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Workplace Rumors About Women's Sexual Promiscuity as Gender-Based Insults Under Title VII

Wendy Hess

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Introduction

"[W]hen you want to put down or undermine a woman, accusing her of being slutty works every time."[1]

Theresa Robbins, a waitress in Wilmington, Ohio, became the subject of false, repeated workplace rumors accusing her of sexual promiscuity.[2] Co-workers called her "Skittles" and said that she liked to "taste the rainbow," meaning that "she was 'sleeping with everybody in the restaurant.'"[3] Robbins' male supervisor told her that "a 'little birdie'" told him that she was "sleeping with everyone at the front desk."[4] A female manager made false statements that Robbins was having sex with two different male cooks.[5] After Robbins stayed overnight at a nearby hotel to open the restaurant the next day to cover for employees unable to drive in the snow, she heard rumors that she was "sleeping with a manager."[6] Robbins eventually quit because of the harassment.[7]

Workplace rumors about a female employee's[8] real or perceived sexual promiscuity can create a hostile work environment in violation

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1. LEORA TANENBAUM, I AM NOT A SLUT 40 (2015) [hereinafter TANENBAUM, I AM NOT A SLUT].

2. Robbins v. Columbus Hosp., L.L.C., No. 1–09–cv–559–HJW, 2011 WL 221879 (S.D. Ohio Jan. 24, 2011).

3. *Id.* at *2.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at *2, *6.

8. This Article focuses primarily on cases involving sexual rumors about women because female plaintiffs file the vast majority of Title VII sexual rumor cases. The author reviewed sixty-five published and unpublished federal court Title VII cases in which rumors comprised all or part of the alleged sexually harassing conduct. Only six cases involved allegations by male plaintiffs that they had been the subjects of sexual rumors. *See generally* Venezia v. Gottlieb Mem'l Hosp., Inc., 421 F.3d 468 (7th Cir. 2005) (male and female subjects of sexual rumors); McDonnell v. Cisneros, 84 F.3d 256 (7th Cir.

of Title VII of the Civil Rights Act of 1964 (Title VII). A rumor that a woman is sexually promiscuous is, in essence, a gender-based insult—it censures a woman for violating the sexual double standard.[9] Sexual rumors can undermine a woman's credibility and call into question her workplace achievements. Indeed, research shows that women perceived to violate the sexual double standard are thought less competent.[10] Yet, courts have been inconsistent in sexual rumor cases. Some courts recognize that rumors about sexual promiscuity are gender-based harassment[11] while others do not recognize such rumors as uniquely degrading and insulting to women.[12]

This Article addresses why workplace rumors about a woman's sexual promiscuity violate Title VII's prohibition of workplace harassment "because of sex."[13] Part I discusses the sexual double standard and explains why spreading rumors about a female employee's sexual promiscuity can damage her workplace credibility. Part II examines hostile work environment cases that allege sexual rumors as harassment. Part III recommends how courts should handle Title VII hostile work environment cases involving workplace sexual rumors.

I. "He's a Stud, She's a Slut"[14]: The Problem with Workplace Rumors About a Woman's Sexual Promiscuity

The sexual double standard is a "moral code that permits sexual freedom and promiscuity for men but not for women."[15] A woman who engages in sexually promiscuous behavior with a man is deemed a "slut." A man who engages in the same sexually promiscuous beha-

1996) (same); Pasqua v. Metro. Life Ins. Co., 101 F.3d 514 (7th Cir. 1996) (male subject of sexual rumors); Torres v. Quatro Composites, L.L.C., 902 F. Supp. 2d 1152 (N.D. Iowa 2012) (same); Wirtz v. Kan. Farm Bureau Servs., Inc., 274 F. Supp. 2d 1198 (D. Kan. 2003) (male subject of sexual rumors after turning down sexual offer from female employee); Dellefave v. Access Temps., Inc., No. 99 CIV. 6098RWS, 2001 WL 25745 (S.D.N.Y. Jan. 10, 2001) (male subject of sexual rumors). A complete list of the sixty-five cases is available upon request from the author. It is unsurprising that sexual rumor plaintiffs are predominantly female because women file sexual harassment charges more frequently than men. *See* EQUAL EMP'T OPPORTUNITY COMM'N, SEXUAL HARASSMENT CHARGES: EEOC & FEPAs COMBINED: FY 1997–FY 2011, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (men filed 16.3% of all sexual harassment charges in 2011).

9. *See infra* note 15 and accompanying text.

10. *See infra* notes 25–26 and accompanying text.

11. *See infra* Part II.A.3.

12. *See infra* Part II.A.4.

13. *See* 42 U.S.C. § 2000e(k) (2012); *id.* § 2000e-2(a)(1) (unlawful employment practice to discriminate on the basis of sex).

14. JESSICA VALENTI, HE'S A STUD, SHE'S A SLUT, AND 49 OTHER DOUBLE STANDARDS EVERY WOMAN SHOULD KNOW (2008).

15. *Double Standard of Sexual Behavior*, THE AMERICAN HERITAGE NEW DICTIONARY OF CULTURAL LITERACY (3d ed. 2005), http://dictionary.reference.com/browse/double+standard+of+sexual+behavior (last visited Mar. 4, 2016).

vior with a woman is celebrated for his sexual prowess; he is considered a "stud." Notwithstanding contemporary gender norms, recent research confirms that the double standard still exists.[16] Researchers have found that eighty-five percent of people agree the double standard still exists.[17] Both men and women believe that casual sex, sex outside a committed relationship, is more acceptable for men than for women, and men endorse the double standard more than women.[18]

Feminists have started calling the practice of criticizing a woman's real or perceived sexual promiscuity as "slut-shaming." Slut-shaming refers to "the idea of shaming and/or attacking a woman or a girl for being sexual, having one or more sexual partners, acknowledging sexual feelings, and/or acting on sexual feelings."[19] It is "sexist because only girls and women are called to task for their sexuality, whether real or imagined; boys and men are congratulated for the exact same behavior."[20] Often, "the so-called slut's actual sexual behavior is nonexistent or irrelevant."[21] Slut-shaming reinforces the sexual double standard by intentionally targeting a woman who "does not adhere to feminine norms."[22] Although commentary often focuses on slut-shaming of adolescents,[23] the behavior is not limited to teenagers. This Article discusses workplace slut-shaming involving adults. Workplace slut-shaming often takes the form of co-workers spreading ru-

16. Terri D. Conley et al., *Backlash from the Bedroom: Stigma Mediates Gender Differences in Acceptance of Casual Sex Offers*, 37(3) PSYCHOL. WOMEN Q. 392 (2012). *But see* John K. Sakaluk & Robin R. Milhausen, *Factors Influencing University Students' Explicit and Implicit Sexual Double Standards*, 49(5) J. SEX RES. 464, 464–74 (2012) (double standard exists but research is inconsistent regarding its causes).

17. Michael J. Marks & R. Chris Fraley, *The Sexual Double Standard: Fact or Fiction?*, 52 SEX ROLES 175, 175 (2005).

18. Susan Sprecher et al., *Premarital Sexual Standards and Sociosexuality: Gender, Ethnicity, and Cohort Differences*, 42 ARCHIVES SEXUAL BEHAV. 1395, 1399 (2013).

