THE TROUBLE WITH “BITCH”: RETHINKING THE SEVENTH CIRCUIT’S APPROACH TO CAUSATION IN SEXIST HARASSMENT CASES

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“It is true that ‘bitch’ is rarely used of heterosexual males . . . But it does not necessarily connote some specific female characteristic, whether true, false, or stereotypical; it does not draw attention to the woman’s sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect. In its normal usage, it is simply a pejorative term for ‘woman.’”¹

— Judge Richard Posner, Seventh Circuit Court of Appeals

“For over six centuries, bitch has been used as a term of contempt toward women.”²

— Prof. Yvonne Tamayo, Willamette University College of Law

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INTRODUCTION

Does calling a female employee “bitch” constitute harassment actionable under Title VII of the Civil Rights Act of 1964? The answer, as often happens to be the case, is a resounding, “it depends.”

Sexual harassment is actionable under Title VII if the plaintiff can prove that she was harassed “because of sex.” Early sexual harassment cases assumed that this requirement was straightforward and did not engage in a rigorous analysis of causation. Faced primarily with fact patterns involving male supervisors who sexually propositioned female subordinates, federal judges concluded that the causation element was satisfied because the supervisors would not have engaged in this conduct but for the employees’ sex. As sexual harassment law expanded to cover purely verbal claims, courts began to treat the sexual content of the harassing language as a shortcut to establishing causation. Consequently, female plaintiffs who were subjected to comments involving explicit references to sex or sexual organs had more success in convincing judges that they were harassed “because of sex” than plaintiffs who were abused in non-sexual terms.

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5 See Henson v. City of Dundee, 682 F.2d 897, 905 n. 11 (11th Cir. 1982) (“it should be clear that sexual harassment is discrimination based upon sex”).
In the late 1990s, sexual harassment doctrine began to undergo a significant theoretical transformation. Confronted with novel fact patterns, courts and scholars were forced to re-examine their longstanding interpretation of Title VII’s causation requirement. Three categories of cases engendered particular controversy. The first category involved the harassment of gay plaintiffs. After the Supreme Court held that a man can bring a sexual harassment claim against another man in Oncale v. Sundowner Offshore Services, Inc., lower courts confronted the issue of whether harassment occasioned by plaintiff’s sexual orientation occurs “because of sex.” The second category included plaintiffs who were exposed to pornographic images and sexually charged language at work. In these cases, judges debated whether harassment can be causally attributed to plaintiff’s sex if the harassers had engaged in the conduct before plaintiff arrived at the workplace or if the harassers did not specifically single out

9 See Butler v. Ysleta Indep. Sch. Dist. 161 F.3d 263, 267 (5th Cir. 1998).
13 See e.g., Prowel v. Wise Bus. Forms, 579 F.3d 285, 289-91 (3d Cir. 2009); Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762-65 (6th Cir. 2006); Dawson v. Bumble & Bumble, 398 F.3d 211, 217-18 (2d Cir. 2005); Hamm v. Weyauwega Milk Prods., 332 F.3d 1058, 1062-65 (7th Cir. 2003); Rene v. MGM Grand Hotel, 305 F.3d 1061, 1066-68 (9th Cir. 2002); Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc., 224 F.3d 701, 704-708 (7th Cir. 2000).
plaintiff as a target.\textsuperscript{16} The final category concerned cases in which supervisors sexually propositioned both men and women, so-called “equal opportunity harassment.”\textsuperscript{17} Although some judges accepted the argument that equal opportunity harassers do not discriminate on the basis of sex,\textsuperscript{18} this position generated sharp criticism from academics\textsuperscript{19} and prompted scholars to propose new approaches to establishing causation in Title VII cases.\textsuperscript{20}

But despite these emerging theoretical debates, there is one area of the law in which the causation element remains underdeveloped and underanalyzed. This area involves cases in which female targets are harassed through derogatory, but non-sexual, name-calling. While some scholars have suggested that such conduct may be gender-motivated even though it is not explicitly sexual,\textsuperscript{21} currently, there is very little guidance on how to establish the Title VII causation element in what I refer to as “sexist harassment” cases. The need for clearer standards is apparent from the conflicting decisions that several circuits have reached on the issue of whether addressing a female employee as a “bitch” constitutes sexual harassment.\textsuperscript{22}

\begin{footnotesize}
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\item Hocevar v. Purdue Frederick Co., 223 F.3d 721, 737 (8th Cir. 2000).
\item Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000).
\item Leeser, \textit{supra} n. 10, at 1782-83 (proposing a Motivating Factor and Foreseeability Test to replace “but-for” causation in Title VII cases).
\item Compare Hocevar v. Purdue Frederick Co., 223 F.3d 721, 737 (8th Cir. 2000) (“mere use of the word ‘bitch’ without other evidence of sex discrimination, is not particularly probative of a general misogynist attitude”), and Kriss v. Sprint Commc’ns Co., Ltd. P’ship, 58 F.3d 1276, 1781 (8th Cir. 1995) (bitch “is not an indication of a general misogynist attitude”) with Reeves v. C.H. Robinson
\end{enumerate}
\end{footnotesize}
The Seventh Circuit considered this question in two cases. In *Galloway v. General Motors Service Parts Operations*, the court opined that the word “bitch” was not a sex- or gender-related term.\(^\text{23}\) More recently, in *Passananti v. Cook County*, the court declared that “[t]he word is gender-specific, and it can reasonably be considered evidence of sexual harassment.”\(^\text{24}\) Despite reaching different conclusions about the meaning of “bitch,” both *Galloway* and *Passananti* analyzed the Title VII causation element in the same manner.\(^\text{25}\) In each of these cases, the Seventh Circuit assumed that the key issue was figuring out the harasser’s attitude toward women.\(^\text{26}\) Taken together, these opinions impose a subjective motivation standard in sexist harassment cases.\(^\text{27}\) The Seventh Circuit’s reasoning suggests that a plaintiff claiming sexist harassment needs to present some evidence that the harasser was subjectively motivated by gender hostility in order to establish that the harassment occurred “because of sex.”\(^\text{28}\) This approach to analyzing causation essentially requires the court to get inside the harasser’s head.

This Note contends that Title VII does not mandate an inquiry into the harasser’s subjective mental state to establish the causation element in harassment cases. The subjective motivation standard adopted by the Seventh Circuit erroneously borrows an intent-based causation requirement from discrimination cases involving adverse employment decisions. This approach is too deferential to employers because harassment, unlike a personnel decision, does not entail a presumptively valid exercise of business judgment.\(^\text{29}\) In addition, the

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Worldwide, Inc., 594 F.3d 798, 810 (11th Cir. 2010) (“when a co-worker calls a female employee a ‘bitch,’ the word is gender-derogatory”).


\(^\text{24}\) 689 F.3d 655, 666 (7th Cir. 2012).

\(^\text{25}\) See *Passananti*, 689 F.3d at 664-67; *Galloway* 78 F.3d at 1167-68.

\(^\text{26}\) See *Passananti*, 689 F.3d at 664-67; *Galloway* 78 F.3d at 1167-68.

\(^\text{27}\) See *Passananti*, 689 F.3d at 664-67; *Galloway* 78 F.3d at 1167-68.

\(^\text{28}\) See *Passananti*, 689 F.3d at 664-67; *Galloway* 78 F.3d at 1167-68.

assumption that actionable harassment must be driven by conscious hostility toward women ignores the reality that discrimination today is more likely to result from unconscious bias.\footnote{See generally Linda Hamilton Krieger, \textit{The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity}, 47 STAN. L. REV. 1161 (1995).}

The argument advanced by this Note proceeds in four parts. Part I places sexual harassment claims in historical context by discussing the enactment of Title VII and reviewing major Supreme Court cases in this area. Part II analyzes the Seventh Circuit decisions in \textit{Galloway} and \textit{Passananti}, focusing on how these cases deal with the issue of causation. Part III explores the inherent ambiguity in the meaning of the phrase “because of sex” in Title VII and examines the divergent approaches to causation taken by the Seventh Circuit in sexual harassment and sexist harassment cases. Part IV proposes and evaluates alternative ways of approaching causation in sexist harassment cases.

