

Notes

“Hostility to the Presence of Women”: Why Women Undermine Each Other in the Workplace and the Consequences for Title VII

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I. USING HARASSMENT LAW TO COMBAT FEMALE-ON-FEMALE WORKPLACE HOSTILITY

When a woman harasses a female coworker out of competitiveness or jealousy, can such harassment be sex-based? Can it give rise to a sexual harassment hostile work environment claim? This Note argues that the answer to both questions is yes because, in many instances of female-on-female harassment, women in the workplace are undermining each other *as women*. Moreover, female-on-female harassment is often created by sex segregation and discrimination in the workplace, and falls squarely under the coverage of Title VII of the Civil Rights Act of 1964.

Title VII prohibits an employer from discriminating against employees based on race, color, religion, sex, or national origin. It states, in relevant part:

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 or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹

When courts began to interpret Title VII, they recognized two main claims: those involving disparate treatment and those involving disparate impact. Disparate treatment, the most easily recognizable form of discrimination, involves any instance in which an employer intentionally treats an employee differently with respect to terms, conditions, or privileges of employment because of her race, color, religion, sex, or national origin.² Simple disparate treatment claims deal with tangible employment actions—actions that create “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”³ Courts also recognize systemic disparate treatment, in which a class of people is affected by discriminatory policies or practices.⁴ In contrast, disparate impact claims reach “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”⁵

Hostile work environment claims initially emerged as a variation of disparate treatment, as courts established that workers could be subject to intentional discrimination even when their employers did not take tangible job actions against them.⁶ The first case to recognize a hostile work environment claim was *Rogers v. EEOC*, decided by the Fifth Circuit in 1971.⁷ In *Rogers*, a Latina employee working in an optometrist's office claimed discrimination based on national origin because her employer segregated patients by ethnicity. The circuit court found that the employer

1. 42 U.S.C. § 2000e-2(a) (2000).

2. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

3. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). For example, in *Price Waterhouse v. Hopkins*, the Supreme Court held that denial of partnership for sex-based reasons violated Title VII. See 490 U.S. 228, 238 (1989).

4. See, e.g., *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (holding that a requirement that women pay more into a pension fund to compensate for their longer life spans violates Title VII); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (holding that a policy of refusing to hire women with pre-school-age children can violate Title VII).

5. *Teamsters*, 431 U.S. at 336 n.15.

6. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1714 (1998). I am excluding from this analysis quid pro quo sexual harassment, in which “an exchange of sex for economic benefit is proposed and job retaliation for refusal of a sexual advance often results.” Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 823 (2002).

7. 454 F.2d 234 (5th Cir. 1971).

had violated Title VII, despite the fact that no tangible job action was taken, because “the phrase ‘terms, conditions, or privileges of employment’ in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.”⁸

Courts later extended this reasoning to sex-based hostile environment claims.⁹ They had little difficulty drawing parallels between racial and sexual harassment, as in *Henson v. City of Dundee*, where the Eleventh Circuit explained that

[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.¹⁰

The Supreme Court quoted this language in *Meritor Savings Bank v. Vinson*, its first sexual harassment case, holding that a plaintiff could establish a violation of Title VII by proving that she was subjected to a hostile or abusive work environment because of her sex.¹¹ Recognizing the conduct as a form of disparate treatment, the Court stated that “[t]he phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment”¹² and that Title VII was therefore “not limited to ‘economic’ or ‘tangible’ discrimination.”¹³ Since *Vinson*, the Supreme Court has decided four other sexual harassment cases through which it has laid out the elements necessary for a plaintiff to prevail on her claim.¹⁴ In order to succeed in a sexual harassment suit, a plaintiff must prove that

8. *Id.* at 238 (quoting 42 U.S.C. § 2000e-2(a) (1964)).

9. The first case to recognize a hostile work environment sexual harassment claim was *Bundy v. Jackson*, in which the D.C. Circuit held that an employer had discriminated based on sex in violation of Title VII because the employer had “created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits.” 641 F.2d 934, 943-44 (D.C. Cir. 1981).

10. 682 F.2d 897, 902 (11th Cir. 1982); *see also Bundy*, 641 F.2d at 945 (comparing sexual harassment to racial and ethnic discrimination).

11. 477 U.S. 57, 67 (1986).

12. *Id.* at 64 (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

13. *Id.*

14. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (establishing standards for vicarious liability for sexual harassment); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (same); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998) (holding that same-sex sexual harassment is actionable under Title VII); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) (holding that harassing behavior must be both subjectively and objectively offensive, so that the victim did, and a reasonable person would, find it abusive and

- (1) she was a member of a protected group;¹⁵
- (2) she was subject to unwelcome behavior;¹⁶
- (3) this behavior was “because of . . . sex”;¹⁷
- (4) the harassing conduct was “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment’”;¹⁸ and
- (5) the employer should bear responsibility for the harassing conduct.¹⁹

The 1990s saw renewed academic interest in sexual harassment law, as a number of scholars began retheorizing its purpose and reach. Professor Anita Bernstein, for instance, argued that the harm of sexual harassment was not that it was sexual, but rather that it was a form of disrespect.²⁰ Professor Katherine Franke explained that sexual harassment was a “technology of sexism” used to construct and perpetuate gender roles.²¹ Similarly, Professor Kathryn Abrams contended, in her article *The New Jurisprudence of Sexual Harassment*, that the true harm of sexual harassment was its perpetuation of male power and masculine norms in the

hostile, and that courts must consider the totality of the circumstances in making this determination).

Sexual harassment is also actionable under Title IX. *See, e.g., Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (holding that a school district can be liable for deliberate indifference to peer sexual harassment if it is so severe, pervasive, and objectively offensive as to impede the victim’s education); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (holding that damages are not available in a teacher-student sexual harassment case under Title IX unless the school district official has actual notice of, and is deliberately indifferent to, the teacher’s misconduct); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) (holding that damages are available to redress teacher-student sexual harassment in the Title IX context). However, when harassed employees of entities receiving federal financial educational assistance have sued under Title IX, some courts have clarified that employment-related harassment properly belongs under Title VII’s purview. *See, e.g., Storey v. Bd. of Regents of the Univ. of Wis. Sys.*, 604 F. Supp. 1200, 1205 (W.D. Wis. 1985) (holding that Title IX “affords no direct remedy” to victims of “employment discrimination in federally funded education programs or institutions”).

15. This element simply requires that the plaintiff be a member of a group protected by Title VII—that the plaintiff is a woman is enough to satisfy this requirement. *See, e.g., Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996) (citing *Vinson*, 477 U.S. at 66-67).

16. *Vinson*, 477 U.S. at 68.

17. *Oncale*, 523 U.S. at 78 (internal quotation marks omitted).

18. *Vinson*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (alteration in original); *see also Harris*, 510 U.S. at 21.

19. *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

20. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 446, 450 (1997).

21. Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 762 (1997).

workplace.²² She emphasized the need for “an understanding of sexual harassment that is explicitly, paradigmatically plural” because “women’s inequality [is] the product of many intersecting motives, constructions, and modes of treatment.”²³

Like some of her colleagues, Professor Vicki Schultz portrayed harassment as a means to subordinate women in the workplace. Yet in her article *Reconceptualizing Sexual Harassment*, she advanced the analysis one step further, recognizing that by focusing on the sexualized behaviors in hostile work environment claims, many courts were failing to recognize nonsexualized but sex-based forms of harassment.²⁴ Schultz revealed how men use harassment—both sexualized and nonsexual—as a tool to undermine women’s competence, drive them out of male-dominated jobs, and keep them in their place in female-dominated jobs.²⁵ Thus, she argued, courts should center their analysis on the competence-undermining impact of harassment in order to reconnect sexual harassment law to its original mission of fighting sex discrimination.²⁶

As Schultz and her colleagues contemplated the harm of sexual harassment, some also debated whether—and if so, how—Title VII should cover same-sex harassment.²⁷ The circuits were split over whether same-sex harassment should be actionable.²⁸ The Supreme Court resolved this issue in 1998 in *Oncale v. Sundowner Offshore Services, Inc.*, in which it explicitly established that same-sex harassment is actionable.²⁹ The Court further recognized that the “harassing conduct need not be motivated by

22. Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1205-20 (1998).

23. *Id.* at 1217.

24. Schultz, *supra* note 6, at 1713-38.

25. *Id.* at 1755-74.

26. *Id.* at 1769-75.

27. *See, e.g.*, Abrams, *supra* note 22, at 1225-29; Franke, *supra* note 21, at 729-71.

28. *Compare* Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that same-sex harassment is never actionable), *with* Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 577-80 (7th Cir. 1997) (holding that same-sex harassment is always actionable, regardless of the harasser’s sex, sexual orientation, or motives), *and* Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996) (holding same-sex sexual harassment actionable when the harasser is homosexual). Note that these cases are no longer good law in light of *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

29. 523 U.S. 75; *see also id.* at 79 (“If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”). The Court explained:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. . . . Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Id. at 79-80 (alteration in original).

sexual desire to support an inference of discrimination on the basis of sex.”³⁰

In so doing, *Oncale* specifically opened the door for female-on-female harassment claims that, though not necessarily sexual, are nonetheless based on sex. The *Oncale* Court hypothesized that “[a] trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by *general hostility to the presence of women in the workplace*.”³¹ Despite this language, no legal scholarship has yet grappled with nonsexualized female-on-female behaviors as sexual harassment. Instead, most of the post-*Oncale* sexual harassment scholarship has centered on two primary questions: (1) How should the lower courts deal with male-on-male harassment;³² and (2) how will *Oncale* affect gay men and lesbians, particularly as the targets of harassment?³³ Thus, while the public and scholars alike remain captivated by male-on-male harassment,³⁴ nonsexualized female-on-female harassment remains invisible as well as undertheorized.

30. *Id.* at 80. However, desire-based conduct remains privileged: An “inference of discrimination . . . would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.” *Id.*

Before *Oncale*, there was a split in the circuits as to whether sexual harassment claims required sexualized conduct. See Schultz, *supra* note 6, at 1716-30 (documenting courts’ emphasis on sexualized conduct). However, most courts have interpreted *Oncale* as establishing that harassment need not be sexualized, so long as it is gender-based. Compare Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1592-93 (2000) (stating that after *Oncale*, “the conduct underlying a sexual harassment claim need merely be harassment undertaken because of the plaintiff’s sex or gender rather than harassment based on sexual desire or of a sexual nature”), and Catharine A. MacKinnon, *Afterword*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 672, 679 & 695 n.21 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (arguing that there is express judicial recognition that gendered abuse need not be sexual, and highlighting that the First, Third, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits have explicitly recognized this point), with Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2084 n.61 (2003) (describing how there is “no uniform agreement about what conduct is required to prove actionable harassment” because “[s]ome court of appeals decisions still seem to expressly require conduct of a sexual nature” while others simply require that the conduct be “based upon sex,” and noting that the Fifth, Seventh, and Ninth Circuits still require sexualized behaviors).

31. *Oncale*, 523 U.S. at 80 (emphasis added).

32. See, e.g., Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual “Horseplay:” Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J.L. & FEMINISM 155 (1999).

33. Even in answering this second question, commentators’ focus has remained more on gay men and less on lesbians. See Franke, *supra* note 21, at 696 n.15 (noting the lack of harassment cases involving lesbians); see also Axam & Zalesne, *supra* note 32, at 157 n.5 (focusing its analysis on same-sex harassment by men because there are only “sparse examples” of harassment of women by women).

34. See, e.g., Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES, Oct. 13, 2002, § 6 (Magazine), at 52 (describing the prevalence of sexualized behaviors among heterosexual men in male-dominated workplaces); see also Robert Brookins, *A Rose by Any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment*, 46 DRAKE L. REV. 441, 449 (1998) (“Sexual harassment can masquerade either as legitimate sexual behavior between males and females, or as

Building on the key insights of the theorists discussed above, this Note argues that courts should recognize female-on-female hostility as a form of sexual harassment, and that such behavior, when because of sex, can satisfy the doctrinal elements necessary to prove sexual harassment as recognized by the Supreme Court. I especially heed Professor Schultz's call to interrogate the role of nonsexualized gender hostility as a barrier to women's advancement in the workplace.³⁵ This Note also expands Professor Schultz's account of how sexual harassment stems from job segregation,³⁶ and elaborates upon the notion of "hostility to women" identified in *Oncale* by focusing on the ways in which women are harassed by other women as a result of the dynamics created by sex segregation. Structural factors such as segregation lead to an environment in which women are more likely to undermine each other.³⁷ By holding employers liable, courts can protect women from female-on-female harassment and encourage employers to prevent it.

