TRYING TO FIT IN TO GET IN: WOMEN WORKING IN A MASCULINITIES WORLD

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In predominately male workplaces, sexualized "horseplay" is common. While this type of conduct can be a tool of gender subordination, it also is a tool for fostering camaraderie and collegiality among co-workers. In other words, some workers, including women, find that engaging in sexual horseplay is necessary in order to "fit in." This Article critiques the failure of courts to appreciate the peer pressure to "fit in" when they analyze Title VII sexual harassment cases. This oversight is especially evident when courts try to determine whether a plaintiff found particular sexual conduct to be "unwelcome." If a plaintiff voluntarily engages in instances of sexual conduct in order to fit into her workplace and in order to advance in her career, it is quite likely that a court will fail to determine that any other sexual conduct that she experienced was "unwelcome," even with respect to conduct that targeted and demeaned her in ways that no one would actually welcome. This Article urges courts to apply a more nuanced approach, and it highlights the types of evidence that courts need to be examining with more scrutiny in order to determine whether conduct was "unwelcome" within the complicated dynamics that occur among genders in the workplace. The focus of this Article is female plaintiffs in male-dominated workplaces. But given the centrality of male-on-male horseplay within the systemic practice of workplace sexual harassment, the approach this Article advocates ultimately will benefit workers of all genders in all workspaces. In order for courts to engage in this more nuanced analysis, however, plaintiffs' lawyers also need to be aware of the pressure to fit in as they engage in discovery and strategize about the best evidence and arguments to present in support of their clients' claims.

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I. INTRODUCTION

Donnie worked as a used car sales representative at Chuck Clancy Ford ("Clancy Ford").[1] She found the behavior of her supervisor, Scott, problematic, and she ultimately left her employment with the dealership.[2] She then sued the company for sexual harassment under Title VII of the Civil Rights Act of 1964.[3] The Northern District Court of Georgia, however, granted Clancy Ford's motion for summary judgment.[4] With respect to Donnie's hostile environment claim,[5] the court determined that, with the exception of one incident when Scott exposed himself to her, Donnie had failed to establish that the sexual behavior that she encountered at Clancy Ford was "unwelcome."[6] One of the bases for this determination was the fact that Donnie participated in some of the sexualized banter and conduct that was commonplace at the dealership.[7] In addition, the court determined that Donnie never established that she unequivocally found Scott's behavior to be unwelcome.[8]

Donnie fully admitted that she participated in sexual banter during her entire employment with Clancy Ford.[9] She flirted with her co-workers, and, in her words, she was "'one of the guys . . . in there with the best of them talking

1. Mangrum v. Republic Indus., Inc., 260 F. Supp. 2d 1229, 1237 (N.D. Ga. 2003).

2. For a more detailed description of Mangrum's allegations, see *infra* notes 213–31 and accompanying text.

3. *Mangrum*, 260 F. Supp. 2d at 1245–46.

4. *Id.* at 1258.

5. According to the Court, plaintiffs need to provide evidence of the following elements in order to establish a hostile environment claim:

> (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable.

Id. at 1247.

6. *Id.* at 1252.

7. *Id.* For a more detailed description of the culture at Clancy Ford, see *infra* notes 339–40, 342–43 and accompanying text.

8. *Mangrum*, 260 F. Supp. 2d at 1253.

9. *Id.* at 1238.

trash.'"[10] As an explanation for why she responded to Scott's advances in the equivocal way that she did, Donnie testified:

> It was a game. You went along with it. You did the best that you could. That's what I had to do in order to keep my job. . . . You have to go along with the game. You just have to go along with it. And that's what I done with [Scott].[11]

When it comes to both rape and sexual harassment cases, courts tend to evaluate the behavior of victims based on specific and narrow gender expectations.[12] In the context of rape cases, this has meant that women traditionally have been expected to physically resist their attackers in order to be entitled to legal redress.[13] In the context of sexual harassment cases, in order to establish that the harassment is "unwelcome," courts tend to expect that women be unequivocal in their negative responses to the harassment.[14] While some courts acknowledge that a woman might be somewhat equivocal when she seeks to appease a harasser in a position of power,[15] courts tend to be less sympathetic if the woman has a history of voluntarily engaging in sexual banter or behavior in the workplace.[16] Consistent with these cases, the Northern District of Georgia found Donnie's willingness to engage in sexual banter with her co-workers (and her equivocality in responding to Scott's conduct) as incongruous to her claim that Scott's conduct was unwelcome.[17]

Some feminist scholars have critiqued these types of analyses. Vicki Shultz has argued that in cases where women choose to engage freely in sexual autonomy and expression, courts tend to deny them judicial relief for what are legitimate claims of abusive harassment.[18] Some scholars also argue that life is more

10. *Id.*

11. *Id.* at 1241.

12. Kimberly D. Bailey, *Male Same-Sex "Horseplay": The Epicenter of Sexual Harassment?*, 73 FLA. L. REV. 95, 114–35 (2021) [hereinafter Bailey, *Horseplay*]; Kimberly D. Bailey, *Sex in a Masculinities World: Gender, Undesired Sex, and Rape*, 21 J. GENDER, RACE, & JUST. 281, 288–97 (2018) [hereinafter Bailey, *Undesired Sex*].

13. Bailey, *Undesired Sex*, *supra* note 12, at 287. While the physical resistance is no longer a legal requirement in most jurisdictions, courts and juries arguably still expect this type of evidence in rape cases. *Id.* at 291.

14. *See* Carr v. Allison Gas Turbine Div., Gen. Motors. Corp., 32 F.3d 1007, 1011 (7th Cir. 1994) (finding that plaintiff's "violent resentment of the conduct of her male co-workers toward her [was] plain"); Zorn v. Helene Curtis, Inc., 903 F. Supp. 1226, 1243 n.17 (N.D. Ill. 1995) (finding "absolutely no 'enthusiastic receptiveness'" on the part of the plaintiff).

15. *See, e.g.*, Chesier v. On Q Fin. Inc., 382 F. Supp. 3d 918, 924 (D. Ariz. 2019) (determining that there was a question of fact as to whether a supervisor's conduct was unwelcome even though the plaintiff engaged in sexually explicit text messages with him).

16. *See, e.g.*, Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1564 (M.D. Fla. 1990) (finding that "plaintiff's willing and frequent involvement in the sexual innuendo prevalent in her work area indicate that she did not find the majority of such conduct truly 'unwelcome' or 'hostile'"). *But see Carr*, 32 F.3d at 1010–11 (noting that plaintiff used some sexual language but determined that her conduct as one woman could not be compared to the conduct of the many men in her workplace); *Zorn*, 903 F. Supp. at 1243–44, 1243 n.17 (finding that plaintiff's occasional banter could not be compared to the "constant sexual banter, vulgarity, and insults" of her many male co-workers).

17. Mangrum v. Republic Indus., Inc., 260 F. Supp. 2d 1229, 1253 (N.D. Ga. 2003).

18. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1732 (1998) (arguing that "[t]o conform to the image of the proper victim, women must comport themselves as sexually pure, even passive,

complicated for women than the agent/victim binary that many courts rely upon in their analyses of survivors of sexual and physical violence; women often operate as both agents and victims as they navigate their respective abusive situations.[19] This Article seeks to build upon these feminist critiques of the judicial treatment of more complicated plaintiffs like Donnie by focusing on the fact that women sometimes feel pressure to engage in sexual conduct in order to "fit in" at work.

Part II of this Article will describe feminist scholars' influence on the development of sexual harassment law and their critiques of current law. Building upon these critiques, Part III will argue that a central component of sexual harassment, in especially predominately male workplaces, is male-on-male sexualized horseplay. On the one hand, horseplay is sometimes used by some male workers to subordinate co-workers of all genders.[20] On the other hand, horseplay can also create a sense camaraderie among the dominant workers.[21] Because "fitting in" and being part of this camaraderie is essential for one's development and advancement at work, many workers sometimes feel that they must engage in this type of horseplay, even if they would prefer not to engage.[22]

Part IV focuses more specifically on how women sometimes have to tolerate and even engage in sexualized horseplay in order to fit in and survive at work. There is no question that male workers also feel pressure to engage in this type of horseplay in order to fit in.[23] But in general, horseplay is intended to create a sense of inclusion for men as a class, while it is intended to create a sense of exclusion for women as a class.[24] For this reason, gender norms make the calculus to engage in this type of behavior much more precarious and complicated for female workers.[25] They often have to walk a fine line between "masculine" and "feminine" behavior in order to be accepted by their work colleagues.[26]

In Part V, this Article concludes that the importance of fitting in should be considered as part of the analysis of Title VII cases. In *Meritor Savings Bank v. Vinson*, the United States Supreme Court expressly stated that a plaintiff's voluntary engagement in sexual conduct does not necessarily mean that she did not find certain conduct to be "unwelcome."[27] For this reason, to the extent that a plaintiff's sexual conduct appears "voluntary," courts should also consider how

beings who have been violated by their co-workers' sexual predation. This requirement is not only sexist, but also class-biased in nature").

19. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172–74 (1989); Bailey, *Undesired Sex*, *supra* note 12, at 310; Aya Gruber, *Rape, Feminism, & the War on Crime*, 84 WASH. L. REV. 581, 623–24 (2009); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 386–88 (1993); Robin L. West, *Legitimating the Illegitimate: A Comment on 'Beyond Rape'*, 93 COLUM. L. REV. 1442, 1452–59 (1993).

20. *See* Bailey, *Horseplay*, *supra* note 12, at 116.

21. *Id.*

22. *Id.* at 126.

23. *See infra* notes 185–94 and accompanying text.

24. *See infra* notes 185–99 and accompanying text.

25. Bailey, *Undesired Sex*, *supra* note 12, at 310.

26. *Id.*

27. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986).

much of that voluntariness was based upon the pressure to fit in at her workplace. In addition, they should consider the extent to which sexual conduct was being used as a tool of gender subordination against the plaintiff. While evidence of peer pressure to engage in sexual horseplay should not necessarily be sufficient to establish an actionable sexual harassment claim under Title VII, the combination of evidence of peer pressure and evidence of gender subordination might suggest in some cases that certain sexual conduct was indeed "unwelcome." In addition, evidence of gender subordination also tends to make the "choice" to submit to peer pressure look less like a meaningful choice.

Part V highlights the types of evidence that courts should be examining with more scrutiny. This greater scrutiny will allow them to apply a more nuanced approach to sexual harassment cases. This more nuanced approach will provide better protection for women who work in predominately male workspaces. Just as important, given the centrality of male-on-male horseplay within the systemic practice of workplace sexual harassment, this more nuanced approach ultimately will provide better protection for workers of all genders in all workspaces. But in order for courts to engage in this type of analysis, plaintiffs' attorneys also need to be aware of the pressure to fit in as they engage in discovery and strategize about the best evidence and arguments to present in support of their clients' claims.

II. WHAT IS SEXUAL HARASSMENT?

Title VII of the 1964 Civil Rights Act makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[28] While the express language of this statue makes it clear that sex discrimination is unlawful, for many years, courts failed to recognize sexual harassment as a form of sex discrimination.[29] While they deemed it inappropriate for a supervisor to demand sexual favors from a woman in exchange for the opportunity to work,[30] they considered this to be behavior related to "personal" relationships.[31] They noted that this type of conduct was

28. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e–2(a)(1)).

29. *See, e.g.*, Miller v. Bank of Am., 418 F. Supp. 233, 236 (N.D. Cal. 1976) (arguing that "[t]he attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions"); Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) (determining that Title VII "is not intended to provide a federal tort remedy for what amounts to [a] physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley"); Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161, 163–64 (D. Ariz. 1975) (arguing that "an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual").

30. *See Tomkins*, 422 F. Supp. at 556 (stating that "[t]he abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience"); *Corne*, 390 F. Supp. at 163 (stating "rather than the company being benefited in any way by the conduct of Price, it is obvious it can only be damaged by the very nature of the acts complained of").