\textbf{PART I: THE TROUBLE WITH SEX – A BRIEF HISTORY OF SEXUAL HARASSMENT CLAIMS UNDER TITLE VII}

\textit{A. Working Women and Title VII}

Reports of women working outside of the home predate the establishment of the United States as a country.\footnote{DEBRAN ROWLAND, \textit{THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN’S RIGHTS IN AMERICA} 49 (1st ed. 2004). See generally \textit{AMERICA’S WORKING WOMEN: A DOCUMENTARY HISTORY 1600 TO THE PRESENT} (Rosalyn Baxendall and Linda Perlman Gordon, eds., W.W. Norton 1995) (1976).} For centuries, women were employed as farmers, midwives, and housekeepers.\footnote{See \textit{id.} at xxii.} As wage labor entered a period rapid expansion in the early 1900s, more women were hired as factory workers, secretaries, and waitresses.\footnote{\textit{id.} at 3-15.} After gaining access to higher education in mid-twentieth century,
women began to enter the labor force as professionals.\textsuperscript{34} Today, most educated women work in an office environment.\textsuperscript{35}

Despite this lengthy legacy of paid employment, women in America have historically encountered resistance to their presence in the workforce.\textsuperscript{36} This resistance was primarily fueled by specific beliefs about appropriate gender roles.\textsuperscript{37} Paid employment seemed incompatible with women’s traditional social identities as wives, mothers, caregivers, and subordinates.\textsuperscript{38} For this reason, married women met particularly harsh disapproval for making the choice to work outside of the home.\textsuperscript{39} Wives were told that their paid employment would make their husbands feel inadequate\textsuperscript{40} and that their absence from the family home would turn their children into juvenile delinquents.\textsuperscript{41}

In the late 1950s, several progressive social movements began to challenge established political institutions and criticize the treatment of women and minorities.\textsuperscript{42} In response to the growing demand for civil rights reform,\textsuperscript{43} Congress, in 1964, enacted a landmark anti-discrimination law, which came to be popularly known as Title VII.\textsuperscript{44} Title VII prohibits employers from “discriminat[ing] 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.”\textsuperscript{45} Over time, Title VII evolved into a powerful weapon against gender and race discrimination and became

\textsuperscript{34} See id. at 288, 299.
\textsuperscript{35} Id. at 299.
\textsuperscript{36} ROWLAND, supra n. 31, at 49-50.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 34.
\textsuperscript{39} AMERICA’S WORKING WOMEN, supra n. 31, at xxii.
\textsuperscript{40} Id. at xxii.
\textsuperscript{41} Id. at 269.
\textsuperscript{42} Id. at 287.
\textsuperscript{43} Id.
\textsuperscript{44} Leeser, supra n. 10, at 1753.
an important tool in advancing the economic and social progress of women and minorities.\(^46\)

Although the plain language of Title VII proscribes discrimination “because of . . . sex,” this provision was added to the statute at the last minute on the floor of the House of Representatives.\(^47\) Representative Howard Smith of Virginia strategically proposed including “sex” in the list of classifications to be protected by Title VII in an effort to divide the bill’s supporters and thwart its passage.\(^48\) His plan backfired and Title VII was enacted into law with the proposed sex amendment.\(^49\) As a result of this unusual history, there is no legislative guidance available to assist courts in interpreting the phrase “because of sex.”\(^50\) This lack of guidance initially prompted judges to express doubt about whether sexual harassment constitutes discrimination on the basis of sex.\(^51\)

**B. The Emergence of Sexual Harassment as Discrimination “Because of Sex”**

Sexual harassment cases began to reach federal courts for the first time in the mid-1970s.\(^52\) At that time, judges were reluctant to hold that sexual harassment amounted to discrimination because of sex.\(^53\) The first officially reported case characterized harassment as “nothing more than a personal proclivity” and an attempt to satisfy “a personal

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\(^{46}\) ROWLAND, *supra* n. 31, at 157.
\(^{48}\) Cook, *supra* n. 7, at 467.
\(^{49}\) *Id.*
\(^{50}\) *Id.* at 468.
\(^{51}\) Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated sub nom.* Corne v. Bausch and Lomb, Inc., 562 F.2d 55 (9th Cir. 1977) (“there is nothing in the Act which could reasonably be construed to have it apply to ‘verbal and physical sexual advances’ by another employee”).
\(^{52}\) CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 60 (1979).
\(^{53}\) Leeser, *supra* n. 10, at 1753.
urge.”

Another early opinion reframed the issue to argue that sexual harassment was discrimination against those who refuse sexual advances rather than discrimination based on the victim’s sex. Still another case suggested that sexual harassment would not be actionable under Title VII unless an employer actually adopted a policy requiring sexual favors as a condition of employment.

In 1979, feminist scholar Catharine MacKinnon became the first legal theorist to formally link sexual harassment to discrimination against women. In her seminal book, *The Sexual Harassment of Working Women*, MacKinnon defined sexual harassment as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.” MacKinnon argued that sexual harassment derives its potency from two power sources: male dominance of women and the employer’s control over workers. The two forms of inequality, one sexual, the other economic, combine to cumulatively reinforce “women’s traditional and inferior role in the labor force.”

MacKinnon’s book identified two forms of sexual harassment. The first type, which MacKinnon termed quid pro quo harassment, involves a direct exchange of sexual favors for employment opportunities. The second type, which is currently known as a hostile work environment claim, arises when sexual harassment becomes a

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54 *Corne*, 390 F. Supp at 163.
58 *MacKinnon*, supra n. 52, at 1.
59 *Id.* at 4.
60 *Id.* at 32.
61 *Id.*
62 *Id.* at 4.
63 Hill, supra n. 57, at 146.
persistent condition of work.\textsuperscript{64} After MacKinnon’s book was published, the Equal Employment Opportunity Commission (“EEOC”), the federal agency responsible for enforcing employment discrimination laws, issued a set of guidelines on sexual harassment.\textsuperscript{65} The EEOC guidelines adopted the framework proposed by MacKinnon and defined sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.\textsuperscript{66}

\textit{C. Meritor, Harris, and Oncale: The Supreme Court Weighs in on Sexual Harassment Claims}

Although lower courts had been struggling with issue of sexual harassment since the late 1970s,\textsuperscript{67} the Supreme Court did not address the question of whether sexual harassment is prohibited by Title VII until 1986.\textsuperscript{68} The first sexual harassment case to reach the Supreme Court was \textit{Meritor Savings Bank, FSB v. Vinson}.\textsuperscript{69} The plaintiff in

\textsuperscript{64} MacKinnon, supra n. 52, at 32.
\textsuperscript{66} 29 C.F.R. § 1604.11(a) (2012).
\textsuperscript{69} Id.
Meritor alleged that over the course of her four-year employment with the bank her supervisor repeatedly demanded sexual favors, pressured her into having sexual intercourse with him, fondled her in front of other employees, exposed himself to her, and forcibly raped her.\textsuperscript{70} The Court held that such conduct is actionable under Title VII and that a plaintiff may establish a violation of the statute by “proving that discrimination based on sex has created a hostile or abusive work environment.”\textsuperscript{71}

In finding the alleged harassment actionable, the Meritor Court focused on the severity of the conduct rather than on the causal link between the behavior and plaintiff’s gender.\textsuperscript{72} Although the Court stated that “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, the supervisor ‘discriminate[s]’ on the basis of sex,”\textsuperscript{73} the opinion contains no other analysis of causation. Instead, the Court adopted the following standard for evaluating hostile work environment claims: “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”\textsuperscript{74} Following Meritor, lower courts established severity as a separate element of a sexual harassment claim.\textsuperscript{75}