In *Oncale*, the Supreme Court did not elaborate what "general hostility to the presence of women" would look like. But this much is apparent: Hostility to the presence of women does not necessarily mean that a woman must hate all other women at her workplace; she may simply be hostile to or jealous of the advancement of other women, her female competitors or peers, or women in power.³⁸ This Note develops the concept of "general hostility to the presence of women" by allowing for more specific contexts of sex-based hostility, and by looking beyond harassing language to explore actual workplace environment and the types of relationships that environment fosters among women employees. Based on the findings presented, this Note suggests that for a thorough analysis of whether sex-based hostility has occurred, courts must explore: (1) contextual factors, including workplace segregation, both horizontal and vertical; (2) the relationships among women in the workplace in question, including those between the harassed and those accused of harassing, and the role of men in affecting these relationships; and (3) the content of the harassment, including whether it was female-specific.

To date, there have been very few cases dealing with female-on-female sexual harassment.³⁹ In researching this Note, I reviewed every female-on-

legitimate or platonic behavior—like horseplay—between heterosexual or homosexual males." (footnote omitted).

35. Schultz, *supra* note 6, at 1762-69.

36. *Id.* at 1756-62; Schultz, *supra* note 30, at 2139-52.

37. *See infra* Sections III.A-C.

38. A similar argument can be made about men who are hostile to the presence of women. They will not protest the presence of women who hold little power and are there to serve them (secretaries, assistants), only that of women with authority or equal jobs.

39. *See Axam & Zalesne, supra* note 32, at 157 n.5 (noting the general absence of these cases, but listing eleven of them).

female hostile work environment sex harassment case I could locate, ultimately finding fifty such cases. Of those, twenty-seven involved sexualized conduct without hostility-based components. These cases contain complaints against female managers and coworkers who were either openly lesbian, behaved in a homoerotic manner, or made sexual advances upon their subordinates and peers.⁴⁰ A number of the remaining twenty-three cases contain hostility-based claims, and they are discussed below.⁴¹

40. I separate out such cases from the discussion, except to note that the legal foundations of such claims are solid in the aftermath of *Oncale*. For cases involving sexual advances against female subordinates, see *Atkins v. Computer Sciences Corp.*, 264 F. Supp. 2d 404 (E.D. Va. 2003); *EEOC v. Pentman, LLC*, No. 2:01CV00043, 2002 WL 548858 (W.D. Va. Apr. 12, 2002); *Storey v. Chase Bankcard Services*, 970 F. Supp. 722 (D. Ariz. 1997); *Drew v. First Savings of New Hampshire*, 968 F. Supp. 762 (D.N.H. 1997); *Sneed v. Montgomery Housing Authority*, 956 F. Supp. 982 (M.D. Ala. 1997), *aff'd*, 136 F.3d 1331 (11th Cir. 1998); *Huddleston v. Lumbermens Mutual Casualty Co.*, 942 F. Supp. 504 (D. Kan. 1996); *Larry v. North Mississippi Medical Center*, 940 F. Supp. 960 (N.D. Miss. 1996), *aff'd in part sub nom. Larry v. Grice*, 156 F.3d 181 (5th Cir. 1998) (unpublished table decision); *Johnson v. Community Nursing Services*, 932 F. Supp. 269 (D. Utah 1996); *Easton v. Crossland Mortgage Corp.*, 905 F. Supp. 1368 (C.D. Cal. 1995), *rev'd on other grounds*, 114 F.3d 979 (9th Cir. 1997); *Nogueras v. University of Puerto Rico*, 890 F. Supp. 60 (D.P.R. 1995); *Pritchett v. Sizeler Real Estate Management Co.*, Civ. A. No. 93-2351, 1995 WL 241855 (E.D. La. Apr. 25, 1995); *Ryczek v. Guest Services, Inc.*, 877 F. Supp. 754 (D.D.C. 1995); *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995); *Kelecic v. Board of Regents of Regency Universities*, No. 92 C 20358, 1994 U.S. Dist. LEXIS 17972 (N.D. Ill. Dec. 16, 1994); *Jones v. Commander, Kansas Army Ammunitions Plant*, 147 F.R.D. 248 (D. Kan. 1993); *Marrero-Rivera v. Department of Justice of the Commonwealth of Puerto Rico*, 800 F. Supp. 1024 (D.P.R. 1992), *aff'd per curiam*, 36 F.3d 1089 (1st Cir. 1994) (unpublished decision), *abrogated on other grounds by Ribot Espada v. Woodroffe*, 896 F. Supp. 69 (D.P.R. 1995); *Roberts v. Wyeth Labs, Inc.*, No. 89-0822, 1991 U.S. Dist. LEXIS 890 (E.D. Pa. Jan. 25, 1991); *Shaull v. Michigan Affiliated Health Care System, Inc.*, No. 202582, 1998 Mich. App. LEXIS 496 (Ct. App. Sept. 22, 1998) (*per curiam*); and *Brentlinger v. Highlights for Children*, 753 N.E.2d 937 (Ohio Ct. App. 2001).

For cases involving sexual advances against peers, see *Smith v. County of Humboldt*, 240 F. Supp. 2d 1109 (N.D. Cal. 2003); *Miller v. Vesta, Inc.*, 946 F. Supp. 697 (E.D. Wis. 1996); *Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995); *King v. M.R. Brown, Inc.*, 911 F. Supp. 161 (E.D. Pa. 1995); and *Goble v. St. Anthony Medical Center*, No. 89 C 20347, 1990 WL 304197 (N.D. Ill. Oct. 23, 1990).

For cases involving open displays of sexuality, lewdness, or vulgarity, see *Dick v. Phone Directories Co.*, 265 F. Supp. 2d 1274 (D. Utah 2003); *Plakio v. Congregational Home, Inc.*, 902 F. Supp. 1383 (D. Kan. 1995); and *Breithaupt v. Northern Michigan Hospitals, Inc.*, No. 182041, 1996 Mich. App. LEXIS 1579 (Ct. App. Sept. 3, 1996).

41. For cases containing hostility-based claims in which summary judgment on the sexual harassment claim was denied, see *Vargas-Cabán v. Caribbean Transportation Services*, 279 F. Supp. 2d 107 (D.P.R. 2003); *Bailey v. Henderson*, 94 F. Supp. 2d 68 (D.D.C. 2000) (denying summary judgment in part); *Lee v. Gecewicz*, No. CIV.A.99-158, 1999 WL 320918 (E.D. Pa. May 20, 1999); *Rajis v. Brown*, No. 96-CV-6889, 1997 U.S. Dist. LEXIS 12319 (E.D. Pa. Aug. 13, 1997); *Newsome v. McKesson Corp.*, 932 F. Supp. 1339 (D. Utah 1996) (denying summary judgment in part); *McCoy v. Johnson Controls World Services, Inc.*, 878 F. Supp. 229 (S.D. Ga. 1995); and *Flizack v. Good News Home for Women, Inc.*, 787 A.2d 228 (N.J. Super. Ct. App. Div. 2001).

For cases in which summary judgment on the sexual harassment claim was granted or affirmed, see *Crespo v. Schering Plough Del Caribe, Inc.*, 231 F. Supp. 2d 420 (D.P.R. 2002), *aff'd sub nom. Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34 (1st Cir. 2003); *Atkins v. Potter*, No. 01 C 4029, 2002 U.S. Dist. LEXIS 14827 (N.D. Ill. July 31, 2002); *Delgado v. Puerto Rican Family Institute, Inc.*, No. 97 CIV. 7122(DAB), 2001 WL 964000 (S.D.N.Y. Aug.

It thus appears that very few courts and plaintiffs have conceived of female-on-female hostility as a form of harassment. Only a small number of women make claims that could be considered hostility-based. It may well be that such cases of undermining behaviors have been framed instead in sexualized terms because plaintiffs and their lawyers believe that they will improve their odds of success by couching the harassment in terms that courts recognize. Or it may be that plaintiffs make claims that involve both sexualized and nonsexualized harassment, but that the sexualized behaviors are highlighted in judicial opinions.⁴²

However, once courts begin to recognize that these harassing and undermining behaviors on the basis of sex are prohibited by current interpretations of Title VII, plaintiffs will be more likely to bring such claims forward. As courts begin to confront cases dealing with female-on-female harassment, they will be forced to determine whether the five necessary elements of a harassment claim have been proven. This Note focuses primarily on the third element—whether the harassment was based on the target’s sex—because that will likely be the main issue of contention in same-sex harassment cases.⁴³ The Note offers guidance by describing the

23, 2001); *Pierce v. Michigan Department of Corrections*, No. 4:00 cv 37, 2001 U.S. Dist. LEXIS 11992 (W.D. Mich. Aug. 9, 2001); *Perez v. MCI World Com Communications*, 154 F. Supp. 2d 932 (N.D. Tex. 2001); *Wieland v. Department of Transportation, State of Indiana*, 98 F. Supp. 2d 1010 (N.D. Ind. 2000); *Johnson v. Missouri Goodwill Industries*, 96 F. Supp. 2d 926 (E.D. Mo. 2000); *Brown v. City of Little Rock*, 3 F. Supp. 2d 1003 (E.D. Ark. 1997), *aff’d*, 149 F.3d 1186 (8th Cir. 1998) (unpublished table decision); *Huffman v. City of Prairie Village*, 980 F. Supp. 1192 (D. Kan. 1997); *Lamar v. NYNEX Service Co.*, 891 F. Supp. 184 (S.D.N.Y. 1995); *Stallings v. U.S. Electronics Inc.*, 707 N.Y.S.2d 9 (App. Div. 2000); and *Daniels v. Vienna Township Board of Trustees*, No. 2002-T-0080, 2003 WL 21689853 (Ohio Ct. App. July 18, 2003).

For cases in which female-on-female harassment was a part of—but not central to—a sexual harassment claim, see *Taybron v. City & County of San Francisco*, 341 F.3d 957 (9th Cir. 2003); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989); *Baker v. John Morrell & Co.*, 263 F. Supp. 2d 1161 (N.D. Iowa 2003); and *Canady v. John Morrell & Co.*, 247 F. Supp. 2d 1107 (N.D. Iowa 2003).

42. For example, in *Lamar v. NYNEX Service Co.*, the plaintiff alleged that her female supervisor “often stared at her in a hostile manner and behaved abusively toward her.” 891 F. Supp. at 185. Yet the court granted the defendant’s motion for summary judgment, discussing only the supervisor’s sexualized behaviors and finding them “too mild and infrequent to constitute sexual harassment.” *Id.* Similarly, in *Atkins v. Potter*, a plaintiff alleged that her female supervisor harassed her by

accusing plaintiff of shutting off a machine; reprimanding her for idleness; monitoring her; shouting at her; invading her personal space; moving her to a different machine; requiring her to leave work early; requiring her to work three of her regular days off in two years . . . refusing to let her play a radio . . .

2002 U.S. Dist. LEXIS 14827, at *11. The court required sexual harassment to have a sexualized character, and therefore concluded that no actionable sexual harassment had occurred. *See id.* at *19. In such cases, even if the sexualized behaviors are more severe, or appear so to courts, this still would not justify focusing on these behaviors exclusively. However, this pattern of sexual-centric decisions should not be surprising, as it follows what Professor Schultz has documented previously in male-on-female sex harassment cases. *See Schultz, supra* note 6, at 1713-29.

43. From my reading of the existing hostility cases, the other elements do not need to be reconsidered. For example, feminists have long argued for the elimination of the unwelcomeness requirement. *See, e.g., Susan Estrich, Sex at Work*, 43 STAN. L. REV. 813, 833 (1991); Schultz,

factors that create sex-based female-on-female harassment, and by using examples from popular literature, the social sciences, and case law to illustrate.

Part II of this Note details how women mistreat and abuse other women in the workplace. A main characteristic of such hostility is that it is expressed indirectly through methods such as exclusion and gossip. For example, a woman may see to it that her female peers are not invited to important meetings or social occasions, or may badmouth other women in an attempt to gain favor with her male peers. This Part then discusses explanations for why women undermine each other.

Part III focuses on the most important structural determinant of the quality of relations among women: workplace segregation. Positive relations among women are strongly linked to whether a sufficient number of women hold positions of power and authority within the organization. Unfortunately, as Section III.A shows, women tend to be concentrated in the lowest-status and lowest-paying positions within organizations (what social scientists refer to as “vertical segregation”) and also work in different types of jobs than men (“horizontal segregation”). Social science research shows that job segregation leads to an association between a specific job and a specific sex. For example, people think of firemen, not firefighters; policemen, not police officers. Male-dominated jobs become associated with maleness, leading people to doubt the authority of women in such jobs.