31. See, e.g., *Corne*, 390 F. Supp. at 163 (determining that defendant "was satisfying a personal urge").

not part of an employee's job duties.[32] For this reason, according to these courts, employers should not be liable when employees chose to engage in this type of harassment.[33]

But as part of the second wave of the feminist movement, some scholars noted that a large number (if not arguably almost all) women were experiencing this workplace phenomenon. For example, in 1974 Lin Farley taught a field study course on women and the workplace at Cornell University.[34] She noted that every woman in that course reported that she had either resigned or had been terminated from a job because a male co-worker had made her feel uncomfortable.[35] This revelation led Farley to document this widespread phenomenon in a variety of professions.[36] She labeled this experience as "sexual harassment."[37]

Furthermore, legal scholar Catharine MacKinnon argued that sexual harassment is not merely something unpleasant that women must endure as part of their work experiences; it is actually a form of sex discrimination under Title VII.[38] She noted that when a man sexually harasses a woman in her job, he is necessarily treating her differently as a woman than he is treating other men.[39] But more importantly, MacKinnon argued that sexual harassment is a tool that systemically maintains the second-class position of women in the workplace.[40] MacKinnon's research demonstrated that women were particularly vulnerable to harassment because most were supervised by men.[41] She also noted that women were segregated into jobs that paid less than male-dominated jobs and that offered less opportunity for skill development and upward mobility.[42] Sexual harassment maintains sex segregation in that it discourages women from entering more lucrative male-dominated fields that would put them more at risk for harassment.[43] According to MacKinnon, the result of sexual harassment is that women systemically remain more dependent upon men because they either remain in jobs that do not allow for financial independence or they opt out of the workplace altogether because of oppressive work conditions.[44] In other words, sexual harassment significantly affects the terms and conditions of women's employment both as individuals and as a class.

32. *See, e.g.*, *Miller*, 418 F. Supp. at 235 (denying plaintiff's claim because the employer did not have a policy requiring that employment be conditioned upon sexual favors).

33. *See, e.g.*, *Tomkins*, 422 F. Supp. at 556 (noting that "[t]he abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience . . . . It is not, however, sex discrimination within the meaning of Title VII . . . .").

34. LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB xi (1978).

35. *Id.*

36. *Id.*

37. *Id.* Farley defined "sexual harassment" as "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as a worker." *Id.* at 14–15.

38. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 27 (1979).

39. *Id.* at 101–02, 192–93.

40. *Id.* at 174.

41. *Id.* at 9.

42. *Id.*

43. *See* FARLEY, *supra* note 34, at 45, 47.

44. MACKINNON, *supra* note 38, at 216.

Courts were heavily influenced by MacKinnon's legal arguments. In *Meritor Savings Bank v. Vinson*, the Supreme Court recognized both forms of sexual harassment that MacKinnon had documented,[45] *quid pro quo*[46] and hostile environment, as sex discrimination under Title VII.[47] With respect to hostile environment claims, in order to be actionable, the harassment in question must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[48] Specifically, the harassment must be severe or pervasive enough to create an objectively hostile environment where a reasonable person would find it to be abusive or hostile.[49] The plaintiff must also subjectively find the harassment to be abusive or hostile in order to argue that it altered the conditions of their employment.[50] The key inquiry with respect to the subjective element is whether the plaintiff found the conduct to be "unwelcome."[51] Finally, if the plaintiff is asserting a sexual harassment claim (as opposed to a harassment claim based on another class category protected by Title VII), it must be established that the harassment was "because of sex."[52]

In analyzing these elements, lower courts have tended to have a very narrow view of what sexual harassment is. Specifically, some opinions suggest that sexual harassment is mostly based upon sexual desire.[53] Some feminists have critiqued this sexual desire approach and have built upon the work of MacKinnon.[54] They have developed additional explanations for why courts should recognize that sexual harassment is not only harmful, but also that it is a discriminatory practice that is specifically based upon sex.[55] Katharine Franke has focused on how sexual harassment is a "technology of sexism" that tries to regulate how gender is performed.[56] Kathryn Abrams has focused on how important work is for women's economic independence, sense of fulfillment, and personal identity.[57]

According to Abrams, sexual harassment is sex discrimination, therefore, because it interferes with women's ability to be fully functioning workers in the

45. *See id.* at 32; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

46. A *quid pro quo* sex discrimination claim involves allegations that a job benefit was conditioned upon complying with a request for sexual favors. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998).

47. *Meritor Sav. Bank, FSB*, 477 U.S. at 73.

48. *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

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

50. *Id.* at 21–22.

51. *Meritor*, 477 U.S. at 68.

52. Oncale v. Sundower Offshore Servs., Inc., 523 U.S. 75, 78 (1998).

53. *See, e.g.*, Lord v. High Voltage Software, Inc., 839 F.3d 556, 562 (7th Cir. 2016) (dismissing plaintiff's sexual harassment claim because the court found no evidence that the alleged harasser desired the plaintiff); King v. Bd. of Regents of Univ. of Wis. Sys., 898 F.2d 533, 539 (7th Cir. 1990) ("[T]reatment of individual based on sexual desire is sexually motivated. Sonstein's sexual desire does not negate his intent; rather it affirmatively establishes it.").

54. *See, e.g.*, Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1219–20 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691, 693 (1997); Schultz, *supra* note 18, at 1686–91, 1706.

55. *See* sources cited *supra* note 54.

56. Franke, *supra* note 54, at 693.

57. Abrams, *supra* note 54, at 1219–20.

workplace.[58] She argues that "[h]arassment may compel choices that trade professional advantage for a more secure or peaceful environment. It may render targeted workers sufficiently uneasy that they do not extend themselves to other workers, depriving the harassed workers of professionally crucial mentoring and camaraderie."[59] Vicki Schultz has argued further that courts' focus on sexual desire has led them to be less aware of the fact that sexual harassment also can be exercised through nonsexual conduct when this conduct undermines the competency of women as workers.[60] Not only do all of these theories enhance one's understanding of why sexual harassment is sex discrimination, but they also explain the factual reality that individuals engage in sexual harassment for many reasons other than just because they sexually desire their subordinates or coworkers.

But what is most significant about all of these theories is that they all focus on what sexual harassment *does* to the victim.[61] By focusing on what sexual harassment does, courts can focus on the real harms of sexual harassment, instead of solely asking whether a plaintiff found specific sexual conduct to be unwelcome. A hyperfocus on unwelcomeness can prove to be problematic because while legal doctrine sometimes presents the concept of unwelcomeness as a straightforward and binary analysis,[62] it often is not straightforward and binary at all. To the extent that this concept could ever be straightforward and binary, it could only happen under circumstances where the parties involved have equal power. Otherwise, determining whether certain conduct is unwelcome is complicated by the fact that individuals can be disempowered from choosing or rejecting certain conduct because of gender, class, race, sexual orientation, ableness, and other identities.[63]

Nevertheless, under current Title VII doctrine, a plaintiff must establish that any alleged harassment was "unwelcome."[64] In performing this inquiry, courts often apply an extremely narrow set of gender norms. For example, for many courts, unwelcomeness means that a plaintiff remains completely passive with respect to any sexual advances,[65] or even better, she unequivocally and fervently resists such advances.[66] This emphasis on resistance in sexual harassment

58. *Id.* at 1218.

59. *Id.*

60. Schultz, *supra* note 18, at 1686–91, 1706.

61. *See supra* text accompanying notes 55–60.

62. *See supra* notes 14–15 and accompanying text.

63. *See* CATHARINE A. MACKINNON, *supra* note 19, at 172–74; Gruber, *supra* note 19, at 623–24; Roberts, *supra* note 19, at 386–88; West, *supra* note 19, at 1452–59.

64. Meritor Sav. Bank, FSB. v. Vinson, 477 U.S. 57, 68 (1986).

65. *See, e.g.*, Zorn v. Helene Curtis, Inc., 903 F. Supp. 1226, 1243 n.17 (N.D. Ill. 1995) (finding "absolutely no 'enthusiastic receptiveness'" to the harassment that plaintiff suffered).

66. *See, e.g.*, Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1011 (7th Cir. 1994) (finding harassment against plaintiff unwelcome "since [plaintiff's] violent resentment of the conduct of her male co-workers toward her is plain"); Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991) (determining that the conduct at the plaintiff's workplace was welcome because "evidence at trial emphasized Reed's enthusiastic receptiveness to sexually suggestive jokes and activities"); Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1564 (M.D. Fla. 1990) (determining that "evidence of Weinsheimer's proven, active contribution to the

cases is consistent with the physical resistance requirement under traditional rape law.[67]

One exception to this expectation of resistance is when a plaintiff can demonstrate a clear disparity of power.[68] But even in those circumstances, it seems that courts expect that the plaintiff should at least express her displeasure with the advances, often in stereotypical ways. For example, in *Chesier v. On Q Financial Corp.*, Mary Chesier engaged in a work discussion with her supervisor, Thomas Middleton, via an instant messaging app.[69] Out of the blue, the conversation became sexual.[70] Over a three-hour period, including some breaks, the exchange included:

> Middleton asking Chesier about her underwear and her describing them; Middleton asking to see Chesier's underwear and Chesier responding maybe at a later date; both parties discussing Middleton's "dominance" in the bedroom; Chesier providing her measurements, including height, weight, and bra size, to Middleton; Middleton stating he wanted to see Chesier's breasts and suck on them; and Middleton stating multiple times he wanted to make Chesier "wet." Chesier declined Middleton's requests to see her underwear, "send [him] pics," "see [her breasts] and suck on them and bite them," and "let him feel."[71]

Chesier claimed that she participated in the exchange because she was afraid of Middleton, and while it was happening, she "was legitimately sitting at [her] desk in tears, and [she] was shaking and [she] was just worried about trying to get through this day safely so [she] could get home and break down and figure out what to do."[72] Chesier then reported Middleton's conduct to a co-worker the very next day; On Q Financial ultimately terminated Middleton.[73]

The court determined that a reasonable jury could determine that Middleton's conduct was unwelcome.[74] Not only did the court acknowledge the power

sexually explicit environment of the back shop belies her contention that much of what occurred there was unwelcome").

67. Under the common law, a woman was expected to physically resist "to the utmost" in order to have a successful legal claim of rape. *See, e.g.*, Brown v. State, 106 N.W. 536, 538 (Wis. 1906) (stating that "[a] woman's means of protection are not limited to [escape], but she is equipped to interpose most effective obstacles by means of hands and limbs and pelvic muscles. . . . It is hardly within the range of reason that a man should come out of so desperate an encounter as the determined normal woman would make necessary, without signs thereof upon his face, hands, or clothing").

68. *See, e.g.*, *Carr*, 32 F.3d at 1010–11 (acknowledging that plaintiff engaged in some vulgar conduct, but determining that this conduct could not be compared to that of her alleged harassers because "[s]he was one woman; they were many men"); Chesier v. On Q Fin. Inc., 382 F. Supp. 3d 918, 920 (D. Ariz. 2019) (determining that when analyzing exchanges via an instant messaging app between plaintiff and her supervisor, "a rational jury could easily find that [plaintiff] was mortified and that the power differential between her and [her supervisor] explains why she adopted a playful tone during the exchange"); *Zorn*, 903 F. Supp. at 1243–44 n.17 (determining that despite the fact that plaintiff had engaged in inappropriate conduct, "asymmetry of the positions should also be considered: she was one woman; they were many men").

69. *Chesier*, 382 F. Supp. at 920.

70. *Id.*

71. *Id.* at 921.

72. *Id.* at 922.

73. *Id.* at 920.

74. *Id.* at 924.

differential between Chesier and Middleton,[75] but it also was persuaded that Middleton's conduct could be viewed as unwelcome by the jury because of Chesier's reaction to his conduct: she was crying and shaking during the exchange, she claimed that she was just trying to get through the day so that she could go home and "break down," and she reported Middleton's conduct the very next day.[76] In other words, she physically manifested her displeasure in stereotypically feminine ways through crying and shaking, and she gave a timely "hue and cry"[77] of complaint.

But how a particular plaintiff responds to harassment is going to be influenced not just by their gender, but also by their race, class, and other identities. For example, Black women disproportionately experience a lack of respect for their sexual integrity, firmly rooted in the history of the enslavement of Black people.[78] Due to this reality, some Black women tend to respond to harassment with cold stares, humor, or verbal wit.[79] But just because these women do not "fall apart" when confronted with sexual harassment, it does not mean that they feel any less pain or oppression than the victim who makes a "hue and cry."[80] Indeed, the United States Supreme Court has stated that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[81]

Yet, courts and juries tend to analyze "unwelcomeness" through the lens of racist, sexist, and class stereotypes. Indeed, Tanya Hernández has argued that *Meritor*'s construction of unwelcomeness itself was implicitly based on the plaintiff's Blackness and the stereotypes of Black women's promiscuity.[82] In Hernández's opinion, this evidentiary requirement ultimately has harmed sexual harassment plaintiffs of all races.[83]

Similarly, Vicki Schultz has critiqued the class bias exhibited in sexual harassment cases.[84] Schultz has been particularly critical of *Reed v. Shepard*. In *Reed*, JoAnn Reed was a civilian jailer.[85] The Seventh Circuit described the jail

75. *Id.* at 920.

