supra* note 8, at 8.

324. Saillant, *supra* note 240 (citing Los Angeles attorney Michael Bononi, an expert in employment law, who posits that the private sector has effectively confronted the issue of general workplace harassment without the intervention of courts and legislation).

325. *Id.* (discussing a similar policy proposed in Ventura County and comparing it to the existing anti-bullying policy of the Peralta Community College District).

326. *Id.*

327. *See supra* Part III.B.2.

328. Saillant, *supra* note 240.

329. *Id.*

330. *Id.*

331. *Id.*

handbooks have a policy against harassment," reports Shane Bengoechea, a Boise, Idaho attorney, but he warns that "it's hard to enforce in court because the handbook is not considered an employment contract. . . . Many managers know that if an employee takes action against them for bullying, [employees] won't win."³³² Public and private businesses alike fail to protect their employees from workplace abuse, even when the abuse is well known by those who have the power to effectuate change.³³³ Without proper protection provided by companies, legislatures, or courts, responsible parties may be left wondering who is at fault.

As the case of *EEOC v. NEA-Alaska* demonstrates, when business policies and existing laws both fail to protect employees, some victims of harassment will be left without recourse.³³⁴ As aptly noted in the Termination of Employment Bulletin: "It is more than surprising that a teacher's union would tolerate the behavior described here toward its employees, regardless of whether it violates Title VII or not."³³⁵

Although setting guidelines and policies are certainly a step in the right direction, the corporate world is ill-prepared to handle the pandemic of workplace harassment plaguing our country. The responsibility of protecting workers from general workplace lies in the hands of lawmakers and cannot be left to the consciences of employers. Under current laws, courts have the power to protect some but not all victims of workplace harassment.³³⁶ For those who cannot claim discrimination as the animus for their distress, current harassment laws offer inadequate protection. This shortcoming cannot be solved by erroneously extending Title VII to protect those outside of its scope. To preserve existing sexual harassment doctrine and develop alternative workplace discrimination doctrine, courts and legislatures can accomplish both goals by introducing and enforcing legislation targeting status-blind workplace harassment.

B. Current Legislation Initiatives in the United States and Abroad

The governments of Australia and some European nations, including the United Kingdom, Italy, Belgium, France, and Sweden,

332. P. L. Murphy, *When Bullies Rule the Boardroom*, BOISE WEEKLY, Jan. 18, 2006, available at <http://www.bullybusters.org/press/boisewkly011806.html>.

333. *Id.* (quoting Mr. Bengoechea: "A lot of companies simply don't want to do much about bully situations").

334. While the female plaintiffs in *EEOC v. NEA-Alaska* recovered for their injuries, their male counterparts, also harassed by supervisor Harvey, cannot claim the same legal protection. See *E.E.O.C. v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 844 (9th Cir. 2005).

335. Castagnera et al., *supra* note 202.

336. *Targeting Workplace Bullies*, CANADA'S SAFETY COUNCIL, available at <http://www.safety-council.org/info/OSH/bully-law.html#top> (last visited Feb. 15, 2007).

have established anti-bullying laws.³³⁷ Quebec, Canada passed anti-bullying legislation in June of 2004.³³⁸ This new law, named the Labour Standards Law in Quebec (Canada), is the first law of its kind to exist in North America to combat status-blind workplace harassment.³³⁹ Quebec's anti-bullying law defines bullying as "any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures that affect an employee's dignity or psychological or physical integrity"³⁴⁰ Quebec's law has proven very effective in addressing workplace harassment and providing recourse for victimized employees.³⁴¹ The Canadian legislature proposed similar legislation, but it died when it went up for vote in 2004.³⁴²

The United States government has yet to pose any comparable legislation, and currently no laws exist protecting Americans from status-blind workplace harassment,³⁴³ yet Americans may soon find state governments offering such protection.³⁴⁴ To date, nine states have proposed legislation prohibiting workplace harassment, with the number of such state legislative initiatives growing every year.³⁴⁵

Beginning in 2003, California was the first state to propose a law targeting status-blind workplace harassment, although the bill died in the Assembly Labor committee.³⁴⁶ Oklahoma's House of Representatives introduced a similar bill less than a year later.³⁴⁷ Much like its California predecessor, Oklahoma's bill died in the Commerce, Industry, and Labor Committee.³⁴⁸ In January of 2005, Hawaii's Senate and House simultaneously introduced two similar companion bills to target workplace harassment; although both bills passed initial readings, they also died in committees.³⁴⁹ Washington, Oregon, and Massachusetts all introduced comparable legislation in 2005.³⁵⁰ Washington's bill met a similar death in committee, and no action

337. Soares, *supra* note 131.

338. *Id.* (summarizing an eighteen month status report by Professor Angelo Soares of the University of Quebec at Montreal).

339. *Id.*

340. *Id.*

341. *Id.* The author notes that most employers who sued under this legislation failed to have any practices in place to prevent workplace harassment.

342. *Targeting Workplace Bullies*, *supra* note 336.