19. Tekanji, *FAQ: What is "Slut Shaming?"*, FINALLY, A FEMINISM 101 BLOG (Apr. 4, 2010), https://finallyfeminism101.wordpress.com/2010/04/04/what-is-slut-shaming/; *see also* Emily Lindin, *5 Ways You Can Stop Slut Shaming Today*, THE EIGHTY8 (last visited Sept. 7, 2015), http://www.theeighty8.com/5-ways-you-can-stop-slut-shaming-today/ (slut-shaming "involves suggesting that a girl or woman should feel guilty or inferior for her real—or perceived—sexual behavior"); Leora Tanenbaum, *The Truth About Slut-Shaming*, HUFFINGTON POST: HUFFPOST WOMEN (Apr. 15, 2015, 9:19 AM) [hereinafter Tanenbaum, *The Truth*], http://www.huffingtonpost.com/leora-tanenbaum/the-truth-about-slut-shaming_b_7054162.html ("Slut-shaming is the experience of being labeled a sexually out-of-control girl or woman (a 'slut' or 'ho') and then being punished socially for possessing this identity.").

20. Tanenbaum, *The Truth*, *supra* note 19.

21. TANENBAUM, I AM NOT A SLUT, *supra* note 1, at xvii.

22. *Id.* at 68.

23. *See, e.g.*, SLUT: A PLAY AND GUIDEBOOK FOR COMBATING SEXISM AND SEXUAL VIOLENCE (Katie Cappiello & Meg McInerney eds., 2015); TANENBAUM, I AM NOT A SLUT, *supra* note 1; LEORA TANENBAUM, SLUT!: GROWING UP FEMALE WITH A BAD REPUTATION (2000); EMILY WHITE, FAST GIRLS: TEENAGE TRIBES AND THE MYTH OF THE SLUT (2002).

mors that a female employee has engaged in sexually promiscuous behavior with a male superior or male co-worker.[24]

Sexually promiscuous women are judged more negatively than sexually promiscuous men, not only on moral grounds, but also on competency measures relevant to success in the workplace. Psychologist Terry Conley and her colleagues found that both men and women rated a sexually promiscuous woman as less competent, intelligent, and mentally healthy than a similarly situated sexually promiscuous man.[25] The researchers' female subjects reported believing that they would be "perceived as more intelligent, mentally healthy, physically attractive, socially appropriate, sexually well adjusted, and more positively overall" if they refused a casual sex offer.[26]

Conversely, the study's male subjects "expected to be perceived as more intelligent, mentally healthy, and sexually well adjusted for *accepting* the [casual sex] offer."[27] Men reported believing that, if they refused a casual sex offer, they would be perceived as "socially inappropriate" and people would more likely view them as homosexual.[28] These findings are consistent with other research indicating heterosexual males are particularly insulted if they are called "gay."[29]

Women have internalized the sexual double standard. Cornell University developmental psychologist Zhana Vrangalova and her colleagues found that females judged sexually promiscuous women more negatively and viewed them as less suitable for friendship.[30] Females, regardless of their promiscuity, preferred having a non-promiscuous woman as a friend because she would be more competent (hardworking, responsible, intelligent, mature) and emotionally stable, among other desirable attributes.[31] Vrangalova also confirmed the other half of the sexual double standard—men view promiscuous men as *more* competent and emotionally stable.[32] "The findings suggest that

24. Slut-shaming takes different forms and can occur regardless of whether the harasser describes the woman as a "slut." Tekanji, *supra* note 19. In addition to spreading rumors about a woman's sexual promiscuity, slut-shaming also occurs when someone posts nude photos of a woman online without her permission. *See, e.g.*, Tanenbaum, *The Truth*, *supra* note 19 (posting nude photographs of a woman on social media without her consent).

25. Conley et al., *supra* note 16, at 403.

26. *Id.* at 397.

27. *Id.* at 401 (emphasis added).

28. *Id.*

29. *Id.* at 397; *see also* Todd G. Morrison et al., *Canadian University Students' Perceptions of the Practices that Constitute "Normal" Sexuality for Men and Women*, 17(4) CAN. J. HUM. SEXUALITY 161, 166 (2008) (both males and females consider it more abnormal for men to be disinterested in sexual activity, engage in homosexual fantasy, and practice sexual activities characterized by submission).

30. Zhana Vrangalova et al., *Birds of a Feather? Not When It Comes to Sexual Permissiveness*, 31(1) J. SOC. & PERS. RELATIONSHIPS 93, 105–06 (2014).

31. *Id.* at 100, 105.

32. *Id.* at 105.

though cultural and societal attitudes about casual sex have loosened in recent decades, women still face a double standard that shames 'slutty' women and celebrates 'studly' men . . . ."[33]

II. Addressing the Problem of Sexual Rumors under Title VII

Sexual rumors can create a hostile work environment in violation of Title VII if they satisfy each element of a sexual harassment claim. Proof of a hostile work environment requires evidence that the harassing conduct was unwelcome,[34] because of sex,[35] and "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[36] The employer is liable for the hostile work environment if it knew or should have known about the harassment and failed to take proper remedial action.[37] This Article examines two of these elements in the context of sexual rumors: (1) the because of sex requirement[38] and (2) employer responses to workplace sexual rumors.[39]

A. Title VII's Because of Sex Requirement

Title VII does not prohibit all harassing conduct. Rather, harassment must be because of a Title VII protected characteristic.[40] This seemingly simple phrase—because of—is in fact conceptually challenging, and courts' interpretations often preclude a judicial remedy for plaintiffs.[41] Scholar David S. Schwartz points out that referring

33. *Women Reject Sexually Promiscuous Peers When Making Female Friends*, SCIENCEDAILY (June 3, 2013), http://www.sciencedaily.com/releases/2013/06/130603142237.htm (quoting Zhana Vrangalova, the study's lead author).

34. Meritor Savs. Bank v. Vinson, 477 U.S. 57, 58 (1986); 29 C.F.R. § 1604.11(a) (2014) (detailing when "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" may "constitute sexual harassment").

35. 42 U.S.C. § 2000e-2(a)(1) (2012); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

36. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

37. *See generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

38. *See infra* Part II.A.

39. *See infra* Part II.B. Whether sexual rumors are sufficiently severe or pervasive to create an abusive working environment is beyond the scope of this Article.

40. *Oncale*, 523 U.S. at 80 ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat[ion]* . . . because of . . . sex.'") (alteration in original).

41. *See, e.g.*, Andrea Meryl Kirshenbaum, *"Because of . . . Sex": Rethinking the Protections Afforded Under Title VII in the Post-*Oncale *World*, 69 ALB. L. REV. 139, 173 (2006) ("As a review of jurisprudence in this area illustrates, there is a consensus about the [Title VII] 'because of . . . sex' requirement, and that consensus is that no court truly knows what it means."); David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1709 (2002) ("When courts or commentators discuss whether an act of harassment is 'because of sex' . . . there is a great likelihood that the discussion will either be misunderstood or analytically faulty.").

to the "because of" requirement as a causation requirement is "something of a misnomer."[42] In tort cases, causation refers to "whether the defendant's negligent or intentional act caused damage to the plaintiff."[43] However, "[i]n discrimination cases, the relationship between the defendant's action and harm to the plaintiff is usually not in controversy."[44] Instead, "the question is whether the 'cause' *of the defendant's act* was the protected characteristic of the plaintiff; put another way, causation in discrimination cases asks whether the harm to the plaintiff was discriminatory in nature."[45]

1. Because of Sex Bewilders Courts and Legal Practitioners

The ambiguity of the term "sex" and uncertainty about the level of required discriminatory intent are among the "confusing issues bedeviling sexual harassment law."[46] Title VII does not define "sex," other than to indicate that it includes pregnancy,[47] and the term is subject to several different meanings. For instance, "sex" may refer narrowly to a person's biological sex, male or female,[48] or more broadly to gender, a concept referring to "the behavioral, cultural, or psychological traits typically associated with one sex."[49] The term "sex" can also refer to sexual behavior: "physical sexual acts or communicative acts depicting sexual acts."[50]