The Supreme Court elaborated on the severity requirement in Harris v. Forklift Systems, Inc.\textsuperscript{76} Plaintiff Teresa Harris alleged that her supervisor had said to her several times, “You’re a woman, what do you know?”, called her “a dumb ass woman,” suggested the two of them go to the Holiday Inn to negotiate her raise, asked her to get coins from his front pants pocket, asked her to pick up objects he

\begin{enumerate}
\item Id. at 60.
\item Id. at 66.
\item See id. at 67.
\item Id. at 64.
\item Id. at 67 (internal citations omitted).
\item See, e.g., Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213 (7th Cir. 1986), abrogated by Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526 (7th Cir. 1993).
\item 510 U.S. 17, 21-22 (1993).
\end{enumerate}
threw on the ground, and made sexual innuendos about her clothing.\textsuperscript{77} The District Court for the Middle District of Tennessee held that this conduct did not create an abusive working environment because it was not so severe as to seriously affect plaintiff’s psychological well-being.\textsuperscript{78} The Supreme Court reversed, holding that while psychological harm is relevant, it is not required to establish a hostile or abusive work environment.\textsuperscript{79} Instead, the Court laid out a two-part test to determine whether the alleged conduct is severe enough to constitute a violation of Title VII. The conduct must be (1) severe or pervasive enough to create an objectively hostile or abusive work environment and (2) the victim must subjectively perceive the environment as abusive.\textsuperscript{80}

Like the \textit{Meritor} Court, the \textit{Harris} majority focused on the severity element and did not address causation.\textsuperscript{81} But Justice Ginsburg’s concurrence in \textit{Harris} shed some light on what evidence might be required to satisfy Title VII’s textual prohibition of discrimination because of sex.\textsuperscript{82} Justice Ginsburg argued that the critical inquiry in sexual harassment cases “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.”\textsuperscript{83} Some courts subsequently interpreted this pronouncement to mean that in order to establish a violation of Title VII, a plaintiff must prove that the harasser would not have engaged in the conduct “but for” the plaintiff’s sex.\textsuperscript{84}

The first Supreme Court case to offer an extended discussion of causation in the context of a sexual harassment claim was \textit{Oncale v.}

\begin{itemize}
  \item \textit{Id.} at 19.
  \item \textit{Id.} at 19-20.
  \item \textit{Id.} at 23.
  \item \textit{Id.} at 21-22.
  \item \textit{Id.} at 20-23.
  \item \textit{Id.} at 25 (Ginsburg, J., concurring).
  \item \textit{Id.}
  \item See Leeser, \textit{supra} n. 10, at 1752.
\end{itemize}
Sundowner Offshore Services, Inc.\textsuperscript{85} In Oncale, the Court for the first time confronted the emerging problem of same-sex harassment.\textsuperscript{86} Plaintiff Joseph Oncale worked as part of an eight-man crew on an oil platform in the Gulf of Mexico.\textsuperscript{87} On several occasions, Oncale’s co-worker and two supervisors subjected him to humiliating sex-related actions, physically assaulted him, and threatened him with rape.\textsuperscript{88} The District Court for the Eastern District of Louisiana and the Fifth Circuit both concluded that Oncale, as a male, had no cause of action under Title VII against his male harassers.\textsuperscript{89} The Supreme Court reversed, stating that there is “no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.”\textsuperscript{90}

The Oncale Court then went on to consider how plaintiffs in same-sex harassment cases could establish that the harassment occurred “because of sex.”\textsuperscript{91} The Court listed three possible ways to establish causation, without specifying whether this list is exhaustive or merely illustrative.\textsuperscript{92} First, in cases involving explicit or implicit proposals of sexual activity, a plaintiff can establish the causation element by presenting credible evidence that the harasser is homosexual, since presumably such proposals would not have been made but for the plaintiff’s sex.\textsuperscript{93} Second, a plaintiff can establish causation through direct evidence of gender animus, “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.”\textsuperscript{94}

\textsuperscript{85} 523 U.S. 75 (1998).
\textsuperscript{86} See id. at 76.
\textsuperscript{87} Id. at 77.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 79.
\textsuperscript{91} Id. at 80.
\textsuperscript{92} See Leeser, supra n. 10, at 1760.
\textsuperscript{93} Oncale, 523 U.S. at 80.
\textsuperscript{94} Id.
Finally, a plaintiff can offer “direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”

The Oncale opinion suggests that the causation element is straightforward in male-female sexual harassment situations involving proposals of sexual activity since “it is reasonable to assume those proposals would not have been made to someone of the same sex.” But the opinion does not explicitly address how to establish causation in situations when the harassment involves non-sexual insults. Is direct evidence of gender animus necessary? Must a plaintiff present comparative evidence? The lack of guidance in this area has forced the Seventh Circuit to grapple with the ambiguities and subtleties inherent in the phrase “because of sex” in two cases involving male harassers, female targets, and non-sexual language. The next section examines these decisions.

PART II: THE TROUBLE WITH “BITCH” – SEVENTH CIRCUIT DECISIONS IN GALLOWAY AND PASSANANTI

A. Galloway: The Personal Animus Defense

Rochelle Galloway was a packer in the parts department of General Motors. Between 1985 and 1986, Galloway dated a coworker named Bullock. After their relationship ended, Bullock began to refer to Galloway as a “sick bitch” and continued this behavior until she quit her position at General Motors in 1991. Bullock once told Galloway, “If you don’t want me, bitch, you won’t

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95 Id. at 80-81.
96 Id. at 80.
98 Id.
99 Id.
100 Id.
have a damn thing,” and, on another occasion, he said, “suck this, bitch,” while making an obscene gesture at her. Galloway brought suit under Title VII, alleging that General Motors discriminated against her on the basis of her sex. The District Court for the Northern District of Illinois granted General Motors’ motion for summary judgment, holding that Galloway failed to establish that her working environment was objectively hostile and remarking that the term “sick bitch” was not overtly sexual in nature. Galloway appealed pro se to the Seventh Circuit.

The Seventh Circuit agreed with the district court that “sick bitch” was not a sex- or gender-related term under the particular circumstances of this case. Writing for a unanimous majority, then-Chief Judge Richard Posner opined that the word “bitch” in and of itself does not “connote some specific female characteristic, whether true, false, or stereotypical; it does not draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect.” Judge Posner then added, “Even if Bullock didn’t abuse any men, there would not be an automatic inference from his use of the word ‘bitch’ that his abuse of a woman was motivated by her gender rather than by a personal dislike unrelated to gender.” The Seventh Circuit concluded that the term “bitch” reflected a personal animosity when used in the context of a failed sexual relationship. The court also stressed that the plaintiff did not present any evidence that her harasser believed that “women

101 Id.
102 Id.
104 Galloway, 78 F.3d at 1165.
105 Id. at 1168.
106 Id.
107 Id.
108 Id.
do not belong in the work force or are not entitled to equal treatment
with male employees.”

Although the court determined that Galloway’s claim was
properly dismissed, it did go on to caution that its holding should not
be interpreted to suggest that the word “bitch” could never be used to
establish sex discrimination. The court emphasized that “context is
everything” and pointed out that “‘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.”

The court opined that there was very little indication that the word
“bitch” carried any of these connotations as used by Bullock of
Galloway, but it remains unclear how the court could have reached
this conclusion short of simply making assumptions about what the
harasser was thinking.

B. Passananti: It’s All About Context

Kimberly Passananti was the Deputy Director of the Day
Reporting Center (“DRC”) of the Cook County Sheriff’s Department
from 2002 until 2007. For several years, DRC Director, John
Sullivan, supervised Passananti. During the course of their
professional relationship, Sullivan “repeatedly and angrily called
Passananti a ‘bitch’” in front of coworkers, “trumped up charges
against her for violating a DRC policy against tampering with
supervisees’ urine samples,” and “fabricated an accusation that she had
had sexual relations with a supervisee.” Sullivan left the DRC in

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109 Id.
110 Id.
111 Id.
112 Id.
113 Passananti v. Cook Cnty., 689 F.3d 655, 658 (7th Cir. 2012).
114 Id.
115 Id. at 658-59.
2006 and Passananti subsequently lost her job in 2007.\footnote{Id. at 659.} Passananti brought claims of sexual harassment and sex discrimination under both Title VII and § 1983 of the Civil Rights Act of 1871.\footnote{Passananti, 689 F.3d at 659.} Following an exchange with counsel at trial, the district court decided to treat Passananti’s sexual harassment claim as arising under Title VII and her discriminatory termination claim as arising under § 1983.\footnote{Id. at 658.} The following analysis focuses solely on Passananti’s Title VII sexual harassment claim.