76. *Id.* at 922–24.

77. Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 954–55 (2004) (explaining that under the English common law rape victims were required to give a "hue and cry" and promptly complain about their assaults).

78. Tanya Katerí Hernández, *"What Not to Wear"—Race and Unwelcomeness in Sexual Harassment Law: The Story of* Meritor Savings Bank v. Vinson, *in* WOMEN AND THE LAW STORIES 277, 299 (Elizabeth Schneider & Stephanie Wildman eds., 2011).

79. *Id.* at 300.

80. Schultz, *supra* note 18, at 1729–32; Hernández, *supra* note 78, at 301.

81. Harris v. Forklift Sys., Inc., 501 U.S. 17, 22 (1993).

82. Hernández, *supra* note 78, at 306.

83. *Id.*

84. Schultz, *supra* note 18, at 1729–32.

85. Reed v. Shepard, 939 F.2d 484, 485 (7th Cir. 1991).

as a "*Barney Miller*"[86] type of environment with a lot of sophomoric and sexualized banter.[87] Reed alleged that:

> [She] was subjected to suggestive remarks . . ., that conversations often centered around oral sex, that she was physically hit and punched in the kidneys, that her head was grabbed and forcefully placed in members [sic] laps, and that she was the subject of lewd jokes and remarks. She testified that she had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs, and that they frequently tickled her. She was placed in a laundry basket, handcuffed inside an elevator, handcuffed to the toilet and her face pushed into the water, and maced.[88]

Reed also participated in some of the sexualized behavior in the jail.[89] She told many filthy jokes with sexual innuendo, and at one point, she was put on probation for her use of offensive language.[90] According to witnesses, she "had one of the foulest mouths in the department."[91] Reed also was asked to stop what the Seventh Circuit called "the exhibitionist habit" of not wearing a bra on the days that she wore a t-shirt to work.[92] In addition, she gave suggestive gifts to some of her co-workers, including a softball warmer shaped like a scrotum and a G-string.[93] Reed also showed co-workers scars from a hysterectomy.[94] According to the Seventh Circuit, this demonstration "involved showing her private area."[95]

In addition to participating in some of the sexualized conduct at that the jail, Reed claimed that she tolerated the sexual horseplay of others in order to succeed in her career:

> Because it was real important to me to be accepted. It was important for me to be a police officer and if that was the only way that I could be accepted, I would just put up with it and kept [sic] my mouth shut. I had supervisors that would participate in this and you had a chain of command to go through in order to file a complaint. One thing you don't do as a police officer, you don't snitch out [sic] another police officer.[96]

But the court noted that Reed's female co-workers did not claim to feel this same type of pressure.[97] Instead, they testified that when they asked these men to stop this type of behavior around them, they did.[98] In light of all of this evidence, the

86. *Id.* at 486. Barney Miller was a television series that aired between 1975–1982 and portrayed a New York Police Department precinct. *See Barney Miller*, IMDB, https://www.imdb.com/title/tt0072472/ (last visited Nov. 18, 2022) [https://perma.cc/J2JE-DPBE].

87. *Reed*, 939 F.2d at 486.

88. *Id.*

89. *Id.* at 486–87.

90. *Id.* at 486.

91. *Id.* at 487.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 492.

97. *Id.*

98. *Id.*

Seventh Circuit determined that any sexualized behavior that Reed was subjected to was not "unwelcome."[99]

But as Schultz has highlighted, courts' expectations of how Reed and other plaintiffs should respond to their work environment are often sexist in requiring that plaintiffs be sexually pure in order to be entitled to judicial relief.[100] In addition, she has argued that courts tend to exhibit class bias not only in their expectations of purity, but also in their perceptions of who is sexually pure.[101] Finally, with respect to Reed, Schultz argued that her willingness to engage in sexualized behavior did not mean that she "welcomed" all of the treatment that she experienced in the jail:

> For even if Reed displayed a sense of bawdy sexuality—or, to go even further, even if she had "welcomed the sexual hijinx [sic] of her co-workers"—this in no way implied that she had invited nonsexual violent physical assaults, such as being hit and punched in the kidneys, shocked with a cattle prod, or pushed facedown into the toilet. Yet, in the court's eyes, Reed's own conduct had branded her as a bad girl outside the bounds of legal protection.[102]

Schultz determined that the sexual desire paradigm leads courts to focus on the goal of protecting "pure" women from sexual violation.[103] She further argued that this focus distracts courts from the larger issue of whether both sexual and nonsexual conduct in the workplace is undermining all women's competency as workers.[104]

The work of all of these feminist scholars has been extremely illuminating in understanding the complex ways that sexual harassment subordinates women. Part III will build upon this work by describing the crucial role that male-on-male sexual horseplay plays in sexual harassment, especially in male-dominated workspaces. Specifically, the male competition that drives this type of behavior is the epicenter of the sexual harassment of workers of all genders. It is essential that courts understand the role that horseplay plays in workplace culture in order to have a more nuanced understanding of when workers find certain conduct to be unwelcome.

III. MALE SEXUAL HORSEPLAY: A TOOL OF GENDER SUBORDINATION *AND* A SOURCE OF CAMARADERIE

Hazing and teasing among male workers is a common occurrence in many workplaces.[105] In addition, this hazing and teasing sometimes takes the form of sexualized humor, gendered name-calling, and even the grabbing or touching of

99. *Id.*
100. Schultz, *supra* note 18, at 1732.
101. *Id.*
102. *Id.* at 1730–31.
103. *Id.* at 1732.
104. *Id.*
105. Bailey, *Horseplay*, *supra* note 12, at 116.

others' genitals.[106] Courts traditionally have treated this type of conduct as mere horseplay that is not "based on sex," and therefore, that is not a violation of Title VII.[107] As will be discussed in this Section, however, courts often fail to recognize that this type of behavior sometimes is a type of gender subordination that actually is based on sex. Furthermore, this type of male-on-male gender subordination plays a central role in the sexual harassment of women workers.

One of the reasons that courts may fail to see that this type of behavior is gendered is because sexualized horseplay not only can be a tool of gender subordination, but it is also often a source of camaraderie and collegiality in predominately male workplaces. But even if a worker feels "peer pressure" to engage in this type of conduct in order to be a part of the camaraderie of the dominant group, it can still be the case that they find some sexual conduct that is directed toward them to be unwelcome, especially if that sexual conduct is used as a tool of gender subordination.

A. A Tool of Gender Subordination

As discussed in Part II, feminist scholars have highlighted how sexual harassment is a tool of gender subordination. The epicenter of this gender subordination is the sexualized masculine competition that occurs in many workspaces.[108] Men sometimes use sexualized horseplay to subordinate each other within the male gender hierarchy.[109] Men also use sexualized horseplay to police each other in order to make sure that a worksite remains sufficiently masculine.[110]

Feminists have recognized for a long time that men can discriminate against both women and men because of sex.[111] But these feminists typically focus their analysis mostly on men who are perceived as gender-nonconforming.[112] Men in

106. *Id.*

107. *See, e.g.*, McCown v. St. John's Health Sys., Inc., 349 F.3d 540, 541–42, 544 (8th Cir. 2003) (finding that although a supervisor's behavior, which included grabbing the plaintiff on the buttocks, grinding his genitals in the plaintiff's buttocks in simulated intercourse, and attempting to shove a shovel handle and tape measure in the plaintiff's buttocks, was "inappropriate and vulgar," there was not sufficient evidence that the conduct was based on sex); Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997) ("Most unfortunately, expressions such as 'fuck me,' 'kiss my ass,' and 'suck my dick,' are commonplace in certain circles, and more often than not, when these expressions are used (particularly when uttered by men speaking to other men), their use has no connection whatsoever with the sexual acts to which they make reference—even when they are accompanied, as they sometimes were here, with a crotch-grabbing gesture. Ordinarily, they are simply expressions of animosity or juvenile provocation, and there is no basis in this record to conclude that Hicks' usage was any different."). *But see* EEOC v. Boh Brothers Constr. Co., 731 F.3d 444, 456–57 (5th Cir. 2013) (determining that the plaintiff did not have to "prop up his employer's subjective discriminatory animus by proving that" the plaintiff was objectively "manly").

108. Bailey, *Horseplay*, *supra* note 12, at 127–35.

109. *Id.*

110. *Id.* at 119.

111. *See, e.g.*, Abrams, *supra* note 54, at 1226–27; Franke, *supra* note 54, at 768–71; Schultz, *supra* note 18, at 1802.

112. *See, e.g.*, Abrams, *supra* note 54, at 1226; Franke, *supra* note 54, at 770–71; Schultz, *supra* note 18, at 1802; Kathryn Abrams and Katherine Franke do, however, allow for the possibility that gender-conforming men

this category can include men who are not cisgender or heterosexual. They also include men who perform their gender in a way that is perceived by others as "too feminine."[113] Under these circumstances, sexual harassment marks the nonconformer as an "incompetent" employee.[114] To some feminists, sexual harassment essentially turns the gender-nonconforming man into a "woman" who simply does not belong in the "male" workspace.[115]

But by focusing on men's subordination of women, some feminists fail to recognize that many gender-nonconforming men are harassed precisely because they are perceived to be people who were assigned the male sex at birth[116]; they are not merely surrogates for women.[117] Masculinities scholars recognize that while men as a class have more power than women as a class, not all men are equally powerful.[118] In American culture, the hegemonic masculine identity is white, middle- or upper-class, and heterosexual.[119] Those who most conform to this "ideal" version of masculinity tend to have more power than those who conform the least.[120] But it is important to note that even the most privileged men must constantly prove their masculinity because "it is a status never achieved, but one constantly to be established and to be tested. Daily proof of masculinity involves significant man-on-man hierarchy."[121] For this reason, most men feel powerless at least some of the time.[122]

In addition, race, class, sexual orientation, age, ableness, and other identities also can influence one's perceived masculinity.[123] Because some of these identities change over time, the masculine identity also is dynamic and constantly

could have a claim of sexual harassment under limited circumstances. *See* Abrams, *supra* note 54, at 1226–27; Franke, *supra* note 54, at 768–69.

113. *See* Schultz, *supra* note 18, at 1801.

114. *Id.* at 1802.

115. *See, e.g.*, Catharine A. MacKinnon, *Oncale v. Sundowner Offshore Services, Inc.*, 96-568, *Amici Curiae Brief in Support of Petitioner*, 8 UCLA WOMEN'S L.J. 9, 19 (1997).

116. Most of the analysis in this Part focuses on people who identify as men and who are perceived to be people who were assigned the male sex as birth. A discussion of the harassment of transgender men and those who identify as gender nonbinary merits deeper analysis that will be developed in future scholarship. That said, it should be noted that there is some interesting research that suggests that transgender men can solidify themselves as part of the male "in group" when they embrace the masculine norms of their respective workplaces and engage in sexual banter. Kristen Schilt & Laurel Westbrook, *Doing Gender, Doing Heteronormativity: "Gender Normals," Transgender People, and the Social Maintenance of Heterosexuality*, 23 GEN. & SOC. 440, 447, 451 (2009).

117. *See* Bailey, *Horseplay*, *supra* note 12, at 119–27.

118. Nancy E. Dowd, Nancy Levit & Ann C. McGinley, *Feminist Legal Theory Meets Masculinities Theory*, *in* MASCULINITIES AND THE LAW 25 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

119. *See* Don Sabo, Terry A. Kupers & Willie London, *Gender and the Politics of Punishment*, *in* PRISON MASCULINITIES 3, 5 (Don Sabo, Terry A. Kupers & Willie London eds., 2001).

120. Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, *in* FEMINISM & MASCULINITIES 184, 190 (Peter F. Murphy ed., 2004).

121. Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis & Feminist Theory*, 33 HARV. J.L. & GENDER 415, 421 (2010).

122. *Id.* at 420.