The phrase "because of" requires a link between the plaintiff's protected status and the harassing conduct but does not make clear what level of discriminatory intent suffices. Discriminatory intent is difficult to identify in harassment cases because it examines motivations for harassing behavior, rather than the motivations for workplace-related business decisions such as hiring, firing, or promotion. Harassing behavior is non-productive, non-legitimate workplace conduct.[51] "[N]onrational, harassing actions" are more likely to reflect "unconscious bias, since there is no call to engage in a conscious pro-

42. Schwartz, *supra* note 41, at 1710.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 1705.
47. 42 U.S.C. § 2000e(k) (2012) ("'[B]ecause of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . .").
48. Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535, 545–48 (2007).
49. *See Gender*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/gender (last visited Aug. 15, 2015); *see also* BARBARA T. LINDEMANN & DAVID D. KADUE, WORKPLACE HARASSMENT LAW 8-14 (2d ed. 2012) (gender "includes both the biological and the cultural differences between men and women").
50. Schwartz, *supra* note 41, at 1706.
51. *Id.* at 1717–18.

cess of reasoned decisionmaking in order to harass."[52] "[M]any, perhaps most, harassers may well act out of intentional but unconscious bias based on a lack of self-awareness or reflection."[53] If courts interpret "because of" to require a *conscious* motive to harass someone because of sex, they incorrectly assume that harassers are sufficiently self-aware to articulate a conscious motive. For example, a harasser may commit an intentional act—such as using an epithet or making a sexual advance—without being aware that the act was *motivated by* hostility to women.[54]

Focusing on the harasser's conscious motive is inconsistent with sexual harassment law's emphasis on the workplace *environment*. For example, the Supreme Court considers harassment to be because of sex if "members of one sex are *exposed* to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[55] In *Meritor Savings Bank v. Vinson*, the Court stated that a hostile environment results from conduct that "has the purpose *or effect* of . . . creating an intimidating, hostile, or offensive working environment."[56] This suggests that conscious motivation is not required to meet the "because of" requirement. Courts can and should examine more than the harasser's conscious, articulated motivations; courts also should infer motivation from the harasser's conduct and the harassment's impact on the victim's workplace experience.[57]

Determining the harasser's subjective motive is made even more difficult because the harasser may have multiple motives, both conscious and unconscious. For example, a harasser could be motivated by misogyny, sexual desire, personal dislike of certain types of women, personal dislike of the plaintiff specifically, or jealousy. Title VII prohibits employment discrimination involving "mixed motives" where a plaintiff's protected characteristic is a "motivating factor" for the adverse employment action.[58] In *EEOC v. Abercrombie &*

52. *Id.* at 1718.

53. *Id.*

54. *Id.* at 1718–19.

55. 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) (emphasis added)).

56. 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a)(3) (1985)) (emphasis added); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) ("[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance.").

57. *See, e.g.*, Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1000 (10th Cir. 1996) ("[E]ven if the motivation behind plaintiff's mistreatment was gender neutral . . . the manner in which her coworkers expressed their anger and jealousy was not. Rather, plaintiff's coworkers often chose sexually harassing behavior to express their dislike of plaintiff, conduct which would not have occurred if she were not a woman.").

58. 42 U.S.C. § 2000e-2(m) (2012); *see also, e.g.*, Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 144 (4th Cir. 1996) (viable Title VII claim although harassment occurred both because of sex and because of plaintiff's sexual orientation).

Fitch Stores, Inc.,[59] a Title VII religious discrimination case, the Supreme Court cited Title VII's "motivating factor" language in holding that the "because of" requirement is a more "relax[ed]" standard than but-for causation.[60]

The harasser's subjective motive is even more difficult to ascertain in sexual rumor cases because the rumors' origins are often unclear.[61] Even if the original source is identifiable, rumors spread quickly, making it difficult to identify those who contribute to its perpetuation. One commentator observed: "A rumor once started is virtually self-propelling . . . . [A] rumor must be likened to a torpedo; for, once launched, it travels of its own power."[62]

2. Courts Use Various Evidentiary Routes to Determine Whether Sexual Rumors Occurred Because of Sex

Because a harasser's motive is rarely explicit, courts must make inferences from circumstantial evidence to determine if harassment occurred because of sex. In *Oncale v. Sundowner Offshore Services, Inc.*,[63] the Court detailed three evidentiary routes to demonstrate a causal connection between harassment and a plaintiff's sex: (1) desire-based "explicit or implicit proposals of sexual activity;" (2) "sex-specific and derogatory terms . . . mak[ing] it clear that the harasser is motivated by general hostility to the presence of women in the workplace;" and (3) "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[64] The Court did not state that this is an exhaustive list of evidentiary routes. Indeed, lower courts view *Oncale*'s evidentiary routes as instructive rather than exhaustive.[65] Courts also have recognized a fourth evidentiary route—harassing behavior that reflects gender-based stereotyping.[66]

A. SEXUAL BEHAVIOR

Oncale held that plaintiffs could prove causation with evidence of sexual conduct or communication about sexual activity, but it placed

59. 135 S. Ct. 2028 (2015).

60. *Id.* at 2032. *Abercrombie* will likely affect the circuits using a but-for causation test in sexual harassment cases.

61. For example, some cases involve rumors started by anonymous letters to the plaintiffs' superiors. *See, e.g.*, Duncan v. Manager, Dep't of Safety, Denver, 397 F.3d 1300, 1307 (10th Cir. 2005); McDonnell v. Cisneros, 84 F.3d 256, 257 (7th Cir. 1996).

62. Robert A. Knapp, *A Psychology of Rumor*, PUB. OPINION Q., Spring 1944, at 22, 28 (1944).

63. 523 U.S. 75 (1998).

64. *Id.* at 80–81.

65. *See, e.g.*, Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) ("*Oncale* also demonstrates that there is no singular means of establishing the [because of] aspect of sexual harassment.").

66. *See infra* Part II.A.2.B (also discussing the most fitting evidentiary routes for workplace sexual rumors).

greater emphasis on the harasser's sexual desire.[67] The Court cautioned that it has "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."[68]

If narrowly interpreted, *Oncale*'s desire-based sexual behavior requirement would unduly emphasize the purpose rather than the effect of harassing conduct.[69] That would unjustly exclude harassing sexual conduct used to wield power over, or otherwise degrade, a victim rather than to express desire.[70] Several courts recognize that sexual conduct that is not desire-based may nevertheless be because of sex. For example, in *Petrosino v. Bell Atlantic*,[71] the Second Circuit concluded that depicting female employees in jokes and graphics in a "sexually demeaning" way "communicated the message that women as a group were available for sexual exploitation by men."[72]

Even a narrow application of *Oncale*'s desire-based sexual behavior evidentiary route will cover some sexual rumors. Several courts implicitly or explicitly recognize that sexual rumors are because of sex when a male has (1) spread rumors after a female employee romantically rebuffs him or (2) spread rumors about his own sexual exploits with the female employee. In *Southerland v. Sycamore Community School District Board of Education*,[73] for example, the court denied the employer's summary judgment motion where a male harasser made sexual advances toward the female plaintiff, disobeyed his employer's direct orders not to interact with the plaintiff, and spread rumors that he was having a sexual affair with the plaintiff.[74]

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67. *Oncale*, 523 U.S. at 80. *Oncale* involved same-sex harassment. *See id.* With regard to this first method of proving causation, the Court held that a plaintiff claiming same-sex harassment could prove desire-based harassment if the harasser was homosexual. *Id.*

68. *Id.*

69. Schwartz, *supra* note 41, at 1720–21 (citing Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 743 (1997)).

70. *Id.*

71. 385 F.3d 210 (2d Cir. 2004).