Section III.B explores the causes of unhealthy female competition among peers. It describes the effects of tokenism, including how token status for women leads to negative associations with being female, prompting women to dissociate and distinguish themselves from other women in an attempt to gain acceptance by their male peers and supervisors. Token status makes gender overtly salient so that women in male-dominated settings often advance *as women*. This leads the women to rightfully perceive each other as rivals as they vie for the token woman’s slot. Often, the men themselves will further taint the relations among token women by making invidious comparisons and subjecting the women to loyalty tests. These behaviors explain how token women unwittingly (and

supra note 6, at 1802. Yet it appears that most of the female-on-female harassment cases that do not involve sexualized behaviors take the unwelcomeness of hostility-based harassment as a given. See, e.g., *Johnson*, 96 F. Supp. 2d at 931-33. Thus, courts seem to be getting it right, leaving little need for altering this element. By contrast, courts may err with respect to the severity and pervasiveness element: Upon failing to recognize harassing conduct as sex-based, some courts allow that judgment to inappropriately invade the analysis of severity and pervasiveness. The conflation of these two issues may work in the opposite direction as well. However, I am inclined to believe that the current severity and pervasiveness standard is appropriate because once courts begin to recognize the sex-based natures of claims, they should also gain a corresponding appreciation of the potential for severity and pervasiveness of such sabotaging and undermining behaviors by female coworkers.

sometimes willingly) become the gatekeepers used by men to keep other women from advancing.

Yet even when women are not in direct competition with each other, their relations may be strained. This is particularly true when one woman is in a position of authority over another. Section III.C describes how the authority gap ensures that female bosses who are otherwise equally situated with their male peers will not receive the same amount of respect or cooperation from the men and women they supervise. Thus, female bosses and managers may have to behave in more coercive and controlling ways to extract the same amount of work from those whom they supervise, and may be undermined from below. Section III.D explores the need for—and promise of—integration. It elaborates upon how integration creates the conditions necessary for women to thrive in the workplace and to build lasting and important relations with each other.

Drawing upon the foregoing sociological analysis and the case law, Part IV advances a framework of relevant factors that courts should consider in their attempts to distinguish non-sex-based harassment from that which occurs because of sex within the meaning of the law. The Note concludes in Part V by addressing potential criticisms and presenting a vision of healthy competition in which both men and women work together to advance in the workplace.

II. FEMALE-ON-FEMALE HOSTILITY

A. *How Women Undermine Each Other in the Workplace*

In much of the popular and even social science literature, women at work have a bad reputation. Whether they are supervisors, subordinates, or peers, women are perceived to share one common denominator: They are tougher and less pleasant to work with than their male counterparts—especially when they work in male-dominated environments.⁴⁴ One woman gives a vitriolic summary of her work experiences with other women:

“Unfortunately, there is *nothing* I enjoy about working with women. I find them to be petty, tyrannical, emotional (usually

44. See Laurie A. Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCHOL. 629, 640 (1998) (finding that “women (but not men) found the self-promoting woman less competent, less socially attractive, and subsequently less hireable than the self-promoting man” and that women “uniformly selected” the man as their partner for a future knowledge-based task and reacted more favorably to the male’s statements); Laurie A. Rudman & Peter Glick, *Feminized Management and Backlash Toward Agentic Women: The Hidden Costs to Women of a Kinder, Gentler Image of Middle Managers*, 77 J. PERSONALITY & SOC. PSYCHOL. 1004, 1008 (1999) (finding that “a strongly agentic (i.e., competent and competitive) female applicant was consistently rated as less socially skilled than an identically presented man”).

about issues that call for logic), spiteful, and vengeful (have I missed any stereotype clichés?). They are mistresses of micromanagement. . . . I have spent a great deal of my life working with women (and occasionally for—a mistake I will *not* repeat again in this lifetime) and, except for an occasional bright spot, I have never failed to be disappointed”⁴⁵

Pat Heim and Susan Murphy have written a book specifically addressing the difficulties of working with women. In its introduction, they explain what led them to write about the topic:

At that time, we were both executives in a Fortune 500 organization where—as in most companies back then—the women employees had little power and held hardly any positions of significance. Still, there were at least a few women in leadership positions in the corporation, and it might be assumed that they would have helped each other and the women beneath them in the corporate hierarchy. But did they lend a hand? Did they offer advice or mentor their up-and-coming female colleagues? Did they praise other women on successful projects? Did they band together for strength in a male-dominated atmosphere or did they help each other move up the organizational ranks? Some did, but, unfortunately, most did not. In fact, we noticed that many women in this large corporation often did the opposite. They actively sabotaged one another.⁴⁶

Heim and Murphy, who have made a career out of teaching women how to work together, claim that they are not alone in their assessment: “[W]e often ask in our gender workshops: ‘When a woman gets promoted, who is the first to attack her?’ The answer is always a resounding ‘Women.’”⁴⁷

The tactics that women use to undermine each other take many forms. Indirect and covert aggression is prevalent in the workplace, and includes negative facial expressions, hostile teasing, gossiping, spreading rumors, divulging secrets, speaking disparagingly about a person behind her back, trying to get others to dislike a person, and ignoring and excluding a person.⁴⁸ Most aggression displayed in the workplace will necessarily be

45. PAT HEIM & SUSAN MURPHY WITH SUSAN K. GOLANT, *IN THE COMPANY OF WOMEN: TURNING WORKPLACE CONFLICT INTO POWERFUL ALLIANCES* 13 (2001) [hereinafter HEIM & MURPHY] (quoting an anonymous woman from Seattle).

46. *Id.* at 2.

47. *Id.* at 1; cf. Joan Smith, *Woman Trouble*, THE GUARDIAN, Oct. 6, 2000, at 22 (arguing that women leaders are often singled out for the harshest and most personal criticism, and that female reporters are often the cruelest in their ridicule).

48. See Kaj Björkqvist et al., *The Development of Direct and Indirect Aggressive Strategies in Males and Females* [hereinafter Björkqvist et al., *Aggressive Strategies*], in OF MICE AND WOMEN: ASPECTS OF FEMALE AGGRESSION 51, 61 (Kaj Björkqvist & Pirkko Niemelä eds., 1992); Kaj Björkqvist et al., *Sex Differences in Covert Aggression Among Adults*, 20 AGGRESSIVE

indirect or hidden because overt hostility is rarely tolerated, and covert aggression allows a person to pretend that she had no harmful intentions.⁴⁹ For example, Susan Porter Benson documents the various forms of aggression that saleswomen used to keep their peers in line with the unspoken rules of the department:

Penalties for violation included messing up the offender's assigned section of stock, bumping into her, banging her shins with drawers, ridiculing or humiliating her in front of her peers, bosses, or customers, and, in the final extremity, complete ostracism. At Filene's, saleswomen used the department-gossip column of the *Echo* to publicly warn those who deviated from group norms.⁵⁰

While the target of covert aggression may be devastated, she can often do little to prove that such behavior was intentionally aimed at hurting her. This very aspect has allowed much nonsexual female-on-female aggression to go undetected, so much so that there is little recognition of it in our culture, in organizational practice, or in the law.⁵¹

B. *Explanations for Female-on-Female Workplace Hostility*

Popular explanations for hostility and competitiveness among women in the workplace usually contain two main themes: that women are biologically predisposed to compete with each other, and that sex-role socialization creates and exacerbates any such tendencies. Heim and Murphy's book, *In the Company of Women: Turning Workplace Conflict into Powerful Alliances*,⁵² illustrates the typical pop psychology approach to female workplace hostility. Heim and Murphy see conflicts among women in the workplace as the product of women's nature and upbringing.⁵³ They

BEHAV. 27, 30 (1994) [hereinafter Björkqvist et al., *Covert Aggression*]; see also PHYLLIS CHESLER, WOMAN'S INHUMANITY TO WOMAN 130-31 (2001) (discussing these behaviors).

49. See Björkqvist et al., *Aggressive Strategies*, *supra* note 48, at 59-60.

50. SUSAN PORTER BENSON, COUNTER CULTURES: SALESWOMEN, MANAGERS, AND CUSTOMERS IN AMERICAN DEPARTMENT STORES, 1890-1940, at 249 (1988).

51. See, e.g., *Bowers v. Radiological Soc'y of N. Am., Inc.*, 101 F. Supp. 2d 691, 696 (N.D. Ill. 2000) (stating in dicta that "a cold shoulder is not actionable" but finding that the plaintiff had brought forth sufficient evidence of actionable conduct to deny a motion for summary judgment); *Cooke v. SGS Tool Co.*, No. CV98062462, 2000 Ohio App. LEXIS 1784 (Ct. App. 2000) (affirming a grant of summary judgment to the defendant where the plaintiff claimed a hostile working environment because she was teased and ridiculed by female coworkers about a soured relationship with her female supervisor). I must note that men, too, use these tactics. See Björkqvist et al., *Covert Aggression*, *supra* note 48, at 31-32. In being faithful to my topic, I focus on female-on-female aggression, with full knowledge that many of the behaviors that this Note describes also apply to men.

52. See HEIM & MURPHY, *supra* note 45.

53. The authors go as far as detailing interactions among female primates in their attempts to explain the biological roots of women's competitiveness and hostility. See *id.* at 73-76.

describe at great length the “special challenges that can arise when working with women,”⁵⁴ explaining that there are “significant biological and sociological reasons why female workplace relationships are *uniquely challenging*.”⁵⁵

Biology- and socialization-based explanations for female hostility lead to “solutions” that undermine rather than empower women. Women are encouraged to tiptoe around other women and told to downplay job-related skills and talent. But how will a woman succeed when she focuses attention on hiding her “special talent/ability” and “promotability”?⁵⁶ Who will have confidence in an employee if she visibly lacks confidence in herself? Only halfway through their book do Heim and Murphy admit that “by downplaying our power, women can and do become invisible.”⁵⁷ Despite this acknowledgment, they continue giving exactly the same advice: “Symbolically Minimize Your Position”⁵⁸ because other women “might be *right behind you*, ready to plunge daggers into your back.”⁵⁹

In addition, biological and sex-role-socialization explanations for female competition and hostility are empirically unconvincing because they leave little room for a thorough explanation of how workplace environments shape people’s preferences and behaviors.⁶⁰ These “pre-labor market explanations” attribute gender-based behaviors in the workplace to forces that occur before women enter the workplace and outside of it, ignoring how these behaviors are prompted and even produced in important ways by women’s interactions with particular structures and conditions of working life.⁶¹ Thus, they deny the potential for change.⁶²

The more effective approach to explaining hostility among women in the workplace looks to the organizational structures perpetuated by male-dominated workplaces. In her book *Men and Women of the Corporation*, Rosabeth Moss Kanter presents an in-depth sociological study of men’s and

54. *Id.* at 8.

55. *Id.* at 10 (emphasis added).

56. *Id.* at 30.

57. *Id.* at 162.

58. *Id.* at 166.

59. *Id.* at 163.

60. See Robin J. Ely, *The Effects of Organizational Demographics and Social Identity on Relationships Among Professional Women*, 39 ADMIN. SCI. Q. 203, 203 (1994) (explaining that sex-role-socialization approaches “ignor[e] sociocultural contexts within which women work”).

61. The term “pre-labor market explanations” was first used in Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1816 (1990). Schultz discusses how the “pre-labor market explanation” for sex segregation ignores the effect of the workplace in shaping workers’ job preferences. *Id.* She notes: “Girls may be taught to be ‘feminine,’ but this does not imply that adult women will aspire only to traditionally female work throughout their adult lives. Rather, women’s work preferences are formed, created, and recreated in response to changing work conditions.” *Id.* at 1815.

62. See *id.* at 1816.

women's experiences within a corporation given the pseudonym Indsco.⁶³ Kanter documents the different, sharply defined roles that men and women occupy at work, explaining that people conform to stereotypical gender roles in an attempt to maximize their well-being given a specific set of circumstances: "Findings about the 'typical' behavior of women in organizations that have been assumed to reflect either biologically based psychological attributes or characteristics developed through a long socialization to a 'female sex role' turn out to reflect very reasonable—and very universal—responses to current organizational situations."⁶⁴ Thus, Kanter concludes that "[a]dults change to fit the system."⁶⁵ This view reaches even the most individualized of behaviors—acts of discrimination and hostility that appear to be based on personal biases. According to Kanter, "Even discrimination itself emerges as a consequence of organizational pressures as much as individual prejudice."⁶⁶

Professor Kanter understands that because gendered behavior and roles at work are created by organizational factors, correction cannot center on individuals, but instead requires system-level intervention.⁶⁷ Indeed, as feminist theorists including Professors Catharine MacKinnon and Vicki Schultz have shown, harassment itself is produced by structural features of the workplace, such as the sex segregation of jobs.⁶⁸ Professor Robin Ely suggests that for this reason, the focus of reform should be on the "processes through which these distinctions emerge."⁶⁹ With this in mind, the next Part focuses on these organizational factors—particularly job segregation, one of the most powerful determinants of how women in the workplace relate to one another.

63. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (2d ed. 1993).

64. *Id.* at 9.

65. *Id.* at 263; *see also* PAULA ENGLAND & GEORGE FARKAS, *HOUSEHOLDS, EMPLOYMENT, AND GENDER: A SOCIAL, ECONOMIC, AND DEMOGRAPHIC VIEW* 138 (1986) ("[R]esearch implies that individuals develop the psychological styles required to survive in the structural position they hold. . . . [B]ehavioral differences between groups are a product of the jobs they have been allowed to enter, rather than being exogenous to actual work experience."); Schultz, *supra* note 61, at 1815-16 ("Like all workers, women adapt their work aspirations and orientations rationally and purposefully, but always within and in response to the constraints of organizational arrangements not of their own making.").