123. Dowd et al., *supra* note 118, at 25.

changing.[124] In addition, masculinity is context specific. The same traits can be perceived as more or less masculine depending on one's environment.[125] As their position in the male gender hierarchy fluctuates up and down, some men feel the need to compete with other men in order to maintain an acceptable position in the male gender hierarchy.[126] One way to "win" at this competition is for a man to demonstrate that he is more masculine than another man.[127] Some men harass gender-nonconforming men for this purpose.[128]

Not only is it important to focus on the gendered dynamic among men in order to have a more complete understanding of the harassment of gender-nonconforming men, but it is also important to focus on this dynamic in order to understand that men who generally are perceived as gender-conforming can be sexually harassed, too.[129] Courts in particular have struggled with recognizing this type of harassment as being "based on sex."[130] Unless there is evidence that the harasser is gay, that the plaintiff was treated differently than female workers, or that the alleged harasser had a general hostility toward men, courts tend to label allegations of sexual harassment toward those perceived as gender-conforming as "horseplay."[131] According to the Supreme Court, horseplay is not conduct that is based on sex, and therefore, it is not unlawful under Title VII.[132]

124. *See* Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1332 (2011); Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 MICH. J.L. REFORM 713, 721 (2010); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 780 (2000).

125. Bailey, *Undesired Sex*, *supra* note 12, at 26.

126. Bailey, *Horseplay*, *supra* note 12, at 115.

127. *Id.*

128. *Id.* at 118.

129. *Id.*; *see also* Amy M. Denissen, *The Right Tools for the Job: Constructing Gender Meanings and Identities in the Male-Dominated Building Trades*, 63 HUM. RELS. 1051, 1056 (2010) (quoting women as noting that men who wash their hands too frequently or who do not curse tend to get teased in their respective workplaces as not being masculine enough).

130. *See, e.g.*, EEOC v. Boh Brothers Constr. Co., 731 F.3d 444, 457 & n.12 (5th Cir. 2013) (describing a married heterosexual plaintiff who was called a "pussy," "princess," and "faggot" and who suffered simulated anal sex and other humiliating acts from his alleged harasser); Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 465 (6th Cir. 2012) (describing a married heterosexual plaintiff who was grabbed by the buttocks, poked in the buttocks with a hammer handle, and poked in the buttocks with a long sucker rod); Shafer v. Kal Kan Foods, Inc., 417 F.3d 663, 664–65 (7th Cir. 2005) (describing a married heterosexual plaintiff who was told he had a "cheerleader ass" and that he "would look real nice on my dick"; was forced face down into the alleged harasser's crotch; and whose hand was forced to touch the alleged harasser's crotch while the alleged harasser moaned); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1001–02 (7th Cir. 1999) (describing a married heterosexual plaintiff who was exposed to the penis of the alleged harasser on several occasions and, when plaintiff was lying face down on a bench, was told by the alleged harasser, "[I]f you [don't] turn over, [I'm] liable to crawl up on top of [you] and fuck [you] in the ass" (alterations in original)); Johnson v. Hondo, Inc., 125 F.3d 408, 410–11 & n.1 (7th Cir. 1997) (describing a heterosexual plaintiff who was repeatedly told by his alleged harasser, some variation of "I'm going to make you suck my dick").

131. These three evidentiary examples came from *Oncale v. Sundowner Offshore Servs., Inc*., the U.S. Supreme Court decision that held that same-sex harassment is cognizable under Title VII. 523 U.S. 75, 80–81 (1998). In that opinion, the Court did not state that this list of examples was intended to be exhaustive. Nevertheless, most courts have tended to read *Oncale* in this limited way. Bailey, *Horseplay*, *supra* note 12, at 107–09.

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

Based on these limited evidentiary routes, most male-on-male sexual harassment cases involving plaintiffs perceived as gender-conforming fall into the horseplay category.[133] It can be difficult for many plaintiffs to establish that they have been treated differently from female workers because male-on-male harassment often occurs on predominately male job sites.[134] For the same reason, it also can be difficult to establish that the alleged harasser is generally hostile to men. In addition, as will be discussed in the next Section, while horseplay may denigrate the masculinity of a particular employee, it also can be a tool to enhance the general camaraderie and masculinity of a work site.

With respect to evidence related to an alleged harasser's sexual orientation, courts tend to presume that he is heterosexual unless a plaintiff presents evidence to the contrary.[135] If the alleged harasser is heterosexual, then the presumption is that the harassment was not based on sex.[136] These presumptions invite homophobia because they perpetuate the harmful stereotype of gay men being deviant sexual predators.[137] They also arguably provide limited protection for gay men harassed by heterosexual men.[138] Until *Bostock v. Clayton County*,[139] most courts did not recognize that discrimination against gay or transgender individuals is sex discrimination under Title VII.[140] *Bostock* may provide recourse for gay plaintiffs who can provide direct evidence that their discrimination was based on their sexual orientation.[141] But it remains to be seen how much protection *Bostock* will provide for plaintiffs who do not have direct evidence that they were discriminated against because of their sexual orientation and who otherwise perform their masculinity in gender-conforming ways. In a work environment where sexualized horseplay is ubiquitous, it might be difficult for some gay plaintiffs to argue that they were not just being treated like "one of the guys."[142] An additional problem with focusing on the sexual orientation of the harasser is that it invites litigants to engage in seriously invasive inquiries into litigants' private

133. Bailey, *Horseplay*, *supra* note 12, at 108–09.

134. *Id.* at 116.

135. Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 617 (2013).

136. *Id.* at 529.

137. *See* Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 191 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

138. David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1746 (2002).

139. *Bostock* held that discrimination based on sexual orientation is sex discrimination under Title VII. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

140. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) (holding that discrimination based on sexual orientation is not a violation of Title VII); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (holding that discrimination based on sexual orientation is not a violation of Title VII), *overruled by* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 290 (3d Cir. 2009) (holding that discrimination based on sexual orientation is not a violation of Title VII). *But see Zarda*, 883 F.3d at 108 ("Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex.'"), *aff'd sub nom. Bostock*, 140 S. Ct. 1731; Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 341 (7th Cir. 2017) ("[D]iscrimination on the basis of sexual orientation is a form of sex discrimination.").

141. *See Bostock*, 140 S. Ct. at 1754.

142. *See* Shafer v. Kal Kan Foods, Inc., 417 F.3d 663, 666 (7th Cir. 2005) (stating that "horseplay" is different from sex discrimination under Title VII).

sexual behavior.[143] But the overarching problem with this type of analysis is that it is based on the problematic and incomplete sexual desire paradigm.

Regardless of whether the target of male-on-male harassment is perceived as gender-conforming or gender-nonconforming, it is important to recognize that the target is specifically targeted because he is perceived to be a person who was assigned the male sex at birth.[144] While the gendered dynamic among men relates somewhat to their relationship to women, there is also an important aspect of this dynamic that is specifically just about their relationships with one another.[145] Many men care about how other men perceive them.[146] More specifically, many men care about whether other men perceive them as adequately masculine.[147] In order to ensure that they are perceived as adequately masculine, some men participate in a masculine competition with one another that sometimes includes sexual harassment and even violence and rape.[148]

In addition, sexual horseplay is a form of gender regulation.[149] This regulation occurs against both gender-nonconforming and gender-conforming men, and it is a form of sex-stereotype discrimination.[150] With respect to gender-nonconforming men, the harassment punishes them for failing to conform to expected gender stereotypes.[151] With respect to gender-conforming men, the harassment ensures that the target never stops conforming to these stereotypes.[152] But this type of horseplay does not just regulate the behavior of the targeted employee; it also regulates other workers observing the behavior. No man wants to be the next target. In other words, horseplay ensures that the whole workplace remains a sufficiently masculine and "feminine free" zone.[153]

EEOC v. Boh Brothers Construction Co.[154] helps illustrate the gendered dynamics that can occur on a predominately male worksite. Kerry Woods was an iron worker and structural welder.[155] Chuck Wolfe was the superintendent of their all-male construction crew, and Wolfe and his crew "regularly used 'very foul language' and 'locker room talk.'"[156] In addition, Wolfe was known as the primary offender of this type of conduct, and he often teased his co-workers.[157] One of his main targets was Woods.[158] The triggering event that led to this targeting seems to be when Woods confided to some of his fellow crew workers

143. Schwartz, *supra* note 138, at 1745.
144. Bailey, *Horseplay*, *supra* note 12, at 119–27.
145. *Id.* at 117.
146. *See id*.
147. *Id.*
148. *Id.* at 117–18.
149. *See* Franke, *supra* note 54, at 771.
150. Bailey, *Horseplay*, *supra* note 12, at 131–35.
151. *Id.*
152. *Id.*
153. *See* Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151, 1217, 1224 (2008).
154. 731 F.3d 444, 449 (5th Cir. 2013).
155. *Id.*
156. *Id*.
157. *Id*.
158. *Id*.

that he used Wet Ones instead of toilet paper at work.[159] In Wolfe's opinion, this behavior "was kind of gay" and "feminine."[160]

As a result, Wolfe called Woods gendered epithets such as "pussy," "princess," and "faggot" at least two or three times a day.[161] In addition, a few times a week he would come up behind Woods and simulate anal sex.[162] He also exposed his penis to Woods approximately ten times while waving and smiling at him.[163] On another alarming occasion, while Woods was napping in his car, Wolfe approached, appeared to be zipping his pants, and said, "[i]f your door wouldn't have been locked, my d[i]ck probably would have been in your mouth.'"[164] Despite the fact that foul language and locker room talk seem to have been a regular part of the construction site's culture, Woods understandably found Wolfe's relentless behavior, which was specifically targeted at him, to be humiliating and embarrassing.[165] While the dissent in *Boh Brothers* deemed Wolfe's conduct not to be illegal sexual harassment based upon sex,[166] the majority of the Fifth Circuit rightly disagreed. Specifically, the court determined that a reasonable jury could determine that Wolfe harassed Woods because he failed to conform to Wolfe's subjective gender stereotypes about men.[167] Under those circumstances, Wolfe's harassment would have been based on sex.[168]

The majority's conclusion that Wolfe's harassment was based on sex is correct because Wolfe was engaging in a type of gender regulation of his crew. In order to protect themselves from his relentless harassment, crew members presumably would need to avoid engaging in what Wolfe personally perceived to be "feminine" or "gay" conduct.[169] In addition, Wolfe may have felt that he needed to harass Woods to make sure that things did not get "too" feminine at the construction site. This would especially be the case if the masculine identity of Wolfe's construction work was important to him.[170] As was the case with Woods, this type of gender regulation is problematic because it dictates how each man on the construction crew must perform his gender in order to be perceived as a "real man," and therefore as a competent worker.[171]

Boh Brothers is rare in determining that male horseplay can sometimes be sexual harassment. Part of the reason that courts often do not come to the same conclusion is because many tend to analyze sexual harassment as arising mainly from sexual desire.[172] By analyzing the case as a sex-stereotype case, however,

159. *Id.* at 450.
160. *Id.*
161. *See id.* at 449.
162. *Id.*
163. *Id.* at 449–50.
164. *Id.* at 450.
165. *Id.* at 449.
166. *Id.* at 476 (Jones, J., dissenting).
167. *Id.* at 456–57, 459.
168. *Id.* at 459–60.
169. *See id.* at 458; Bailey, *Horseplay*, *supra* note 12, at 124.
170. *Boh Brothers Constr. Co.*, 731 F.3d at 458; *see* McGinley, *supra* note 153, at 1223.
171. *Boh Brothers Constr. Co.*, 731 F.3d at 457; *see* Franke, *supra* note 54, at 772.
172. *See supra* note 53 and accompanying text.

the *Boh Brothers* court seemed to recognize on some level that Wolfe's behavior was a form of gender regulation.[173]

But one of the shortcomings of *Boh Brothers* is that the majority seems to suggest that in order to have a successful sexual harassment claim, a male plaintiff must always be perceived as gender-nonconforming, even if only in the eyes of the harasser.[174] But it can also be the case that a harasser targets another man in order to assert his superior masculinity, regardless of whether he actually perceives the target as gender-conforming.[175] This is actually a plausible alternative reading of the facts in the *Boh Brothers* case given the fact that Wolfe admitted that he did not actually perceive Woods as gay.[176] "I was just playing with him," was Wolfe's explanation for this label.[177] Moreover, Wolfe opined,

> [i]t's [not] the kind of thing you'd want to say in front of a bunch [of] rough iron workers that they had there. They all picked on him about it. They said that's kind of feminine to bring these, that's for girls. To bring Wet Ones to work to wipe your ass, you damn sure don't sit in front of a bunch of iron workers and tell them about it. You keep that to yourself in fact that's what you do.[178]

In other words, Wolfe knew the rules. Under no circumstances should a construction worker act in a way that is perceived to be "kind of feminine."[179] In addition, by joining in with the rest of the crew in targeting and labeling Woods as gay and feminine, Wolfe assured the rest of the crew that he could fit in and be masculine enough to work on the construction site.[180] It could very well be the case that, in general, Wolfe perceived Woods to be plenty masculine, despite his use of Wet Ones. But regardless of his personal perception of Woods, Wolfe's denigration of Woods' masculinity bolstered his own.[181] This effort to jockey for a higher position on the male hierarchy at the expense of Woods was very much a gendered act that was based on the sex of both Woods and Wolfe.