72. *Id.* at 222. The court held that the jury could have found that the conduct was "based on" the female plaintiff's sex because "[s]uch workplace disparagement of women . . . stands as a serious impediment to any woman's efforts to deal professionally with her male colleagues." *Id*; *see also* Hoyle v. Freightliner, LLC, 650 F.3d 321, 331–32 (4th Cir. 2011) ("A juror could reasonably find that sexualizing the work environment by placing photos of nude women or women in sexually provocative dress and poses in common areas is detrimental to female employees and satisfies the 'because of sex' requirement.").

73. 277 F. Supp. 2d 807 (S.D. Ohio 2003).

74. *Id.* at 809, 815–16; *see also* Cross v. Prairie Meadows Racetrack & Casino, Inc., 615 F.3d 977, 979 (8th Cir. 2010) (male co-worker spread rumor that female plaintiff performed fellatio on him); Rahn v. Junction City Foundry, Inc., 161 F. Supp. 2d 1219, 1228–29 (D. Kan. 2001) (male co-worker claimed he had sex with female plaintiff); Quiroz v. Hartgrove Hosp., No. 97 C 6515, 1999 WL 281343, at *1–5 (N.D. Ill. Mar. 24, 1999)

Although the Supreme Court cautioned that harassment is not "automatically discrimination because of sex merely because the words used have sexual content or connotations,"[75] workplace sexual behavior—including communication about sexual behavior—can degrade and demean women, even if not desire-based. For example, in *Ocheltree v. Scollon Productions, Inc.*,[76] the Fourth Circuit held that the female plaintiff's male co-workers demonstrated gender-based animus through sexual behavior, such as discussion of their sexual exploits with women, "that consistently painted women in a sexually subservient and demeaning light."[77] Similarly, rumors about a woman's sexual promiscuity can meet the "because of" requirement using the sexual behavior evidentiary route as well as the gender-based hostility and gender stereotypes evidentiary routes, discussed next.

B. GENDER-BASED HOSTILITY AND NONCONFORMITY WITH GENDER STEREOTYPES

Plaintiffs also may meet the causation requirement by showing that harassment—even nonsexual harassment—demonstrates a "general hostility to the presence of women in the workplace."[78] Similarly, the Supreme Court held in *Price Waterhouse v. Hopkins*[79] that gender stereotyping is actionable discrimination under Title VII. In *Price Waterhouse*, the defendant denied the plaintiff partnership, based at least in part on her nonconformity with female stereotypes.[80] For example, co-workers described the plaintiff as "macho;" told her to take "a course at charm school;" and advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[81]

Lower courts have relied on *Price Waterhouse* to find that gender stereotyping is actionable sexual harassment.[82] Often, these cases involve male plaintiffs harassed for not conforming to masculine gender stereotypes. For example, in *Nichols v. Azteca Restaurant Enterprises*,[83] the Ninth Circuit considered co-worker verbal sexual harassment of a male plaintiff.[84] The plaintiff's male co-workers and a male

(after female plaintiff spurned male employee's sexual advances, he spread rumors that she was a prostitute).

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

76. 335 F.3d 325 (4th Cir. 2003) (en banc).

77. *Id.* at 332 (quoting *Oncale*, 523 U.S. at 80).

78. *Id.*

79. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

80. *Id.* at 228–29.

81. *Id.* at 235 (internal citations omitted).

82. *See* LINDEMANN & KADUE, *supra* note 49, at 8-41 to 8-52, 17-13 to 17-14 (discussing sex stereotyping circuit court decisions).

83. 256 F.3d 864 (9th Cir. 2001).

84. *Id.* at 869.

supervisor: referred to the plaintiff with female pronouns; mocked him for behaving like a woman; "derided [him] for not having sexual intercourse" with a female employee; and called him derogatory names, comparing him to a woman ("female whore") or questioning his sexual orientation ("faggot").[85] The court held this verbal harassment was actionable because, as in *Price Waterhouse*, it was "discrimination on the basis of sex stereotypes."[86]

Workplace rumors about a woman's sexual promiscuity also satisfy Title VII because they bring unwanted attention to a woman's real or perceived sexual behavior and demean her for violating gender-based norms. Due to the sexual double standard, spreading a rumor that a woman is sexually promiscuous is tantamount to calling her a "slut" or a "whore," both gender-based insults.[87] Research demonstrates that accusing a woman of being sexually promiscuous calls into doubt her desirability as a competent and professional employee and colleague.[88]

3. Case Law Recognizing Sexual Rumors as Gender-Based Insults Premised on Gender Stereotypes

Some courts have concluded that a workplace sexual rumor about a female employee satisfies the because-of-sex requirement even though the rumor also concerned a man because the harassment questions only the woman's competency and achievements. *Jew v. University of Iowa*,[89] *Spain v. Gallegos*,[90] and *McDonnell v. Cisneros*[91] were three early, groundbreaking decisions concluding sexual rumors occurred because of sex.

The earliest sexual rumor case, *Jew v. University of Iowa*, involved a particularly egregious sexual harassment claim. Dr. Jean Jew, a female associate professor at the University of Iowa[92] endured over ten years of false rumors that she had a sexual relationship with her married, male department head, Dr. Williams, in exchange for favorable treatment.[93] A male faculty member told other faculty, graduate students, and staff that Dr. Jew was seen having sexual intercourse with Dr. Williams in the workplace and that she and Dr. Williams

85. *Id.* at 870, 874.
86. *Id.* at 874–75.
87. *See, e.g.*, Flockhart v. Iowa Beef Processors, Inc., 192 F. Supp. 2d 947, 967 (N.D. Iowa 2001) (calling female plaintiff a "slut," "whore," "bitch," and "cunt" were gender-based insults).
88. *See supra* note 25 and accompanying text.
89. 749 F. Supp. 946 (S.D. Iowa 1990).
90. 26 F.3d 439 (3d Cir. 1994).
91. 84 F.3d 256 (7th Cir. 1996).
92. *Jew*, 749 F. Supp. at 947.
93. *Id.* at 947, 949.

were seen together leaving a motel.[94] The rumors spread widely in the department, to other parts of the university, the Iowa City community, and faculty at other institutions.[95]

The court concluded that the rumors about Dr. Jew occurred because of sex because they "accused her of physically using her sex as a tool for gaining favor, influence and power with the Head of the Department, a man, and suggested that her professional accomplishments rested on sexual achievements rather than achievements of merit."[96] It did not matter that the rumors also implicated the male department head. Unlike the rumors about Dr. Jew, "there was no suggestion that Dr. Williams was *using* a sexual relationship to gain favor, influence and power with an administrative superior . . . . Were Dr. Jew not a woman, it would not likely have been rumored that [she] gained favor with the Department Head by a sexual relationship with him."[97]

In *Spain v. Gallegos*, there were workplace rumors that EEOC investigator Ellen Spain was having sex with her boss for personal gain.[98] Eugene Nelson, Ms. Spain's boss, met with her frequently to extort private loans from her.[99] Other employees observing these private meetings started rumors that Nelson and Spain had a sexual relationship.[100] Spain's co-workers ostracized her and believed her perceived influence over Nelson meant she could get them into trouble.[101] Spain asked Nelson to stop the rumors, but the private loan meetings continued and so did the sexual rumors.[102] The social stigma caused Spain to receive poor performance evaluations, particularly on interpersonal relations measures.[103] Ultimately, due to her poor evaluations, Nelson denied Spain a promotion.[104]

The Third Circuit held that the rumors occurred because of sex because they asserted that Spain had a sexual relationship with her male supervisor.[105] The court observed: "Unfortunately, traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior stubbornly

94. *Id.* at 949. These are only some of the examples of the rumor mongering described in the court's opinion.