66. KANTER, *supra* note 63, at 9.

67. *Id.* at 241, 261-64.

68. *See, e.g.*, CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 9 (1979); Schultz, *supra* note 6, at 1756-61.

69. Robin J. Ely, *The Power in Demography: Women's Social Constructions of Gender Identity at Work*, 38 *ACAD. MGMT. J.* 589, 590 (1995).

III. THE ROLE OF SEX SEGREGATION IN CREATING FEMALE-ON-FEMALE HOSTILITY

A. *Sex Segregation in the Workplace*

In most workplaces, men and women experience horizontal job segregation; they tend to have coworkers who are predominantly of the same sex.⁷⁰ Furthermore, workplaces are generally vertically segregated, so that men disproportionately occupy the top jobs, while women disproportionately fill out the bottom. The women who do advance rarely reach the very tops of organizations.⁷¹ Even in predominantly female occupations, management remains disproportionately male.⁷²

Job segregation reinforces stereotypes about what men and women are capable of doing. When men predominate in a position, “we see it as a masculine job” and emphasize the characteristics of the job in male terms.⁷³ Barbara Gutek and Bruce Morasch argue that this is a result of “sex-role spillover”: “the carryover into the workplace of gender-based roles that are usually irrelevant or inappropriate to work.”⁷⁴ They explain that sex-role spillover occurs whenever a sex ratio is skewed in either direction.⁷⁵ Expectations of the job role become infused with the stereotypical characteristics of the sex that holds the job.⁷⁶ For example, secretaries—most of whom are women—have been nicknamed “office wives,” and are often expected to perform stereotypically female tasks that include serving coffee, buying gifts and doing personal errands, and providing sympathy and emotional support to their male bosses.⁷⁷

Sex-role spillover visibly affects women who enter male-dominated jobs. Since the job has been characterized as requiring masculine qualities, women are seen as naturally less capable of doing the job.⁷⁸ As social psychologist Virginia Valian points out, “A woman does not walk into the

70. For example, women make up ninety-eight percent of secretaries, typists, and registered nurses. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 81 (2000).

71. See BARBARA F. RESKIN & IRENE PADAVIC, WOMEN AND MEN AT WORK 91-92 (1994); see also Gail M. McGuire & Barbara F. Reskin, *Authority Hierarchies at Work: The Impacts of Race and Sex*, 7 GENDER & SOC'Y 487, 489 (1993).

72. For example, as Barbara Reskin and Irene Padavic point out, “the majority of nurses, teachers, librarians, and social workers are women. However, women are underrepresented as nursing administrators, school principals, head librarians, and social work administrators.” RESKIN & PADAVIC, *supra* note 71, at 92; see also KANTER, *supra* note 63, at 17 (making the same point with respect to bank employees and clerical workers).

73. VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 114 (1998).

74. Barbara A. Gutek & Bruce Morasch, *Sex Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, 38 J. SOC. ISSUES 55, 55 (1982).

75. *Id.* at 56.

76. *Id.* at 58.

77. See KANTER, *supra* note 63, at 89-91.

78. VALIAN, *supra* note 73, at 103.

room with the same status as an equivalent man, because she is less likely than a man to be viewed as a serious professional.”⁷⁹ Although men may be more likely to see women who do these jobs in such stereotyped terms, the women themselves are by no means immune from such conclusions; gendered job expectations also influence how women perceive themselves and other women who hold traditionally male jobs. Sex remains a salient dimension, so that they, too, realize that a *woman* is holding what is normally *a man's* job.⁸⁰ Thus, the result of job segregation is that when a woman enters a male-dominated profession, “those around her, both men and other women, perceive her as at least slightly unsuited to that profession, because her gender doesn't fit in.”⁸¹

In essence, sex-role spillover leads to what psychologists term the “ultimate attribution error”: People tend to attribute a woman's success to outside factors, such as luck or simplicity of the task, while her failures become her own, a reflection of her (lack of) capabilities.⁸² Professor Valian cites a study that finds that leaders are judged according to the fit between their sex and conceptions about their jobs: When a job is perceived as masculine, male leaders are judged as better than their female equals.⁸³ This discrimination is often unconscious and can manifest itself in subtle ways. Women have to speak more to get the same amount of attention for their ideas, and then others call them pushy for their efforts.⁸⁴ They are attended to less by others, and experience greater difficulty gaining and keeping the floor than do their male peers.⁸⁵ Women get more negative facial expressions from both men and women and are perceived less positively than men in problem-solving situations.⁸⁶ Studies show that women receive these negative reactions from their peers even when they

79. *Id.* at 5.

80. Gutek & Morasch, *supra* note 74, at 64 (describing how numerically dominant men see their nontraditionally employed female peers “as women first, work-role occupants second,” and how “[a woman's] sex is a salient dimension to herself as well as to her male colleagues”).

81. VALIAN, *supra* note 73, at 15.

82. *Id.* at 169-74 (describing the ultimate attribution error as it applies to male and female workplace success, and explaining that, conversely, men's failures are attributed to external factors and explained away, while their successes are attributed to internal factors); *see also* Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. SOC. ISSUES 41, 56-58 (1987) (discussing the ultimate attribution error).

83. VALIAN, *supra* note 73, at 134 (citing Alice H. Eagly et al., *Gender and the Effectiveness of Leaders: A Meta-Analysis*, 117 PSYCHOL. BULL. 125 (1995)).

84. *Id.* at 131.

85. *Id.*

86. *Id.* at 129, 133.

follow the same trained scripts as males,⁸⁷ and that both sexes evaluate the women more negatively.⁸⁸

Even more problematically, neutral evaluators will take cues from others and will evaluate the women accordingly.⁸⁹ They will see that a woman is struggling to be heard by others, that she is receiving negative facial expressions, and that her points are being ignored. Professor Valian notes that “[b]ecause all concerned are unaware of the extent to which they are affected by the woman’s gender, they will attribute their reaction to the woman’s lesser ability, or to her bossiness.”⁹⁰ For example, she describes how “[p]eople who eschew statements such as, ‘Women do not command respect from their subordinates,’ may nevertheless feel comfortable saying, ‘Lee does not command respect from her subordinates.’ The latter comment is just a ‘fact’ about Lee, arrived at through impartial and fair observation.”⁹¹

One consequence of such unconscious biases is that male employees are often given more formal authority than their female counterparts.⁹² Barbara Reskin and Gail McGuire measured formal authority held by men and women, and found that men’s authority scores were almost double women’s scores.⁹³ They also found that employers do not reward women’s credentials the way they do white men’s: If they had, white women’s authority scores would have increased by 57%,⁹⁴ and black women’s scores would have increased by an even larger amount.⁹⁵

Reskin and McGuire’s statistics highlight women’s lack of formal authority, but even these stark figures fail to convey how little power women *actually* have. As Professor Kanter notes, “[P]ower [does] not necessarily come automatically with the designation of leaders, with the delegation of formal authority.”⁹⁶ Women gain less from formally bestowed power and from symbols of authority.⁹⁷ Virginia Valian cites an experiment to illustrate this point: Students viewed pictures of five people sitting at a

87. *Id.* at 131-32 (citing Virginia Brown & Florence L. Geis, *Turning Lead into Gold: Leadership by Men and Women and the Alchemy of Social Consensus*, 46 J. PERSONALITY & SOC. PSYCHOL. 811 (1984)).

88. *Id.* at 129 (citing Doré Butler & Florence L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. PERSONALITY & SOC. PSYCHOL. 48 (1990)).

89. *Id.* at 132.

90. *Id.* at 133.

91. *Id.* at 16.

92. See RESKIN & PDAVIC, *supra* note 71, at 93. The authors note that women in female-dominated industries have greater access to authority. They suppose that “the companies’ greater experience with female workers makes them less likely to stereotype women and better able to spot talented individuals.” *Id.*

93. See McGuire & Reskin, *supra* note 71, at 492.

94. *Id.* at 496.

95. *Id.*

96. KANTER, *supra* note 63, at 165.

97. VALIAN, *supra* note 73, at 127.

table and were asked to determine the leader of the group. When the picture depicted a man sitting at the head of the table, he was always assumed to be the leader. Similarly, if a woman sat at the head of the table with an all-female group, she, too, was always selected as the leader. Sitting at the head of the table, it seems, is a symbol of power. Yet when the picture showed a woman sitting at the head of the table in a mixed-sex group, she was assumed to be the leader only half of the time. The other half of the time, the assumed leader was a man sitting elsewhere at the table. The head-of-table experiment leads Professor Valian to conclude that “male and female observers see the situation in the same way: they are both less likely to perceive women as leaders. Gender schemas affect us all.”⁹⁸ Sex-role spillover, gender schemas that associate competence with masculinity, and a lack of actual authority leave female bosses struggling to maintain control.

B. *Competition-Based Hostility*

1. *The Dynamics of Tokenism*

When women are significantly underrepresented in a position, they experience what Professor Kanter calls “the dynamics of tokenism.”⁹⁹ One primary effect of women’s tokenism is that sex becomes a salient feature. Women become visible *as women*. Professor Valian explains that, as a consequence, “being in a minority increases a woman’s likelihood of being judged in terms of her difference from the male majority, rather than in terms of her actual performance.”¹⁰⁰ Also, because women stand out as unusual, they are subjected to greater scrutiny than—and by—their male peers.¹⁰¹ This scrutiny often has negative consequences.

When women discover that they, as a group, are considered inferior workers, and when men subject them to loyalty tests,¹⁰² exclusion, and general hostility because of their sex, they begin to realize that it does not pay to be a woman. Group identification is only strong to the extent that an individual perceives her ability to succeed as tied to the success of others in the group.¹⁰³ Token women, therefore, will often have little positive group

98. *Id.* (citing Natalie Porter & Florence L. Geis, *Women and Nonverbal Leadership Cues: When Seeing Is Not Believing*, in GENDER AND NONVERBAL BEHAVIOR 53 (Claro Mayo & Nancy Henley eds., 1981)).

99. KANTER, *supra* note 63, at 209; *see also id.* at 206-37 (discussing tokenism in general). It is important to note that tokenism results from numerical rarity, and in the social science literature the term carries no connotation as to why the person was hired.

100. VALIAN, *supra* note 73, at 140.

101. *See* KANTER, *supra* note 63, at 214-15.

102. *See infra* Subsection III.B.3.

103. Ely, *supra* note 60, at 206, 229.

identification.¹⁰⁴ Instead, they will engage in what Professor Ely calls “personal self-enhancing strategies” that may be at the expense of the group.¹⁰⁵

A primary self-enhancing strategy used by token women is group dissociation, whereby people “actively dissociate from members of their group by attempting to distinguish themselves as exceptional or uncharacteristically worthy in comparison with other group members.”¹⁰⁶ Even when the behavior is not overt or intentional, one effect of group dissociation is that members will evaluate outsiders more favorably than they do group members, contrary to psychologists’ expectations of in-group preferences.¹⁰⁷ The result of tokenism, then, is that women begin to believe that to fit in with the men, they must not be “one of the girls”—and they begin to hold the same biases as the men do against women.

In addition, because she is a rarity, a token woman becomes both a representative of other women and the exception to them.¹⁰⁸ With each success, a woman differentiates herself in the eyes of her male peers as the exception to other women—the special one who highlights what the other women lack. Yet she is also viewed as a representative, empowered to represent “the female view.” These incentives lead token women to “accept their exceptional status, dissociate themselves from others of their category, and turn against them.”¹⁰⁹ In fact, token women can even begin to develop a preference for solo status. According to Professor Kanter, “[T]hose women who sought publicity and were getting it in part for their rarity developed a stake in not sharing the spotlight. They enjoyed their only-women status, since it gave them an advantage”¹¹⁰ Indeed, some enjoy their solo status so much that they “operate[] so as to keep other women out by excessive criticism of possible new-hires or by subtly undercutting a possible woman peer.”¹¹¹

Because many powerful women in male-dominated settings succeed by dissociating from other women and conforming to masculine norms, they

104. *Id.* at 205-06 (“[W]hen there are clear and abiding status differences between groups, members of low-status groups find it difficult to maintain positive in-group distinctiveness and hence find in-group interactions less attractive.”).

105. *See id.* at 206.

106. *Id.*

107. Ely, *supra* note 69, at 593-94 (citing HENRY TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES [323-26] (1981) (describing exceptions to in-group preferences in minority groups)); *cf.* CHESLER, *supra* note 48, at 145-46 (asserting that “similarity in experience does not necessarily make a juror sympathetic . . . [but] may lead to less objective and more harsh responses” (internal quotation marks omitted)).

108. *See* KANTER, *supra* note 63, at 239.

109. *Id.* at 240.

110. *Id.* at 220.