After the jury returned a verdict in favor of Passananti, Defendant Cook County renewed its motion for judgment as a matter of law.\footnote{Passananti v. Cnty. of Cook, Ill., No. 08-CV-2803, 2010 WL 3958645, at *7-8 (N.D. Ill. 2010), reconsideration denied, No. 08-CV-2803, 2011 WL 198131 (N.D. Ill. 2011), and aff’d in part, rev’d in part sub nom. Passananti v. Cook Cnty., 689 F.3d 655 (7th Cir. 2012).} The district court granted the motion, citing to Galloway for the proposition that “the mere fact that a defendant used a pejorative term that is more likely to be directed toward a female than a male does not alone establish unwelcome sexual conduct.”\footnote{Id. at *8.} The district court concluded that “the evidence is insufficient for a rational jury to conclude that Sullivan’s sometimes-vulgar conduct was directed at Plaintiff because she is a woman and that it was so severe or pervasive that it rendered her work environment hostile as a matter of law.”\footnote{Passananti, 689 F.3d at 659.}

The Seventh Circuit reversed the district court’s decision with respect to Passananti’s sexual harassment claim, holding that “[t]he jury could reasonably treat the frequent and hostile use of the word ‘bitch’ to be a gender-based epithet that contributed to a sexually hostile work environment.”\footnote{Id. at 658.} The Passananti Court pointed to the
passage in the *Galloway* decision emphasizing the importance of context and, on this basis, interpreted *Galloway* as recognizing that “repeated use of the word ‘bitch’ to demean a female employee could support a claim of sexual harassment if it was sufficiently pervasive or severe and if the context showed a hostility to the plaintiff because she was a woman.”123 The *Passananti* Court identified the fact that the defendant in *Galloway* harbored a personal animosity toward the plaintiff arising out of an earlier failed relationship as the relevant context in that case.124 The *Passananti* Court then concluded that there was no such contextual evidence in this case to undermine the inference “that Sullivan’s repeated and hostile use of ‘bitch’ to address and demean Passananti was based on her sex.”125

Although *Passananti* distinguished *Galloway* and did not overrule it, the *Passananti* Court apparently perceived the use of the word “bitch” as a stronger indication of animosity toward women than did the *Galloway* Court. The *Passananti* Court approvingly quoted an en banc opinion from the Eleventh Circuit holding that “when a co-worker calls a female employee a ‘bitch,’ the word is gender-derogatory.”126 The court further opined that “[a]dditional evidence that ‘bitch’ is ‘sex based’ for purposes of establishing gender-based harassment is not necessary”127 and it rejected “the idea that a female plaintiff who has been subjected to repeated and hostile use of the word ‘bitch’ must produce evidence beyond the word itself to allow a jury to infer that its use was derogatory towards women.”128 At the same time, the court attempted to limit the scope of its decision by stating, “We do not hold that use of the word ‘bitch’ is harassment ‘because of sex’ always and in every context, just as we did not hold...”

123 *Id.* at 665.
124 *Id.*
125 *Id.*
126 *Passananti*, 689 F.3d at 665 (quoting Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 810 (11th Cir. 2010)).
127 *Passananti*, 689 F.3d at 665.
128 *Id.* at 666.
that it never is in Galloway. Our precedents have made clear that the use of the word in the workplace must be viewed in context.”  

C. Galloway v. Passananti – What Are We Really Fighting About?

In addition to taking different sides in a debate on the meaning of the term “bitch,” Galloway and Passananti raise the challenging legal question of how plaintiffs can establish causation in sexist harassment cases. Implicit in both decisions is the assumption that in order to prove that the harassment occurred “because of sex,” the harasser must be subjectively motivated by hostility toward women in the workplace or hostility to the plaintiff because she is a woman. The difference between the two cases is their view of what evidence plaintiffs must present in order to prove the existence of such hostility.

In Galloway, the court concluded that the word ‘bitch’ is in and of itself insufficient to establish hostility toward women in the workplace because the word is not gender-specific. Although the word may be used to denigrate women, plaintiff presented no evidence that her harasser intended to use it in this way. Instead, the court inferred another motive from the fact that the harasser and victim dated in the past—personal animus. The weight the court gave to this alternative explanation suggests that the harasser’s subjective motivation was dispositive in Galloway.

In Passananti, the court took a slightly different approach. It concluded that the term ‘bitch’ is gender-specific. This conclusion

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129 Id.
131 See Passananti, 689 F.3d at 665.
132 Galloway, 78 F.3d at 1167.
133 Id. at 1168.
134 Id.
135 See Gregory, supra n. 65, at 767.
136 Passananti, 689 F.3d at 665-66.
allowed the court to infer that the harasser could have been motivated by a desire to demean the plaintiff as a woman. But the court explicitly limited its holding by stating that the word “bitch” is not harassment “because of sex” in every context. The court pointed out that the context is different in this case than in Galloway, because, unlike in Galloway, there is no evidence indicating the alternative explanation of personal animus. This qualification suggests that the court employed the term “context” as shorthand for the harasser’s subjective motivation.

The fact that the Galloway and Passananti decisions both seemed concerned with pinning down precisely what could have motivated the harasser to use the term “bitch” leads to the fundamental question: what evidence does the Seventh Circuit require to prove that harassment occurred “because of sex”? The next section explores the thorny issue of causation in sexual harassment cases.

PART III: THE TROUBLE WITH CAUSE – WHAT WERE THEY THINKING, ANYWAY?

A. “Because of Sex” – The Bifurcated Jurisprudence of Causation in Title VII Discrimination Cases

The phrase “because of sex” in Title VII implies that there must be a relationship between the offending conduct and the victim’s sex, but the statute does not specify the precise nature of that relationship. Courts have approached this causation element differently in cases involving personnel decisions and in cases involving harassment. In personnel decision cases brought under the disparate treatment theory, courts have assumed that Title VII liability

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137 Id. at 665.
138 Id. at 666.
139 Id.
140 See Schwartz, supra n. 29, at 1709.
141 See id. at 1718.
is premised on a conscious intent to discriminate. This assumption has resulted in much confusion about the terms “discrimination,” “motive,” and “intent,” and has produced a theory of causation that is incoherent and inconsistent with contemporary psychology’s understanding of intergroup bias. By contrast, harassment cases have traditionally offered almost no analysis of the causation element. These cases were willing to simply infer a causal connection between the conduct and the sex of the victim from the nature of the harassment itself. This approach has been called into question by the Supreme Court’s decision in Oncale and has left current causation jurisprudence in a state of uncertainty.

1. The Problem of Discriminatory Intent in Disparate Treatment Cases

Traditionally, Title VII doctrine has subdivided cases involving personnel decisions into two categories: intentional discrimination, known as “disparate treatment,” and unintentional discrimination, known as “disparate impact.” To establish liability under a disparate impact theory, a plaintiff must show that a facially neutral employment practice has a disproportionate impact on a protected group. No showing of discriminatory intent is required. By contrast, plaintiffs bringing claims under a disparate treatment theory must establish intent to discriminate.

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142 Krieger, supra n. 30, at 1172
143 See Schwartz, supra n. 29, at 1711.
144 See Krieger, supra n. 30, at 1165.
145 See Schwartz, supra n. 29, at 1718.
146 See id. at 1717-25 (discussing the development of a “sex per se” rule).
148 See Schwartz, supra n. 29, at 1714.
150 Id. at 432.
151 Schwartz, supra n. 29, at 1710.
The idea of “intentional discrimination” is more complex than most court opinions suggest. First, the term “discrimination” is itself ambiguous. Discrimination could simply refer to differential treatment. Alternatively, discrimination could be conceptualized as involving an invidious attitude toward members of a particular group. The first definition is expressed in Justice Ginsburg’s concurrence in *Harris*, “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” The second definition is embraced by Justice Rehnquist in *Furnco Construction Corp. v. Waters*, where he argues that disparate treatment “is not the equivalent of a factual finding of discrimination” but “simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.”