But what happened to Woods is not only problematic for him and other male workers, it is also problematic for any woman who would want to work at his construction site. As will be discussed further in the next Section, the masculine competition and gender regulation that fueled the type of harassment that Woods experienced is actually the epicenter of all sexual harassment, regardless of the gender of the victim.

173. *Boh Brothers Constr. Co.*, 731 F.3d at 456–57; *see* Franke, *supra* note 54, at 772.
174. *See Boh Brothers Constr. Co.*, 731 F.3d at 456–57, 459.
175. Bailey, *Horseplay*, *supra* note 12, at 124–26.
176. *Boh Brothers Constr. Co.*, 731 F.3d at 458.
177. Bailey, *Horseplay*, supra note 12, at 125.
178. *Id.* at 123.
179. *See id.*
180. *See id.* at 99.
181. *See id.* at 117.

B. A Source of Camaraderie

One of the reasons that courts have a hard time seeing a lot of male-on-male horseplay as sex discrimination is because horseplay also can be a source of camaraderie among male workers. For example, new men to a worksite are sometimes subject to "hazing," including being called gendered terms that reference the newcomer as a woman, being grabbed or touched on the genitals, sexual humor, and other types of humiliating acts.[182] Sometimes, they are threatened with rape.[183] In response, the new employee is expected to either laugh it all off as part of good-natured male fun or to reciprocate or "double down" on the conduct in order to assert his equal or superior masculinity.[184] If he complains, his employer is likely not going to do much to stop the conduct, especially because this conduct is generally deemed by courts to be legal.[185] Instead, he is likely to be abused further.[186] Leaving his employment is not really feasible given financial constraints and the reality that he might have to endure similar conduct at other job sites.[187] For this reason, it is often easiest for a man in these circumstances to just play along and join in the horseplay, even if he secretly would prefer not to engage.[188]

But as will be discussed further in Part IV, fitting in is a bit more complicated for women. While the sense of camaraderie that occurs in predominately male workplaces is intended to include male workers as a class, this same sense of camaraderie is usually intended to exclude women as a class.[189] This exclusion occurs in two specific ways. First, the hypermasculine nature of the camaraderie implicitly communicates that women do not belong.[190] Second, men sometimes create a bond with one another by objectifying women co-workers for the benefit

182. McGinley, *supra* note 153, at 1186.

183. *See, e.g.*, MacKinnon, *supra* note 115, at 13.

184. McGinley, *supra* note 153, at 1186–87; *see, e.g.*, Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 465–66 (6th Cir. 2012) (noting that when the plaintiff complained about the sexualized harassment he experienced, his supervisor told him to stop whining, to duke it out, or to find a line of work outside of the oil fields if he could not handle this treatment).

185. Bailey, *Horseplay*, supra note 12, at 116, 128–31.

186. *See* Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCH. 247, 255 (2003). Cortina and Magley found that 66% of employees who complained of workplace mistreatment faced some type of retaliation. *Id.* Most of this retaliation was what the study authors labeled as "[s]ocial retaliation victimization." *Id.* at 248. This type of retaliation affects the victim's social work setting and includes behavior such as "harassment, name-calling, ostracism, blame, threats, or the 'silent treatment.'" *Id.* Approximately 36% of the participants in the study who had complained about workplace treatment experienced "[w]ork retaliation victimization," which involves tangible adverse job actions such as demotions and terminations. *Id.* at 248, 255. The study authors opined that social retaliation might be more common because its illegality is more questionable. *Id.* at 259. Behaviors that are arguably not illegal may be policed less in the workplace. *Id.*

187. Bailey, *Horseplay*, *supra* note 12, at 130.

188. *See id.* at 133–34.

189. *Id.* at 102, 110.

190. *Id.* at 116.

of other male observers.[191] Sexual prowess and dominance over women are idealized traits of masculinity in American culture.[192] But some research suggests that the real audience for this type of behavior is actually other men; women are just the instrument used to gain the admiration and respect of other men.[193]

Thus, the masculine competitions that drive male-on-male horseplay appear to be the epicenter of the sexual harassment of workers of all genders.[194] One of the more troubling effects of this conduct is that it discourages the presence of women workers and encourages sex segregation, which is an express violation of Title VII.[195] Sex segregation is particularly problematic because male-dominated occupations tend to pay more than occupations dominated by women; this phenomenon necessarily leaves women as a class poorer than men as a class.[196]

In addition, male-dominated jobs generally tend to be more interesting than the work that traditionally has been deemed to be "women's work."[197] For example, some women are drawn to construction work because they like working with their hands, and they enjoy seeing the tangible fruits of their labor.[198] One construction worker from New York has expressed, "I just needed a job at the time, and I wanted to feed my son. . . . But I fell in love with how the building went up."[199] A truck driver says that "what she loves about trucking is the 'freedom of the open road,' the 'independence that it brings' and 'of course, I love the income.'"[200] In addition, some women are attracted to police work because it allows them to help people and children.[201] For these reasons, there are women

191. *Cf. id.* at 117–18.

192. *See id.* at 117–18.

193. Rachel Kalish & Michael Kimmel, *Hooking Up: Hot Hetero Sex or the New Numb Normative?*, 26 AUSTRALIAN FEMINIST STUD. 137, 144–45 (2011) (finding that college men seemed to get more satisfaction out of bragging about their hookups than in actually engaging in those hookups).

194. Bailey, *Horseplay*, *supra* note 12, at 119.

195. *See supra* notes 42–44 and accompanying text; *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(2), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e–2(a)(2)) (stating that "[i]t shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin").

196. *See supra* notes 42–44 and accompanying text.

197. SUSAN EISENBERG, WE'LL CALL YOU IF WE NEED YOU: EXPERIENCES OF WOMEN WORKING CONSTRUCTION 7–17, 87–94 (2018); Dan Krauth, *7 On Your Side Investigates: Construction Workers Claim Sexual Harassment on Job*, ABC 7 N.Y.: EYEWITNESS NEWS (Dec. 4, 2020), https://abc7ny.com/sex-harassment-sexual-construction-workers-women/8469943/ [https://perma.cc/3UEK-S5GU]; Richard Seklecki & Rebecca Paynich, *A National Survey of Female Police Officers: An Overview of Findings*, 8 POLICE PRAC. & RSCH. 17, 18 (2007); Keturah Gray, Jeff Schnieder, Lauren Effron & Kelly McCarthy, *Working Women Share Stories of Sexual Harassment While on the Job*, ABC NEWS (Apr. 20, 2018, 4:22 AM), https://abcnews.go.com/US/News/working-women-share-stories-sexual-harassment-job/story?id=54449605 [https://perma.cc/4SEG-HS6V].

198. EISENBERG, *supra* note 197, at 7–17, 87–94.

199. Krauth, *supra* note 197.

200. Gray et al., *supra* note 197.

201. Seklecki & Paynich, *supra* note 197, at 18.

who dare to venture into these predominately male spaces, despite the risk of sex discrimination, including sexual harassment.[202]

Like men,[203] however, these women cannot afford to ignore the fact that "horseplay" encourages not only masculine conformity and superiority, but it also enhances collegiality among the dominant workers in the workplace.[204] While most female workers do not want to be sexually objectified or denigrated by their co-workers, many of them do want to fit in.[205] Not only does fitting in with one's co-workers make the work day much more tolerable, but it also can be crucial in order to gain important mentoring, training, and networking opportunities.[206] For this reason, women sometimes find that they have to walk the fine line of trying to avoid unwanted sexual harassment while at the same time engaging in sexualized conduct in order to fit into the workplace.[207] It is important to recognize that some woman actually enjoy and want to join in on some of this sexualized conduct.[208] But some women find that their voluntary engagement in some horseplay prohibits them from receiving much legal protection from the sexual harassment that they do not want.[209]

IV. WOMEN WALK THE LINE

As mentioned in the Introduction, Donnie Mangrum was a used car sales representative at Clancy Ford, and she found the behavior of her supervisor, Scott Wilson, to be problematic.[210] Specifically, Mangrum alleged that on more than one occasion, Wilson requested that she perform oral sex (or other types of sexual favors).[211] She further alleged that when she refused his requests,[212] Wilson reduced the appraisal value of some of her prospective customers' trade-in vehicles.[213] As a result, Mangrum was not able to complete any of these sales.[214]

In addition to interfering with her ability to make car sales, Mangrum alleged that on two occasions Wilson went into her office and asked her to lie on her desk so that they could "knock out a piece real quick."[215] In response, she told Wilson, "[n]o, not right now, no, I'm busy, I have a customer coming, no,

202. EISENBERG, *supra* note 197, at 7–17.
203. *See supra* notes 175–87 and accompanying text.
204. *See infra* notes 250–70 and accompanying text.
205. *See infra* notes 249–308 and accompanying text.
206. *See infra* notes 249–308 and accompanying text.
207. *See infra* notes 249–309 and accompanying text.
208. *See infra* notes 282–94 and accompanying text.
209. *See supra* note 102 and accompanying text.
210. Mangrum v. Republic Indus. Inc., 260 F. Supp. 2d 1229, 1237 (N.D. Ga. 2003).
211. *Id.* at 1239.
212. On one occasion, she simply walked away from Scott after his proposition and told a couple that she could not get a proposed deal approved. *Id.* On another occasion, she "told [Scott], no, he was stupid." *Id.* at 1240. Another time, the prospective customers overheard Scott propositioning Donnie. *Id.*
213. *Id.* at 1239–40. On one occasion, Scott asked Donnie to set him up with the wife of a couple seeking to purchase a vehicle from the lot. *Id.* at 1240.
214. *Id.* at 1239–40.
215. *Id.* at 1239.

leave me alone."[216] Wilson also hugged and patted Mangrum on the buttocks on more than one occasion.[217] Mangrum acknowledged, however, that just as she did with other co-workers,[218] she sometimes hugged Wilson, scratched his back, and gave him massages.[219]

Mangrum alleged that her breaking point occurred on a rainy day when business was slow at the dealership.[220] While she waited for customers, she decided to watch a football game in a van on the car lot.[221] At one point, Wilson entered the van and propositioned Mangrum for sex.[222] She refused, and he exposed his penis.[223] According to the Northern District of Georgia, "[a]t times while his penis was out of his pants, Wilson had 'his hands on top of himself . . . messing around.'"[224]

Mangrum reported that she felt "trapped" in the van; she was afraid that if she tried to leave, Wilson would get on top of her.[225] But in the recording that she made of this incident, she is heard laughing, joking, and teasing Wilson.[226] According to the court,

> [a]t one time, when Plaintiff said "It's scary," Wilson laughed and responded, "Is that what it is? I don't see you being scared of it personally whose [sic] to say that." At which point, Plaintiff just laughed. At one point, Wilson suggested, "You need a quickie, don't you." Plaintiff's first response was, "I don't think so," in a joking tone of voice. When Wilson asked, "That would tire you out, wouldn't it?", Plaintiff replied, "It might. I hadn't had one in a long time. . . . I hadn't had one in a while, maybe that's what I need." The conversation finally ended when Wilson was paged and left the van.[227]

After this exchange, Mangrum grabbed her purse, left the dealership, and never returned back to work.[228]

Mangrum sued Clancy Ford for sexual harassment under Title VII of the Civil Rights Act of 1964.[229] The Northern District Court of Georgia granted

216. *Id.*
217. *Id.*
218. The work culture at the dealership involved a lot of sexual banter, dirty jokes, and foul language. *Id.* at 1238. Donnie admitted that she was an active participant in this behavior. *Id.* She used bad language. *Id.* She sat on co-workers' laps. *Id.* She also gave co-workers massages and scratched their backs, and she asked them to reciprocate this conduct in kind. *Id.*
219. *Id.* at 1241.
220. *Id.* at 1240.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 1245–46.