111. *Id.*

often offer little support to younger women in the workplace.¹¹² For example, Leora Tanenbaum notes the prevalence of the “individualist rhetoric that powerful women . . . have used to distance themselves from less powerful women in the business.”¹¹³ Such rhetoric translates into a situation where many successful women refuse to mentor younger women, leaving them to fend for themselves.¹¹⁴ Professor Susan Estrich makes a similar observation in an interview by *Working Woman* magazine:

When you talk to women at the very top, it becomes clear that part of their success is due to convincing men that they aren't like other women. . . . [D]enying their status as women becomes a reflex. So when they get high up enough—far from making a difference for the women who come after them—they're still in the business of proving to the guys that they're really *not* one of the girls.¹¹⁵

Such tactics surely harm women as a whole and may not be the best move for the token woman; even those token women who gain respect forever remain outsiders. For, as Professor Kanter points out, tokens are “instruments for *underlining* rather than *undermining* dominant culture.”¹¹⁶

2. *Limited Opportunities for Advancement*

Another main reason that women see their female peers as adversaries is that they often (rightly) believe that they are competing with each other

112. Many proclaim that the younger generation of women must “pay their dues.” LEORA TANENBAUM, *CATFIGHT! WOMEN AND COMPETITION* 201 (2002) (internal quotation marks omitted); see also Teresa Watanabe, *Wild Dance Craze Cures 9-to-5 Blues*, L.A. TIMES, Dec. 15, 1993, at A1 (noting that “[m]any of the [Japanese Office Ladies] say they're harassed by female colleagues, especially those with more seniority who force them to toe the line and perform the same menial tasks they once were made to do” and quoting capital markets analyst Shie Tanabe as stating that “[t]he [Office Lady] culture is one where women hold each other back” (internal quotation marks omitted)).

In addition, many successful women may be resentful that they had to sacrifice their personal lives to advance—forsaking family and children—while their male peers had stay-at-home wives and did not need to make such a choice. Note that forty-nine percent of forty-year-old American female executives earning \$100,000 or more are childless, as compared to only ten percent of their male counterparts. Lisa Belkin, *For Women, the Price of Success*, N.Y. TIMES, Mar. 17, 2002, § 10, at 1 (citing Sylvia Ann Hewlett). Only fourteen percent of such women actively chose to be childless. SYLVIA ANN HEWLETT, *CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* 86 (2002).

113. TANENBAUM, *supra* note 112, at 200 (referencing the work of Hollywood reporter Rachel Abramowitz).

114. See *id.* at 200-01 (“The irony, of course, is that the Queen Bee is perfectly positioned to help women because she has unusual access to power and male favor, yet she declines to support women as a group.”).

115. Kathleen Jacobs, *In Praise of Power*, WORKING WOMAN, Nov. 2000, at 22, 22 (internal quotation marks omitted).

116. KANTER, *supra* note 63, at 223.

for advancement. When women are mere tokens in the powerful positions of a firm, they advance *as women*, and a high position filled by one woman leaves one fewer position for the other women in the firm; the women in male-dominated jobs can find themselves in a zero-sum game where only a limited number of women will succeed.¹¹⁷ Thus, when there seems to be an unstated cap on the number of successful women within a workplace—say, when the number of female partners in a law firm hovers below ten percent—women will likely see each other as rivals.

Men almost drop out of the calculation, as the women are judged against each other first and foremost. Women compare themselves to other women as a way of gauging their success and therefore their relative opportunities.¹¹⁸ Tanenbaum explains: “As you can see, I measure myself against other women. . . . The success of another woman translates into my failure.”¹¹⁹ The resulting competition between women becomes unhealthy, because, unlike a setting in which people are competing with all of their peers and equals, the rivalry among two or three token individuals can become personal. This can lead to overt hostility, as women will have strong incentives to sabotage other women: They stand to directly benefit when they undermine other women—and they know that other women are out to undermine them. Thus, women will have incentives to resort to underhanded sabotage and harassment against each other that they do not use against men, and that are not found in female-dominated settings.¹²⁰ Professor Ely interviewed a female attorney who described a female peer’s continuous attempts to get a competitive leg up on her:

She does little things to me that I think are not fair. She will jokingly sort of disparage me in front of the partner. . . . And she’s laughing the whole time and I don’t know if she’s trying to sabotage me, or if she really doesn’t know [what she’s doing].

Some people say she destroys people whom she sees as a threat to her. . . . She’s done things that subtly may be undermining so that [another woman and I] are less of a threat. [For example,] she has characterized [a woman peer] to the partners as “fru-fru”—too feminine, too emotional, organized but maybe not the highest caliber brain. . . . A little bit like she is too flirty.¹²¹

117. *See id.* at 232.

118. Ely, *supra* note 60, at 229 (stating that this type of comparison takes place in male-dominated firms, though not in sex-integrated firms).

119. TANENBAUM, *supra* note 112, at 15.

120. As Leora Tanenbaum points out, “[M]any women believe that supporting other women is suicidal if they want to achieve success in a male-dominated milieu. It’s one small step away to thinking that they should cut down other women who might stand in their way.” *Id.* at 48-49.

121. Ely, *supra* note 60, at 226 (alterations in original) (internal quotation marks omitted).

A significant cause of competition among women in male-dominated jobs, then, is the lack of advancement opportunities that they face.¹²²

3. *Loyalty Tests and Gatekeeping*

Senior men who work with token women often create the conditions that cause women to undermine each other. One main method is through the use of invidious comparisons between women.¹²³ One woman is told that she is better than the other; the first then invests great efforts to distance herself from the other woman.¹²⁴ For example, a female attorney interviewed by Professor Ely described how a male partner had criticized her for being less “lady-like” than her peer. “He played us off one another,” she said.¹²⁵ Another method is by taking two equally qualified women and setting one in charge of the other so as to create power struggles between the two.¹²⁶ A sure way to make two women resent each other is by treating them as if they are twins so that they desperately try to differentiate themselves from each other.¹²⁷ One female attorney interviewed by Ely observed:

It’s a divide and conquer strategy on the part of men. . . . I can see it starting to happen in terms of the women who are thinking about how the men perceive them vis-à-vis the other women, and thinking that we can’t all quite make it—that being a woman is going to be a factor in their decision, so what kind of woman do they want? It’s very subtle.¹²⁸

Furthermore, male coworkers often subject token women to what Professor Kanter calls “loyalty tests”: As a requirement of fitting in and being brought into the fold, the women are expected to put down other women.¹²⁹ Kanter explains, “For token women, the price of being ‘one of

122. Similarly, feminist theorists have long used the term “horizontal hostility” to describe how members of oppressed groups misdirect their anger at each other rather than attacking the true causes of their oppression. *E.g.*, AUDRE LORDE, *Scratching the Surface: Some Notes on Barriers to Women and Loving*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 45, 48 (1984) (describing horizontal hostility, in which “energy is being wasted on fighting each other over the pitifully few crumbs allowed us rather than being used, in a joining of forces”). I am grateful to Professor MacKinnon for drawing my attention to this point. I would, however, distinguish horizontal hostility as theorized by some feminists from the actions that result from the dynamics of tokenism because, as Kanter points out, the latter are a rational approach to tokenism. KANTER, *supra* note 63, at 263.

123. See Ely, *supra* note 60, at 227.

124. *Id.*

125. *Id.* at 226 (internal quotation marks omitted).

126. See *id.*

127. See KANTER, *supra* note 63, at 238.

128. Ely, *supra* note 60, at 225 (internal quotation marks omitted).

129. See KANTER, *supra* note 63, at 227-29.

the boys' [i]s a willingness to turn occasionally against 'the girls.'"¹³⁰ Kanter notes that there are three ways that token women can pass loyalty tests. They can let slide prejudicial statements about other women, allowing themselves to be accepted as the exceptions.¹³¹ They can allow themselves and other women to be the targets of jokes without resistance. In doing so, they may even collude with the men in disparaging other women—joining in the “woman hunts” and discussing the “pros” and “cons” of particular women in an attempt to remain one of the boys.¹³² Or tokens can “demonstrate their gratitude by not criticizing their situation or pressing for any more advantage.”¹³³

Consider an example from the case law: In *Carr v. Allison Gas Turbine Division, General Motors Corp.*, the plaintiff was the first woman to work in a tinsmith shop, and her male coworkers were less than thrilled about having to work with her.¹³⁴ They made daily comments to her such as “I won’t work with any cunt”; referred to her in her presence as “whore” and “cunt”; painted “cunt” on her toolbox; and went as far as cutting out the seat of her overalls.¹³⁵ Despite all this, the defendants found someone willing to testify that Carr was not being harassed—another woman:

A female welder, who worked in proximity to the tinsmiths, considered Carr vulgar and unladylike, a “tramp,” because she used the “F word” and told dirty jokes. This woman further testified that she herself had no trouble with the men in the shop—though occasionally she did have to zap them with her welding arc to fend them off.¹³⁶

While the welder’s personal relationship with Carr was not explored in the opinion, it is likely that the welder won the acceptance of her male coworkers by testifying on their behalf—a significant prize in her male-dominated setting.

By contrast, the penalty for failing a loyalty test is exclusion and isolation by men, a heavy punishment for any woman struggling to do her job.¹³⁷ One female attorney interviewed by Professor Ely explains:

I’ve seen many women set themselves up—and maybe I did this in the beginning before I learned a lesson, now that I think back on it—for being cast as feminist. Once they’re labeled like that, no

130. *Id.* at 228.

131. *Id.* at 229.

132. *Id.*

133. *Id.*

134. 32 F.3d 1007 (7th Cir. 1994).

135. *Id.* at 1009.

136. *Id.* at 1010.

137. KANTER, *supra* note 63, at 227.

one will deal with them anymore. . . . Let's face it, this is a man's environment, and . . . either you're going to stay there and deal with it, or you can leave. . . . I just tend to join in and laugh with them.¹³⁸

It is for this reason that Professor Kanter suggests "a reexamination of the popularized 'women-prejudiced-against-women' hypothesis, also called the 'Queen Bee syndrome,' for possible structural (numerical) rather than sexual origins."¹³⁹

C. *Hostility as a Result of the Authority Gap*

Women in male-dominated jobs who attempt to overcome the disadvantages of the authority gap find themselves playing a game they cannot win: They must display the masculine characteristics demanded of those who do their jobs while maintaining their "femininity."¹⁴⁰ Yet these characteristics are considered mutually exclusive, creating an impossible double bind. Consider the famous case of *Price Waterhouse v. Hopkins*, in which a successful female was denied partnership because she was seen as too aggressive, and needed to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."¹⁴¹ Women lose out when power is associated with masculinity, because they are perceived as having qualities that male managers do not: They are characterized as bitter, quarrelsome, and selfish.¹⁴² As one female professor interviewed by Phyllis Chesler lamented, "There are some exceptions, but most of my female students think I'm cold, heartless, selfish, and obsessed with my subject. They might admire these same traits in a male professor. They fear it in me. Their loss. But mine too."¹⁴³

When Professor Ely interviewed female attorneys in male-dominated firms, a large number had poor things to say about their female superiors. One disparaged the partner for whom she worked by saying, "She is horrible; she is not a good manager. She can't set priorities. . . . I don't think she's that bright, to tell you the truth."¹⁴⁴ Another attorney had even more negative comments: "It's so universally acknowledged that she doesn't have a clue what she's doing and that she's a bitch to boot."¹⁴⁵ A third made sweeping statements about the female partners in her firm:

138. Ely, *supra* note 69, at 619 (internal quotation marks omitted).

139. KANTER, *supra* note 63, at 230.

140. See, e.g., TANENBAUM, *supra* note 112, at 193.

141. 490 U.S. 228, 235 (1989).

142. See VALIAN, *supra* note 73, at 126.

143. CHESLER, *supra* note 48, at 368 (internal quotation marks omitted).

144. Ely, *supra* note 60, app. A at 235 (internal quotation marks omitted).

145. *Id.* (internal quotation marks omitted).

[They are] very, very deferential to men. I don't like that. . . . I mean, they must be good lawyers to have made it, I'll grant them that. But their demeanor is just very flirtatious. One of them, everyone feels is a manipulative bitch who has no legal talent. . . . She's talked about all the time as having slept with numerous partners. It doesn't even matter if it's not true, if that's the way she's perceived, she's a bad role model.¹⁴⁶

According to Tanenbaum, such sentiments are common among professional women, particularly those who work in male-dominated fields:

They complain that women at work refuse to share power, or withhold information, or are too concerned about receiving credit for every little thing they accomplish, or are cold toward underlings (male and female alike). In such complaints, they use the word "bitch" a lot. They also claim that men in positions of authority appear more comfortable, are more laid-back—that counter to what you might expect, men feel less threatened by women and therefore give them more opportunities to advance than other women do.¹⁴⁷

The authority gap taints the interactions that women have with others: When subordinates fail to recognize a woman's authority, they are less likely to obey her directions or trust her judgment. Subordinates may instead doubt their female leader, question the legitimacy of her power, and drag their feet as they begrudgingly do what they are told.¹⁴⁸ At best, these workers unenthusiastically follow orders, making female bosses press harder for the same work a male boss would receive with a smile. As Chesler dryly observes, "The same woman who will work for a man with a towering ego may sabotage his female counterpart."¹⁴⁹ The authority gap thus creates resentment and lower satisfaction rates among those who work for women¹⁵⁰—which in turn gets misinterpreted as mere cattiness and jealousy among women.