The analysis of what evidence is necessary to establish intentional discrimination under Title VII is further complicated by the fact that courts tend to conflate the terms “motive” and “intent” in Title VII cases. These concepts are not equivalent. Motive is a “synonym for ‘actuating factor,’ – something which causes a person to act or decide in a particular way.” By contrast, intent refers to the state of mind accompanying the action or decision. Confusing these ideas has serious implications for how courts analyze disparate treatment
It is the difference between asking, “did the defendant act with the intent to discriminate against the plaintiff because she is a woman?” and “did the defendant take this action because the plaintiff is a woman?”

Furthermore, even when judges premise Title VII liability on discriminatory motive rather than discriminatory intent, they nonetheless assume that such motive is consciously known to the actor at the time that the action is taken.\textsuperscript{163} This assumption is reflected in Justice Brennan’s discussion of motivating factors in \textit{Price Waterhouse v. Hopkins}: “In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.”\textsuperscript{164} Justice Brennan’s analysis suggests that employers are rational actors who are fully aware of all the reasons that influence their decisions.\textsuperscript{165}

The imprecise definition of discrimination, the confusion between intent and motive, and the assumption of decisionmaker self-awareness can all, in some way, be linked to judicial reliance on an outdated theory of social psychology.\textsuperscript{166} Up until the 1970s, psychologists understood intergroup bias as a motivational process.\textsuperscript{167} Discrimination, a behavior, was believed to result from prejudice, an attitude.\textsuperscript{168} The attitude of prejudice was connected to the behavior of discrimination by a discriminatory motive, which was defined as “a conscious behavioral intention to create social distance by denying outgroup members certain benefits and opportunities.”\textsuperscript{169}

\begin{thebibliography}{99}
\bibitem{162} See id. at 1172.
\bibitem{163} Krieger, \textit{supra} n. 30, at 1187.
\bibitem{165} Krieger, \textit{supra} n. 30, at 1187.
\bibitem{166} See id. at 1165.
\bibitem{167} Id. at 1187.
\bibitem{168} See id. at 1776.
\bibitem{169} Id. at 1177.
\end{thebibliography}
The emergence of social cognition theory has fundamentally transformed thinking about intergroup bias.\textsuperscript{170} Psychologists now believe that the origin of discrimination is more likely cognitive than motivational.\textsuperscript{171} To make sense of our complex environment, we put objects and people into categories.\textsuperscript{172} This categorization process is adaptive; if we perceived every object as unique “we would rapidly be inundated by an unmanageable complexity that would quickly overwhelm our processing and storage capabilities.”\textsuperscript{173} The need to classify our surroundings leads to the formation of stereotypes.\textsuperscript{174} Stereotypes operate beyond our self-awareness.\textsuperscript{175} They are automatic and unintentional.\textsuperscript{176} They also bias how we process information about other people.\textsuperscript{177} In sum, contemporary psychological theory now conceives of discrimination as “an unwelcome byproduct of otherwise adaptive cognitive processes.”\textsuperscript{178}

Although some instances of overt deliberate discrimination no doubt still occur, discrimination today is more likely to be subtle, unconscious, and unintentional.\textsuperscript{179} Thus, by equating Title VII’s causation requirement with intent to discriminate, courts have adopted a standard that is inconsistent with the real-world phenomenon of intergroup bias.\textsuperscript{180} For this reason, some scholars have proposed reforming the current approach to causation in disparate treatment cases.\textsuperscript{181} For instance, David Oppenheimer has advocated replacing the intentional discrimination requirement with a negligence standard

\textsuperscript{170} Id. at 1187.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 1188.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 1187.
\textsuperscript{175} Id. at 1188.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 1190.
\textsuperscript{178} Id. at 1218.
\textsuperscript{179} Id. at 1241.
\textsuperscript{180} See id.
\textsuperscript{181} Id.
and imposing on employers a duty to correct for cognitive bias by carefully screening their decision-making procedures.\textsuperscript{182} Linda Krieger has suggested that Title VII adopt a two-tier liability system, similar to the Age Discrimination in Employment Act, in which a willful violation of the statute triggers a more substantial damage award than unconscious discrimination.\textsuperscript{183}

2. Causation in Harassment Cases

Unlike cases involving actual personnel decisions, hostile work environment cases arising under Title VII have developed with less attention to the intent of discrimination.\textsuperscript{184} There are two possible explanations for this trend. First, harassment cases do not involve a “decision.”\textsuperscript{185} As a result, there is no specific point in time at which it would be appropriate to examine the actor’s mental state. Second, harassment serves no legitimate business purpose.\textsuperscript{186} In cases involving personnel decisions, courts may have fashioned a heightened causation standard out of deference to the employer’s business judgment.\textsuperscript{187} By contrast, harassment cases do not implicate business judgment.\textsuperscript{188} Thus, there is less concern in harassment cases about courts telling employers how to run their companies.\textsuperscript{189}

While some early sexual harassment cases looked for evidence that the harasser consciously selected the victim on the basis of her sex, over time most courts abandoned an intent-based analysis of causation in harassment cases.\textsuperscript{190} Instead, courts gradually developed a

\begin{itemize}
\item \textsuperscript{183} Krieger, \textit{supra} n. 30, at 1243-44.
\item \textsuperscript{184} Schwartz, \textit{supra} n. 29, at 1718.
\item \textsuperscript{185} \textit{Id}.
\item \textsuperscript{186} \textit{Id}.
\item \textsuperscript{187} \textit{Id}. at 1717.
\item \textsuperscript{188} \textit{Id} at 1718.
\item \textsuperscript{189} See \textit{id}.
\item \textsuperscript{190} \textit{Id}. at 1718-19.
\end{itemize}
“sex per se” rule, which allowed them to infer the causal link between
the harassment and plaintiff’s sex from the sexual nature of the
harassing words or conduct.\textsuperscript{191} For over a decade, this rule functioned
as an evidentiary shortcut to establishing the causation element in Title
VII cases and obviated the need to develop a formal theory linking
sexual harassment to sex discrimination.\textsuperscript{192}

But in 1998 the Supreme Court cast serious doubt upon the
continuing validity of the “sex per se” rule.\textsuperscript{193} Emphasizing
the importance of the causation element in the context of same-sex
harassment, Justice Scalia made the following observation in \textit{Oncale}:
“We have never held that workplace harassment, even harassment
between men and women, is automatically discrimination because of
sex merely because the words used have sexual content or
connotations.”\textsuperscript{194} Although some scholars have argued that this
language does not necessarily abolish the “sex per se” rule,\textsuperscript{195} the fact
that both the majority\textsuperscript{196} and the concurrence\textsuperscript{197} vehemently stressed
the phrase “because of sex” suggests that courts in harassment cases
may need to develop a more robust theory of causation.

Against this backdrop of confusing Title VII jurisprudence, the
Seventh Circuit has struggled to articulate its own approach to
causation in harassment cases. The next section argues that the
Seventh Circuit has approached this element differently in sexual
harassment cases and in sexist harassment cases. In sexual harassment
cases, the Seventh Circuit has taken a victim-centered approach and at
times adopted the “sex per se” rule. In sexist harassment cases, the
Seventh Circuit has embraced a causation theory that closely
resembles the intent-based approach of disparate treatment cases.