343. *Id.*

344. *Id.*

345. Bullybusters.org, *A Guide to Citizen Lobbying*, <http://bullybusters.org/advocacy/legisadv.html> (last visited Feb. 15, 2007) (tracking proposed legislation targeting workplace bullies).

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

was taken on Oregon's bill.³⁵¹ Massachusetts took a different route by introducing its anti-bullying bill to the House based on a voter-approved Public Policy Question.³⁵² Furthermore, instead of proposing a law explicitly prohibiting workplace harassment, Massachusetts's bill proposes conducting a study to determine the cost of workplace harassment to workers, families, and businesses in terms of health-care and insurance costs.³⁵³ Based on the outcome of that study, the Massachusetts bill mandates that the Division of Occupational Safety will create a policy for businesses employing fifty or more people, defining and preventing workplace harassment.³⁵⁴ This House bill has passed the Senate and awaits decision in committees.³⁵⁵ In 2006, Missouri and Kansas joined the initiative to pass anti-bullying legislation.³⁵⁶ Both bills have been referred to committees and await decision.³⁵⁷

New York State has most recently added its name to the list of states attempting to introduce anti-bullying legislation.³⁵⁸ In May of 2006, parallel bills were simultaneously introduced in the state house and senate, aimed at directing the house of labor to study workplace harassment and report its findings to the legislature and governor.³⁵⁹ The simultaneous introduction of this bill signals the legislature's recognition of the debilitating effects of workplace harassment on the social and economic well-being of workers, families, and businesses.³⁶⁰ These legislatures further recognize that the pervasiveness of workplace harassment has an overall detrimental effect on society and the economy at large.³⁶¹

351. *Id.*

352. *Id.*

353. H. 3809., 184th General Court (Mass. 2005), *available at* <http://bullybusters.org/advocacy/legis-ma2.html>.

354. *Id.*

355. Massachusetts Legislative Tracking System, House No. 3809, <http://www.mass.gov/legis/184history/h03809.htm> (last visited Feb. 15, 2007).

356. *Id.*

357. *Id.*

358. S. 8018, A. 11565, 30th Gen. Assem. (N.Y. 2006), *available at* <http://assembly.state.ny.us/leg/?bn=A04921&sh=t> (last visited Feb. 15, 2007).

359. The bill provides in part:

The department of labor is hereby authorized and directed to study hostile workplace behavior, including psychological and emotional abuse, and its consequences, including but not limited to costs incurred by the workers' compensation system, and shall develop recommendations to reduce workplace abuse and harassment; and report its findings to the legislature and the governor within one year of the effective date of this act.

Id.

360. *Id.*

361. "[T]he social and economic well-being of the state is dependent upon healthy and productive employees. Research on hostile workplace behaviors indicates that a signifi-

This recognition represents a crucial step toward providing a harassment-free workplace for all employees and a cause of action for every harassed employee. Although Title VII currently provides a remedy for harassment stemming from discrimination, such anti-bullying legislation must be introduced to provide a remedy for all victims of workplace abuse.³⁶² By introducing such legislation, state legislatures can encourage employer responsibility in preventing workplace harassment and create a viable cause of action for all victims of workplace harassment.

CONCLUSION

Manipulating general workplace harassment claims to fit within the scope of Title VII not only misappropriates the statute but also restricts protection from workplace harassment to a select few who happen to fall within a protected class.³⁶³ This expansion of Title VII also encourages plaintiffs to claim they were harassed due to sexual discrimination even when that bully may be victimizing both men and women in the workplace.

Sexual harassment law is currently in flux and promises to grow and change along with societal expectations. In its current state, circuit courts disagree about what constitutes sexual harassment and what standard should be used to evaluate elements of sexual harassment claims. The Supreme Court has yet to define clearly the boundaries of this area of law. In effect, Title VII has become a popular, albeit sometimes inappropriate, basis for claims of general workplace harassment. Courts and legislatures can create a more appropriate remedy by preserving the doctrine of Title VII to include those cases truly based on discrimination and providing an appropriate remedy to *all* employees victimized by workplace bullying. Although no federal legislation to this end currently exists in the United States,³⁶⁴ the noticeable growing trend to litigate such cases indicates the need for such legislation. A growing number of states have made efforts to pass policies and laws forbidding bullies from harassing workers in an attempt to compensate for the inadequate legal protections.³⁶⁵ As legislatures move toward establishing laws prohibiting general work-

cant percent of employees will experience health-endangering workplace abuse. . . . In addition to harming the target of such abuse, this behavior also has consequences for employers" *Id.*

362. WBI REPORT, *supra* note 8, at 4.

363. *Id.*

364. *Targeting Workplace Bullies*, *supra* note 349.

365. Bauza, *supra* note 237.

place harassment, courts must preserve the law in its current state, limiting the reach of Title VII harassment claims to those that stem from discrimination. By endeavoring to preserve the doctrine of sexual harassment law, while recognizing the need to remedy the majority of workplace harassment not covered by Title VII, courts can promote workplace equality and simultaneously protect all victims of workplace harassment regardless of their subjective reactions or status as a protected class.

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