95. *Id.* at 950.

96. *Id.* at 958.

97. *Id.*

98. 26 F.3d 439, 441–42 (3d Cir. 1994).

99. *Id.* at 442.

100. *Id.* at 442 n.4.

101. *Id.*

102. *Id.* at 442.

103. *Id.* at 442–43. One supervisor "graded Spain low on the 'integrity' category of [an] evaluation due to his perception of her conduct with Nelson based on the rumors and his observations." *Id.* at 442.

104. *Id.* at 442.

105. *Id.* at 448.

persist in our society."[106] Such "stereotypes may cause superiors and co-workers to treat women in the workplace differently than men . . . ."[107] If a male employee had regular close contact with Nelson, co-workers likely would not have assumed the relationship was sexual.[108] Although the rumors also implicated Nelson, the court found that "the rumors did not suggest that his involvement in the alleged relationship had brought him additional power in the workplace over his fellow employees, and the employees had no reason for resenting him in the way they did Spain."[109]

McDonnell v. Cisneros[110] is notable as the first sexual rumor case brought by both a female and a male. The sexual harassment claims of Thomas Boockmeier, a male supervisor, and his female subordinate, Mary Pat McDonnell, were based on the same sexual rumors.[111] The rumors started with anonymous letters sent to the plaintiffs' employer, accusing the two of job-related sexual misconduct.[112] The letters made "lurid charges," including an allegation that McDonnell was Boockmeier's "in-house sex slave" and that she provided him with sexual favors "in exchange for more rapid promotion and other preferential treatment."[113] After receiving the letters, the employer launched an investigation.[114] The investigators exacerbated the situation by indicating to interviewees that they believed the rumors were true.[115] The "hostile and unprofessional manner" of the investigation led to more rumors, including additional salacious allegations of incest and that Boockmeier had fathered McDonnell's child.[116] The rumors made the plaintiffs "pariahs," male employees shunned McDonnell, and female employees shunned Boockmeier.[117] Although the investigation exoner-

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* In dicta, *Spain* emphasized the importance of the supervisor's role in perpetuating rumors. The court distinguished rumors about Spain from rumors of a co-worker's behavior outside the workplace or rumors resulting from "employees' misperception of a supervisor's and an employee's frequent but necessary, job-related interaction." *Id.* at 448–49. The court's emphasis on the supervisor's role in causing the rumors was misplaced. Consideration of a supervisor's role in creating and perpetuating rumors is more relevant to evaluating severity or pervasiveness of the conduct and the existence of employer liability. Indeed, had the court applied this reasoning in *Jew*, where the department head did not contribute to misperceptions of his relationship with Dr. Jew, it might have answered the because-of-sex question differently.
110. 84 F.3d 256 (7th Cir. 1996).
111. *Id.* at 257. The plaintiffs sued separately, but the lower court consolidated the cases. McDonnell v. Cisneros, Nos. 94 C 4440, 94 C 7314, 1995 WL 110131, at *1 (N.D. Ill. Mar. 13, 1995).
112. *McDonnell*, 84 F.3d at 257 (7th Cir. 1996).
113. *Id.*
114. *Id.*
115. *Id.* at 258.
116. *Id.*
117. *Id.*

ated the plaintiffs, their supervisors discouraged them from doing anything that would create a "'perception' of sexual activity."[118] Ultimately, the employer reassigned Boockmeier to a different office for ninety days "to dilute any perception that he had a sexual relationship with McDonnell."[119]

Writing for the Seventh Circuit, Chief Judge Richard Posner concluded that sexual rumors, even those about a man *and* a woman, can be because of sex under Title VII. With respect to McDonnell's claim, the court reasoned that "[u]nfounded accusations that a woman worker is a 'whore,' a siren, carrying on with her coworkers, a Circe, 'sleeping her way to the top,' and so forth are capable of making the workplace unbearable for the woman verbally so harassed."[120]

The court also held that the rumors about Boockmeier could be because of sex, placing particular emphasis on the "exceedingly perverse" results if an employer could avoid liability because the harasser "[took] care to harass sexually an occasional male worker, though his preferred targets were female."[121] The court stressed Title VII's purpose of protecting women in the workplace: "Sexual harassment was brought under the aegis of Title VII's sex discrimination clause because it makes the workplace difficult for women on account of their sex."[122] Although the court recognized that same-sex harassment and harassment of men by women exists, it said "these are relatively esoteric practices that do not detract seriously from the fact that sexual harassment is a source of substantial nonpecuniary costs to many working women."[123] The court rejected as "too literal" the employer's argument that the harassment was not because of sex because it was directed at both a man and a woman.[124] The court reasoned: "By a further stretch of the concept a male supervisor for whom life is made unbearable by baseless accusations that he is extorting sexual favors from his subordinates could also be thought a victim of sexual harassment."[125]

Although these early sexual rumor decisions addressed rumors accusing female employees of using sex for workplace advancement, sexual rumors need not make this particular connection to constitute ha-

118. *Id.*
119. *Id.*
120. *Id.* at 259.
121. *Id.* at 260.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* The court also reasoned that rumors that a male supervisor exchanged preferential employment treatment for sexual favors from female subordinates were because of sex because they were based "on the difference in sex between [the male supervisor] and the persons he was accused of abusing." *Id.* This rationale is the weakest and least satisfying explanation. It suggests that rumors about employees of the same sex would not meet the because-of-sex requirement.

rassment because of sex. Courts also hold that rumors about a woman's sexual promiscuity, regardless of whether the rumor accuses the woman of "[sleeping] her way to the top," are gender-based insults that accuse the woman of violating gender-based behavioral norms.[126]

4. Case Law Holding Sexual Rumors Were Not Because of Sex: The "Equal Opportunity Harasser" Loophole

Not all courts determine that rumors about a woman's sexual promiscuity occurred because of sex. The most common reason[127] for this determination is because the rumors were about both a man's and a woman's sexual behavior—the so-called "equal opportunity harasser" rationale.[128] Courts holding that sexual rumors about a man and woman were not because of sex often rely on *Pasqua v. Metro Life Insurance Co.*,[129] decided by a different panel of the Seventh Circuit shortly after *McDonnell*. *Pasqua* is atypical of sexual rumor cases because it was brought by a sole male plaintiff.[130] Donald Pasqua, a life insurance company branch manager, sued his employer for sexual harassment based on rumors spread by his employees that he "engaged in an intimate relationship" with a female subordinate to whom he

126. *See, e.g.*, Brown-Baumbach v. B & B Auto., Inc., 437 F. App'x 129, 133–34 (3d Cir. 2011) (rumor about female employee having a sexual relationship with male co-worker could be because of sex even though rumor did not accuse her of using a sexual relationship for workplace advancement); Southerland v. Sycamore Cmty. Dist. Bd. of Educ., 277 F. Supp. 2d 807, 816 (S.D. Ohio 2003); Rahn v. Junction City Foundry, Inc., 161 F. Supp. 2d 1219, 1228–29 (D. Kan. 2001).

127. Less common reasons include personal dislike and the underlying truth of the rumors. *See, e.g.*, Brown v. Henderson, 257 F.3d 246, 255–56 (2d Cir. 2001) (sexual rumor about female employee having an extramarital affair with a male co-worker "was fundamentally the product of a workplace dispute stemming from the union election, and not from her being a woman"); Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 999, 1001 n.1 (10th Cir. 1996) (evidence supported veracity of rumors about plaintiff's sexual relationship with her boss). *But see* Nash v. N.Y. State Exec. Dep't, Div. of Parole, No. 96 CIV. 8354(LBS), 1999 WL 959366, at *8–9 (S.D.N.Y. Oct. 20, 1999) (viable sexual harassment claim based on rumor that female plaintiff was a prostitute in the past (true) and that she was recruiting female co-workers to work as prostitutes (false)).