\textsuperscript{191} See \textit{id.} at 1719-25.
\textsuperscript{192} See \textit{id.} at 1703-04.
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} Schwartz, \textit{supra} n. 29, at 1787-88.
\textsuperscript{196} \textit{Oncale}, 523 U.S at 78-81.
\textsuperscript{197} \textit{Id.} at 82 (Thomas, J., concurring).
B. Title VII Causation Analysis in the Seventh Circuit

1. Sexual Harassment Cases: It’s What They’re Doing, Not What They’re Thinking

In cases involving overtly sexual terminology or conduct, the Seventh Circuit has been willing to analyze the issue of discriminatory intent from the point of view of the victim rather than the harasser. The court explicitly adopted this approach in King v. Board of Regents of the University of Wisconsin System.\footnote{198 898 F.2d 533, 537-38 (7th Cir. 1990).} Plaintiff Katherine King was an assistant professor who alleged that the assistant dean made suggestive innuendos, leered at her, touched her, rubbed up against her, placed objects between her legs, and forcibly kissed and fondled her.\footnote{199 Id. at 534-35.} In addition to her Title VII claim, King also brought suit under § 1983 alleging that the harassment violated her constitutional right to equal protection of the law.\footnote{200 Id. at 537.} As a result, the court had to specifically address the different showings of discriminatory intent required for each of King’s claims, providing that “[o]ne difference between sexual harassment under equal protection and under Title VII . . . is that the defendant must intend to harass under equal protection . . . but not under Title VII, where the inquiry is solely from the plaintiff’s perspective.”\footnote{201 Id. at 537-38 (emphasis added) (internal citations omitted).}

More recently, the Seventh Circuit reiterated this plaintiff-centered view in Yuknis v. First Student, Inc.\footnote{202 481 F.3d 552, 554 (7th Cir. 2007).} Although the court ultimately dismissed the plaintiff’s claim, it emphasized that a conscious intent to discriminate is not required to prevail on a hostile work environment theory.\footnote{203 Id.} The court explained, “[W]e do not mean to suggest that there must be an intention of causing distress or offense. A working environment may be deeply hurtful to women even
though the men who created it were merely trying to please themselves, and were thus guilty of insensitivity rather than aggression.”

However, the most extensive defense of the need to adopt a different standard of causation in sexual harassment cases appears in the Seventh Circuit’s opinion in *Doe v. City of Belleville, Illinois*. At the outset, it is important to note that *Doe* is not controlling precedent in the Seventh Circuit. After deciding *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court vacated *Doe* and remanded it for further consideration in light of *Oncale*. Nonetheless, the *Doe* opinion is worth considering both for its application of the “sex per se” rule in the context of same sex harassment and for its rejection of a victim-centered approach in sexist harassment cases.

The plaintiffs in *Doe* were two teenage brothers who had been hired by the City of Belleville to cut grass in the municipal cemetery. The boys were subjected to an intense harassment campaign by their male coworkers, which included insults, name-calling, regular threats of rape, and one incident of testicle-grabbing. The district court granted Belleville’s motion for summary judgment, reasoning that “because both the Does and their harassers were heterosexual males, the plaintiffs could not show that they were harassed ‘because of’ their sex.”

The Seventh Circuit reversed, arguing that when workplace harassment has explicit sexual overtones, “the content of that harassment in and of itself demonstrates the nexus to the plaintiff’s gender that Title VII requires.” The Seventh Circuit agreed with the Third Circuit’s observation that “[t]he intent to discriminate on the

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204 *Id.*
206 *City of Belleville*, 523 U.S. at 1001.
207 *Doe*, 119 F.3d at 566.
208 *Id.* at 567.
209 *Id.* at 566.
210 *Id.* at 576.
basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course.” The Seventh Circuit also quoted approvingly the following remark made by the Ninth Circuit: “[S]exual harassment is ordinarily based on sex. What else could it be based on?” Thus, the Doe Court effectively concluded that the subjective motivation of the harasser is irrelevant in cases involving explicitly sexual words or conduct. As the court observed, “[S]o long as the environment itself is hostile to the plaintiff because of her sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point.”

Although the Doe Court was willing to infer causation solely from the nature of the harassing conduct, the court cautioned that such an inference would not be appropriate in cases where the alleged harassment was non-sexual. The court provided the following example to illustrate:

A woman employed in a male-dominated workplace with an antipathy toward female workers might find her tools constantly missing, her locker broken into, and her work sabotaged, for example, as part of a campaign of harassment motivated by her gender yet devoid of sexual innuendo and contact. In such a case, the plaintiff necessarily must show differential treatment of men and women, or an animus to her own gender, in view of the fact that the harassment itself does not suggest a nexus to the plaintiff's gender.

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211 Doe, 119 F.3d at 566 (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n. 3 (3d Cir. 1990)).
212 Doe, 119 F.3d at 566 (quoting Nichols v. Frank, 42 F.3d 503, 511 (9th Cir.1994) (opinion of Reinhardt, J.) (emphasis in original)).
213 Doe, 119 F.3d at 578.
214 Id. at 575-76.
215 Id.
Taken together, the preceding cases suggest that the Seventh Circuit has in the past been willing to infer the necessary causal relationship between the harasser’s conduct and the victim’s sex in cases involving harassment that is overtly sexual. But the Seventh Circuit’s reasoning in *Doe* suggests that the same inference would not be warranted in cases where harassment assumes a non-sexual form. The next section examines the Seventh Circuit’s approach to analyzing causation in situations where harassment is non-sexual but may nonetheless be sexist.

2. Sexist Harassment Cases: It’s What They Think About Women That Counts

Gender-based harassment is not always sexual.\textsuperscript{216} For example, men in a workplace might engage in “taunting, pranks, and other forms of hazing designed to remind women that they are different and out of place.”\textsuperscript{217} The challenge facing plaintiffs in such cases is how to show that they were targeted for harassment “because of sex.”

In *Smith v. Sheahan*, the plaintiff rose to this challenge by presenting extensive evidence of the disparate treatment of women in her workplace.\textsuperscript{218} Valeria Smith was a guard at the Cook County Jail who became involved in a work-related dispute with her coworker, Ronald Gamble.\textsuperscript{219} In the course of this dispute, “Gamble called Smith a ‘bitch,’ threatened to ‘fuck [her] up,’ pinned her against a wall, and twisted her wrist severely enough to damage her ligaments, draw blood, and eventually require surgical correction.”\textsuperscript{220} To show that Gamble’s actions were because of her sex, Smith presented affidavits from six other female guards, detailing a total of seven incidents in which Gamble became verbally abusive and threatened female guards.

\textsuperscript{216} See Schultz, *supra* n. 21, at 1687.
\textsuperscript{217} *Id.*
\textsuperscript{218} 189 F.3d 529, 531 (7th Cir. 1999).
\textsuperscript{219} *Id.* at 530-31.
\textsuperscript{220} *Id.* at 531.
with violence.\textsuperscript{221} The Seventh Circuit concluded that Smith had presented sufficient evidence to raise the inference that Gamble targeted fellow guards based on their sex.\textsuperscript{222} The court pointed out that Gamble’s violent outbursts toward women at work were “unmatched by similar reports of verbally and physically aggressive behavior toward male co-workers.”\textsuperscript{223}

In \textit{Boumehdi v. Plastag Holdings, LLC}, the plaintiff prevailed on her hostile work environment claim by presenting direct evidence of her supervisor’s hostility toward women.\textsuperscript{224} Julie Boumehdi worked as a press operator in Plastag’s lithographic press department.\textsuperscript{225} Over the course of ten months, Boumehdi’s supervisor, Ed Vega, made at least eighteen sex-based comments to her.\textsuperscript{226} For example, Vega told Boumehdi that women do not belong in the pressroom, that women should work in flower shops, and that she should clean the pressroom because that is what women are supposed to do.\textsuperscript{227} Although the district court granted the defendant’s summary judgment motion, the Seventh Circuit reversed, holding that “comments evincing anti-female animus can support a hostile environment claim.”\textsuperscript{228}

As the above examples illustrate, plaintiffs who are harassed through non-sexual conduct can demonstrate that the harassment was based on sex by adopting the avenues of proof outlined in \textit{Doe} and \textit{Oncale}: they can present direct evidence of hostility toward women or show disparate treatment of male and female employees in a mixed-sex workplace.\textsuperscript{229} But what happens if the harassers do not openly

\begin{itemize}
\item \textsuperscript{221} \textit{Id.}
\item \textsuperscript{222} \textit{Id.} at 533.
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} 489 F.3d 781, 786 (7th Cir. 2007).
\item \textsuperscript{225} \textit{Id.} at 785.
\item \textsuperscript{226} \textit{Id.} at 786.
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.} at 788.
\end{itemize}
proclaim hostility to women? And what if there are no other female coworkers? The Seventh Circuit’s analysis in *Galloway* and *Passananti* suggests that in such cases, the court might be more likely to probe the harassers’ minds to find out what motivated the harassment. Both of these cases turned on the highly subjective concept of personal animus; the plaintiff in *Galloway* lost because the court concluded this factor was present in her case and the plaintiff in *Passananti* won because the court concluded it was absent.  