A lower-ranking woman can sabotage her boss in a number of ways. She can gossip about her or undermine her reputation. She can make the boss's work a low priority, taking longer with it or being lax with its

146. *Id.* at 222 (alteration in original) (internal quotation marks omitted).

147. TANENBAUM, *supra* note 112, at 173.

148. See KANTER, *supra* note 63, at 168 ("Power begets power. People who are thought to have power already and to be well placed in hierarchies of prestige and status may also be more influential and more effective in getting the people around them to do things and feel satisfied about it.").

149. CHESLER, *supra* note 48, at 251-52.

150. See ROSEMARY PRINGLE, SECRETARIES TALK 58 (1988) ("Women do not like other women exercising authority directly over them. . . . They experience women's authority as 'unnatural', whereas men's authority is taken for granted."); *id.* at 74 ("Because the relationship [between a female boss and her female secretary] does not have the 'normal' structures it appears a little lukewarm.").

quality. For example, a female attorney I know shares a secretary with two other women and one man. She told me that her secretary often does the man's work first, regardless of urgency.¹⁵¹ She wonders whether he somehow makes all of his requests seem really important, or whether her secretary just resents taking directions from the female attorneys because they are all women about her age.¹⁵² Subordinates can even refuse to fulfill their duties. A female physician in Rhode Island wrote to Heim and Murphy for advice, lamenting that "her biggest problem was a secretary who could not accept the fact that she was the surgeon" and would not obey her orders.¹⁵³ "I repeatedly tried to 'negotiate' and used every conflict management tool I knew," the doctor explained.¹⁵⁴ Another woman, the only female project manager at a large Cincinnati construction company, gave a more extreme example: "The female receptionist will not give me phone messages from anyone except my nine-year-old. She has told me that I act too 'manly.' My manager will not intervene because he thinks we 'girls should just work it out!'"¹⁵⁵

D. *The Promise of Integration*

Since sex segregation creates the conditions that lead to sex-based harassment among women, sex integration at all levels of organizational hierarchy is the key to alleviating the conditions that create hostile relations among women as described above. One main way that sex integration improves relationships among women is by making sex a less salient feature. Two studies, discussed by Virginia Valian, support the proposition that "the more numerous women are, the less important their gender is."¹⁵⁶ In the first study, by psychologist Paul Sackett and his colleagues, 486 blue-collar and clerical work groups evaluated the performances of male and female coworkers. When women consisted of less than twenty percent of the group, they were rated nearly half a standard deviation below their male peers.¹⁵⁷ When they were between twenty percent and half of the workforce, they were still rated lower than their male peers, although less

151. Interview with Anonymous Attorney, in San Francisco, Cal. (June 17, 2003) (on file with author).

152. *Id.*

153. HEIM & MURPHY, *supra* note 45, at 12.

154. *Id.* (internal quotation marks omitted).

155. *Id.* at 7 (internal quotation marks omitted).

156. VALIAN, *supra* note 73, at 139.

157. Paul R. Sackett et al., *Tokenism in Performance Evaluation: The Effects of Work Group Representation on Male-Female and White-Black Differences in Performance Ratings*, 76 J. APPLIED PSYCHOL. 263, 265 (1991).

so.¹⁵⁸ But when women constituted fifty percent or more of the groups, they were rated more highly than males.¹⁵⁹

In the second study, psychologist Madeline Heilman examined people's perceptions of female applicants depending upon their representation in an applicant pool.¹⁶⁰ She found that when women were twenty-five percent or less of an applicant pool, they were evaluated more negatively than when they made up thirty-seven percent or more of a pool.¹⁶¹ In addition, the fewer women there were in the applicant pool, the more likely they were to be perceived as stereotypically feminine (e.g., unambitious, emotional, indecisive).¹⁶² Valian explains that "[b]eing in a small minority made a female applicant appear less qualified, less worth hiring, and less potentially valuable to the firm."¹⁶³ There was no difference between male and female evaluators, which again leads Valian to conclude that "[b]eing female does not exempt one from the power of gender schemas."¹⁶⁴ These studies lend force to the argument that a critical mass of women is needed to undo the effects of solo status.¹⁶⁵

Sex integration also improves relationships between women by reducing group dissociation. When women hold positions of authority within an organization, sex, when made salient, becomes a positive source of identification for female workers throughout the organization. Professor Ely, whose studies examining the relationships among female attorneys at both male-dominated and sex-integrated law firms are quoted extensively throughout this Note, compared firms where fewer than five percent of partners were female (male-dominated) with those where at least fifteen percent of partners were female (sex-integrated).¹⁶⁶ Professor Ely observed that "[i]n settings in which women can perceive their group favorably relative to men, as when there is evidence of women's advancement,

158. *Id.*

159. *Id.*

160. Madeline E. Heilman, *The Impact of Situational Factors on Personnel Decisions Concerning Women: Varying the Sex Composition of the Applicant Pool*, 26 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 386 (1980).

161. *Id.* at 391.

162. *Id.* at 391-92.

163. VALIAN, *supra* note 73, at 141.

164. *Id.*

165. See Susan T. Fiske & Peter Glick, *Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change*, 51 J. SOC. ISSUES 97, 111 (1995) ("The solution to solo structures is to achieve a critical mass of 20% or more, and not fewer than two individuals." (citing Pettigrew & Martin, *supra* note 82, at 71)).

166. While a fifteen-percent female partnership is far from being sex-integrated, there were not enough firms with a sufficient percentage of female partners to make a higher threshold feasible. See Ely, *supra* note 60, at 210. This is a sad reflection of how few women hold positions of power within the field of law. One can only imagine how much more the relationships among women at the firms studied would improve if the gender ratios of the firms' partnership ranks were more balanced.

women's identifying with women will be a positive experience and can serve to strengthen relationships among them."¹⁶⁷ As she explained,

Women's proportional representation in senior positions of an organization may signal to junior women the extent to which positions of power are attainable by women. This helps to shape the meaning and significance women attach to being female in that organization which, in turn, may influence the nature and quality of their work relationships with other women.¹⁶⁸

Professor Ely found that women in sex-integrated settings were twice as likely to mention gender as a source of shared experience and were also twice as likely to see female partners as good role models.¹⁶⁹ Ely cited the following as a typical comment from a female associate in an integrated firm: "Having a lot of senior women here affects all the women associates because they're such good role models and because they're such good standard bearers. Because of their success, we're perceived [by the men in the partnership] as having the ability to be successful."¹⁷⁰ Another consequence of more positive relations is that competition in sex-integrated firms is more likely to be channeled productively.¹⁷¹ Younger women will see in the older women their own potential to succeed; older women will appreciate the ambition and drive they recognize in the younger versions of themselves. And all of the women will feel more solidarity with their peers as they understand that each victory won by a woman is one in whose spoils they will share.

IV. GUIDING COURTS AND FACTFINDERS: A PROPOSED ANALYSIS

Once courts understand female-on-female hostility-based sexual harassment as properly within the ambit of Title VII, factfinders will need to determine whether plaintiffs have proven the elements needed to succeed in their claims. This Part focuses on the "because of sex" element, as it will usually be the main factor of contention in same-sex hostility cases. Drawing on the sociological and psychological data discussed in Part III, this Part delineates factors that should weigh toward the conclusion that the harassing conduct is sex-based.

In *Oncale*, the Supreme Court put language from Justice Ginsburg's concurrence in *Harris* at the center of its analysis: "The critical issue, Title

167. *Id.* at 206.

168. *Id.* at 205.

169. *Id.* at 219. Ely also found that while twenty-seven percent of women in male-dominated settings mentioned that female partners were poor role models, none of the women in the integrated firms did. *Id.*

170. *Id.* at 223 (alteration in original) (internal quotation marks omitted).

171. *Id.* at 226-27.

VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹⁷² Thus, the critical question in any sex-based harassment case becomes whether a woman would have been harassed but for her sex. *Oncale* gave three examples of situations in which a factfinder can infer same-sex harassment: (1) when the harasser is a homosexual who made explicit or implicit proposals for sexual activity,¹⁷³ (2) when the plaintiff was "harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace,"¹⁷⁴ or (3) when the plaintiff offers "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."¹⁷⁵

In this Part, I push for a deeper understanding of hostility to women, arguing that the concept should be expanded to recognize that there can be specific sex-based hostility, and that one must go beyond language to explore the workplace environment and the relationships among women in order to make a satisfactory determination about such a claim. Based on the findings presented in Part III, I suggest that for a thorough analysis of whether sex-based hostility has occurred, courts must explore:

- (1) contextual factors, including workplace segregation, both horizontal and vertical;
- (2) the relationships among the women in the workplace, including those between the harassed and those accused of harassing, and the role of men in affecting these relationships; and
- (3) the content of the harassment, including whether it was female-specific.

Throughout the analysis, the court must remain focused on "but for" causation, and must ask, "Would the plaintiff have been treated this way if she were a man?"

Readers will observe that this Note focuses primarily on the dynamics created by male-dominated environments. However, a quick exploration of the social science and ethnographic literature indicates that sex-based harassment is also prevalent in female-dominated environments, and thus, the recommendations that follow are no less applicable to these workplaces.

172. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

173. *Id.*

174. *Id.*

175. *Id.* at 80-81.

I posit three segregation-based reasons for this. The first is that sex may remain more salient in female-dominated jobs than it would be in integrated settings, so that women compare—and compete with—each other along gendered lines. Second, female-dominated jobs often incorporate sex roles, and while such sex roles and related norms often remain invisible, they lead to judgments and harassment against women who deviate from them.¹⁷⁶ Third, many female-dominated jobs have little potential for advancement, leading women to value relations with their peers above advancement. “Uppity women” would likely be resented and undermined by former peers.¹⁷⁷ Therefore, while this topic is ripe for future research, courts should also consider harassment in female-dominated jobs more likely to be sex-based than the identical conduct in an integrated setting.

A. *Considering Sex Segregation and Its Consequences*

Faced with a claim of female-on-female harassment, a court should first consider the context in which the alleged harassment took place.¹⁷⁸ The court should begin this inquiry by looking at the degree of workplace segregation. It should examine the division of authority in the workplace, and investigate whether there are women at the top of the organizational hierarchy.

Recall the research linking the level of integration in a workplace to the quality of relationships among the women there. The discussion in Part III explained that segregated environments are breeding grounds for sex-based competition and hostility among women. Women in male-dominated jobs are seen as less competent than men; they dissociate from other women in order to gain the acceptance and respect of men.¹⁷⁹ They rightly see other women as their main competitors, giving them incentives to undermine each other. Male coworkers and supervisors often exacerbate these tensions, setting up comparisons among women and rewarding those who pass loyalty tests. Furthermore, since a woman’s sex is more likely to be salient when she is one of only a few women in a position, women in a segregated workplace are more likely to be aware of their gender as they

176. Gutek & Morasch, *supra* note 74, at 64-65; *cf.* Franke, *supra* note 21, at 762-71 (describing sexuality as a “technology of sexism” that can be used to police gender norms).

177. Kanter explains that “peer groups formed by those low in opportunity tend to focus on group solidarity and internal group culture [A group member] is under pressure to remain loyal to the immediate group of workmates and to see leaving the group, even for a promotion, as an act of ‘disloyalty.’” KANTER, *supra* note 63, at 151.

178. I use “court” in place of “factfinder”; the same analysis will apply when a case reaches a jury.

179. I must note here that this analysis focuses on traditionally male-dominated settings. Sex-role spillover will not taint women in jobs where authority is not associated with maleness. Thus, the segregation of both the occupation as a whole and of the particular job and workplace are relevant.

interact with each other, and hostility among women is therefore more likely to be sex-based. By exploring the level of segregation, the court will be able to infer whether the dynamics of tokenism (and other segregation-related conditions) are in effect.

In her recent article *The Sanitized Workplace*, Professor Schultz proposes that when courts determine whether conduct of a sexual nature is harassment because of sex, proof requirements should vary depending upon the sex ratios of the workplace.¹⁸⁰ Explaining that women's experiences of workplace sexuality are based on their representation and access to power within the workplace itself, Schultz finds workplace sex ratios to be highly correlated with whether sexualized behavior is considered harassment.¹⁸¹ Her approach leads to a more accurate determination of whether a given behavior was sex-based, with the added benefit of creating legal incentives for employers to integrate their workforce—one of the main purposes of Title VII and sexual harassment law.