128. A rationale that Judge Posner rejected in *McDonnell*. *See* McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996); *see also* text accompanying notes 120–125.

129. 101 F.3d 514 (7th Cir. 1996).

130. *Id.* at 515. Indeed, it remains atypical because only four of sixty-five published and unpublished federal Title VII sexual harassment cases reviewed for this Article involved a sole male plaintiff who was the subject of rumors about his sexual promiscuity. *See generally id.*; Torres v. Quatro Composites, L.L.C., 902 F. Supp. 2d 1152 (N.D. Iowa 2012); Wirtz v. Kansas Farm Bureau Servs., Inc., 274 F. Supp. 2d 1198 (D. Kan. 2003); Dellefave v. Access Temps., Inc., No. 99 CIV. 6098 RWS, 2001 WL 25745 (S.D.N.Y. Jan. 10, 2001). One of these cases involved a rumor that the male plaintiff *lacked* sexual prowess. *See Wirtz*, 274 F. Supp. 2d at 1210 (rumor that female co-worker turned down male plaintiff for sex). There are likely more sole male plaintiff harassment cases based on rumors about sexual orientation. *See, e.g.*, Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999) (rumors about male plaintiff's sexual orientation).

showed favoritism.[131] Both male and female employees circulated the rumors within Pasqua's office and at other branch offices.[132] Both Pasqua and the female subordinate were upset about the rumors.[133] Pasqua complained to his employer several times about the rumors and reported that the female subordinate was threatening a sexual harassment lawsuit.[134] Pasqua's employer demoted him a few weeks later, purportedly because his branch office was not meeting sales objectives.[135]

The Seventh Circuit held that Pasqua's hostile work environment claim did not meet the because of sex requirement because the rumors were about both a man and a woman and "both men and women alike were talebearers."[136] The court reasoned that the sort of rumors in this case can spread for reasons other than gender discrimination.[137] The court explained: "In addition to what commonly motivates gossip of this type—a fascination with the prurient—perceptions of favoritism on Pasqua's part added fuel to the fire . . . ."[138] The court acknowledged "that someone might spread slanderous rumors in the workplace for the simple motivation that someone else was of a particular gender," but Pasqua's case was "not one of those rarities."[139]

Although *Pasqua* is atypical—a sole male plaintiff asserting sexual harassment from rumors about his sexual liaison with a female subordinate[140]—courts often cite it to support decisions that sexual rumors cannot meet the because of sex requirement.[141] For example, in

131. *Pasqua*, 101 F.3d at 515. For example, when the two were simultaneously out of the office, one employee said that Pasqua was probably at the female subordinate's house "laying her and her new tile." *Id.* at 515 n.1.

132. *Id.* at 515.

133. *See id.* at 515–16.

134. *Id.* at 516.

135. *Id.*

136. *Id.* at 517. This aspect of the court's decision is particularly vulnerable because the Supreme Court later recognized same-sex harassment claims in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998). For example, both men and women can sexually harass women. If women spread rumors about other women, as they did about the female subordinate in *Pasqua*, they have internalized the sexual double standard. *See supra* notes 30–31 and accompanying text (research shows women internalize the sexual double standard).

137. *Pasqua*, 101 F.3d at 517.

138. *Id.*

139. *Id.* Curiously, the court did not rely on *McDonnell*, which the Seventh Circuit had decided just six months earlier. Not only is this peculiar in that the two cases both concerned sexual rumors, it contravened Seventh Circuit jurisprudence requiring the court to "give considerable weight" to its prior decisions unless overruled or otherwise undermined by a higher court's decision. *See* Haas v. Abrahamson, 910 F.2d 384, 393 (7th Cir. 1990).

140. *Pasqua*, 101 F.3d at 515–16.

141. *See, e.g.*, Duncan v. Manager, Dep't of Safety, Denver, 397 F.3d 1300, 1312 (10th Cir. 2005); Ptasnik v. City of Peoria, Dep't of Police, 93 F. App'x 904, 909 (7th Cir. 2004); Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000); Lewis v. Bay Indus., Inc., 51 F. Supp. 3d 846, 854–55 (E.D. Wis. 2014); Reiter v. Oshkosh Corp., No. 09-C-

Lewis v. Bay Industries, Inc.,[142] Kyla King was subject to false rumors after she was promoted from receptionist to "travel manager" in a newly created travel department.[143] The rumors alleged King was having sex with the company's male president, resulting in the promotion and her receiving gifts.[144] Administrative support staff and upper-level executives—including, paradoxically, the human resources manager—spread the rumors.[145]

The company terminated one of King's male co-workers, Timothy Lewis, after he complained to management on King's behalf about the rumors.[146] Lewis filed a Title VII retaliation claim,[147] which requires only that he establish that he was retaliated against for reporting what he reasonably believed was an unlawful employment practice.[148]

The court held that Lewis "could not have reasonably believed that King was subjected to discrimination on the basis of sex."[149] Relying on *Pasqua*, the court reasoned that the rumors were not because of sex because they were about both a male and a female.[150] Lewis unsuccessfully tried to distinguish *Pasqua* by arguing that King experienced harassment disproportionate to that experienced by the male subject of the rumor.[151] The court's "simple answer" to this argument was that the male subject of the rumor was the company's president and owner, and, therefore, no one would believe he obtained an undeserved position "through unfair means."[152] The court explained: "It may be true that King suffered more insults than [the company president], but [they] were not similarly situated employees . . . [the president] ran the company, and it is unsurprising that no one teased or insulted him in connection with the rumors."[153] The court held that the rumors were not based on King's sex, but "were based on the belief, whether true or not, that King had been unfairly given a position she was

239, 2010 WL 2925916, at *6 (E.D. Wis. July 22, 2010); Snoke v. Staff Leasing, Inc., 43 F. Supp. 2d 1317, 1327 (M.D. Fla. 1998).

142. 51 F. Supp. 3d 846 (E.D. Wis. 2014).

143. *Id.* at 850.

144. *Id.*

145. *Id.* Female administrative employees who perpetuated the rumors worked for the company longer than King and resented her promotion. *Id.*; *see also* Plaintiff's Brief in Response to Defendants' Motion for Summary Judgment at 3, *Lewis*, 51 F. Supp. 3d 846 (No. 12-C-1204) (female human resources manager and male general manager spread the rumors).

146. *Lewis*, 51 F. Supp. 3d at 850–51.

147. *Id.* at 849.

148. 42 U.S.C. § 2000e-3(a) (2012). Even if the employee is mistaken, complaints are protected if the employee had a reasonable and good faith belief that the complained-of conduct violated Title VII. *See Lewis*, 51 F. Supp. 3d at 854.

149. *Lewis*, 51 F. Supp. 3d at 856.

150. *See id.* at 855–56.

151. *Id.* at 855.

152. *Id.* at 856.