Is getting into the harasser’s head the only way to deal with causation in cases like *Galloway* and *Passananti*? The next section assesses the practical difficulties with adopting a standard dependent on discovering and interpreting the subjective motivation of the harasser.

**C. Dissecting the Harassing Mind: Problems with a Subjective Motivation Standard**

The Seventh Circuit’s opinions in *Galloway* and *Passananti* suggest that in order to figure out whether non-sexual verbal harassment occurred “because of sex” it is necessary to determine why the harasser targeted the plaintiff. In *Galloway*, the court concluded that the harasser was motivated by personal animus and thus did not act on the basis of sex. In *Passananti*, the court concluded that there was no contextual evidence of personal animus and thus it was reasonable to infer the harasser was motivated by the plaintiff’s sex. Lurking beneath the court’s analysis in both cases is an implicit assumption that harassers make the decision to harass based on a single factor and that this factor can be discovered by analyzing the context in which the harassment occurs. There are several problems with approaching harassment cases from this perspective.

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231 *Galloway*, 78 F.3d at 1168.

232 *Passananti*, 689 F.3d at 665.
First, this model ignores the reality that very few actions or decisions derive from a single cause.\textsuperscript{233} The conduct of harassment can be honestly based on the nondiscriminatory reason proffered by the defendant and still nonetheless be tainted by intergroup bias.\textsuperscript{234} In other words, even though the harasser in \textit{Galloway} may very well have harbored a personal animus toward the plaintiff, that fact alone does not rule out the possibility that his behavior was also motivated by the plaintiff’s gender.\textsuperscript{235} The Seventh Circuit’s analysis in \textit{Galloway} obscures this possibility and treats personal animus and gender animus as two mutually exclusive explanations of the harasser’s behavior.

Second, the subjective motivation standard effectively borrows its intent-based theory of causation from the disparate treatment cases, thereby injecting unnecessary complexity into harassment caselaw. Unlike disparate treatment cases, harassment cases do not involve discrete personnel decisions but consist of continuous conduct often stretching over long time periods.\textsuperscript{236} As such, it is not clear at what precise point in time the court should inquire into the harasser’s mental state or motivations. In addition, harassment claims do not raise the same deterrence concerns as cases involving personnel decisions. The heightened causation standard in disparate treatment cases may be necessary to avoid chilling employers in exercising their right to make legitimate business decisions about the composition of their workforce.\textsuperscript{237} By contrast, there is no comparable concern about over-deterring harassers from engaging in harassing conduct. Finally, relying on the causation standard developed in disparate impact cases amounts to implicitly accepting the assumption that most discrimination is conscious and intentional. This assumption is inconsistent with empirical reality.\textsuperscript{238}

\begin{itemize}
\item \textsuperscript{233} Krieger, supra n. 30, at 1223.
\item \textsuperscript{234} See \textit{id}.
\item \textsuperscript{235} See Gregory, supra n. 65, at 768.
\item \textsuperscript{236} See Schwartz, supra n. 29, at 1719.
\item \textsuperscript{237} Id. at 1717-18.
\item \textsuperscript{238} See Krieger, supra n. 30, at 1164-65.
\end{itemize}
A third problem with focusing on the harasser’s motivations is that, even when the motivations are known, they may still be difficult to interpret. This difficulty is illustrated in the exchange that took place between the majority and the dissent in the *King* case.\(^{239}\) Because the plaintiff in *King* brought her sexual harassment claim under both Title VII and \(\S\) 1983, the court had to make an explicit finding of intent to harass on the basis of sex in order to hold the defendant liable for violating the equal protection clause.\(^{240}\) Dean Sonstein, the alleged harasser, claimed that “his actions were merely the result of his desire for King as an individual and, therefore, were not sex-based harassment.”\(^{241}\) The majority concluded that Sonstein’s actions were based on the plaintiff’s gender because they were motivated by his sexual desire for her.\(^{242}\) The court opined, “[T]reatment of [an] individual based on sexual desire is sexually motivated. Sonstein’s sexual desire does not negate his intent; rather it affirmatively establishes it.”\(^{243}\) In his dissent, Judge Manion opined that the plaintiff failed to establish the required discriminatory intent, arguing, “Sonstein harassed Katherine King because she was Katherine King, not because she was female.”\(^{244}\) Thus, although both the majority and the dissent started with the harasser’s self-proclaimed motivation of sexual desire, each opinion interpreted the significance of this motivation and its relationship to the plaintiff’s sex differently.

Finally, focusing on the harasser’s subjective motivation obscures the fact that discrimination can be analyzed just as validly from the point of view of the victim.\(^{245}\) “If one views ‘discrimination’ as an injurious act or course of conduct, sex can be a ‘cause’ of that injury not only if the actor’s motivation was the plaintiff’s sex, under the

\(^{239}\) King v. Bd. of Regents of the Univ. of Wis. Sys., 898 F.2d 533 (7th Cir. 1990). The facts of this case are discussed above in Part III B.2.
\(^{240}\) Id. at 537.
\(^{241}\) Id. at 538.
\(^{242}\) Id. at 539.
\(^{243}\) Id.
\(^{244}\) Id. at 542 (Manion, J., dissenting).
\(^{245}\) See Schwartz, supra n. 29, at 1781.
traditional view, but also if the plaintiff experienced injurious conduct ‘because of her sex.’”246 Thus, plaintiffs who experience harassment as based on their sex will suffer the same degree of harm regardless of whether their harassers harbored a conscious hostility toward women or whether they were acting on the basis of an unconscious bias.

In sum, the subjective motivation standard is problematic because it erroneously assumes that harassment is actuated by a single cause, relies on an intent-based theory of causation that is ill-fitted to harassment claims, glosses over the difficulty of interpreting motives, and ignores the importance of acknowledging the victim’s point of view. At the same time, some showing of a connection between the plaintiff’s sex and the defendant’s conduct is mandated by Title VII’s requirement that the harassment occur “because of sex.” The next section will consider how plaintiffs can establish causation without probing the harassers’ minds.

PART IV: GETTING OUT OF THE HARASSER’S HEAD – ALTERNATIVE APPROACHES TO CAUSATION IN SEXIST HARASSMENT CASES

A. Focusing on the Conduct: The “But-For” Test

One alternative to analyzing the subjective mental state of the harasser is to focus solely on the conduct. Thus, in cases involving harassment that is not explicitly sexual, the court would ask the following question: “Would the harasser have engaged in this conduct if the plaintiff were a man instead of a woman?” (or vice versa). In fact, many courts have interpreted the holdings of Meritor, Harris, and Oncale to require this “but-for” analysis of causation.247

The main advantage of the “but-for” test is that it comports with the formal equality theory of Title VII that has been embraced by most judges.248 This theory sees the goal of Title VII as promoting color-

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246 Id.
247 See Leeser, supra n. 10, at 1752.
248 See Schwartz, supra n. 29, at 1776-77.
blind and sex-blind workspaces. A violation of Title VII occurs anytime an employer considers an employee’s sex in making a personnel decision. Thus, if the harasser would not have engaged in the harassing conduct but for the victim’s sex, then the harasser has impermissibly taken sex into account and a Title VII violation has occurred.

The “but-for” test has several shortcomings. First, the test is relatively easy to apply in a case like Smith where the plaintiff presented affidavits from her female coworkers to show that her harasser only targeted women. But in cases involving a single victim, the harasser’s conduct is much more difficult to interpret. In addition, the “but-for” test is unsuitable in situations involving mixed motives. For example, if the harasser’s conduct indicates hostility to the victim because of her sex and because of her job performance, the “but-for” test fails to impose liability. This result is inconsistent with the formal equality principle of promoting sex-blind workspaces and with the text of Title VII which imposes liability on employers whenever a prohibited characteristic is a motivating factor for an employment practice “even though other factors also motivated the practice.”