Although originally developed to address instances of sexualized conduct, Professor Schultz's approach applies equally to nonsexualized female-on-female harassment cases: If the plaintiff's workplace is strongly horizontally or vertically segregated, courts should take into account the higher probability that the harassment was sex-based. For example, by showing that she works in a highly segregated environment, a plaintiff could create a rebuttable presumption that the harassment was "because of sex" within the meaning of Title VII.¹⁸² Where, however, a workplace is both vertically and horizontally sex-integrated, the plaintiff would not be able to demonstrate that she was a victim of tokenism-based competition, and she would bear a higher burden in proving that the behavior at issue was "because of sex."¹⁸³

Thus far, no female-on-female hostility case has discussed the sex ratios of the workplace. It may be that plaintiffs are not presenting contextual data as evidence, or it may be that courts do not consider it relevant to the analysis. However, a discussion of these factors would provide a richer understanding of the environment in which the harassment took place, and an accordingly greater likelihood of accurately determining whether the harassment was sex-based.

180. Schultz, *supra* note 30, at 2172-84.

181. *Id.* at 2171-72.

182. *See id.* at 2175.

183. *See id.* at 2175-76. Schultz explains: "Because, by definition, the pressures associated with tokenism and skewed sex ratios would have been alleviated in such settings, we would not expect any gender-based patterns of harassment to occur routinely; nor would we expect any sexual conduct to be part of any larger pattern of sex discrimination." *Id.* at 2176.

B. *Exploring the Relationships Among Women*

Courts should also examine the relationships between the harassed woman and those she claims harassed her to determine what psychological factors may be at play because of the dynamics of tokenism. As explained in Section III.B, when women occupy token roles within an organization, their sex becomes salient and they advance *as* women. This leads them to perceive each other as competitors. Thus, when the harassment comes from a coworker (or coworkers), the court should ask whether the workplace is structured in such a way that exacerbates hostility among the women. Are the women in direct competition with each other for promotion or favor among powerful men? Have they been compared with each other? If so, this should weigh toward the conclusion that any harassing behaviors were motivated by sex. If the harasser was the plaintiff's supervisor, the court should ask similar questions: Is sex salient in the workplace as a result of sex segregation? Are there few women in positions of power, and are they displaying group dissociation by being "tough" on their female subordinates?

In addition, how are the relationships among other women in the office? If the plaintiff can establish that women in her workplace are more hostile toward each other than toward their male peers, courts should accept this as evidence sufficient to prove sex-based harassment.

The court should also consider whether others played a part in the harassment. Is misogyny prevalent in the workplace? Were there men involved in the harassment? Did they set up invidious comparisons? Are they, too, harassing the woman? And finally, is the harasser's involvement part of a loyalty test? All of these would point toward women undermining each other because of a culture in which female workers are depreciated, and in which dissociation from being a woman is encouraged. If the court finds that such dynamics of tokenism are in effect, it can conclude that the harassment was sex-based, for a male worker would not be singled out as a competitor by a token woman, nor would his authority be under siege in a male-dominated environment.

None of the female-on-female cases that I encountered presents a meaningful discussion of the relationships among women in the workplace. One case, *Newsome v. McKesson Corp.*,¹⁸⁴ offers what I believe is the right outcome, but with little analysis of the relational factors that justify the result. In its recitation of the facts, however, the *Newsome* court details how women in male-dominated workplaces can be complicit in harassing—and suppressing the advancement of—other women. Joyce Newsome was a computer operator who alleged that her female supervisor "made her life

184. 932 F. Supp. 1339 (D. Utah 1996).

miserable and told people in the workplace of [the supervisor's] desire to get rid of [Newsome]."¹⁸⁵ Newsome's environment—as she described it—was the classic male-dominated setting in which women are both marginalized and sexualized:

[T]he workplace was one where “philandering” and “riotous partying” occurred among some of McKesson’s managers who pursued sexual affairs with female employees. . . . [F]emale employees who consented to or provided sexual favors were granted preferential treatment and those that did not became the victims of retaliation. . . . [M]anagers tolerated a working climate in which female employees were referred to as “bitches”, . . . work place communications were filled with vulgarities, . . . there was often a display of sexually lewd objects and . . . in at least one instance an inappropriate video was shown.¹⁸⁶

Newsome objected to these conditions and complained to management about them; in response, others at the company began harassing her. She was regularly referred to as the “old bitch,” and she became “the victim of a note writing campaign, rumors, disciplinary warnings and unreasonable actions concerning her vacation days and illnesses.”¹⁸⁷ Another female, Samantha Wells, also joined in the harassment, once telling her she was too old to work in the department. Wells was later promoted over her to become her immediate supervisor, despite Newsome’s allegedly better qualifications for the position, and the harassment continued.¹⁸⁸ Wells told Newsome that “even though plaintiff’s job was computer operator, she wanted only men working in the computer room.”¹⁸⁹

The court correctly observed that Newsome “demonstrated the existence of disputed issues of material fact” sufficient to survive summary judgment as to her claims of sexual harassment and age discrimination. But it didn’t explore why. It may be that Wells’s blatantly discriminatory remarks, as opposed to the less obvious factors discussed above, made this an easy case to withstand summary judgment.

Yet in a case like this, the better approach would be for the factfinder to begin by exploring Newsome’s work environment. Was her description of the environment as being highly chauvinistic accurate? Was it highly segregated, with most of those in positions of authority being male? If so, it is probable that Newsome was penalized for speaking out against such conditions. In addition, the factfinder should consider Wells’s role: Can

185. *Id.* at 1342.

186. *Id.* at 1341.

187. *Id.* at 1341-42.

188. *Id.* at 1342.

189. *Id.*

Newsome show that Wells was passing a loyalty test when she insulted her? Her promotion over Newsome—despite lower qualifications (if Newsome’s claims are taken at face value)—shows that she won the favor of her male supervisors. Was Wells serving as a gatekeeper when she undermined Newsome in her ability to do her job? Could it be that Wells was merely an unwitting victim of group dissociation when she voiced distaste for women? If the answer to any of these questions is “yes,” a factfinder could easily find that Wells was harassing Newsome because of her sex.¹⁹⁰

Whereas *Newsome* lends hope to plaintiffs advancing nonsexualized female-on-female harassment claims, *Daniels v. Vienna Township Board of Trustees*¹⁹¹ illustrates the dangers of courts’ failure to explore sex segregation and the relationships among those in the workplace. In *Daniels*, a female police officer complained that male officers did not want to work with a woman and that they spread rumors about her. The chief of police told her that “a woman belongs in the back with her mouth shut.”¹⁹² In addition, her female supervisor, who happened to be related to her by marriage, accused her of “wearing shorts with her ass hanging out” and “looking ‘like a slut and a whore’” while off-duty.¹⁹³ The supervisor also told her that “she was a ‘pretty girl,’ that things like this [harassment] would happen and that she would have to learn how to handle it.”¹⁹⁴ The court determined that the comments did not reveal animus toward women, supporting its point by highlighting that “[s]ome of the statements appellant mentioned were from her supervisor who was related to her and also was a woman.”¹⁹⁵

That the supervisor was a woman (and even a relative) cannot alone support the conclusion that her comments were not fueled by animus. The police department was likely heavily male-dominated, and it is very possible that the dynamics of tokenism tainted the relations among those two and other women in the police force. Furthermore, the environment created by the men in the department—particularly the police chief—makes it likely that the supervisor possessed biases against women officers and that her comments to *Daniels* reflected these misogynistic sentiments. This likelihood should have weighed heavily against summary judgment.

190. A case where the court got it right, even as it decided for the defendant, is *Brown v. City of Little Rock*, 3 F. Supp. 2d 1003 (E.D. Ark. 1997), *aff’d*, 149 F.3d 1186 (8th Cir. 1998). In *Brown*, the court dismissed claims of sex-based harassment made by an accounting clerk against her supervisor, noting that the plaintiff admitted that the environment where she worked was not “anti-female,” and that she could not say whether she was treated worse than male employees. *Id.* at 1011.

191. No. 2002-T-0080, 2003 WL 21689853 (Ohio Ct. App. July 18, 2003) (affirming the trial court’s grant of summary judgment for the employer).

192. *Id.* at *2.

193. *Id.*

194. *Id.*

195. *Id.* at *3.

Consider also *Wieland v. Department of Transportation, State of Indiana* in which the district court failed even to recognize the possibility of sex-based harassment by both male and female workers.¹⁹⁶ Wieland, a female highway maintenance worker, claimed that she was subjected to a hostile environment and disparate treatment.¹⁹⁷ She alleged that Hicks, a male supervisor, used nonsexual offensive language toward her, and that her female supervisor refused to give her a necessary bathroom break, leading her to bleed through her overalls.¹⁹⁸ In addition, Wieland overheard a female coworker “refer to her as a bitch and a slut.”¹⁹⁹

The court concluded that the language was “clearly that of coarse and boorish workers with vulgar banter from both sexes” but was not directed at her because of her sex,²⁰⁰ and that none of the actions, even in combination, were severe enough to alter the plaintiff’s terms of employment.²⁰¹ It appears that the court required sexualized behavior, and was dissatisfied with the lack of sexualized conduct.²⁰² With no discussion, it rejected the claim that the actions of the plaintiff’s female coworkers would not have occurred “‘but for’ her sex.”²⁰³

But the court’s analysis failed to explore why Wieland was singled out for the harassing behavior. Denying a woman a bathroom break so as to force her to bleed through her clothing is a sex-specific form of action, which alone might lead to an inference that the behavior was based on sex. Perhaps more central to my focus here, it is not at all obvious that the actions of the supervisor and language of her peers were not a reflection of gender hostility. A more proper analysis would center on the structure of the plaintiff’s workplace, including the representation and authority of women within the organization. The highway maintenance workplace was almost certainly a male-dominated one, and its female employees were probably experiencing the dynamics of tokenism. A court should look at the prevalence of gender hostility in the workplace overall, and should see whether it is structured in a way that rewards competition among the women.

196. 98 F. Supp. 2d 1010 (N.D. Ind. 2000).

197. *Id.* at 1013-14.

198. *Id.* at 1019.

199. *Id.*

200. *Id.* at 1020.

201. *See id.* at 1017 (citing “sexual advances, requests for sexual favors, and other conduct of a sexual nature” as examples of unwelcome sexual harassment). The court even pointed out that the plaintiff “admits that Hicks never touched her, never asked for sexual favors and never tried to date her. He never made sexual comments like ‘nice T and A’ or referred to her sexually.” *Id.* at 1019 (citation omitted).

202. *Id.* at 1019-20.

203. *Id.* at 1019.

C. The Content of the Harassment

Recall that in evaluating claims of female-on-female harassment, the critical question for factfinders is whether the harassment would have occurred if the plaintiff were male. If the answer is “no,” then the court can conclude that the behavior was sex-based. When the form of the harassment is sex-specific, courts can infer that but for the woman’s sex, she would not have been harassed. This assumption is most often used when the harassment takes the form of sexualized conduct; courts conclude that if the plaintiff were a man, she would not have been targeted by her male (or lesbian) harasser.²⁰⁴ The same reasoning applies when the behavior is nonsexualized, but nevertheless sex-specific. Consider the example above of the supervisor who forced her employee to bleed through her clothing by denying her a bathroom break.²⁰⁵

Language, too, can fall into the category of the sex-specific. If a woman shows hostility to a female coworker by using strongly sexist language, the same inference can be made.²⁰⁶ Strong sexual epithets such as “cunt” and “whore” indicate that hostility is being expressed in a gendered manner that incorporates hostility toward women.²⁰⁷ Thus, if a woman is called female-specific derisive terms by the female harasser, this should weigh toward the conclusion that the hostile treatment was fueled by her sex.²⁰⁸

However, it is important to distinguish terms that are used as “gender-identifiers,” and do not necessarily convey animus, from those that do.²⁰⁹ For example, “bitch” is often a generic term used to express hostility toward a woman; “bastard” and “dick” are often used in a similar manner

204. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

205. *Wieland*, 98 F. Supp. 2d at 1019.

206. *Oncale*, 523 U.S. at 80.

207. *Cf. Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 965 (8th Cir. 1993) (stating that it would not “accept the employer’s callous explanation that since [he and the plaintiff] did not get along together, his ‘verbal assault on Plaintiff would have occurred even if Plaintiff had not been a woman’”).

208. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (holding that “pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment”); *Bowers v. Radiological Soc’y of N. Am.*, 101 F. Supp. 2d 691 (N.D. Ill. 2000) (denying summary judgment on a hostile work environment claim where a female employee’s female supervisor used gendered epithets such as “cunt” and “bitch” more frequently than nongendered obscenities, and specifically targeted her for sexualized conduct); *Huffman v. City of Prairie Village*, 980 F. Supp. 1192, 1201 (D. Kan. 1997) (denying the defendant’s motion for summary judgment in a case in which male coworkers used demeaning language, because “[s]exual epithets that a woman worker is a ‘whore’ or a ‘bitch’ are capable of making the workplace unbearable for the woman verbally so harassed, and since these are accusations based on the fact that she is a woman, they can constitute a form of sexual harassment”).