Clancy Ford's motion for summary judgment.[230] With respect to her hostile environment claim,[231] the court determined that, with the exception of the exposure incident, Mangrum had failed to establish that the sexual behavior that she encountered at Clancy Ford was unwelcome.[232] One of the bases for this determination was the fact that Mangrum participated in sexualized banter and conduct that took place at Clancy Ford.[233] In addition, the court determined that Mangrum never unequivocally established that she found Scott's behavior to be unwelcome.[234] According to the court, even on the occasions when Mangrum said "no," her intentions were not clear because she also said variations of "I'm busy" or "not now."[235] The court also found it significant that even after saying "no" to Wilson, Mangrum generally continued to participate in sexual banter at Clancy Ford.[236] While the court acknowledged that the exposure incident in the van was unwelcome, it determined that the conduct was not pervasive enough to establish a Title VII claim.[237]

Mangrum fully admitted that she participated in sexual banter during her entire employment with Clancy Ford.[238] She flirted with her co-workers, and, in her words, she was "'one of the guys . . . in there with the best of them talking trash.'"[239] As an explanation for why she responded to Wilson in the equivocal way that she did, Mangrum testified,

> [i]t was a game. You went along with it. You did the best that you could. That's what I had to do in order to keep my job. . . .You have to go along with the game. You just have to go along with it. And that's what I done with Wilson.[240]

230. *Id.* at 1252.

231. According to the court, a plaintiff can establish a hostile environment claim under Title VII when they can show:

> (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable.

Id. at 1247.

232. *Id.* at 1252.

233. *Id.* For a description of the culture at Clancy Ford, see *supra* note 218.

234. *Id.* at 1253.

235. *Id.*

236. *Id.*

237. *Id.* The court also determined that Donnie had not established a *quid pro quo* claim. *Id.* at 1254. In order to establish this type of claim she needed to show:

> (1) she belong[ed] to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) [her] reaction to harassment complained of affected tangible aspects of [her] compensation, terms, conditions, or privileges of employment; and (5) respondeat superior.

Id. at 1248. While Donnie alleged that Scott reduced appraisal values for the trade-in vehicles of prospective customers when she declined to perform sexual favors, she also stated that she had difficulties with Scott's appraisal values even before the sexual harassment began. *Id.* at 1254. She also acknowledged that she never really knew whether Scott was actually proposing sex or if he was just making rude comments. *Id.* Donnie also failed to establish that the appraisal values that she got from Scott should have been higher. *Id.*

238. *Id.* at 1238.

239. *Id.*

240. *Id.* at 1241.

As has already been discussed, when it comes to both rape and sexual harassment cases, courts tend to evaluate the behavior of victims based on specific and narrow gendered expectations.[241] In the context of rape cases, this has meant that women traditionally have been expected to physically resist their attackers in order to be entitled to legal redress.[242] In the context of sexual harassment cases, in order to establish that the harassment was "unwelcome," courts tend to expect that women be unequivocal in their negative response to the harassment.[243] While some courts acknowledge that a woman might be somewhat equivocal when she seeks to appease a harasser in a position of power,[244] courts tend to be less sympathetic if the employee has a history of willingly engaging in other sexualized banter or behavior in the workplace.[245] Consistent with these cases, the Northern District of Georgia found Donnie's willingness to engage in sexual banter with her co-workers (and her equivocality in responding to Scott's conduct) as incongruous with her claim that some of Scott's conduct was unwelcome.[246]

Feminist critiques of this type of analysis include the arguments that it punishes women who choose to engage in sexual expression[247] and that women's lives are more complicated than what an agent/victim binary suggests.[248] But it is also important for courts to understand that in especially male-dominated environments, sexual horseplay is a well-accepted component of the social dynamic of the workplace.[249] Furthermore, as long as this conduct is generally deemed to be legal and acceptable in a particular work environment, participation in horseplay will continue to play a vital role in asserting one's competency in that environment and in creating camaraderie with one's co-workers.[250] For these reasons, in order to survive and thrive in these work environments, many women

241. *See supra* notes 12–16 and accompanying text.

242. *See supra* note 13 and accompanying text.

243. *See* Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007, 1011 (7th Cir. 1994) (finding that plaintiff's "violent resentment of the conduct of her male co-workers toward her [was] plain"); Zorn v. Helene Curtis, Inc., 903 F. Supp. 1226, 1243 n.17 (N.D. Ill. 1995) (finding "absolutely no 'enthusiastic receptiveness'" on the part of the plaintiff).

244. *See, e.g.*, Chesier v. On Q Fin. Inc., 382 F. Supp. 3d 918, 924 (D. Ariz. 2019) (determining that there was a question of fact as to whether a supervisor's conduct was unwelcome even though the plaintiff engaged in sexually explicit text messages with him).

245. *See, e.g.*, Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559, 1564 (M.D. Fla. 1990) (finding that "plaintiff's willing and frequent involvement in the sexual innuendo prevalent in her work area indicate that she did not find the majority of such conduct truly 'unwelcome' or 'hostile'"). *But see Carr*, 32 F.3d at 1010–11 (noting that plaintiff used some sexual language, but determined that her conduct as one woman could not be compared to the conduct of the many men in her workplace); *Zorn*, 903 F. Supp. at 1243–44 n.17 (finding that plaintiff's occasional banter could not be compared to the "constant sexual banter, vulgarity, and insults" of her many male co-workers).

246. Mangrum v. Republic Indus., Inc. 260 F. Supp. 2d 1229, 1253 (N.D. Ga. 2003).

247. *See, e.g.*, Schultz, *supra* note 18, at 1732 (arguing that "[t]o conform to the image of the proper victim, women must comport themselves as sexually pure, even passive, beings who have been violated by their co-workers' sexual predation. This requirement is not only sexist, but also class-biased in nature").

248. *See* MACKINNON, *supra* note 19, at 172–74; Bailey, *Undesired Sex*, *supra* note 12, at 310; Gruber, *supra* note 19, at 623–24; Roberts, *supra* note 19, at 386–88; West, *supra* note 19, at 1452–59.

249. Bailey, *Horseplay*, *supra* note 12, at 116.

250. *Id.* at 129–31.

have learned that it is essential to learn how to navigate this gendered dynamic successfully.

Part III described how difficult it is for some men to navigate this dynamic, but women also have difficult and distinct dynamics to navigate. On the one hand, if women are the target of this conduct, they risk being objectified and being perceived as incompetent workers.[251] On the other hand, if they object to the conduct or try to completely remove themselves from situations where horseplay is occurring, they risk alienating themselves from their co-workers.[252] After objecting to this type of conduct, some women are ostracized for not being able to "take a joke,"[253] similar to how men are ostracized in these situations.[254] If a woman completely withdraws from co-workers, she is ostracizing herself. If a woman is ostracized at work, she does not have access to the mentorship and training that she needs to succeed and advance in her workplace.[255]

For example, construction work by its very nature is a transient occupation comprised of temporary work projects. [256] If a worker is not able to get along with her co-workers at a job site today, it very well might mean that she will get dismissed from that job site tomorrow.[257] It can also mean that a more senior tradesman will not be willing to train an apprentice so that she can develop her skills, which would allow for better work opportunities, more interesting work, and better wages.[258] It is also important to note that these concerns are not limited to "blue-collar" workers; college-educated engineers also experience similar challenges and barriers when working on construction sites.[259]

Moreover, in many working situations, not getting along with one's co-workers can lead to serious injury or even death.[260] Construction workers must sometimes spot each other and make sure that a co-worker does not fall from a

251. Schultz, *supra* note 18, at 1686–91; Amy M. Denissen & Abigail C. Saguy, *Gendered Homophobia and the Contradictions of Workplace Discrimination for Women in the Building Trades*, 28 GENDER & SOC'Y 381, 384 (2014); *see also* Chaiyavej Somvadee & Merry Morash, *Dynamics of Sexual Harassment for Police-women Working Alongside Men*, 31 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 485, 492 (2008) (describing how a police officer was "humiliated" after another officer said to her, "[s]he's [a] sweetheart and she swallows too"); Denissen, *supra* note 129, at 1064 (describing a tradeswoman who considered displays of femininity to be potentially dangerous because they can be interpreted as incompetence).

252. Amy M. Denissen, *Crossing the Line: How Women in the Building Trades Interpret and Respond to Sexual Conduct at Work*, 39 J. CONTEMP. ETHNOGRAPHY 297, 312 (2010).

253. *Id.* at 307.

254. *See supra* notes 178–87 and accompanying text.

255. Denissen & Saguy, *supra* note 251, at 384.

256. EISENBERG, *supra* note 197, at 151.

257. *Id.* at 80–81, 161.

258. *Id.* at 54–68.

259. *See* Janice L. Tuchman, *How One Woman and Her Employer Struck Back Against Sexual Harassment*, ENG'G NEWS REC., (Oct. 11, 2018), https://www.enr.com/articles/45453-how-one-woman-and-her-employer-struck-back-against-sexual-harassment [https://perma.cc/K2LP-22VD] (describing the experiences of an engineer who initially tolerated the locker room talk at a jobsite, but who then experienced ostracism from a few co-workers after reporting her boss for sexual harassment).

260. EISENBERG, *supra* note 197, at 77–80.

high or precarious position.[261] In addition, if a worker carries materials or equipment that is too heavy for them, they can risk serious injury.[262] For this reason, safety sometimes requires that more than one worker handle a piece of equipment.[263] Similarly, because of the inherent dangers of their jobs, police officers and those working in the military sometimes have to rely on their colleagues for backup.

A particularly poignant and tragic example of how not getting along with one's male co-workers can lead to mortal danger is the story of Outi Hicks, a Black union carpenter apprentice.[264] In 2017, Aaron Lopez, a man who worked with Hicks on a construction site, bludgeoned her to death.[265] Lopez had been harassing Hicks for several days prior to her murder.[266] Yet Hicks told no one.[267] She did not report the abuse to her union nor did she tell any colleagues.[268] She suffered in silence, and then she was murdered.

In order to try to understand why Hicks might have remained silent, it is important to understand that women working in predominately male workspaces have been required to adapt to their precarious positions by walking the thin line between masculinity and femininity. On the one hand, some male co-workers criticize women who do not conform somewhat to their gender expectations of women acting "ladylike" and not swearing or engaging in other types of coarse behavior.[269] On the other hand, these same male co-workers expect their female co-workers to be "man enough" to do the job.[270] When it comes to managing the type of sexualized banter and horseplay that can be prolific in male-dominated workspaces, women have come up with a variety of strategies that often do not involve objecting or resisting to the conduct outright.[271] Instead, some women tolerate it, ignore it, or actively demonstrate to their co-workers that they do not find it to be bothersome at all.[272]

While the approaches that women take will probably depend somewhat on the career in question, one qualitative study of women working in the building trades is illustrative of the types of tradeoffs that a woman might have to make in a male-dominated field. The focus of this study was women working in the building trades in Southern California.[273] The study involved in-depth interviews

261. *See, e.g.*, *id.* at 105–06 (describing a situation when a woman needed to rely upon her co-workers to recover from a panic attack she had while standing on a high beam).

262. *Id.* at 132–34.

263. *Id.*

264. Debra K. Rubin, *Killer of a Woman Carpenter Sentenced to 15 Years to Life*, ENG'G NEWS REC., https://digital.bnpmedia.com/publication/?i=652805&article_id=3622222&view=articleBrowser&ver=html5 (last visited Nov. 18, 2022) [https://perma.cc/9UTN-HKY3].

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. EISENBERG, *supra* note 197, at 82–83; Denissen, *supra* note 129, at 1056–57; Seklecki & Paynich, *supra* note 197, at 20; Gray et al., *supra* note 197.

270. Denissen, *supra* note 129, at 1056–57; Seklecki & Paynich, *supra* note 197, at 20.

271. *See infra* notes 284–94 and accompanying text.

272. *See infra* notes 279–91, 298–305 and accompanying text.