The final and most serious problem with the “but-for” test is that it can very easily turn into a subjective motivation analysis. Asking whether the harasser would have called the plaintiff a “bitch” if she had not been a woman may lead the court to start wondering what could have motivated the harasser to use the word “bitch” in the first place. Thus, to fully escape the danger of getting stuck in the harasser’s head, it may be necessary to analyze Title VII causation from the victim’s point of view.

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249 See id. at 1775-76.
250 See id.
251 Smith v. Sheahan, 189 F.3d 529, 531 (7th Cir. 1999).
252 See Leeser, supra n. 10, at 1779 (discussing the problem of causal overdetermination).
B. Focusing on the Victim: The Perceived Discrimination Test

A victim-centered approach to analyzing causation is more consistent with a protected class theory of Title VII.254 This theory sees Title VII as a tool to eradicate the vestiges of past discrimination against women and minorities.255 Under this view, harassment must be understood in the context of the historical imbalance of power between men and women.256 For some women, the word “bitch” can “conjure up the entire history of male-on-female abuse.”257 Because gender-motivated violence is more likely to be perpetrated by men against women than vice versa,258 a woman may be more likely than a man to experience verbal abuse as “a prelude to physical violence.”259

A victim-centered standard could be articulated as either an objective or subjective test. Thus, a court might ask “would a reasonable victim have perceived the harasser’s actions to be motivated by sex?” or “did this victim perceive the harasser’s actions to be motivated by sex?” Each approach has its own benefits and drawbacks.

1. The Pros and Cons of a Subjective Standard

The main advantage of a subjective standard is its recognition that harassment can be perceived as discriminatory even if the harasser lacks conscious intent to discriminate. Harassment victims often suffer real harm. They may “perform below capacity at their jobs or seek inferior employment as a way of avoiding harassment.”260 If a harassment victim honestly but mistakenly believes that the harasser’s

254 See Schwartz, supra n. 29, at 1776.
255 See id.
256 See Gregory, supra n. 65, at 768.
257 Id.
259 See Gregory, supra n. 65, at 768.
260 See Leeser, supra n. 10, at 1774.
conduct was motivated by sex, allowing that belief alone to establish the causation element of the victim’s Title VII claim is defensible on the ground that, as between an innocent victim and a harasser who intentionally engaged in wrongful conduct, it is fair to allow the victim’s perception to govern.

The most significant criticism of this subjective standard is that it turns solely on the sensitivity of a particular employee, which may be difficult to foresee and which lies outside of the employer’s control. This concern might have prompted the Oncale Court to emphasize that careful attention to the causation element is necessary to avoid transforming Title VII into “a general civility code for the American workplace.”261 Allowing causation to be determined solely on the basis of the plaintiff’s perception might arguably result in the proliferation of frivolous sexual harassment claims.262

Although this concern is valid, the judge-made law of sexual harassment contains other safeguards designed to limit the floodgates of litigation.263 First, sexual harassment plaintiffs must show that the conduct was severe or pervasive.264 The Seventh Circuit has not hesitated to grant summary judgment in cases where plaintiffs failed to meet this requirement.265 In addition, a pair of cases decided by the Supreme Court in 1998 has provided employers with an affirmative defense against sexual harassment claims if the employer can show that (1) it exercised reasonable care to prevent and correct promptly

262 See Schwartz, supra n. 29, at 1738.
263 Id. at 1739.
264 Id.
265 See, e.g., Savino v. C.P. Hall Co., 199 F.3d 925, 933 (7th Cir. 1999) (“[S]poradic use of abusive language, gender-related jokes, and occasional teasing are fairly commonplace in some employment settings and ‘do not amount to actionable harassment.’” (quoting Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1159 (8th Cir.1999))); Adusumilli v. City of Chicago, 164 F.3d 353, 361-62 (7th Cir. 1998) (teasing, ambiguous comments, and four isolated incidents in which a co-worker briefly touched plaintiff’s arm, fingers, or buttocks were not severe or pervasive enough to constitute sexual harassment); Baskerville v. Culligan Int’l Co., 50 F.3d 428, 431-32 (7th Cir. 1995) (a handful of suggestive comments spread out over seven months did not amount to actionable sexual harassment).
any sexually harassing behavior, and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. An employer can satisfy this requirement by showing that it has a sexual harassment policy, it promptly investigates sexual harassment complaints, and it takes corrective action. Taken together, the severe and pervasive element and the availability of an affirmative defense discourage unmeritorious claims and guard against transforming Title VII into a civility code.

2. The Pros and Cons of an Objective Standard

For those who believe that the causation element should fulfill the same gate-keeping function as the severity requirement, adopting an objective victim-centered standard may be a satisfactory compromise. An objective standard takes care of the egg-shell plaintiff problem by asking whether a reasonable victim would have perceived the harasser’s conduct to be based on sex. The main advantage of this approach is that it imposes a threshold reasonability requirement for the causation element.

The chief concern with an objective victim-centered standard is that it may evolve into a reasonable woman standard. The danger with telling judges or juries to consider how a reasonable person might interpret the harasser’s conduct is that it may inadvertently encourage fact-finders to rely on gender stereotypes and conclude that female plaintiffs would be more likely to perceive harassment as discriminatory because women are oversensitive. Inherent paternalism aside, this attitude is problematic because it favors female plaintiffs charging sexual harassment against male harassers but not vice versa. Granted, this outcome is less troubling for those who

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267 See Savino, at 199 F.3d at 932-33.
268 See Hill, supra n. 57, at 172.
269 See id. at 167-68.
270 See id. at 181-82.
view Title VII as a way of leveling the playing field given the history of discrimination women have traditionally encountered in the workplace. But for those who espouse a sex-blind view of Title VII or who aim to apply the law in same-sex harassment cases, such a result is more difficult to justify.

In sum, analyzing causation from the point of view of the victim rather than that of the harasser has several advantages. Focusing on the victim recognizes that conduct can have a discriminatory effect even if the harasser is not acting on the basis of conscious bias. More importantly, a victim-centered approach does not require the court to get inside the harasser’s head. It does not give the harasser the option of getting away with the behavior by blaming it on personal animus. While victim-centered approaches are not completely problem-free, they are more workable in practice than is a standard that requires a court to figure out why the harasser engaged in the offending conduct in order to determine that the conduct occurred “because of sex.”

CONCLUSION

The trouble with “bitch” is that the message it communicates about the harasser’s attitude toward women in general is ambiguous. In Galloway, the Seventh Circuit concluded that the word is not gender-derogatory. In Passanati, the court reached the opposite conclusion. These contradictory opinions highlight the chief difficulty with relying on a subjective motivation standard to establish the causation element of a harassment claim. In order to determine whether the harasser was consciously motivated by hostility toward women, a judge must infer the presence or absence of such hostility from the word “bitch” alone. This highly speculative exercise is likely to result in decisions that merely reflect the opinion of a particular judge about the meaning of “bitch.” Thus, the subjective motivation standard offers very little guidance to future litigants and threatens to produce an inconsistent and arbitrary body of harassment law.

On the other hand, analyzing causation from the point of view of the victim is a more workable standard. This approach does not require the court to get inside the harasser’s head but focuses instead on the
victim’s interpretation of the offending conduct. In the subjective version of this test, a victim’s credible testimony that she perceived the harassment to be based on sex will suffice to establish the causation element. In the objective version, a judge or a jury will decide whether a reasonable person would have perceived the harassment as motivated by sex. This test eliminates the speculative guesswork about what the harasser was thinking. It refocuses the inquiry on the objective conduct and the injury suffered by the victim who perceived the conduct as discriminatory. If the goal of Title VII is to deter discriminatory behavior, rather than to police discriminatory thinking, then the victim-centered approach advances that objective more effectively.