153. *Id.*

not qualified to perform."[154] The court failed to recognize that the sexual rumors were used to question King's competency and achievements.[155]

5. Limits on the Equal Opportunity Harasser Rationale and *Pasqua*'s Impact: *Venezia v. Gottlieb Memorial Hospital, Inc.*

Just as the Seventh Circuit critiqued the equal opportunity harasser loophole in *McDonnell*,[156] scholars have also criticized this rationale for creating the "perverse" situation in which "harassing more people leads to less liability under Title VII."[157] Some courts have avoided the equal opportunity harasser rationale by distinguishing the severity or manner of the harassing conduct toward men and women.[158] Other courts recognize that the same harassing conduct toward a man and a woman might be specifically insulting to each of them for different reasons.[159] For example, in *Chiapuzio v. BLT Operating Corp.*,[160] a district court denied summary judgment on claims by a husband and wife who asserted their male manager subjected them to "sexually abusive remarks."[161] The harasser described to the plaintiffs his "sexual prowess and included graphic descriptions of sexual acts [he] . . . desired to perform with various *female* employees," including the plaintiff's wife.[162] The harasser also said he could "do a better job of making love to [the wife] . . . than [her husband] . . . could."[163] The court concluded: "Where a harasser violates both men and

154. *Id.*

155. *Contra* Rother v. NYS Dep't of Corr. & Cmty. Supervision, 970 F. Supp. 2d 78 (N.D.N.Y. 2013). In *Rother*, the female plaintiff's hostile work environment claim was based, in part, on an incident in which a male co-worker told the plaintiff, in front of inmates and her subordinates and colleagues, "that she had received her administrative-sergeant position by performing sexual favors" and insulted her using gender-specific terms. *Id.* at 86, 92–93. The district court denied the employer's motion to dismiss the hostile work environment claim. *Id.* at 93.

156. *See* McDonnell v. Cisneros, 84 F.3d 256, 258–63 (7th Cir. 1996).

157. David R. Cleveland, *Discrimination Law's Dirty Secret: The Equal Opportunity Sexual Harasser Loophole*, 58 HOW. L.J. 5, 6 (2014); *see also* Ronald Turner, *Title VII and the Inequality-Enhancing Effects of the Bisexual and Equal Opportunity Harasser Defenses*, 7 U. PA. J. LAB. & EMP. L. 341, 343 (2005) ("Acceptance of the bisexual and equal opportunity harasser defenses would result in an increase of unchecked and unremedied workplace harassment, thereby producing an inequality-enhancing effect antithetical to the antidiscrimination purposes and policies of the statute.").

158. *See, e.g.*, Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463–64 (9th Cir. 1994) (harasser referred to men using non-gender-based insults such as "asshole," but referred to women using gender-based insults such as "dumb fucking broad" and "fucking cunts"); Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269–70 (8th Cir. 1993) (both men and women experienced abusive behavior, but the offenses against women were more frequent and severe, including physical contact, while men experienced only verbal abuse).

159. *See, e.g.*, Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337–38 (D. Wyo. 1993).

160. *Id.*

161. *Id.* at 1335.

162. *Id.* at 1338.

163. *Id.* at 1335.

women, 'it is not unthinkable to argue that each individual who is harassed is being treated badly because of gender.'"[164] The harasser's remarks were because of the wife's sex because they communicated the harasser's desire to have sex with her, and there was no indication that the harasser harassed male employees concerning sexual acts he wished to perform with them.[165] The remarks were also because of the husband's sex because they reflected the harasser's desire to demean and harass the husband—as a male—by describing sexual acts the harasser would perform with the husband's wife.[166]

Although some courts have followed *Pasqua* in sexual rumor cases,[167] a subsequent Seventh Circuit decision, *Venezia v. Gottlieb Memorial Hospital, Inc.*,[168] curtailed *Pasqua*'s rejection of Title VII claims based on sexual rumors involving both a male and a female.[169] The Seventh Circuit distinguished *Pasqua* and denied the employer's motion to dismiss hostile work environment claims of husband and wife Frank and Leslie Venezia against the hospital at which they both worked.[170]

Mr. Venezia, who worked in the maintenance department, experienced a variety of harassing conduct, including anonymous notes asserting that his wife performed sexual acts to secure Mr. Venezia's job.[171] His co-workers also left "pictures of nude men . . . on his bulletin board[,] . . . crassly inquired about his relationship with his wife[,] . . . sent him a pornographic . . . nude [photo of a] woman that referred to . . . [his wife,]" and subjected him to other nonsexual antagonistic conduct such as "spitting on his coat."[172] Ms. Venezia worked in a different department as the hospital's director of child care.[173] She was subject to rumors, spread by a male co-worker, that she "sat on his lap, in the presence of her husband . . . for the purpose of demeaning" her husband.[174]

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164. *Id.* at 1337 (quoting John J. Donahue III, *Review Essays: Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1611 n.134 (1992)). Although Donahue used the phrase "because of sex" the court's opinion used the phrase "because of gender."

165. *Id.* at 1338. Although the court held sexual comments to the wife were made because of sex, its analysis was not as explicit as it was for the conduct regarding the husband. *See id.* at 1337–38.

166. *See id.* at 1337–38.

167. *See supra* cases cited in note 141.

168. 421 F.3d 468 (7th Cir. 2005).

169. *See id.*

170. *Id.* at 469, 472–73. The court also distinguished another Seventh Circuit case, *Holman v. Indiana*, in which the court held that equal opportunity harassment could not give rise to Title VII employer liability because the statute is not a workplace civility code prohibiting all forms of harassment. 211 F.3d 399, 402–05 (7th Cir. 2000).

171. *Venezia*, 421 F.3d at 469.

172. *Id.* at 469–70.

173. *Id.*

174. *Id.* at 470.

The Venezias sued the hospital as co-plaintiffs, each alleging sexual harassment.[175]

The court held that *Pasqua*'s equal opportunity harasser defense was inapplicable because the Venezias worked "in different settings, reporting to different supervisors, with different co-workers,"[176] and were subject to harassment by different people.[177] Although *Venezia* limited *Pasqua*'s impact on sexual rumor-based hostile work environment claims, the court failed to recognize that the harassment of both the husband and wife was gender-based.[178] The harassing conduct in *Venezia* was much like that in *Chiapuzio*, in which the district court noted that the same harassing conduct can be insulting to men and women for different reasons.[179] The rumors directed at Mr. Venezia referred to *his wife's* sexual promiscuity—her using sex to secure his job and his watching her sitting on another man's lap. The harassers also sent nude pictures of both men and women to Mr. Venezia.[180] The nude picture of the woman referred to Ms. Venezia,[181] suggesting that she was sexually promiscuous. The nude picture of the man[182] was most likely a gender-based insult to Mr. Venezia's masculinity and perhaps questioned his heterosexuality. Thus, Mr. Venezia was harassed because of sex because the actions were intended to demean him as a man.[183] The harassment of Ms. Venezia was also because of sex because rumors suggesting she was sexually promiscuous were insulting to her as a woman because of the sexual double standard.[184]

B. Employers' Responses to Sexual Rumors in the Workplace

Despite the potential difficulty of identifying the source of rumors as well as those who perpetuate them, employers still must respond adequately and promptly to avoid liability.[185]

1. Effective Employer Response to Sexual Rumors: *Rheineck v. Hutchinson Technology, Inc.*

In *Rheineck v. Hutchinson Technology, Inc.*,[186] the Eighth Circuit concluded the employer was not liable for workplace harassment because its remedial actions in response to sexual rumors were immedi-

175. *Id.*
176. *Id.* at 472.
177. *Id.* at 471.
178. *See id.* at 472.
179. *See* Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337–38 (D. Wyo. 1993).
180. *Venezia*, 421 F.3d at 469–70.
181. *Id.* at 469.
182. *Id.*
183. *See id.* at 469–70.
184. *See id.* at 470.
185. *See supra* note 37 and accompanying text (*Faragher/Ellerth* employer liability standard).
186. 261 F.3d 751 (8th Cir. 2001).