273. Denissen, *supra* note 252, at 303; Denissen, *supra* note 129, at 1054.

with tradeswomen, apprentices, and pre-apprentice job seekers.[274] The following are direct quotations from material gleaned from thirty-seven tape-recorded in-depth interviews with fourteen experienced journey-level tradeswomen and twenty-three apprentices:[275]

> They can say a few things and you know, that they know, they shouldn't be saying it. But if it doesn't bother me, I won't say anything. If it bothers me, maybe I would. I'm not going to make a big deal about it because it's true; you're walking into a so-called man's world.[276]

> If they're saying something sexual, innuendos or whatever, it doesn't bother me. [Construction] workers talk about stuff like that all the time and it doesn't really bother me as long as they don't use it in context of me.[277]

> The last thing you want to do is cause a scene. You get a reputation and then no one wants to work around you. You're the sexual harassment lady and you just don't want that, it doesn't help at all.[278]

> You got to like let it go in one ear and out the other. You can't be uptight about it, you know.[279]

Interviews from this same study suggested that another approach that some women take is to adapt their behavior in order to better blend in with their masculine work environment.[280] This might include dressing in a way that hides or minimizes body parts that might draw unwanted attention from one's co-workers.[281] It might also include participating in the banter in a way that allows a woman to maintain her femininity.[282] For example, one tradeswoman reported that she was able to find a way to participate in her co-workers' ogling of female passerby by commenting on the passerby's shoes:

> They include me in their conversations of checking out all the women walking by. "Hey Jenny, what do you think of her?" (And I say) "Oh yeah, she's cute." Or, "No, I don't like her shoes." One of the guys that I'm working with right now, because I have a thing with shoes, he's constantly pointing out all these women's shoes to me. All the guys are saying, "Why are you telling her to check that girl out?" When really he's telling me to look at her shoes.[283]

274. Denissen, *supra* note 252, at 303.
275. *Id.*
276. *Id.* at 308.
277. *Id.*
278. *Id.* at 309.
279. *Id.* at 311.
280. *Id.* at 312.
281. *Id.*; *see also* Krauth, *supra* note 197 (quoting a construction working who reported, "I cut all of my hair off to go back into construction, because I felt someway [sic], somehow, I felt like I wouldn't be attractive so they wouldn't bother me").
282. *See* Denissen, *supra* note 129, at 1061.
283. *See id.*

But the truth is that some women fully engage in sexualized banter in exactly the same way that their male co-workers do.[284] The effect of this banter may sometimes depend on whether the woman identifies as queer or lesbian or heterosexual.[285] One tradeswoman reported that she rather enjoyed looking at and joking about a swimsuit calendar in her workplace because she was openly a lesbian.[286]

Another article based on sixty-three in-depth interviews with tradeswomen and apprentices also suggests that lesbians can sometimes fit in a little easier with male co-workers because they can become "one of the guys" by freely engaging in sexual banter about female subjects.[287] As one tradeswoman reported:

> [My co-worker] tells his girlfriend, "She's like one of the guys, you know, I can tell her anything." That's how most of the guys think of me anyways. They just talk about whatever they want to. It's, like, [I'll tell the men,] "You should do this [sexual maneuver] or you should try that [sexual position]." [And, later they'll tell me,] "Oh, that worked! Thanks a lot, Toni." So it's all good.[288]

But misogynistic banter sometimes can dampen this sense of camaraderie. A lesbian tradeswoman explained:

> They're sitting around talking about the Mike Tyson case when he sexually assaulted this woman. For me, rape is no joking matter. So here's nine of 'em, a foreman, journeymen, apprentices, and one shop steward, and I'm the only woman in this discussion. They're all sitting there talking about it and joking about it, and I'm, like, "Whoa. I'm feeling really, really violent." So I said, "The next person who says anything, I'm gonna get really violent." They all shut the fuck up. Then there was another situation where they were talking about wife beating. I got mad, but sometimes it's not worth it 'cause it's, like, "Oh, she's got no sense of humor." So then I just don't eat lunch with them anymore.[289]

In some cases, men are actually hostile and violent toward lesbians who refuse to engage in sexualized banter.[290] Furthermore, some male co-workers may be hostile to these women because of their sexuality.[291] This hostility can be heightened against women of color,[292] and sometimes this hostility can lead to physical

284. *See id* at 1059.

285. This Part is focused on individuals who identify as women and who are perceived as being assigned the female sex as birth. As is the case with transgender men and individuals who identify as gender nonbinary, a discussion of the treatment of transgender women merits a much deeper analysis that will be the focus of future scholarship.

286. Denissen, *supra* note 252, at 306.

287. Denissen & Saguy, *supra* note 251, at 389–90. Lesbians can also sometimes fit in a little bit easier because some co-workers perceive them as "not fully female." *Id.* at 389. If these women are "not fully female," then the men can maintain the identity of their work as "men's work." *Id.*

288. *Id.* at 389–90.

289. *Id.* at 390.

290. *Id.* at 396. "Some of the more egregious examples include having electrical wires turned on while [the women] were working on them, having tools dropped on them, or finding feces in their hard hat." *Id.*

291. *Id.* at 391.

292. *Id.*

danger or sexual assault.[293] In addition, some male co-workers objectify lesbian workers based on their personal fantasies of lesbian sex.[294]

With respect to heterosexual women, some tradeswomen find participating in sexualized behaviors to be somewhat liberating.[295] Similarly, another study on female police officers found that the women willingly engaged in sexual jokes and banter with their fellow male officers.[296] The study involved 117 women who worked in a variety of police departments in a Midwestern state.[297] The police officers in this study understood that engaging in this type of behavior made them part of the "in" group.[298]

Furthermore, similar to the way that men are expected to be able to "take a joke" when horseplay occurs between men,[299] women also report that they cannot take these types of jokes too seriously if they want to fit in with their work group. This was certainly the case for the women who participated in the tradeswomen interviews.[300] Similarly, in a *New York Times* article, women who served in the Air Force reported that "[s]quadron members sang group songs that included lyrics about raping women, ejaculating, and mutilation of women, and female officers and airmen were expected to tolerate it, if not sing along."[301] They also reported that they laughed "at bawdy jokes knowing that if they were not viewed as part of the team, they would not advance in their careers. And the quickest way to kill your military careers, they said, was to report [it]."[302]

It also seems to be the case that whether women participate in or simply tolerate horseplay, what matters most to them is that the horseplay does not target them as individuals and that it does not suggest that they are incompetent workers.[303] In addition, while women sometimes find certain situations to be ambiguous as to whether they are being sexually harassed,[304] many women have a sense of when sexualized banter and behavior has definitely "crossed the line."[305] When these situations occur, some workers have reported that they feel that they can stop it by simply telling their co-workers to stop.[306] Others ask other male supervisors, co-workers, or family members for help in stopping the behavior.[307]

293. *Id.* at 396.

294. *Id.* at 394–95.

295. Denissen, *supra* note 252, at 304.

296. Somvadee & Morash, *supra* note 251, at 490–91.

297. *Id.* at 486–87. The departments included state police headquarters, county sheriff departments, a city department, and a campus department. *Id.* at 486.

298. *Id.* at 490–91.

299. *See supra* note 182 and accompanying text.

300. Denissen & Saguy, *supra* note 251, at 390; Denissen, *supra* note 252, at 307.

301. Helene Cooper, Dave Philipps & Richard A. Oppel Jr., *'I, Too, Was a Survivor': Senator McSally Ends Years of Silence*, N.Y. TIMES (March 26, 2019), https://www.nytimes.com/2019/03/26/us/senator-martha-mcsally-rape-assault.html [https://perma.cc/H9D5-NAWC].

302. *Id.*

303. *See* Denissen, *supra* note 252, at 306; *see also* Somvadee & Morash, *supra* note 251, at 491.

304. Denissen, *supra* note 252, at 307.

305. *Id.* at 304.

306. *See* Denissen & Saguy, *supra* note 251, at 390; Somvadee & Morash, *supra* note 251, at 491–92.

307. Denissen, *supra* note 252, at 317–18. The Ironworkers International Union has rolled out a bystander program called "Be That One Guy," which encourages men to intervene when they see a crew member being

The use of formalized complaint procedures is usually a last resort.[308] Women of color are even less likely to report harassment than White women, even though women of color are disproportionately targeted as victims of sexual harassment.[309] Women know that formal complaints are rarely successful and that they often can lead to retaliation and an escalation in abuse.[310] The likelihood of success is even lower for complicated plaintiffs like JoAnn Reed and Donnie Mangrum.

This Article does not take a position on whether Ms. Reed and Ms. Mangrum should have won their sexual harassment cases. As will be discussed in the next Part, there are additional factual questions that need to be answered in order to properly analyze the merits of their claims. Nevertheless, the courts in their cases needed to understand that while it is sometimes the case that male horseplay among men is experienced as welcomed good-natured fun, it is also sometimes the case that it is abusive and unwelcome and that it should be deemed to be actionable sexual harassment.[311] Within these types of environments, women can also welcome some of the horseplay that they are experiencing and find other sexual conduct to be unwelcome.[312] With this broader understanding of sexual horseplay in mind, the next Part will highlight the types of evidence that plaintiffs' attorneys and courts should be examining with greater scrutiny as they try to determine whether conduct is legal sexual horseplay or whether it has "crossed the line" into illegal sexual harassment.

V. CROSSING THE LINE

This Article does not seek to create a new framework for Title VII law. Indeed, other scholars have persuasively argued that frameworks have led courts to drift too far away from the original goal stated in the plain language of Title VII: to address conduct that affects the terms and conditions of the plaintiff's

harassed by another crew member. Jobsite Editorial Staff, *"Be That One Guy" Aims to Make the Workplace Safer for Everyone*, JOBSITE (Jul. 22, 2019), https://www.procore.com/jobsite/be-that-one-guy-aims-to-make-the-workplace-safer-for-everyone/. [https://perma.cc/7H6W-9XAM]. The program was inspired by the murder of Outi Hicks, a Black apprentice carpenter who was bludgeoned to death by a co-worker on a construction site. *Id*.; Rubin, *supra* note 264.

308. Denissen, *supra* note 252, at 305.

309. Hernández, *supra* note 78, at 295. Many women of color have the role of primary breadwinner. *Id.* It could be that this primary wage-earning role makes these women more of a target; they are more reluctant to complain because of their precarious economic situation. *Id.* In addition, women of color face higher barriers in obtaining employment, which also makes them more reluctant to jeopardize their current job situation by complaining. *Id.* In addition, women of color have a higher level of mistrust for internal reporting procedures. *Id.* Undocumented immigrants are particularly vulnerable due to fears of being deported. *"…So I Tolerated It" How Workplaces Are Responding to Harassment and the Clear Need for Federal Action*, Minority Staff Report, COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, U.S. SENATE, 115TH CONG. 17-18 (December 2018).

310. Denissen, *supra* note 252, at 319. "Tradeswomen described retaliatory acts such as being laid off, isolation, pornographic materials in their locker, tools glued together, feces in their hardhat, or urine in their thermos." *Id.*

311. Bailey, *Horseplay*, *supra* note 12, at 119–35.

312. *See supra* notes 314–29 and accompanying text.

employment because of their sex.[313] Moreover, it is reasonable to question whether the "unwelcome"[314] or "severe or pervasive"[315] elements should even be required for Title VII plaintiffs, given the fact that these terms cannot be found anywhere in the text of the statute. In addition, as previously discussed, the "unwelcome" element puts too much focus on the plaintiff's behavior and not enough on what the sexual harassment does to the plaintiff.[316]

Rather than delve into these worthy debates, this Article has a more modest goal. To the extent that courts are going to require that a plaintiff establish that she encountered unwelcome conduct, courts need to consider more deeply the importance of fitting in at work and the role of sexual horseplay as a tool of gender subordination.[317] This Part seeks to begin a conversation about what that type of analysis might look like by highlighting the types of evidence that both plaintiffs' attorneys and courts need to be examining with more scrutiny in order to provide better protection for workers of all genders.