209. *See Canady v. John Morrell & Co.*, 247 F. Supp. 2d 1107, 1118 (N.D. Iowa 2003) (distinguishing between terms that are “gender-identifiers” and ones that contain animus, and denying an employer’s motion for summary judgment in a case involving both gender/race-specific and gender/race-neutral harassment by an African-American female’s coworkers).

against men.²¹⁰ These terms, when used generically, are not probative, and on their own do little more than provide evidence that the harasser expressed hostility toward the person.²¹¹ Yet, when the terms are used in certain manners and contexts, as when a woman is called a “black bitch” or when reserved for successful or powerful women, they do take on an animus-based connotation.²¹² Recall that many of the women who described tense relations with female coworkers and bosses (as a result of the dynamics of tokenism) called these women “bitches.”

*Bailey v. Henderson*²¹³ provides a good illustration of the role of language in harassment. Vanessa Bailey had been a postal worker for twenty years when she was assigned to work in “the cage,” an enclosed area where time-sensitive materials are handled.²¹⁴ Shortly thereafter, two coworkers, who were African-American women like Bailey, began a campaign of verbal abuse.²¹⁵ They referred to her as “bitch” and “bitch in the cage.”²¹⁶ They also called her “toilet paper wipe” and “toilet paper tongue” and said that she was “giving it up out of both drawer legs,” meaning that she was promiscuous.²¹⁷ Her peers even threw things at her and put objects on the floor to make her trip.²¹⁸ When Bailey complained, one of her supervisors told the other not to take action because it was “just some black women going through menopause.”²¹⁹ Bailey filed suit, claiming discrimination based on sex, race, and disability.²²⁰ The district court properly denied the defendant’s motion for summary judgment, holding that a reasonable juror could find that the comments, coupled with

210. *Cf. id.* (noting that in the context of a “rough-and-ready production line,” “persons of either gender would call a man a ‘bastard,’ for example, rather than a ‘bitch,’ intending the term to be derogatory and gender-tailored, but not necessarily intending the term to suggest hostility to men in the workplace”).

211. *See Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1167-68 (7th Cir. 1996) (affirming a grant of summary judgment to the defendant even though a coworker repeatedly called the plaintiff a “sick bitch,” since this term was “in context, not a sex- or gender-related term” sufficient for a claim of hostile work environment sexual harassment), *abrogated on other grounds by Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

212. *See id.* at 1168 (“In its normal usage, [the term ‘bitch’] is simply a pejorative term for ‘woman.’ . . . When a word is ambiguous, context is everything. The word ‘bitch’ is sometimes used as a label for women who possess such ‘woman faults’ as ‘ill-temper, selfishness, malice, cruelty, and spite,’ and latterly as a label for women considered by some men to be too aggressive or careerist.” (quoting Beverly Gross, *Bitch*, *SALMAGUNDI Q.*, Summer 1994, at 146, 150)).

213. 94 F. Supp. 2d 68 (D.D.C. 2000).

214. *See id.* at 70.

215. *See id.*

216. *Id.* (internal quotation marks omitted).

217. *Id.* (internal quotation marks omitted).

218. *Id.* at 70-71.

219. *Id.* at 71 (internal quotation marks omitted).

220. *Id.* at 70.

the supervisors' inaction and failure to follow a protocol that they had followed with respect to conflicts between male workers, were sex-based.²²¹

In addition, when the *reason* for the harassment is female-specific, the same “but for” test can be used to determine that the “because of sex” element has been satisfied: If only a woman could be targeted for the harassment, it is by definition sex-based. For example, when a woman harasses a female coworker out of jealousy regarding a female-specific trait, the harassment can be considered sex-based. Recall, too, that sex segregation leads to sex being salient, so that women are more likely to compare themselves to each other along gendered lines than they would be in an integrated environment.

One set of cases—involving claims by women that female superiors harassed them out of jealousy—can be used to illustrate how courts can approach the “because of sex” question where the reason for the harassment is female-specific. While some courts rightly note that jealousy can be closely interconnected with sex, and may sometimes satisfy the “because of sex” prong, other courts state that such jealousy does not create “but for” causation and grant defendants’ motions to dismiss and motions for summary judgment. The former analyses properly take into account that when such jealousy occurs exclusively among women employees for sex-related reasons, the harassment is sex-based.

*Huffman v. City of Prairie Village*²²² can be used to explore the consequences of ignoring the sex-based nature of jealousy between women. In *Huffman*, a court found that harassment that was centered on rumors of a female police officer’s sexual relationship with a male sergeant did not constitute harassment based on sex. Officer Cindi Huffman was the target of rumors that she was dating a higher-ranking officer.²²³ As she (and

221. *Id.* at 75-76. The *Bailey* case also presents the perennial difficulty of what courts should do when presented with both race- and sex-based claims. Courts have long been unable to effectively and fairly deal with such intersectionality—a fact that is all the more distressing given the prominence of such claims in the context of female-on-female hostility. My survey of the existing cases reveals that a large number of them involve the intersection between sex and other protected categories, particularly race. At least twelve of the twenty-two cases involved African-American and Latina women, and in ten cases the plaintiffs had also filed race discrimination claims. There may be several reasons why so many of these cases involve both race and sex harassment claims. It may be that plaintiffs are more willing to go forward with a novel claim of female-on-female harassment when they can also bring forward a more accepted racial harassment claim. It may be that women of color are more likely to experience sex-based harassment or are more economically vulnerable to its consequences. Or it may be that African-American and Latina women experience race discrimination that manifests itself in gendered forms. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 30 (1979) (noting that “sexual harassment can be both a sexist way to express racism and a racist way to express sexism”). Consider, too, that when sexual harassment first arose as a cause of action in the late 1970s and early 1980s, “all of the early women plaintiffs in the D.C. Circuit, and many elsewhere, were African-American.” MacKinnon, *supra* note 6, at 826.

222. 980 F. Supp. 1192 (D. Kan. 1997).

223. *Id.* at 1197.

another female officer, also the target of similar rumors) would walk by, a sergeant would make “love, kisse noises.”²²⁴ Huffman also complained that there were demeaning sexually explicit cartoons displayed on bulletin boards and other areas of the department, and she produced twelve of them.²²⁵ Finally, the plaintiff claimed that her direct supervisor, Lieutenant Angie Young, created a hostile environment by taking various actions against her out of jealousy and anger over Huffman’s alleged involvement with the detective.²²⁶

First, the court noted that the rumors and comments could not have been directed at the plaintiff because of her sex, since they were aimed at embarrassing two officers, and there was no evidence that the noises and comments were aimed at Huffman alone.²²⁷ The court ignored the fact that both targets of the harassment were women, a point that makes it *more* likely that the harassment was intended to embarrass the two women because of their sex. It then treated the claim against Young similarly, stating that Huffman had an “expansive definition of discrimination based on sex”²²⁸ and citing cases related to sexual favoritism for the point that Title VII was not intended to be used for the “policing of intimate relationships.”²²⁹ The court erred in analogizing the case to ones in which courts had rejected claims of favoritism when a woman was promoted over others: The case was not about courts policing intimate relations, but rather about protecting women from conduct intended to undermine their reputations as capable and qualified workers.

Thus, in *Huffman*, the court’s fatal mistake was its failure to recognize that harassment is sex-based when only women can be targets.²³⁰ In contrast, *Vargas-Cabán v. Caribbean Transportation Services* illustrates a more nuanced analysis of a “jealousy” claim.²³¹ The plaintiff, Wanda Vargas-Cabán, claimed that her company’s female vice president, Mary Ellen Nicoletti, sexually harassed her. Vargas-Cabán alleged that Nicoletti “belittled, denigrated, and overworked” her because she was jealous of the (unwanted) sexual attention the plaintiff had received from the company

224. *Id.*

225. *Id.* at 1198.

226. *Id.* at 1198-99.

227. *Id.* at 1197-98.

228. *Id.* at 1199.

229. *Id.* (quoting *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986)).

230. *See also Stallings v. U.S. Elecs. Inc.*, 707 N.Y.S.2d 9 (App. Div. 2000) (holding, without discussion, that harassment because of a non-work-related intimate relationship does not state a cause of action under the New York City Human Rights Law, because such harassment is not based on the plaintiff’s gender). *Huffman* raises additional concerns that the actions of the plaintiff’s supervisor were based on sex: The supervisor may have been attempting to affirm her loyalty to the male officers by disparaging one of the only other female police officers.

231. 279 F. Supp. 2d 107 (D.P.R. 2003).

president.²³² The court denied the defendant summary judgment, asserting that the plaintiff would prevail in her claim if she could show that the vice president's behaviors were motivated by jealousy related to the president's attentions, and that women were the main target of Nicoletti's jealousy because the president was only attracted to women.²³³ In making this determination, the court followed a Pennsylvania district court's earlier decision in *Lee v. Gecewicz*, in which that court found that the plaintiff had stated a valid hostile work environment claim when she alleged that her female supervisor, out of jealousy of her close working relationship with the company's assistant vice president of sales and marketing, taunted her, spread false rumors that the plaintiff and the vice president were having a sexual relationship, and gave her an unfavorable performance evaluation.²³⁴ The approach of *Vargas-Cabán* and *Gecewicz* leaves room for recognition that jealousy may be exacerbated by the dynamics of tokenism; as gender becomes salient, other women's status or associations may become a source of resentment.

V. CONCLUSION

When women undermine and undercut each other, vying for advancement, they are reacting to workplace segregation and low organizational power. Employers must work to integrate workplaces to the best of their abilities, ensuring that women are present in ample numbers at all levels of the organization. They must ensure that women hold positions of authority, supporting them if they are undermined from above or below. When full integration is not possible (as in fields where there are few women in the labor pool), employers must ensure that the women hired are protected from loyalty tests or intentional comparisons to other women that lead to dissociation. Yet responsibility for eradicating workplace segregation lies not only with employers, but with federal courts as well: Female-on-female sexual harassment demands redress under Title VII.

Critics may question why Title VII, and harassment law more specifically, should be used to address female-on-female hostility-based harassment. The answer is twofold: Such harassment falls squarely within the scope of Title VII, and its coverage remains true to the statute's purpose of eradicating barriers to advancement for women and minorities. As detailed earlier, the sexual harassment hostile work environment cause of action now covers all sex-based harassment that satisfies the required elements. It has developed to cover behaviors that were not originally

232. *Id.* at 110.

233. *Id.*

234. *Id.* (citing *Lee v. Gecewicz*, No. CIV.A.99-158, 1999 WL 320918, at *1 (E.D. Pa. May 20, 1999)).

envisaged by the drafters of the statute, including same-sex harassment.²³⁵ In the aftermath of *Oncale*, there is little doubt that hostility-based sex harassment among women would be actionable under Title VII.

However, hostile work environment claims should be used against female-on-female hostility not just because they *can* be, but because doing so helps achieve the original purpose of Title VII. Title VII was created with the intention of reducing segregation and eliminating the barriers that stand in the way of women and minority success in the workplace.²³⁶ Female-on-female hostility-based harassment both results from and perpetuates sex segregation and limited opportunities for women in the workplace. Thus, to the extent that employers structure the workplace in ways that give female employees incentives to compete with and undermine each other, they should be held responsible for violating the mandates of Title VII.

Some may argue that Title VII's prohibition of discrimination based on sex was meant to address male supremacy, and that a recognition of female-on-female harassment would be a significant departure from Title VII's goal. However, legal recognition of female-on-female sex harassment *does* work to combat male supremacy in the workplace. As explained throughout this Note, the exclusion of women from male-dominated jobs and from positions of authority creates hostile relations among women in the workplace. Holding employers liable for the dynamics that they have created among women shifts the focus back to segregation, and thus creates additional incentives for employers to integrate their workplaces and empower female workers.

Others may fear that liability will lead employers to regulate female relationships and potentially overdiscipline women workers. Some may even worry that if women do opportunistically undermine each other, recognition of female-on-female harassment will simply give them another tool with which to do so: the ability to "run to daddy" and complain about other women to their bosses. Yet all harassment claims carry the potential for abuse; the fear of unfounded accusations or overexuberant enforcement should not deter courts from extending protection to those deserving of it.²³⁷ A woman experiencing discrimination because of her sex should not remain

235. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

236. Schultz, *supra* note 6, at 1758 & n.403 (stating that "[t]he major purpose of Title VII was to dismantle sex segregation by integrating women into work formerly reserved for men" and citing statements by members of Congress to that effect).

237. Cf. *Oncale*, 523 U.S. at 80 ("Respondents and their *amici* contend that recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace. But that risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute.").

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without recourse merely because the person harassing her is also female. Discrimination based on sex is prohibited by Title VII, and so long as a woman can prove the elements necessary for a successful hostile work environment claim, she should have a cause of action. It would be a welcome change for employers to regulate hostile behaviors among women when many currently refuse to intervene in behaviors "between girls."

Women should not have to constantly tiptoe around each other. Instead, they should be aware of the factors that encourage them to compete with each other, recognizing that they can help each other advance and that the success of one can lead to the success of another. With healthy competition, women can push each other to do their best, supporting each other in the face of conditions that would have others thinking that it's every man for himself.