ate and thorough.[187] Rumors circulated that Sheila Rheineck was the woman in a semi-nude photo distributed among co-workers.[188] Her employer promptly confiscated the picture, worked with supervisors to identify and destroy copies of the photo, and scanned the company computer system to ensure no employees retained the photo.[189] The employer identified and disciplined employees who had copies of the photo and required them to attend sexual harassment training.[190] The employer's actions appeared to be effective because there was no indication that the photo circulated further.[191] Although Rheineck alleged that rumors of her being the woman in the photo continued, she made no further complaints to her employer, so it was unaware of any need for additional remedial action.[192] The court held that the employer's actions were "prompt and reasonably designed to end the harassment."[193]

2. Quelling Sexual Rumors: Should Employers Publically Disavow Rumors?

Another issue unique to workplace sexual rumor cases is whether the employer should or must publicly refute a rumor in order to quell it. Courts have not mandated this specific remedial action but they have identified it as an option. For example, in *Spain v. Gallegos*,[194] the Third Circuit held that the employer was not required to deny rumors publically, but it also criticized as too broad the lower court's statement "that Title VII does not require a supervisor who is the object of a rumored affair between himself and a subordinate to 'embarrass himself' by denying the rumors."[195]

In *Rheineck*, the Eighth Circuit approved the employer's response, although the employer did not publically disavow the rumors.[196] The employer considered whether to tell employees that Rheineck was not the woman in the semi-nude photo but ultimately decided that doing so would worsen the situation because it would make more of the 1200 employees aware of, and potentially interested in, the photo.[197]

187. *Id.* at 756.
188. *Id.* at 753–55.
189. *Id.*
190. *Id.*
191. *Id.* at 754.
192. *Id.* at 755.
193. *Id.* at 756; *see also* Cross v. Prairie Meadows Racetrack & Casino, Inc., 615 F.3d 977, 982 (8th Cir. 2010) (employer effectively responded to workplace sexual rumor by promptly investigating and disciplining male employee who allegedly started the rumor despite his denial).
194. 26 F.3d 439 (3d Cir. 1994).
195. *Id.* at 450 (quoting the record).
196. *See supra* Part II.B.I.
197. *Rheineck*, 261 F.3d at 754.

In *Duncan v. Manager, Department of Safety, Denver*,[198] Cynthia Duncan, a police officer, sued her employer after enduring years of harassing conduct, including rumors that she was having sex with her superiors.[199] An anonymous letter accused Duncan of sleeping with two deputy chiefs and receiving a promotion because of one of the relationships.[200] Duncan asserted that the "letter fueled . . . rumors that she [had] achieved her rank in exchange for sexual favors."[201] The court held the employer promptly and effectively remedied the situation by having a male superior publicly discredit the letter's substance during a roll call.[202]

III. Conclusion: Recommendations for Courts Considering Sexual Rumors in Hostile Work Environment Cases

Women's work lives are adversely affected by workplace sexual rumors. They should have redress under Title VII because such harassing conduct is because of sex.[203] Existing jurisprudence permits courts to answer affirmatively the threshold question of whether sexual rumors are because of sex, allowing them to examine the remaining hostile environment claim elements of whether conduct is unwelcome, whether it is severe or pervasive, and whether the employer bears liability.[204]

Courts presented with sexual harassment cases involving rumors about a woman's sexual promiscuity should recognize that such rumors are gender-based insults. Rumors alleging a woman is sexually promiscuous are effectively calling her a gender-based epithet like "slut" and accusing her of violating gendered behavioral norms. Such rumors question women's achievements, suggesting they did not advance by merit but, rather, by "sleeping their way" to success.[205] Research confirms that sexual rumors harm a woman's workplace reputation and credibility.[206] They are uniquely insulting to women, even if the rumor also involves a male employee. Alleging that a man is sexually promiscuous is not as insulting to a man as it is to a woman; for a

198. 397 F.3d 1300 (10th Cir. 2005). *Duncan* also adopted *Pasqua*'s equal opportunity harasser rationale. *Duncan* concluded that a plethora of harassing conduct, including sexual rumors, did not occur because of Duncan's sex because the harassment was directed toward both her and a male superior. *Id.* at 1312.

199. *Id.* at 1306.

200. *Id.* at 1307.

201. *Id.*

202. *Id.* at 1312. *Duncan* should be viewed with some caution because its evaluation of the employer's remedial actions was not particularly thorough. For example, the public discrediting occurred one year after the letter, yet the court described it as "prompt action to combat the influence of these letters." *Id.*

203. *See, e.g.*, Spain v. Gallegos, 26 F.3d 439, 441–42 (3d Cir. 1994).

204. *See supra* text accompanying notes 34–37.

205. *See, e.g.*, McDonnell v. Cisneros, 84 F.3d 256, 259 (7th Cir. 1996).

206. *See* Conley et al., *supra* note 16.

man it is often considered an accolade.[207] Sexual rumors about a woman and a man should not be treated as lawful under an equal opportunity harassment theory. Male plaintiff sexual rumor cases, a tiny percentage of workplace sexual rumor cases, should not be the proverbial tail that wags the dog. Courts should not use an equal opportunity harasser rationale to deny relief to women distinctly harmed by rumors of sexual promiscuity.[208]

Courts must not place undue emphasis on one element of a hostile work environment claim. The requirement that harassment occurs because of sex helps separate conduct that violates Title VII from nondiscriminatory conduct, but harassing conduct does not automatically violate Title VII simply because it occurred because of sex. For example, harassing conduct does not create a hostile work environment if the recipient welcomes it or if it is insufficiently severe or pervasive.[209] Courts must not equate harassing conduct because of sex with *discrimination* because of sex. To do so would erroneously conflate this single element with the ultimate conclusion of whether there is an actionable sexually hostile work environment.[210] The because-of-sex requirement, if too narrowly interpreted, will preclude Title VII from fulfilling its purpose of promoting workplace gender equality.[211]

Courts should afford plaintiffs the opportunity to demonstrate the existence of an abusive work environment and that the employer failed to take proper remedial action, rather than dismissing claims prematurely by concluding that sexual rumors were not because of sex. Even if harassment meets all elements of a hostile workplace claim, an employer still can avoid liability in most circumstances by taking reasonable measures to stop the harassing conduct.[212]

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207. *See generally id.*

208. The question of whether rumors about a man's heterosexual sexual promiscuity can be because of sex is admittedly more difficult and merits a more in-depth discussion beyond the scope of this Article. Generally, the sexual double standard makes such rumors less insulting than rumors that women are promiscuous. However, rumors of men's failure to conform to the sexual double standard, such as rumors of lack of sexual prowess, are more clearly gender-based insults. *See generally, e.g.*, Wirtz v. Kan. Farm Bureau Servs., Inc., 274 F. Supp. 2d 1198 (D. Kan. 2003) (rumor that male refused to have sex with female). This Article also does not explore whether sexual rumors based on truth or motivated by personal animosity—less common situations—can be because of sex.

209. *See supra* notes 34, 36, and accompanying text. Indeed, these two required elements help avoid paternalism to the detriment of women's sexual agency. If a woman does not find the sexual rumors unwelcome and is not subjectively offended, the harassing conduct is not actionable under Title VII even if others would find the same conduct harassing.

210. *See* Schwartz, *supra* note 41, at 1761.

211. *See id.* at 1738–39 ("The notion that a restrictive interpretation of causation is needed to keep cases like this from turning Title VII into a 'civility code' ignores the other requirements of a sexual harassment claim, namely, that the conduct must be severe or pervasive.").

212. *See, e.g.*, Rheineck v. Hutchinson Tech., Inc. 261 F.3d 751, 756 (8th Cir. 2001).