It is not the case that all workers who can provide evidence that they felt pressured to engage in sexual conduct in order to fit into their workplace are necessarily going to have sufficient evidence to establish actionable claims under Title VII. But if these workers can also demonstrate that some sexual conduct that was directed toward them was used as a tool of gender subordination, courts should be more open to their claim that they found this sexual conduct to be unwelcome. Gender subordination that affects the terms and conditions of an employee's employment is actionable, and a high occurrence of gender subordination in a particular workplace makes a worker's "choice" to submit to peer pressure to engage in horseplay look less like a meaningful choice. Instead, it looks like a rational choice to try to survive in a hostile work environment. Examples of evidence that suggests that sexual conduct has "crossed the line" into actionable gender subordination include evidence of behaviors that regulate gender performance and encourage sex segregation; behaviors that sexually objectify and implicitly or explicitly label a worker as "incompetent;" behaviors that put a worker's physical safety at risk; and a lack of reciprocity on the part of the

313. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e–2(a)(1)) (stating that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex"); *see, e.g.*, Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 70–72 (2011).

314. *See, e.g.*, Hernández, *supra* note 78, at 304–05 (citing various scholars debating the merits of the unwelcomeness requirement).

315. Both Maryland County, Maryland and the state of New York have revised their sexual harassment statutes. Both statutes now expressly state that a showing of "severe or pervasive" harassment is no longer required. *See* MONTGOMERY CNTY. CODE § 27-19(b)(2) ("The term 'harassment' in subsection (a) includes verbal, written, or physical conduct, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims"); N.Y. HUMAN RIGHTS LAW § 296(1)(h) ("It shall be an unlawful discriminatory practice . . . [f]or an employer . . . to subject any individual to harassment because of an individual's . . . sex . . . regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims.").

316. *See supra* notes 62–63 and accompanying text for my personal critique of this concept.

317. *See supra* notes 64–67.

target of the behavior, which suggests a lack of agency in choosing to engage in the behavior with one's co-workers.[318]

In analyzing JoAnn Reed's case, it is important to recognize that hypermasculinity is deeply engrained in police culture.[319] Furthermore, this masculinity is sometimes performed through sexualized horseplay.[320] While this horseplay traditionally functions to keep women out, some evidence suggests that female police officers rebel and voluntarily engage in this horseplay in order to fit in.[321] JoAnn Reed arguably was one of these women. She was a civilian jailer who worked in a jail, which the Seventh Circuit described as "a modern version of TV's Barney Miller,[322] with the typically raunchy language and activities of an R-rated movie and the antics imagined in a high-school locker room."[323] As has already been stated, many women feel that they need to participate in sexualized horseplay in male-dominated fields in order to fit in and to establish the type of camaraderie with their co-workers that is crucial for finding mentors and opportunities for advancement.[324] It is possible that Reed also felt a similar type of pressure to participate in some of this behavior in order to further her career in the jail.[325] Her own testimony supports the conclusion that she felt some peer pressure to at least tolerate her hypermasculine work culture in order to fit in:

> Because it was real important to me to be accepted. It was important for me to be a police officer and if that was the only way that I could be accepted, I would just put up with it and kept [sic] my mouth shut. I had supervisors that would participate in this and you had a chain of command to go through in order to file a complaint. One thing you don't do as a police officer, you don't snitch [out] another police officer.[326]

Yet, the Seventh Circuit dismissed Reed's claim and determined that she did not have to engage in sexualized behavior at the jail since some of her female co-workers testified that they had actually been successful in asking their male co-workers to not engage in this behavior around them.[327] But what would have been helpful to know is whether the horseplay occurring at the jail was a type of gender regulation that required workers to prove that they were masculine enough to work at the jail. Part III has already discussed how gender regulation is a type of gender subordination that can affect the terms and conditions of some employees' employment.[328] With respect to a plaintiff like Reed, attorneys might investigate what happens to male jailers who refuse to engage in horseplay? Are

318. *See infra* notes 319–46 and accompanying text..

319. Shannon L. Rawski & Angela L. Workman-Stark, *Masculinity Contest Cultures in Policing Organizations and Recommendations for Training Interventions*, 74 J. SOC. ISSUES 607, 608 (2018).

320. Seklecki & Paynich, *supra* note 197, at 29.

321. Somvadee & Morash, *supra* note 251, at 490–91.

322. Barney Miller was a television series that aired between 1975–1982 and portrayed a New York Police Department precinct. *See Barney Miller*, supra note 86.

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

324. *See supra* notes 283–301 and accompanying text.

325. *Reed*, 939 F.2d at 486–87.

326. *Id.*

327. *Id.*

328. *See supra* notes 166–72 and accompanying text.

they ridiculed? Do they miss out on opportunities to advance? In addition, are there professional costs for the women who ask their male co-workers not to engage in this type of behavior? Yes, the behavior might stop out of respect for "the ladies." But does complaining reinforce their femaleness, which then leads them to miss out on the camaraderie that exists among their male co-workers? And if they do miss out on this camaraderie, do their male co-workers then feel hesitant to mentor and train them so that they can advance in their careers? In other words, does a lack of participation in this behavior essentially create sex segregation in terms of the job opportunities available to these women? And if an employee chooses to engage in sexual banter in order to fit in and advance in her career, is she still ultimately harassed because she chose not to "act like a lady"? If the answer to any of these questions is yes, then it is arguable that gender regulation at a particular workplace was a type of gender subordination that affected the terms of conditions of an employee's employment and that crossed the line into illegal sexual harassment.

In addition, as discussed in Part IV, workers tend to feel that the line is crossed when they are the specific target of sexual behavior.[329] By being targeted, the worker is objectified, and this objectification undermines the worker's competency.[330] Furthermore, this type of targeted behavior goes beyond the behavior to which the worker might have initially consented. In that sense, the worker has lost a sense of autonomy in determining when to engage in this type of behavior and when not to engage. Finally, crossing the line occurs when a worker's physical safety is put at risk.

Reed alleged that "she was subjected to suggestive remarks,"[331] "she was the subject of lewd jokes and remarks,"[332] "she was physically hit and punched in the kidneys,"[333] her face was pushed into the water in a toilet, and "a cattle prod with an electrical shock was placed between her legs."[334] One could argue that some of the sexual humor at the jail was good-natured fun intended to create collegiately and camaraderie. But arguably the conduct that was specifically targeted at Reed was intended to objectify and humiliate her, which undermined her competency as a jail worker. In addition, it is hard to fathom that she enjoyed and welcomed being hit and punched in the kidneys, having her face pushed into a toilet, or having a cattle prod with an electrical shock placed between her legs. This conduct goes beyond consensual ribbing. Not only must this conduct have been humiliating, but it also put her physical safety at risk. It is hard to see how this specific conduct could be viewed as anything but unwelcome.

With respect to Donnie Mangrum, "[f]oul language, sexual innuendo, and dirty jokes were routine" at her workplace.[335] She admitted that she was "'one of

329. *See supra* note 303 and accompanying text.
330. *Id.*
331. *Reed*, 939 F.2d at 486.
332. *Id.*
333. *Id.*
334. *Id.*
335. *See* Mangrum v. Republic Indus., Inc. 260 F. Supp. 2d 1229, 1238 (N.D. Ga. 2003).

the guys…in there with the best of them talking trash.'"[336] And it is quite possible that Mangrum enjoyed the camaraderie that came from engaging in some of this conduct. But she also explained that, specifically with respect to her interactions with her supervisor, Scott, "[i]t was a game. You went along with it. You did the best that you could. That's what I had to do in order to keep my job. . . .You have to go along with the game. You just have to go along with it."[337] Like Reed, Mangrum seemed to feel some pressure to "go along to get along."

But as was the case with Reed, in order to better analyze Mangrum's claim, it would be helpful to know whether the horseplay on the car lot was a type of gender regulation. How many other women worked on the car lot with her? What were the consequences of not engaging in this conduct for both men and women? Did this conduct discourage women from working on the car lot and encourage sex segregation?

In addition, even if Mangrum willingly engaged in sexualized behavior and joking with some of her co-workers,[338] there is a strong argument that what occurred with her supervisor, Scott Wilson, was different and crossed the line into unwelcome conduct. She "acknowledged that she sat on other employees' laps and rubbed their shoulders and that she gave scalp, neck, shoulder and back massages to various employees and would scratch their backs and ask for the same in return."[339] In other words, Mangrum's behavior in these situations was not only arguably consensual, but it was also reciprocal. Not only would she literally scratch her co-workers' backs, but she would also ask them to scratch hers in return.

In contrast, while she admitted giving back rubs and massages to Wilson in the same way that she did with her other co-workers,[340] Wilson's behavior took things a step further. He asked for oral sex, sexually propositioned both Mangrum and her nineteen-year-old daughter, and exposed himself to Mangrum.[341] At no point does the court suggest that Mangrum reciprocated any of this behavior. While the court characterizes Mangrum as laughing and joking during the incident when Wilson exposed himself in a van on the used car lot, the truth is that she did not engage in any sexual contact with Wilson on that occasion and after he left the van, Mangrum left work and never returned again.[342] Indeed, even the court acknowledged that the van incident was unwelcome.[343]

There is no question that Wilson's behavior objectified Mangrum. In addition, although she was equivocal in responding to Wilson's advances,[344] her lack of reciprocation suggests that, unlike her interactions with other co-workers, this

336. *Id.*
337. *Id.* at 1241.
338. *See supra* notes 236–38 and accompanying text.
339. *Mangrum*, 260 F. Supp. 2d at 1238.
340. *Id.* at 1241.
341. *Id.* at 1239, 1242.
342. *Id.*
343. *Id.* at 1240–43.
344. *See supra* notes 218, 233–34, 239 and accompanying text.

contact was nonconsensual. Furthermore, it is quite likely that Mangrum felt physically at risk when Wilson sexually propositioned her when they were isolated in her office,[345] and the facts definitely suggest that despite what was probably nervous laughter and joking, she felt scared, vulnerable, and upset when he exposed himself while they were alone in the van.[346] For these reasons, even if the backrubs and massages that Mangrum shared with Wilson and her co-workers did not cross the line for purposes of Title VII, Wilson's other behaviors might have because they arguably were tools of gender subordination that affected the terms and conditions of her employment.

In summary, in analyzing sexual harassment cases where plaintiffs engaged in sexual conduct at their workplaces, courts should determine the role of horseplay in their particular workplace cultures. Specifically, they should determine what the consequences were for both male and female workers who did not comply with a horseplay culture. Is the sexualized conduct essentially a form of gender regulation that requires workers to perform their gender in specific ways in order to succeed? In addition, does the gender regulation appear to be encouraging sex segregation? If the answer to either of these questions is yes, then the horseplay appears to be a tool of gender subordination that potentially affected the terms and conditions of the plaintiff's employment. Furthermore, courts should distinguish consensual, reciprocal sexual conduct from humiliating conduct that undermines a worker's competency and even risks the worker's physical safety. Plaintiffs' attorneys play an important role in helping courts to answer these questions and to determine when "voluntary" camaraderie is actually gender subordination.

VI. CONCLUSION

This Article has discussed cases that highlight how challenging it can be for some women who work in predominately male workplaces to file successful sexual harassment claims. One of the reasons why success can be so elusive is because courts, and probably some plaintiffs' attorneys, have failed to take into account the fact that some women engage in sexualized conduct because they feel pressure to fit into their workplaces. Conduct that appears "voluntary" actually might be based upon this type of pressure, and such voluntary conduct does not negate the possibility that the plaintiff also was subordinated based upon her gender.

In order to better assess whether sexual conduct is "unwelcome," plaintiffs' attorneys and courts should contextualize the role of sexual conduct and horseplay in a particular work setting. Specifically, they need to acknowledge the pressure a plaintiff might have felt to engage in sexual horseplay in order to advance her career. They also need to assess the extent to which sexual horseplay was used as a tool of gender subordination against her. As part of this analysis, courts should consider whether there is evidence of gender regulation, which requires

345. *See supra* note 211 and accompanying text.
346. *See supra* notes 224–27 and accompanying text.

workers to conform to specific gender stereotypes in order to succeed at work. In addition, they should consider whether there is evidence of sexualized conduct that objectified or targeted specifically the plaintiff. Furthermore, evidence that the plaintiff did not reciprocate certain sexual conduct or that her physical safety was threatened also suggests that she suffered from unwelcome conduct.

A strong showing of evidence that suggests that the plaintiff suffered from gender subordination undermines a claim that she welcomed certain sexual conduct that targeted specifically the plaintiff. It also undermines the presumption that her decision to engage in sexual horseplay in order to fit in was a meaningful choice. This more nuanced approach will offer better protection for women who work in predominately male workspaces. Just as important, because of the centrality of male-on-male horseplay within the systemic practice of workplace sexual harassment, it will ultimately provide better protection for workers of all genders in all workspaces.